Higher Education: Title IX Litigation Update

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Disclaimers

- We are not giving you legal advice.
- Many of these cases may still be in appeals – stay tuned.
- Some of these cases still predate the 2020 regulations.
- Consult with your legal counsel regarding how best to address a specific situation.
- Feel free to ask general questions and hypotheticals.
- There are a variety of stakeholders listening, so please keep that in mind as you submit questions.
- Watch your inbox for a link to the slides!

Agenda

- Cases brought by Student Complainants
- Cases brought by Student Respondents
- Cases brought by Employees
- Title IX Athletics

Quick Reminder

- Pay the closest attention to the Supreme Court, your Circuit Court, and your District Court, as these decisions are "precedential," which means future courts are supposed to follow the same logic.
- All other decisions are "persuasive." The persuasiveness depends on how thoughtful the decision is, and how similar the facts are to your own.
- Your District Court might prefer to look first to case law from other District Courts in your Circuit.
- We are not second-guessing parties or attorneys in these cases. Today we are focusing on how courts have construed facts and what they have said about those facts as construed, so as to help Title IX team members better implement their procedures.

Another Quick Reminder

- The information considered by the Court will depend on how far along the case is at the time of the decision.
  - **Motion to Dismiss** – If we assume everything in the plaintiff's complaint is true, do they have a case?
  - **Motion for Summary Judgment** – Court can make findings of fact based on what is in the record now that depositions and other discovery has taken place.
  - **Appeal** – Look to whether this is an appeal of a motion to dismiss, or an appeal for motion for summary judgment, and that will tell you whether we are working with established facts.

Humphries v. Pennsylvania State Univ.

2026 WL 1021527 (3rd Cir., 3.16.2026)

- Complainant alleged he was sexually harassed by teammates for not conforming to gender stereotypes, including:
  - Threats that he would be sexually assaulted
  - Being wrestled to the ground and placing or "smack[ing]" their genitalia on the victims' faces
  - Sexualized touching in the locker room
- **Motion to Dismiss:** District court dismissed Complainant's Third Amended Complaint; Third Circuit Court of Appeals affirmed
- **Not precedential

Humphries v. Pennsylvania State Univ.
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- Complaint's assertions in support of his gender-stereotyping theory of harassment:
  - He is a musician, articulate, does not use vulgarity, appears refined and well-groomed, presents as affluent, is compassionate and sensitive, is not physically aggressive, and does not embrace a "thug persona"
  - As a result of his characteristics, attributes, and demeanor, he was perceived by his abusers as weak and not living up to the stereotypical toughness and masculinity expected of a collegiate football player;
  - He and other players were targeted because of their failure to live up to these expectations

Humphries v. Pennsylvania State Univ.

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- **Holding:** Complainant-Plaintiff "alleges no facts from which it can be deduced that his harassers viewed the specified characteristics as feminine and targeted him because he possessed such characteristics."
- Complainant alleged other players were subjected to the same harassment, but did not allege they shared the same traits and were targeted for that reason

- Reminder – Title IX claims must be on the basis of sex

Humphries v. Pennsylvania State Univ.
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- Footnote 3:

"We have also said that for Title VII purposes, unwanted sexual touching is inherently gender-based harassment... [internal citations omitted]. Humphries does not assert this theory, so we will not address it."

Humphries v. Pennsylvania State Univ.
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- Claim of retaliation and differential treatment by his coaches in response to his complaints of abuse dismissed
  - The Third Amended Complaint did not include differential treatment claim
  - Retaliation claim not sufficiently pleaded, as there were no facts to infer that the defendants acted against him because of his protected activity in reporting harassment
- Negligence claims also dismissed
  - State anti-hazing law – No facts alleged inferring abuse he suffered had the purpose of initiation or continued membership on team
  - Common law negligence claims also failed b/c no state law duty to control the conduct of third parties to protect others from harm
    - No recognized exception applies here

Whylie v. Morgan State Univ.

2026 WL 1265405 (D. Maryland, 5.8.2026)

- Complainant alleged that after she was sexually assaulted by a student-athlete in 2014, the university failed to respond adequately, conducted a deficient disciplinary process that excluded her meaningful participation, and ultimately, on April 14, 2014, found the accused not responsible despite incomplete evidence.
- According to the complaint:
  - Complainant was informed on April 7, 2014, that a hearing would take place on April 15, 2014.
  - Complainant called the Chief Judicial Officer for the Office of Student Rights and Responsibilities and asked questions about the nature of the investigation, the hearing, supportive measures, and whether she could attend the hearing remotely, but did not receive any response.
  - Respondent attended the hearing with 2 witnesses, but Complainant did not attend because she was concerned for her safety.

Whylie v. Morgan State Univ.

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- The University issued its Notice of Decision the same day the hearing took place – on April 15, 2014. Respondent was found not responsible.
- On May 14, 2014, Complainant filed a complaint with OCR – nearly ten years later, the University entered into a Resolution Agreement with OCR.
  - Procedural errors = lack of an equitable process:
    - Failed to offer any accommodation to address Complainant's fear of attending the hearing in person;
    - The Code of Conduct in effect at the time did not provide the reporting party with any meaningful opportunity to participate by providing evidence, witnesses, opening or closing statements, or an opportunity to question witnesses.
    - Also, video recordings of the apartment building were not obtained until after hearing.
    - No opportunity for Complainant to appeal the outcome.

Whylie v. Morgan State Univ.

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- In accordance with the Resolution Agreement, the University offered to pay for counseling expenses during a 2-year time period, subject to proof of payment
  - Complainant rejected this offer and filed suit for violations of Title IX and other claims (which were barred by sovereign immunity)

- This decision was issued after the University filed a **Motion to Dismiss**

Whylie v. Morgan State Univ.

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- The University sought dismissal of the Title IX claims under Maryland's three-year statute of limitations for personal injury claims
  - The time begins to run when the plaintiff has knowledge of sufficient facts about the harm that would reveal the cause of action upon "reasonable inquiry"
  - The University says this was on April 15, 2014 – when the Notice of Outcome was issued
  - Complainant says this was after the OCR investigation report was issued 10 years later – on April 16, 2024 – because there was information in the report that she could not have known

Whylie v. Morgan State Univ.

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- What was the new information?
  - The report contained information about the University's mishandling of other sexual assault claims that other students brought prior to Complainant's assault

- Complainant alleged **both** pre-assault deliberate indifference and post-assault deliberate indifference

- **Holding:** Complainant knew when she received the Notice of Outcome that her report had been mishandled, which gave her knowledge *then* of the post-assault deliberate indifference. This means SOL passed and her claim is barred.
- **However,** she did not have knowledge of the pre-assault deliberate indifference based on mishandling of other cases. **That claim is <u>not</u> dismissed.**

Whylie v. Morgan State Univ.

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- To state a pre-assault claim under Title IX, a plaintiff must allege that:

  (1) a school maintained a policy of deliberate indifference to reports of sexual misconduct;

  (2) which created a heightened risk of sexual harassment that was known or obvious;

  (3) in a context subject to the school's control, and;

  (4) as a result, the plaintiff suffered harassment that was "so severe, pervasive, and objectively offensive that it can be said to [have] deprive[d] the [plaintiff] of accesss to the educational opportunities or benefits provided by the school."

Thompson v. Trustees of Indiana State Univ.

2026 WL 1064700 (S.D. Indiana, 4.20.2026)

- Complainant/Plaintiff alleges that in 2021, after taking the LSAT, she met friends at two downtown bars in Bloomington, IN.
- The next morning, a jogger came across the Complainant and called police, who found her partially nude, disoriented, and unable to remember how she got to her location on campus.
  - A toxicology screen showed no drugs but a BAC of 0.298 percent
  - A sexual assault kit was collected at the time, but Complainant told police she did not remember what happened

Thompson v. Trustees of Indiana State Univ.

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- IUPD sent a report to the University's student conduct office that noted Complainant had been found nude on campus with a .298 BAC
- The University charged Complainant with three violations of the Code of Student Rights, Responsibilities, and Conduct:
  - Lewd, indecent, or obscene conduct
  - Personal misconduct that endangers oneself or others
  - Unauthorized use of alcohol on university property
- Prior to her disciplinary hearing, Complainant retained legal counsel and reported to the University that Complainant believed she had been sexually assaulted and should not be charged under the Code
  - Also requested the hearing (scheduled for 6 days later) be cancelled

Thompson v. Trustees of Indiana State Univ.

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- The charges were later dismissed following an initial judicial conference meeting with Complainant (where sexual assault concerns were raised)
- Complainant sued the University for discrimination for Title IX gender discrimination, Title VI discrimination, and IIED
  - University Counsel directed IUPD to preserve evidence related to the litigation, but did not specifically mention the SANE kit
- Complainant argued that rather than supporting and protecting her, it charged her with conduct violations and refused to postpone or cancel the judicial conference

Thompson v. Trustees of Indiana State Univ.
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- Interesting back-and-forth between Complainant's Attorney, IUPD, and the Indiana State Police.
  - Complainant did not want IUPD investigating the matter because she did not trust them
  - Wanted the SANE exam materials – which were anonymous – to be shared with ISP.
  - ISP said they could investigate as long as IUPD hadn't already started to investigate
  - Complainant continued to want to her anonymous SANE exam to be shared with ISP
  - Later, Complainant's attorney accused IUPD of refusing to allow ISP to investigate
- The anonymous SANE kit was later disposed of as part of a routine periodic review of IUPD storage – which Complainant was warned about in writing when the exam was performed

Thompson v. Trustees of Indiana State Univ.

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- Title IX and Title VI claims
  - Complainant failed to demonstrate she was excluded from or denied any educational benefits by the University
    - "Inaction, such as not attending classes, is not the equivalent of being prevented from attending class or performing that action. Emotional distress alone is not enough."
    - Complainant missed some classes and did not attend graduation, but she completed final exams and graduated early
  - **Motion for Summary Judgment –** granted in favor of the University

Thompson v. Trustees of Indiana State Univ.
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- Procedural irregularities – While Complainant disagrees with how the conduct charges were handled, the fact that the University made Complainant attend a meeting is not enough to establish discrimination
- Complaint did not identify any similarly-situated comparators who were treated differently
- Even if Complainant could make out a prima facie case of discrimination, no reasonable jury could conclude the University's reasons for bringing the disciplinary charges and requiring Complainant to attend a meeting were pretextual
  - When the University learned of Complainant's potential sexual assault, it converted the hearing into a meeting in accordance with its common practice of meeting with student eligible for amnesty

Ortegel v. Virginia Tech

2026 WL 1073631 (W.D. Va., Apr. 17, 2026)

- Ruling on cross-motions for summary judgment arising from a university Title IX disciplinary proceeding against a male student accused of sexual harassment
- Male student alleged sex-based bias
- Court held Title IX claim against university could proceed
- A reasonable jury could find that sex was a but-for cause of the disciplinary outcome, based on evidence that one hearing officer may have harbored sex-based bias against male respondents

Ortegel v. Virginia Tech
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- Court applied but-for causation – Sex need be a cause, not the only cause
- Analysis based on totality of the circumstances
- Considered Collectively, the following evidence raises a genuine issue of material fact as to whether hearing officer harbored sex-based bias:
  - Hearing officer's social media statements about holding men accountable and men's understanding of consent;
  - Deposition testimony acknowledging implicit bias, male privilege, and patriarchal systems, including statements suggesting men struggle more with consent;
  - Sex-specific sanction requiring Respondent to read Man Enough: Undefining My Masculinity – reasonable juror could conclude hearing officer believed Respondent had a "masculinity problem" and "imposed a sanction rooted in sex-based assumptions rather than in a case-specific analysis"

Ortegel v. Virginia Tech
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- University argued that independent decisions by other officials (co-hearing officer, student conduct appellate officer, separate decision by Corps of Cadets hearing officer, separate ROTC investigation) severed any causal link
- The court rejected this argument
  - "Under Title IX, sex need only be a but-for cause—not the sole cause—of the disciplinary outcome. Accordingly, the existence of subsequent or parallel determinations by other decisionmakers does not defeat liability if sex was a but-for cause of the challenged adjudication. To hold otherwise would permit the very discrimination Title IX prohibits, so long as a non-biased decisionmaker later reached the same conclusion. "

Ortegel v. Virginia Tech
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- Equal Protection Claim against hearing officer dismissed
  - Respondent did not identify a similarly situated comparator
  - Contention that hearing officer never found an intoxicated female student was not credible “far too broad” to be a valid comparator
  - No record evidence demonstrating that Respondent was similarly situated to these purported female comparators
  - Accuser and accused are not similarly situated absent a cross-complaint (which did not occur here)
- Equal Protection and Due Process claims against Title IX coordinator in her official capacity dismissed

Poe v. Lowe, et al.

2026 WL 1231217 (M.D. Tenn., May 5, 2026)

- Respondent suspended from Vanderbilt University for one year for making social media posts about another male student's sexual behaviors with females
- Ruling on motion for summary judgment by University and various University officials
- Title IX Selective Enforcement claim against Vanderbilt
  - To prevail, Respondent must show a similarly-situated member of the opposite sex was treated more favorably than Respondent because of gender
  - Other students posted about male student's behavior with females, but University opened a disciplinary case against only one of them, a female student who received probation
  - The University argued Respondent was not similarly situated to the female student because of differences in timing, volume, and subject matter of their social media posts

Poe v. Lowe, et al.

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Title IX Selective Enforcement claim against Vanderbilt, cont.

- The Court ruled Respondent presented sufficient evidence for a reasonable jury to conclude that he and the female student were similarly situated:
  - The female student made at least twelve posts about the male student, and her posts similarly accused the male student of sexual misconduct
- Undisputed evidence could also lead a reasonable jury to conclude Respondent's gender influenced the University's disciplinary decisions
  - The decisionmaker knew the gender of the students
  - When the decisionmaker learned the female student's gender, he apparently believed her accusation of rape because he wanted to report it to the Title IX Director
  - Even after the decisionmaker learned the female student's posts were knowingly false, she only received probation

Poe v. Lowe, et al.

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- Summary judgment also denied on:
  - Negligence and negligent infliction of emotional distress claims – disputed facts remain regarding University's duty of care and causation in light of Respondent's known mental-health risks
  - Breach of contract in part – Disputed facts remain regarding failing to provide Respondent access to all information supporting the disciplinary charges; denial of right to call witnesses by withholding witness identities; and allegedly biased appellate review tainted by irregularities stemming from the investigation
- Summary judgment granted in favor of University defendants on defamation, intentional infliction of emotional distress, tortious interference with business relations, and Section 504 of the Rehabilitation Act claims

Crowther, et al. v. Bd. of Regents of the Univ. System of Georgia

No. 25-183, 2026 WL 1377024 (U.S., 5.18.2026)

- Background
  - *Joseph v. Bd. of Regents of the Univ. System of Georgia*, 2024 WL 4705544 (11th Cir., Nov. 7, 2024)
  - Key issue: Whether Title IX provides an implied right of action for sex discrimination in employment.
  - 11th Circuit's answer: Title IX does not create an implied right of action for sex discrimination in employment.

Crowther, et al. v. Bd. of Regents of the Univ. System of Georgia (slide 2 of 2)

- Employment sex discrimination claims brought under Title IX
  - Circuit Courts are split on whether Title VII's rights and remedies preclude employment discrimination claims under Title IX
  - The First, Second, Third, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits have permitted Title IX claims by employees
  - The Fifth, Seventh, and now Eleventh Circuit have held that Title VII provides the exclusive remedy for employees in federally funded educational institutions
- On May 18, 2026, the U.S. Supreme Court granted petition for writ of certiorari.
  - Question Presented: Whether Title IX provides employees of federally funded educational institutions a private right of action to sue for sex discrimination in employment.

Niblock v. University of Kentucky

165 F.4th 460 (6th Cir., 1.20.2026)

- Class action lawsuit, filed in 2019, alleged that the University's current varsity sports offerings do not fully and effectively accommodate the interests and abilities of female students.
  - On July 31, 2023, the District Court ordered it would apply the 1979 policy interpretation (three-part test) and issued an opinion on August 4 explaining its reasoning.
  - On Oct. 28, 2024, the District Court entered judgment in favor of the University on Title IX claim – Plaintiffs "failed to prove the selection of sports and levels of competition at UK do not effectively accommodate the interests and abilities of UK's female students."

Niblock v. University of Kentucky

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- The Sixth Circuit affirmed - the district court did not err in finding plaintiffs failed to prove sufficient interest and ability among female students to support varsity teams in equestrian, field hockey, or lacrosse.
- The Sixth Circuit declined to address the University's request to invalidate the guidance (3-part test) under *Loper Bright* and *Kisor v. Wilkie,* instead resolving the case based on plaintiffs' failure to satisfy the third prong of the 1979 interpretive guidance
  - A concurring opinion noted that "current caselaw applying Title IX in the athletic context does not appear to comport with the statute's text and instead rests on now-outdated views of agency deference. But much about the proper approach to Title IX in this sensitive area remains open to debate. With these observations, we concur in the majority decision resolving this case on narrow grounds."

Proactive Title IX Compliance After the SDSU Athletics Settlement

- San Diego State University (SDSU)
- Title IX class action claims alleging systemic disparities in athletic financial aid awarded to female student-athletes
- Court-approved settlement in April 2026
- SDSU agreed to pay $300,000 to former female student-athletes (denied liability)
- See https://www.bricker.com/insights/publications/proactive-title-ix-compliance-after-the-sdsu-athletics-settlement

Next Year's Title IX In Focus Webinars

- All of these are free and held at 12:00 p.m. CT/1:00 p.m. ET
- Sign up at www.brickergraydon.com/events

- **Aug. 27, 2026 – What HR Needs to Know About Title IX**
- **Sept. 24, 2026** – Pregnancy and Parenting
- **Oct. 29, 2026** – Peer-on-Peer Retaliation
- **Nov. 19, 2026** – Title IX Litigation Update
- **Feb. 25, 2027 – Understanding Neurodivergence in Title IX Investigations**
- **March 25, 2027** – FERPA and Public Records Considerations in Title IX Cases
- **April 29, 2027** – Sexualized Hazing and Title IX
- **May 27, 2027** – Title IX Litigation Update

For our Ohio attendees...

- Watch for information about our new ODHE training series

ODHE Title IX Writing Series

- Best Practices for Writing Title IX Investigation Reports
  - June 8 and June 22, 2026, 9:30 a.m. - 11:30 a.m.
- Best Practices for Writing Title IX Decisions
  - June 10 and June 24, 2026, 9:30 a.m. - 11:30 a.m.

Upcoming Events

- Higher Education Compliance Conference in San Antonio – June 7-9 – Say hello to Erin Butcher!
- NACUA Conference Reception in Nashville: June 30 at 4:00-7:00 CT – Say hello to all of us!

Thank You

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