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Critical Court Decisions & Legal Developments in Title IX and BIT

Presenters





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Our goal is to examine these topics thoughtfully and respectfully to strengthen prevention, response, and support practices across our educational communities.

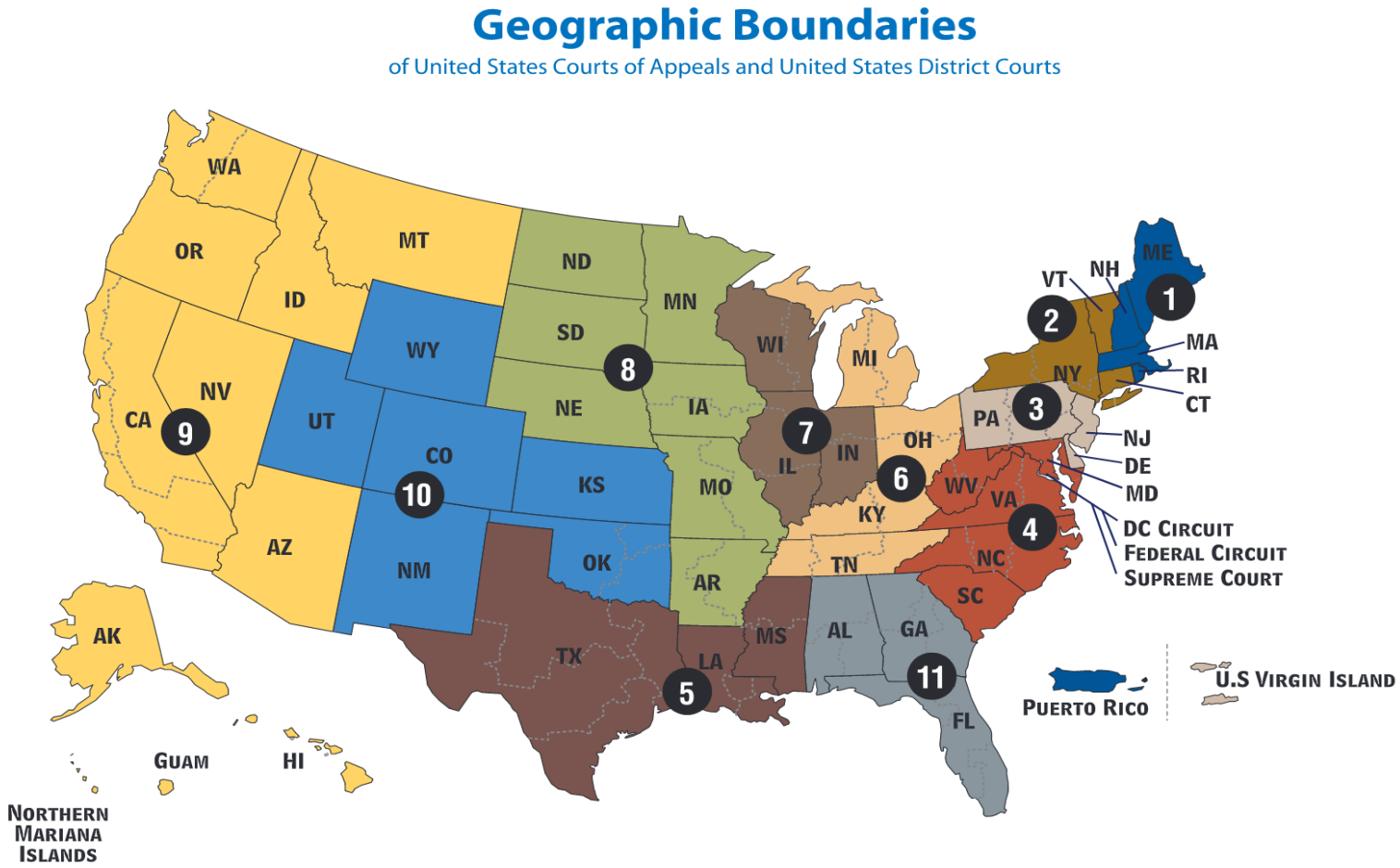
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Setting the Table

- We will be discussing cases that have not gone all the way to trial
  - Since pre-trial settlements are common, the real legal battles are in pre-trial motions
  - In pre-trial motions, the court assumes the allegations are true
  - Motion to Dismiss (MTD) v. Motion for Summary Judgement (MSJ)
- For the purposes of this session, we assume the allegations are true
  - Facts discussed have not been proven to be true
- **Note: This session does not provide legal advice**

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Map of Circuit Courts of Appeal



Source: https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf

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Title IX: Checking Back In

West Virginia v. B.P.J.

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West Virginia v. B.P.J.

U.S. Supreme Court upheld Idaho and West Virginia's laws, concluding that:

- The Court unanimously agreed that "sex" in Title IX refers to biological sex, at least in the athletics context
- States **may** classify athletic participation based on biological sex for women's and girls' athletic teams
- Idaho and West Virginia's laws do not violate Title IX or the Equal Protection Clause under the Constitution
- **This decision is limited to athletics' participation only**

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Title IX

C.W. v. Smith

Doe v. University of Maryland

Ortegel v. Virginia Tech

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Deliberate Indifference

Courts generally apply a four-part test to determine if a school or institution was deliberately indifferent:

1. **Funding:** The school/institution must be a federal funding recipient
2. **Notice:** An individual with the authority to address the harassment must have actual knowledge of the harassment
3. **Failure to Act:** The school/institution must act with deliberate indifference
4. **Denial of Access:** The harassment must be so severe, pervasive, and objectively offensive that it denies an individual access to the education program or activity

C.W. v. Smith

C.W. v. Smith Facts

- C.W. was a member of the football program
- Allegations included hazing/bullying with sexual or sex-based elements
- C.W.'s mother reported to school
- Harassment of C.W. continued after report
  - Slapped C.W.'s butt, called him "gay," a "pussy," a "snitch," threats to "key" him
  - Coach said "soft people look for a reason to be mad"
  - Students faced only minor discipline for their roles
  - C.W. eventually transferred schools
- District court dismissed complaint
  - C.W. had not complained of harassment based on sex, or that he was bullied because he was male

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Circuit Court Decision

- The 11th Circuit disagreed
  - C.W. plausibly alleged that he was subjected to sexual harassment when he was harassed for failing to conform to **sex stereotypes**
    - Called young, lightweight, easily offended, pussy, gay, and soft
    - Supports an inference that C.W. did not conform to football team's concept of masculinity
    - Coach knew that "keying" was a problem on the team generally
  - The harassment was also sexual in nature
    - Intended to emasculate
    - Nipple twisting, butt slapping, threats of sexual assault
  - Even if it was anti-freshman bias, it was also based on sex

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C.W. v. Smith Takeaways

- "It's hazing," or "it's bullying," does not end the Title IX analysis
- Consider whether sex stereotypes are underlying the alleged discrimination or harassment
  - This is similar to the rationale in Bostock, but not exactly the same
  - Therefore, we may see more cases tackling the sex stereotyping justification in cases involving transgender individuals
- An additional factor to consider upon receiving reports of students using homophobic or gendered slurs – do those reports implicate sex stereotyping?
  - Especially important for schools/institutions without policies or state laws that protect on the basis of sexual orientation and/or gender identity

Doe v. Maryland

Doe v. Maryland Facts

- Doe was accused of sexual assault
- Following an investigation, the University determined Doe was not responsible
- The Complainant embarked on a campaign to brand Doe a rapist and exclude him from campus activities
  - Identified at campus program as a rapist by Complainant
  - Contacted club lacrosse team, persisted
  - Resulted in Doe being removed from the club team
  - Doe made complaint of sexual harassment and retaliation
  - University conducted intake and initial inquiry/assessment
  - Dismissed allegations; Doe did not appeal the dismissal

The Court's Analysis

- "Persistent pattern" of publicly identifying Doe as a rapist constituted harassment directed at his sex
  - It culminated in Doe's exclusion (participation in club lacrosse)
  - Doe may have experienced sexual harassment
  - Retaliation likely not the proper frame

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Doe v. Maryland Takeaways

- Takeaways
  - Analyze this kind of behavior through a sexual harassment lens, in addition to retaliation
    - Balance between rights to discuss allegations and rights to be free of harassment
    - Mindful of chilling effect on participation or reporting
    - Consider denial/limitation of access
  - Training for registered student organizations and Advisors
    - RSOs may follow established bylaws and disciplinary procedures
    - Fraternity and sorority life may follow national disciplinary procedures
  - Defamation and/or social ostracization

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Ortegel v. Virginia Tech

Ortegel v. Virginia Tech

- Plaintiff found responsible by two-person panel for sexual assault (nonconsensual kiss accompanied by unwelcome sexual comments)
  - Largely on the basis of credibility determinations
- Sanctions assigned:
  - Deferred suspension
  - Participation in wellness services
  - Two letters of acknowledgement
  - Mentorship
  - Reading a book about masculinity and submit written reflection

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Plaintiff's Sex Discrimination Claim

- Sex discrimination allegations focused on alleged "bias against men" by one of the DMs
  - Public statements via social media
    - Tweet: "Doing his part to hold other men accountable"
    - Retweet: "Quite interesting how many college aged boys and men seem to understand consent when it comes to drinking their chocolate milk but not when it comes to someone's else body and space."
  - Deposition testimony
    - "I think there's inherently a male bias… I actively acknowledge and I try to work against [that]."
    - Made other comments about the patriarchy, male privilege, and validating the experiences of women
    - Emphasized that "everyone should be believed" until there is contrary evidence
  - The sanction requiring Plaintiff to read a book about masculinity

The Court's Decision

- The Decision-maker's social media statements were not "egregious or overtly reflecting sex-based bias" but raised questions about his objectivity
  - Some of these statements occurred less than a year prior to Plaintiff's hearing
- Deposition testimony further calls objectivity into question – or at least "raise an eyebrow" regarding his impartiality
  - "At best" the comments "reflect a tension" between the Decision-maker's commitment to impartiality and his acknowledgment of sex-based implicit bias in favor of men, which he tried to actively counteract
- Book assignment may have indicated sex bias, too

Ortegel v. Virginia Tech Takeaways

- Consider social media activity when identifying and recruiting individuals for neutral roles in a Title IX process
  - Faculty research and publications have presented similar issues in past litigation
  - More appropriate to serve as Advisors, possibly
- Training around navigating bias is critical
- Appropriate, sex-neutral sanctions
  - Stop, prevent, and remedy takes precedent over educational remedies

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Threat Assessment

Riordan v. Lane Community College

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Riordan v. Lane Community College

- Student criticizes Board over program cuts
- Persistent emails, comments, administrator contacts
- Officials report anger, fixation, escalating concern
- Threat Assessment Team (TAT) begins “monitoring” student
- Public Safety investigates alleged harassment
- Reports include memes, metaphors, violent references
- Student trespassed and enrollment hold; enrollment effectively blocked (for 99 years)
- Student brings First Amendment challenge

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Federal Court: Preliminary Injunction

- PI stage: Is Riordan likely to succeed on his First Amendment claim?
- Court finds likely First Amendment violation (including retaliation)
- Counterman case: true threats require subjective recklessness
  - Recipient fear alone is not enough
  - Threatening meaning must be assessed in context
  - Court finds rhetoric repeatedly decontextualized
  - Record insufficient to establish true threats
- Campus/enrollment access restored
- Preliminary ruling—not final merits decision

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Threat/Violence Assessment Takeaways

- Referral was appropriate
- Protected speech can still be assessed
- Perceived threat does not determine actual risk
- Monitoring, gathering evidence ≠ behavioral threat assessment
- Assess behavior and speech in context
- Look for pathway—not alarming language
- Test confirming and disconfirming evidence
- Public Safety investigation ≠ violence risk assessment

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First Amendment

Gartenberg v. Cooper Union

Fellers v. Kelley

Defending Education v. Olentangy Local School District

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Gartenberg v. Cooper Union

Gartenberg v. Cooper Union Information

- This case resolved with a settlement agreement, but Cooper Union originally sought dismissal of the complaint stemming from incidents in October 2023
  - The complaint alleged Cooper failed to respond to escalating antisemitic harassment and intimidating on campus
    - Focused on an incident at the library but included other incidents
- The court's decision required it to articulate the legal boundary between protected political expression and actionable discriminatory harassment **within higher education**

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Applicable to Public and Private

- First, the court had to address Plaintiff's contention that since Cooper was a private institution, the First Amendment did not apply
  - Therefore, Cooper was responsible for responding to and addressing all reported behavior until Title VI, not just behavior falling outside 1A protections
- The court **rejected** that argument
  - The court did not want to create a rule in which private institutions would have different, and far more extensive, obligations under Title VI than public institutions

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Failure to Stop, Prevent, and Remedy

- **Jewish student hung up posters;** they were vandalized and/or torn down
- Large signs were hung up on a building that characterized Jews as settlers living in Palestine and described the October 7 attacks as a reaction or counterattack
- **Students staged a walkout, chanting slogans;** they stormed a campus building
- Pro-Palestinian graffiti appeared on the exterior of a campus building
- A bathroom stall was vandalized with pro-Palestinian slogans and references to *Mein Kampf*
- **Flyers posted around campus celebrated the 36th anniversary of the First Intifada**
- **The Muslim Student Association released a statement questioning whether the Jewish students being trapped in the library was a "false narrative"**
- **The Black Student Union put out a statement of solidarity with the Palestinian struggle**
- **A school-sanctioned art display referenced colonialism and Palestine**
- **Required attendance at a talk of an anti-Israel activist for a core Humanities course**

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Gartenberg v. Cooper Union Takeaways

- Institutions cannot discipline speech merely because it generates discomfort, outrage, or political pressure
  - But institutions must act when conduct escalates beyond protected speech and into actionable harassment
  - Cooper was not sued because students engaged in pro-Palestinian activism
    - Legal exposure arose because Cooper **did not** investigate, enforce policies, discipline misconduct, and addressed vandalism and intimidation
- Private institutions may need to work with legal counsel to determine their approach to regulating speech
- Settlement details included TVIC position, training, policy rewrites

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Stand with Us v. MIT

- Post-October 7 protests and encampment at MIT
- Jewish students alleged antisemitic hostile environment
  - Anti-Israel/anti-Zionist chants, signs, protests, disruption
  - Some incidents targeted Jewish students
- MIT progressively increased restrictions and enforcement
- Result: Title VI hostile environment claim dismissed

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Fellers v. Kelley and Defending Education v. Olentangy Local School District

Fellers v. Kelley (“XX” Wristbands)

- Girls’ high-school soccer game in New Hampshire
- Visiting team included transgender female player
- Adults planned protest of transgender participation
- At halftime, silently donned pink “XX” wristbands
- No chanting, signs, confrontation, or targeting
- School directed removal of wristbands
- Refusal resulted in removal/sanctions
- Adults sued under First Amendment

Olentangy (Pronouns and Student Speech)

- District prohibited harassment based on gender identity
- Policy applied to intentional use of non-preferred pronouns
  - Some students believed sex is immutable
  - They wanted to use classmates' sex-based pronouns
- District offered option: avoid pronouns altogether
- Students claimed policy compelled/suppressed their speech
- District court declined to enjoin the policy
- En banc Sixth Circuit reversed

Different Facts; Similar Constitutional Problem

- Fellers — First Circuit
  - Framework uncertain; result same either way
  - Passive protest caused no material disruption
  - Record did not establish actionable harassment
  - Predictive concerns insufficient on actual facts
- Olentangy — Sixth Circuit
  - Tinker governs student personal speech
  - Pronoun choice communicates a viewpoint
  - Requires disruption or infringement of rights
  - Record did not satisfy that standard
- **Bottom line:** Calling expression "harassment" **does not end the First Amendment inquiry.**

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A Practical Framework

- **What actually happened?** Separate anticipated from actual conduct.
- **Who is speaking, and where?** Identify the governing speech doctrine.
- **What is the school's basis for acting?**
  Disruption, rights of others, neutral rules, or civil rights obligations?
- **What evidence supports that concern?** Prediction requires a factual basis.
- **Conduct or viewpoint?** Regulate effects—not disfavored ideas.
- **Is intervention required?** Keep Title IX analysis distinct.
- **Can we respond more narrowly?** Address harm while protecting speech.

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Stay Tuned: We're Watching

- Crowther v. University System of Georgia
  - Supreme Court Oral Argument scheduled for November 30th
  - Decision expected Spring/Summer 2027
- Question Presented: Does Title IX provide employees of federally funded educational institutions a private right of action for sex discrimination in employment?
  - Will resolve a "circuit split" on the interaction between Title VII and Title IX

Questions?

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