

Title IX Litigation Update: Focus on Process

WITH BRICKER & ECKLER LLP

Joshua
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Bricker & Eckler
ATTORNEYS AT LAW



Live Forum

To ask a question using the chat function:

The screenshot displays the Cisco WebEx Event Center interface. The main content area features a red banner with the text: "Title IX Litigation Update: Focus on Process WITH BRICKER & ECKLER LLP". Below the banner are two portraits: Joshua Nolan on the left and Melissa Carleton on the right. The Bricker & Eckler logo is centered between the portraits. The interface includes a top navigation bar with "Event Info" and "10600802_1", and a right-hand sidebar with "Participants" and "Q&A" sections. The "Q&A" section is active, showing a list of questions and a "Send" button. A red box highlights the "Send" button with the text "Hit send". Another red box highlights the "Ask:" input field with the text "Type your question here". A third red box highlights the "Send" button with the text "Type your question in the box".

Cisco WebEx Event Center

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Event Info 10600802_1

01: Live Forum for AKA

Title IX Litigation Update: Focus on Process

WITH BRICKER & ECKLER LLP

Joshua Nolan

Melissa Carleton

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Participants

Speaking:

Panelists: 1

TG Traci Graham (Host)

Attendees:

CC

Q&A

All [2] My Q&A (1)

Carole Chidester - 3:52 PM

Ask: All Panelists

Type your question here

Send

Hit send

Type your question in the box

Connected

Disclaimer

- We are not giving you legal advice
- We encourage you to read the cases
- Talk with competent counsel in your jurisdiction on how these cases might apply to a particular situation

When Last We Spoke

- Our last webinar on this topic was on January 17, 2018
- Since then, all the activity has been in the courts:
 - 100+ federal decisions
 - One every two days

Context helps here...

- Note the procedural posture of these cases (Motion to Dismiss, Motion for Summary Judgment);
- Is this a Constitutional Due Process Argument (look to type of IHE)?
 - Private schools → CONTRACT (reasonable expectations of the parties)
 - Public → DUE PROCESS (*Matthews v Eldridge; Goss*) (greater the interest/more formal procedures)

Themes from cases

- The roles of advisors and duties to report inconsistencies;
- Use of experts?
- Remove appearance/actual bias
- PRIVATE SCHOOLS: Follow your process (Contract)
- PUBLIC SCHOOLS: Seek informal hearings
 - Permit limited cross examination;
 - Credibility analysis requires witness to interact with decision maker.
 - TRAIN your panel.

Univ. of Notre Dame Du Lac

- N.D.Ind. – May 11, 2018 – MTD Granted
- Complainant didn't want case pursued
- Investigated anyway because 2 Cs against same R
- C concerned for violation of her privacy
- C concerned R wasn't discipline enough
- Court: "not unreasonable for ND to initiate an investigation... [I]t would have been unreasonable ... to *fail* to open investigations"

Univ. of Notre Dame Du Lac

- Court: “not unreasonable for ND to initiate an investigation... [I]t would have been unreasonable ... to *fail* to open investigations”
- Court: “school has an obligation to the larger community to investigate the matter”
- What are your standards for pursuing beyond C’s consent?

Joyce v. Wright State

- Complainant: R assaulted people in HS and WSU admitted him anyway
- Court: If WSU knew about it, maybe SO...
- Complainant: WSU didn't enforce violations of NCO
- Court: If WSU knew about it, maybe SO...

Joyce v. Wright State

- How fast can you move on an NCO?
- How do you process allegations from HS?
- How do you address violations of NCO?

Powell v. St. Joseph's Univ.

- E.D.Pa. – Feb. 20, 2018 – MTD denied
- Charged with stalking
- Found responsible for sexual harassment
- Court: Survives MTD on breach of contract claim
- Provide notice and opportunity to respond for all charges – as they arise

Schaumleffel v. Muskingum

- S.D. Ohio – March 6, 2018 – MTD
- Allegations that training materials contained biased statements allowed to survive MTD
- Make sure your training materials are unbiased
- Use the hearing panel composition promised in your policy

Gischel v. Univ. Cincinnati

- S.D. Ohio – Feb. 5, 2018 – MTD
- P alleged relationship between complainant and detective who investigated case
- Panel refused to ask questions about complainant's incapacitation and alleged relationship
- Permit questions on central issues; vet conflicts.

Doe v. Marymount Univ.

- E.D. Va. – Mar. 14, 2018 – MTD Denied
- Exculpatory evidence was not permitted to be considered
- Adjudicator made statements in a later case that showed impermissible gender bias
- What does your policy say to limit or require evidence?
- How do you train re: bias?

Doe v. Miami Univ. (OH)

- **6th Cir. – Feb. 8, 2018 – MTD**
- **Allegations that Director of Student Conduct was biased, withheld information, and made an inappropriate biased comment to respondent**
- **One kiss was not enough of a pattern of sexually offensive behavior**
- **Make information available**
- **Investigate all claims implicated by facts**

Roe v. Adams-Gaston (OSU)

- S.D. Ohio – Apr. 19, 2018 – Inj. Granted
- Case #1 – adverse witnesses did not come to hearing
- Case #2 – complainants and adverse witnesses did not come to hearing
- Due Process violated where decision-maker could not question accusing witnesses or complainant – necessary to choose between competing stories

Doe v. Ohio State Univ.

- S.D. Ohio – April 24, 2018 – MSJ
- Use of Expert Witnesses
- Effective Cross Examination
- If your employee acts as an advisor, do they have obligations to disclose to the institution?
- Read this case

Doe v. Univ. of Mich.

- E.D. Mich. – July 6, 2018 – TRO granted
- Still in investigation, no decision rendered, but court finds the case ripe for review
- “[A]t this very moment, the University may be denying Plaintiff due process protections to which he is entitled. The Court cannot, and will not, simply stand by as the fruit continues to rot on the tree.”

Doe v. Univ. of Mich.

- Court was concerned that P couldn't know what questions investigator had asked (Investigator Model)
- "Without a live proceeding, the risk of an erroneous deprivation of P's interest in his reputation, education, and employment is significant."
- Court says that the Policy violates DP rights without live hearing and X-exam

Doe v. Univ. of Mich.

- Court ordered a live hearing
- BUT: No right to cross examine the claimant directly – submit questions to panel
- Note: UM uses a hearing procedure for non-TIX claims already

Doe v. Boston College

- **1st Cir. – June 8, 2018 – Remanded**
- **Forensic tests still pending at time of hearing**
- **Defense was misidentification – an alternative culprit was identified**

Doe v. Boston College

- Hearing panel consulted with administrators about possibility of “no finding” – who then discouraged it
- Hearing panel was supposed to deliberate “in private”
- Court: MSJ should have been denied
- What were other options for the College to consider here?
- Is “no finding” an option?

Garrett v. Univ. S. Fla.

- M.D.Fla. Apr. 18, 2018 – MTD denied
- Found responsible for NCSI
- Sanction: deferred suspension
- R still permitted to attend class and participate in educational program (small and close knit)
- C is upset, records conversation with her, advocate, and Univ. employee
- Univ. files disciplinary charges against C

Garrett v. Univ. S. Fla.

- Court: allowing R to remain on campus may constitute deliberate indifference
- Charging C raises concerns about retaliation
- How do you ensure sanctions are appropriate?
- Does student conduct talk with Title IX before filing charges? Should it?

Doe v. G. Wash. Univ.

- **D.D.C. – April 25, 2018 – Inj. Denied**
- **R learned at hearing for first time how much C alleged she had to drink**
- **Witness that was abroad at time of hearing had info to offer**
- **Subpoena later showed no phone call from witness to C while in Uber to R's dorm**

Doe v. G. Wash. Univ.

- **D.D.C. – April 25, 2018 – Inj. Denied**
- **Court says this was “new evidence” that will likely result in success on a breach of contract claim**
- **What are your standards for appeal?
How do you apply them?**

Doe v. Distefano

- D.Col. – May 7, 2018 – MTD Denied
- No due process interest in good name and reputation
- Actual bias can be a violation of due process
- Court asks in dicta whether older cases deferring to IHEs should be reexamined in light of criminal nature of recent cases

Joyce v. Wright State

- S.D. Ohio – June 15, 2018 – MTD mixed
- Sexual assault reported
- NCO and interim suspension issued three days later
- Complainant: 3 days is too long – deliberate indifference
- Court: Maybe so...

Save the Date

July 23rd, 12:00p EDT:

“Should I Worry About GDPR?”

(Spoiler: Yes)

August 16th, 12:00p EDT:

“What You Missed This Summer: Higher Ed Edition”



You can register for all of our upcoming
webinars/events by visiting:

<http://www.bricker.com/events/>

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TITLE IX RESOURCES

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