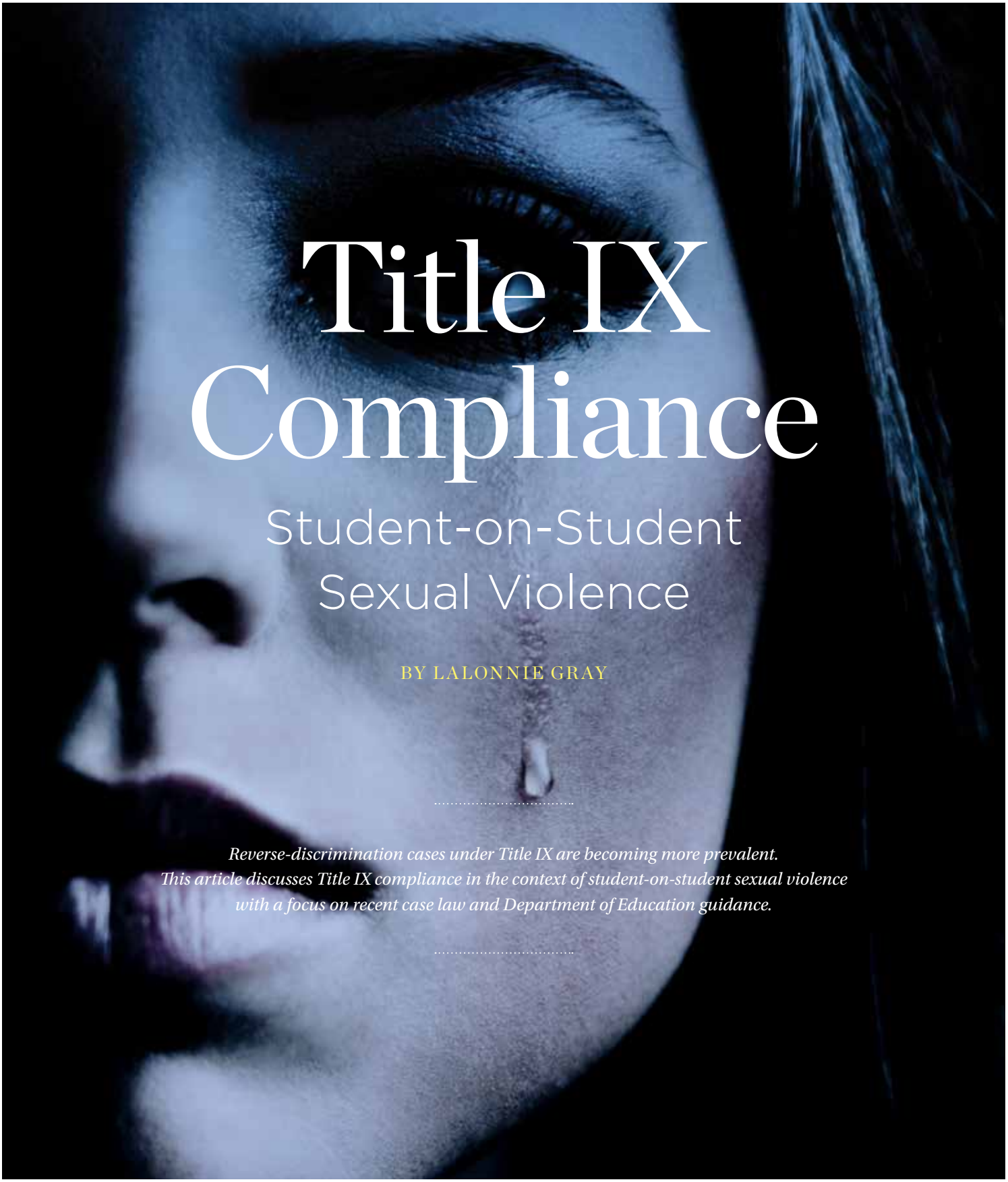

Title IX Compliance

Student-on-Student Sexual Violence

BY LALONNIE GRAY

Reverse-discrimination cases under Title IX are becoming more prevalent. This article discusses Title IX compliance in the context of student-on-student sexual violence with a focus on recent case law and Department of Education guidance.

Sexual violence is deeply disturbing. Sexual violence on a school campus is even more distressing, given that an educational environment is intended to be a safe zone where students can learn new skills and gain understanding of the world around them. It is no secret that sexual violence occurs too frequently on college campuses. In fact, in 2015, the Association of American Institutions administered a study at 27 institutions of higher education with more than 150,000 students participating that revealed that 23.1% of female and 5.1% of male undergraduate students experienced some form of nonconsensual sexual contact.[1]

Sexual harassment, which is defined as unwelcome conduct of a sexual nature, is a form of sex discrimination that is prohibited under USC Title IX. The U.S. Supreme Court held that an educational institution may be liable for student-on-student harassment under Title IX when the educational institution "acts with deliberate indifference to known acts of harassment in its programs or activities."[2] The U.S. Department of Education's Office for Civil Rights (OCR) is tasked with enforcing Title IX and investigating schools' handling of allegations of sexual assault when a complaint is filed directly with OCR or upon compliance review.[3] Educational institutions must comply with both procedures set by the judiciary through case law and OCR guidance documents.

The Title IX Framework

In 1972, Congress enacted Title IX of the Education Amendments of 1972, which states in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[4] In conjunction with Title IX, Congress enacted an administrative enforcement scheme in which federal departments or agencies with the authority to provide financial assistance can terminate funding if an educational institution fails to comply with Title IX.[5]

Although Title IX does not expressly reference sexual harassment or sexual assault, courts have interpreted it to prohibit both. In 1986, citing the Equal Employment Opportunity Commission Guidelines and existing case law as support, the Supreme Court recognized that Title VII[6] prohibits sexual harassment, which it found to be a form of sex discrimination.[7] When addressing sexual harassment in the context of Title IX, the Supreme Court followed its Title VII precedent and, in 1992, held that a teacher who sexually harasses and abuses a student because of the student's sex discriminates on the basis of sex.[8] Subsequently, in 1998, the Supreme Court determined that an educational institution may be liable for the independent acts of a teacher under Title IX when the educational institution has actual notice and is deliberately indifferent to the sexual harassment and abuse by the teacher.[9] In 1999, the Supreme Court expanded its precedent in holding that an educational institution may be liable for student-on-student sexual harassment under Title IX, but only where the educational institution "acts with deliberate indifference to known acts of harassment in its programs or activities."[10]

Department of Education Office for Civil Rights

The OCR has issued numerous guidance documents in an effort to assist educational institutions in complying with Title IX. This section describes the guidance documents issued by the OCR that relate to student-on-student sexual misconduct.[11] The OCR's requirements for educational institutions continue to evolve, so schools must stay up-to-date with the OCR's approved preventative and investigative procedures.

In 1997 the OCR issued its first guidance document regarding sexual harassment under Title IX, "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" (1997 Guidance). The 1997 Guidance asserted that sexual harassment of students was a form of prohibited sex discrimination under Title IX.[12]

In 2001, following *Davis v. Monroe County Board of Education*, the OCR issued a second guidance document, "Revised Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties" (2001 Revised Guidance).[13] In the 2001 Revised Guidance, the OCR advised educational institutions that to avoid acting with deliberate indifference—as set forth in *Davis*—the educational institution must "tak[e] prompt and effective action to stop the harassment and prevent its recurrence."[14] Additionally, the OCR stated that the standard for administrative enforcement of Title IX, and in court cases where plaintiffs are seeking injunctive relief, is "if the school knows or reasonably should know about the harassment."[15] The OCR noted in a footnote that the "knew, or in the existence of reasonable care should have known" standard is "[c]onsistent with its obligation under Title IX to protect students . . . [and] OCR interprets its regulations to ensure that [educational institutions] take reasonable action to address, rather than neglect, reasonably obvious discrimination."[16]

In 2004 the OCR issued further guidance, "Title IX Grievance Procedures, Postsecondary Education" (2004 Guidance).[17] The 2004 Guidance reminded postsecondary institutions that "the Title IX regulations require recipients to designate a Title IX coordinator, adopt and disseminate a nondiscrimination policy, and put grievance procedures in place to address complaints of discrimination on the basis of sex in educational programs and activities."[18]

Subsequently, in 2011, the OCR issued what has become known as the "2011 Dear Colleague Letter,"[19] which reiterated the requirements set forth in the 2004 Guidance and stated that the correct evidentiary standard to use in resolving complaints is "preponderance of the evidence" (i.e., it is more likely than not that the sexual harassment or violence occurred).[20] With respect to the preponderance of the evidence standard, the OCR reasoned that the "Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII" and the "OCR also uses a preponderance of the evidence standard when it resolves complaints against recipients."[21] Thus, the OCR concluded that the preponderance of the evidence standard should be used in a school's grievance procedures. Until the 2011 Dear Colleague Letter, no formal regulation or

guidance document set forth this evidentiary standard.

In 2014—on the same day that the White House issued "The First Report of the White House Task Force to Protect Students from Sexual Assault"—the OCR issued "Questions and Answers on Title IX and Sexual Violence" (Questions and Answers).[22] In the Questions and Answers, the OCR stated that the 2001 Guidance and the 2011 Dear Colleague Letter remained in "full force" and recommended that the guidance documents be read in conjunction with the Questions and Answers.[23] The Questions and Answers describe training and preventive measures that educational institutions should take to curtail sexual violence and the "immediate and appropriate steps" educational institutions must take after a complaint is filed.[24]

In 2017, the OCR formally rescinded the Obama-era guidance on how educational institutions should handle sexual assaults under Title IX.[25] The 2017 Dear Colleague Letter stated that the Obama-era guidance "interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student-on-student sexual misconduct."[26] The OCR issued interim guidance in the form of Questions and Answers (2017 Questions and Answers).[27] The 2017 Questions and Answers include a description of the nature of an educational institution's responsibility to address sexual misconduct, information about how the Clery Act[28] relates to a school's obligations under Title IX, and a school's obligations concerning grievance procedures and investigations.[29] The guidance document states that "findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard."[30] The 2017 Questions and Answers make clear that existing resolution agreements between OCR and educational institutions are still binding.[31] The OCR "intends to engage in rulemaking on the topic of schools' Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence."[32] The 2017 Questions and Answers serve as interim guidance until the rulemaking process concludes.[33]

"Regardless of the outcome of a university disciplinary proceeding in which a student asserts sexual misconduct against another student, the non-prevailing party may sue the university, alleging both federal and state claims."

Claims against Educational Institutions

Regardless of the outcome of a university disciplinary proceeding in which a student asserts sexual misconduct against another student, the non-prevailing party may sue the university, alleging both federal and state claims. A complainant in a university disciplinary proceeding (i.e., the student alleging the sexual misconduct) generally asserts that the educational institution had knowledge of the sexual misconduct and failed to take action, thus depriving the student of access to the educational benefits and opportunities provided by the school. As discussed above, when a complainant files suit against an educational institution under Title IX, he or she must prove that the institution had actual knowledge and acted with deliberate indifference to the acts of sexual harassment and abuse performed by another student. Further, "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[34] "A school district may be liable under Title IX provided it (1) has actual knowledge of, and (2) is deliberately indifferent to, (3) harassment that is so severe, pervasive and objectively offensive as to (4) deprive access to the educational benefits or opportunities provided by the school."[35]

Conversely, a respondent (i.e., the student who was charged with committing sexual misconduct) found responsible for committing the sexual misconduct will often allege that the school failed to conduct an adequate, reliable, and impartial investigation based on the complaint of sexual misconduct.[36] There are multiple standards for determining whether a plaintiff-respondent has stated a discrimination claim against an educational institution arising from a disciplinary hearing under Title IX. The standards under which a plaintiff may assert a claim are "erroneous outcome," "selective enforcement," "deliberate indifference," and "archaic assumptions."[37]

Under the erroneous outcome standard, a plaintiff claims that he or she was innocent of the charges presented and wrongly found to have committed an offense in an educational institution's disciplinary proceedings.[38] Under the selective enforcement standard, a plaintiff claims that, "regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender."[39] Under the deliberate indifference standard, a plaintiff must "demonstrate that an official of the institution who had authority to institute corrective measures had actual notice of, and was deliberately

indifferent to, the misconduct."[40] Finally, the archaic assumptions standard requires a plaintiff to demonstrate "discriminatory intent in actions resulting from classifications based upon archaic assumptions" regarding sex or gender.[41] Under each of these standards, a plaintiff must demonstrate that the educational institution's challenged misconduct was motivated by sex-based discrimination.[42]

Navigating Reverse-Discrimination Cases

While the Tenth Circuit has yet to hear a reverse-discrimination case under Title IX, two appellate courts—the Second and Sixth Circuits—have issued rulings on this exact issue. Both appellate courts vacated the district courts' dismissal of the plaintiff's Title IX claim at the motion to dismiss stage. Remarkably, the Second Circuit adopted a burden-shifting framework at the Federal Rule of Civil Procedure 12(b)(6) stage for Title IX cases.

In *Doe v. Columbia University*, a male student brought an action against the university alleging that the university acted with sex bias in violation of Title IX in investigating and suspending him for alleged sexual assault.[43] The Second Circuit Court of Appeals adopted a burden-shifting framework in which a "plaintiff needs to present only minimal evidence supporting an inference of discrimination in order to prevail."[44] The court stated:

> We therefore hold that the temporary presumption afforded to plaintiffs in employment discrimination cases under Title VII applies to sex discrimination plaintiffs under Title IX as well. Thus, a complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, is sufficient with respect to the element of discriminatory intent, like a complaint under Title VII, if it pleads specific facts that support a minimal plausible inference of such discrimination.[45]

With respect to the plaintiff's Title IX claims, the court found that "the Complaint meets the low standard described in *Littlejohn v. City of New York* . . . of alleging facts giving rise to a plausible minimal inference of bias sufficient to survive a motion to dismiss, which we hold applies in Title IX cases."[46] Accordingly, the court vacated the district court's judgment dismissing the complaint and remanded the case for further proceedings.[47]

Similarly, in *Doe v. Miami University*, the appellate court reversed the district court's

grant of the defendants' motion to dismiss the plaintiff's Title IX claim under the erroneous-outcome theory of liability.[48] In this case, the university found the plaintiff, a male student, responsible for violating the school's sexual assault policy.[49] Following his appeal through the university's administrative process, the plaintiff filed suit against Jane Doe, the university, and the individual university employees who had been a part of the disciplinary process. The plaintiff voluntarily moved to dismiss his claims against Jane after the two parties reached a settlement. The other defendants moved to dismiss the plaintiff's six remaining claims under Title IX and § 1983 pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court granted their motion. On appeal, the plaintiff argued that the district court erred in granting the defendants' motion to dismiss. Among other rulings, the Sixth Circuit Court of Appeals reversed the district court's holding that the plaintiff did not sufficiently plead his Title IX erroneous-outcome claim.[50] The Court opined on the pleading standard in a Title IX case, stating:

> Whatever the merits of the Second Circuit's decision in *Columbia University*, to the extent that the decision reduces the pleading standard in Title IX claims, it is contrary to our binding precedent. . . . [I]n this circuit, John must meet the requirements of *Twombly* and *Iqbal*[51] for each of his claims in order to survive a Rule 12(b)(6) motion to dismiss.[52]

The court found the plaintiff to have "pleaded sufficient specific facts to support a reasonable inference of gender discrimination"[53] and remanded the matter for further proceedings consistent with its opinion.[54]

The federal district court in Colorado is no exception to the national increase in reverse-discrimination cases under Title IX. As discussed below, the U.S. District Court for the District of Colorado has granted universities both a motion to dismiss and a motion for summary judgment in Tile IX cases. In another Title IX case, the parties settled the issue outside of court after a magistrate judge issued a recommendation for the court to deny the university's motion to dismiss. The following Title IX cases have been filed in the U.S. District Court for the District of Colorado.

> "Whether representing a plaintiff or an educational institution in the Title IX context, practitioners must stay up to date on the evolving case law and OCR guidance, and keep in mind that university compliance with Title IX may vary greatly from school to school."

Doe v. University of Denver

In *Doe v. University of Denver*, the plaintiff, a male college student, was expelled from the University of Denver after the university investigated and concluded that it was more likely than not that he had engaged in non-consensual sexual contact with a female classmate.[55] Among other claims, the plaintiff alleged that the university failed to conduct an adequate, reliable, and impartial investigation because of his gender, which led to an allegedly discriminatory expulsion decision. The court granted summary judgment for the university, stating:

> In this case, the legal theory plaintiff chose to assert required him to show that gender bias was a motivating factor behind DU's disciplinary decision. Because plaintiff has failed to make this showing, defendants are entitled to summary judgment on his Title IX claim.[56]

On April 20, 2018, the plaintiff filed an appeal with the Tenth Circuit Court of Appeals.

Doe v. University of Colorado

In *Doe v. University of Colorado*,[57] the plaintiff, a male student, was expelled from the University of Colorado at Boulder after the university's Title IX office concluded by a preponderance of the evidence that he had raped two female students in separate incidents.[58] Among other claims, the plaintiff alleged that the university discriminated against him on the basis of sex in violation of Title IX.[59] Both the university and the individual defendants—the university's Title IX co-coordinator, the Title IX investigator assigned to the case, and the head of the university's Office of Student Conduct—filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6).[60] With respect to the pleading standard, the court stated:

> The Court basically agrees with the Second Circuit that Plaintiff needs no more than a "minimally plausible inference" to satisfy the *Twombly/Iqbal* pleading standard . . . but the Court does not read this as some sort of weakening of *Twombly* and *Iqbal*. Either the complaint states a plausible claim or it does not—the degree of plausibility only becomes relevant when an "obvious alternative explanation[] . . . overwhelms any inference of liability that might otherwise exist.[61]

With respect to the Title IX claim against the university, the court found that "Plaintiff has failed to raise a plausible inference of gender bias, and has therefore failed to state a claim for sex discrimination under Title IX."[62] The court granted defendants' motions to dismiss.[63]

Neal v. Colorado State University–Pueblo

In *Neal v. Colorado State University–Pueblo*, the university concluded, by a preponderance of the evidence, that the plaintiff, a male student-ath-

lete, was responsible for sexual misconduct in violation of the university's Code of Conduct.[64] The plaintiff alleged that in conducting the disciplinary matter, the university discriminated against him on the basis of his gender in violation of Title IX. With respect to the university's motion to dismiss, Magistrate Judge Shaffer issued a Report and Recommendation to deny the university's motion as to the plaintiff's Title IX claim, stating:

> Applying these legal standards to Plaintiff's allegations, Wilson's alleged failures to (among other things) consider that Jane Doe told Wilson the sexual encounter was consensual, the physical or documentary evidence in which she consistently said the same thing, her motivation to not be disciplined by her department for her prohibited relationship with a football player, the Clarks' conflicts of interest, Wilson's failure to question any witnesses favorable to Plaintiff (e.g., Coach Wristen), and Wilson's failure to identify to Plaintiff the witnesses against him before completing the investigation all suggest bias and inaccuracy in the outcome.[65]

With respect to the proper pleading standard, the court noted that "[t]he Court need not resolve that question because Plaintiff's allegations go well beyond 'facts supporting a minimal plausible inference of discriminatory intent.'"[66] Magistrate Judge Shaffer found the plaintiff's Title IX claim plausible in that "the discipline occurred because . . . of sex."[67] The defendants filed an objection to the Report and Recommendation.[68] Before the judge ruled on the Report and Recommendation, the parties filed a stipulated motion to dismiss the plaintiff's claims against the university with prejudice.[69] Based on the parties' Joint Status Report filed on July 14, 2017, it appears that the parties agreed upon both monetary and non-economic terms in the settlement agreement.[70]

Johnson v. Western State Colorado University

In *Johnson v. Western State Colorado University*, the court granted the defendants' motion to dismiss the plaintiff's claims brought under Title IX.[71] The court found that the plaintiff—a male student who served as a teaching assistant—did not meet his burden of pleading sufficient facts to show that the disciplinary proceedings taken against him for a sexual relationship he engaged in with a female student resulted from gender bias.[72] The disciplinary board at Western State Colorado University found the plaintiff to be *not* responsible for the sexual harassment.[73] Because he was found not responsible, the analysis in *Johnson* differs somewhat from that in *Neal* and the *Doe* cases.

Conclusion

Following university disciplinary proceedings involving claims of sexual misconduct by one student against another student, the non-prevailing party in the proceeding may bring a Title IX action against the school. Whether representing a plaintiff or an educational institution in the Title IX context, practitioners must stay up to date on the evolving case law and OCR guidance, and keep in mind that university compliance with Title IX may vary greatly from school to school. Educational institutions should take a proactive approach toward Title IX compliance to avoid liability for student-on-student sexual misconduct. CL

LaLonnie Gray is an associate at Lewis Bess Williams & Weese P.C. She focuses her practice on employment law and higher education. Gray routinely defends claims brought under the Fair Labor Standards Act, Equal Pay Act, Americans with Disabilities Act, Title VII, Title IX, Age Discrimination in Employment Act, and Colorado Anti-Discrimination Act—lgray@lewisbess.com.

Coordinating Editor: Caryn A. Datz, cdatz@bouldercounty.org

NOTES

1. Association of American Universities, Campus Climate Survey on Sexual Assault and Sexual Misconduct (Sept. 2015), www.aau.edu/sites/default/files/files/AAU%20Releases%20Report%20on%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct%20-%209-21-15.pdf.

2. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

3. U.S. Dep't of Educ., Title IX and Sex Discrimination (2015), www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

4. 20 USC § 1681(a).

5. *Davis*, 526 U.S. at 638–39.

6. Title VII prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC § 2000e-2(a)(1).

7. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65–66 (1986).

8. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

9. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292–93 (1998).

10. *Davis*, 526 U.S. at 633.

11. Sexual misconduct incorporates a range of behaviors including sexual assault and sexual harassment. *See, e.g.*, Sexual Misconduct Policies at Yale (2017–18), http://catalog.yale.edu/undergraduate-regulations/policies/definitions-sexual-misconduct-consent-harassment.

12. U.S. Dept. of Educ., Office for Civil Rights (OCR), Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed.Reg. 12034 (Mar. 13, 1997), www.gpo.gov/fdsys/pkg/FR-1997-03-13/pdf/97-6373.pdf.

13. OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 19, 2001), www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

14. *Id.* at 10.

15. *Id.* at 12.

16. *Id.* at 13, n. 73.

17. OCR, Title IX Grievance Procedures, Postsecondary Education (Aug. 4, 2004), www2.ed.gov/about/offices/list/ocr/responsibilities_ix_ps.html.

18. *Id.*

19. Ali, Dear Colleague Letter, OCR (Apr. 4, 2011), www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

20. *Id.* at 11.

21. *Id.* at 10–11.

22. OCR, Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

23. *Id.* at ii.

24. *Id.* at 15.

25. Jackson, Dear Colleague Letter, OCR (Sept. 22, 2017), www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

26. *Id.* at 1.

27. OCR, Questions and Answers on Campus Sexual Misconduct (Sept. 2017), www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

28. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 USC § 1092(f). The Clery Act requires colleges and universities participating in federal financial aid programs to maintain and disclose campus crime statistics and security information.

29. OCR, *supra* note 27 at 1–4.

30. *Id.* at 5.

31. *Id.* at 7.

32. *Id.* at 1.

33. *Id.*

34. *Davis*, 526 U.S. at 651.

35. *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1119 (10th Cir. 2008).

36. *See, e.g., Doe v. Brown Univ.*, 166 F.Supp.3d 177 (D.R.I. 2016); *Marshall v. Ohio Univ.*, No. 15-cv-775, 2015 WL 7254213 (S.D. Ohio Nov. 17, 2015); *Salau v. Denton*, 139 F.Supp.989 (W.D. Mo. 2015); *Doe v. Case W. Reserve Univ.*, No. 14-cv-2044, 2015 WL 5522001 (N.D. Ohio Sept. 16, 2015); *Sahm v. Miami Univ.*, 110 F.Supp.3d 774 (S.D. Ohio 2015).

37. *Mallory v. Ohio Univ.*, 76 F. App'x 634, 638 (6th Cir. 2003) (internal citations omitted).

38. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).

39. *Id.*

40. *Mallory*, 76 F. App'x at 638 (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998)).

41. *Id.* at 638–39 (citing *Pederson v. La. State Univ.*, 213 F.3d 858, 880–82 (5th Cir. 2000)).

42. *Id.* at 638.

43. *Doe v. Columbia Univ.*, 831 F.3d 46, 48 (2d Cir. 2016)

44. *Id.*

45. *Id.* at 56.

46. *Id.* at 48.

47. *Id.* at 59.

48. *Doe v. Miami Univ.*, 882 F.3d 579, 594 (6th Cir. 2018).

49. *Id.*

50. *Id.* at 605.

51. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

52. *Miami Univ.*, 882 F.3d at 589.

53. *Id.* at 594.

54. *Id.* at 605.

55. *Doe v. Univ. of Denver*, No. 16-cv-00152, 2018 WL 1304530 (D.Colo. Mar. 13, 2018).

56. *Id.* at *12.

57. *Doe v. Univ. of Colo.*, 255 F. Supp. 3d 1064 (D.Colo. 2017).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 1076 (internal citations omitted).

62. *Id.*at 1079.

63. *Id.* at 1087.

64. *Neal v. Colo. State Univ.–Pueblo*, No. 16-cv-873, 2017 WL 633045, at *5 (D.Colo. Feb. 16, 2017).

65. *Id.* at *11.

66. *Id.* at *15 (citing *Columbia Univ.*, 831 F.3d at 55).

67. *Id.* at *17 (internal citation and quotation marks omitted).

68. *Neal v. Colo. State Univ.–Pueblo*, No. 16-cv-873 (D.Colo.), doc. 104.

69. *Id.* at doc. 110.

70. *Id.* at doc. 108.

71. *Johnson v. W. State Univ. Colo.*, 71 F. Supp. 3d 1217, 1226 (D.Colo. 2014).

72. *Id.* at 1226.

73. *Id.* at 1223.