



Association of
Title IX Administrators

ATIXA Annual
Conference 2023

FEATURED SESSION A: KEEPING UP WITH THE COURTS

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Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice or an assurance of compliance. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law in your jurisdiction, any applicable state or local laws, and evolving federal guidance.

FEDERAL COURTS IN A NUTSHELL

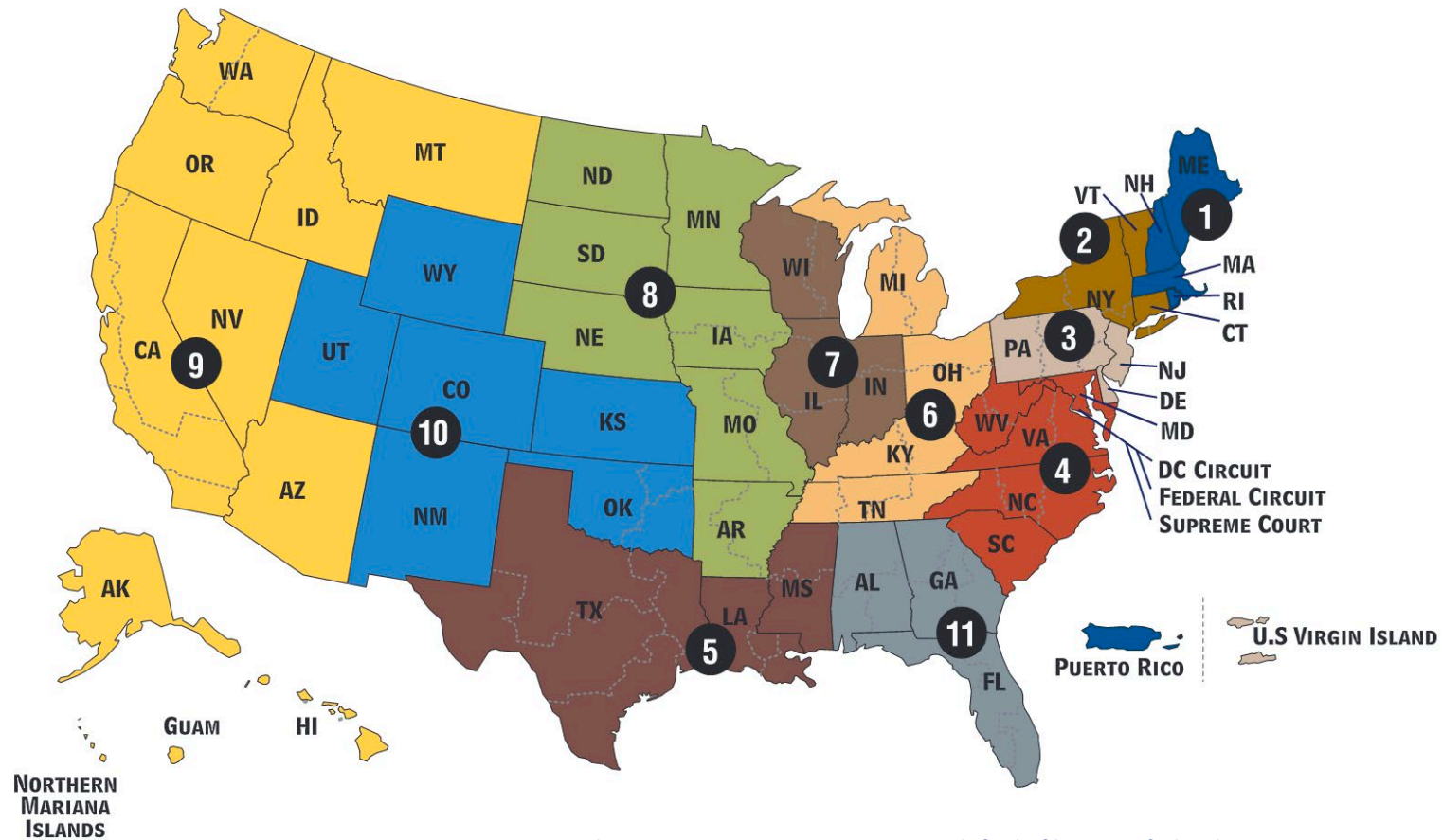
Federal Court

- **U.S. District Courts**
 - Trial Court; Single judge or magistrate judge; Decisions binding only on single District (94 Districts)
- **U.S. Courts of Appeals (“Circuit Courts”)**
 - 12 Geographic Circuits: 11 + DC Circuit
 - Panel of three judges (*en banc* = all judges)
 - Decisions binding on entire Circuit
- **U.S. Supreme Court**
 - Final appellate court
 - Nine justices

U.S. COURTS OF APPEALS MAP

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



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

LAWS, COURTS & REGULATIONS

- **Laws** passed by Congress (e.g., Title IX) – Enforceable by Courts and Office for Civil Rights (OCR) at the U.S. Department of Education
 - Federal Regulations – **Force of law**; Enforceable by Courts and OCR
- Federal Case Law – **Force of law** within the jurisdiction, but can be persuasive to other courts
- State Case Law – **Force of law**; binding only in that state, but can be persuasive for other courts

Brown v. Arizona

___ F.4th ___ (9th Cir. Sept. 25, 2023)

Facts:

- Brown was assaulted twice by football player in his off-campus house
- Player had history of dating violence towards women while at Arizona; University knew of two other assaults
- Football team had approved off-campus living arrangement
- Title IX staff knew about prior incidents but did not tell coaches
- Brown sued under Title IX claiming that the University knew about the prior assaults, exercised control over the context of Brown's harassment, and acted with deliberate indifference
- District court first held that University did not exercise control over the "context" of the harassment

Question:

- Did Arizona have substantial control over the context of the harassment?

Brown v. Arizona

___ F.4th ___ (9th Cir. Sept. 25, 2023)

Decision:

- “Although physical location is important, a key consideration is whether the institution has **some form of disciplinary authority** over the harasser in the setting in which the harassment takes place.”
 - Football program gave permission to live off-campus
 - Could revoke at any time
 - Subject to coaches’ control
 - Coaches applied revocation for minor discipline; failed to exercise authority here
 - University’s Student Code of Conduct applies to conduct on- and off-campus
 - Arizona had issued a NCO to the player after a previous incident
 - NCO applied on- and off-campus

Brown v. Arizona

___ F.4th ___ (9th Cir. Sept. 25, 2023)

Takeaways:

- This decision mirrors the direction of the NPRM on jurisdiction
- “Context” is defined broadly
 - Tied to disciplinary authority including over off-campus conduct
 - Cannot pick and choose where to exercise authority
- Courts are critical of inaction that leaves students vulnerable
 - Another example of “before theory” liability
 - Ensure that those who could exercise disciplinary authority know allegations/misconduct

Counterman v. Colorado

600 U.S. 66 (2023)

Facts:

- Petitioner sent hundreds of Facebook messages to a local singer (C.W.)
- The two never met and C.W. never responded
- She blocked Petitioner repeatedly
- Each time, Petitioner created new Facebook accounts
- Some of his messages were innocuous, others suggested he was surveilling her (“Was that your white Jeep?” and others suggested harm, including “F*&k off permanently” and “Staying in cyberlife is going to kill you.”)
- C.W. grew fearful and she suffered severe anxiety.
 - Stopped walking alone
 - Declined social engagements
 - Cancelled some performances

Counterman v. Colorado

600 U.S. 66 (2023)

Facts, continued:

- The State charged Counterman under a criminal statute prohibiting:

“repeatedly make any form of communication with another person [in] a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.”

Counterman v. Colorado

600 U.S. 66 (2023)

Facts, continued:

- Counterman’s defense argued he did not make “true threats” because he did not actually *intend* to threaten C.W., and claimed First Amendment protections
 - He was convicted, using a “reasonable person” standard
- Counterman appealed in state court and lost
- Appeals court determined that to be convicted the state needed to prove his statements were:
 - Objectively threatening, and
 - Made with actual awareness of their threatening character

Counterman v. Colorado

600 U.S. 66 (2023)

- Under First Amendment analysis, “true threats” are typically **outside** the protections of the First Amendment
- But what constitutes a true threat?
- Federal courts are split on whether the First Amendment requires proof of a defendant’s subjective mindset in “true threat” cases
- U.S. Supreme Court took this case to determine:
 - Does the First Amendment analysis require proof of the defendant’s actual subjective state of mind, and
 - If so, what *mens rea* standard standard is sufficient?
 - *Mens rea* is a legal term that defines “criminal mind” or “criminal intent

Counterman v. Colorado

600 U.S. 66 (2023)

U.S. Supreme Court Decision:

The State must prove, in true threats cases, that the defendant had some **subjective understanding of his statements' threatening nature**, but the First Amendment requires no more than a showing of **recklessness**.

Takeaways:

- Watch carefully for evolving analysis about whether this concept is adopted into stalking definition
- Public institutions should revisit policies that include a threat element or analysis of threats
 - Stalking, Dating Violence, Domestic Violence
 - Title VI, Title VII
 - Student conduct
 - Threat assessment (Title IX and BIT cases)

Doe v. Rice University

67 F.4th 702 (5th Cir. 2023)

Facts:

- Doe disclosed to Roe that he had an STD
- Doe and Roe engaged in consensual, unprotected sex
- Roe reported that she “most likely got” the STD after having sex with Doe
- Roe filed a complaint with student conduct (2017)
 - Doe charged with notice of allegations and related policies, inc. DV
 - **“Intentionally inflicting...mental or bodily harm on any person...”**
- Determined Doe failed to adequately notify Roe “of the details of the disease, the long-term effects, or how STD was spread.”
 - Kicked off football team, left university

Doe v. Rice University

67 F.4th 702 (5th Cir. 2023)

- Throughout process, including on appeal, Doe insisted that Roe had credibility issues
 - She had also engaged in unprotected sex while having an STD
 - Highlighting instances where Roe “lied or misled.”

Lawsuit:

- Doe sued under Title IX claiming that the way Rice investigated and adjudicated was biased against him as a male
 - Erroneous outcome, selective enforcement, archaic assumptions

Doe v. Rice University

67 F.4th 702 (5th Cir. 2023)

Decision:

- Many due process deficiencies
 - Lawyer not permitted to participate or view documents
 - Not clearly noticed of the conduct he would ultimately be sanctioned for
 - Charged with failure to notify Roe of STD but was held responsible for failure to notify Roe of the risks of sex (and no rule appears in Rice code)
 - Conflicts of interest
 - Disregarded Roe credibility concerns
 - Failed to investigate other possible sources of Roe’s STD
 - “At some point an accumulation of procedural irregularities all disfavoring a male respondent begins to look like a biased proceeding.”
- Archaic assumptions about sex and gender

Doe v. Rice University

67 F.4th 702 (5th Cir. 2023)

Takeaways:

- Even outside of the 2020 Title IX regulations, due process matters!
- Courts will look to core concepts of due process when reviewing disciplinary matters, such as notice, access to an advisor, bias
- Stay vigilant regarding basic due process concepts in all cases
 - “Process B” cases
 - Student or employee conduct cases
 - More flexible procedures under NPRM
 - Notice, opportunity to be heard, opportunity to be assisted, opportunity to respond

Khan v. Yale

295 A.3d 855 (Conn. 2023)

Facts:

- Doe and Khan were classmates; sexual encounter that Doe alleges was a sexual assault
- Doe filed complaint with Yale (2018) and criminal charges; Khan suspended on interim basis
- Khan was acquitted in criminal investigation
- Khan returned to campus and faced Yale sexual misconduct proceeding
 - Khan raised questions of Doe's credibility in making report
- Sexual misconduct proceeding garners significant attention against #metoo backdrop
 - *Yale Daily News* article
 - Petition with 77,000 signatures protesting his reenrollment (after interim suspension)
- Khan expelled from Yale
- Khan sues Yale under Title IX and sues Doe for defamation

Khan v. Yale

295 A.3d 855 (Conn. 2023)

Defamation:

- Defamation elements:
 - False statement
 - Published
 - Negligently
 - That causes damages (harm)
- Doe's defense: immunity because her statements were made as part of sexual misconduct report
 - Statements made in the criminal proceeding were entitled to immunity
 - Connecticut law is not clear about whether immunity should extend to campus sexual misconduct proceedings
- Competing public policy goals:
 - Encouraging reporting sexual assault without repercussion
 - Ability to protect one's reputation

Khan v. Yale

295 A.3d 855 (Conn. 2023)

Analysis:

- Statements would be entitled to *absolute* immunity if the campus proceeding were akin to a quasi-judicial proceeding. The key is whether the disciplinary proceedings had “**adequate procedural safeguards**”

Yale’s process failed this test

- Proceeding must contain procedural protections against defamatory statements.
 - Notice
 - Opportunity to be heard
 - Physical presence during proceedings
 - Oath requirement
 - Ability to call, examine, confront, and cross-examine witnesses
 - Representation by counsel
 - Right to appeal

Khan v. Yale

295 A.3d 855 (Conn. 2023)

Fallback Analysis:

- Even if the *proceeding* is not entitled to immunity, could Roe's statements be protected under the concept of *qualified* immunity?
 - Immunity, but subject to key exceptions
- Public policy demands that participants in a campus sexual misconduct proceeding are entitled to qualified immunity BUT
 - A Respondent can validly defeat the immunity to a defamation claim if there are facts to suggest that the Complainant acted with actual malice
- Khan does allege "malice facts," though the lawsuit will need to proceed to discovery (depositions, evidence)

Khan v. Yale

295 A.3d 855 (Conn. 2023)

Takeaways:

- Defamation claims are on the rise
- Highlights that even outside the 2020 regulations, concepts of fundamental fairness and due process are important, including for private institutions
- Endorsement of the DeVos-era narrative that campus proceedings must adequately allow a Respondent to defend themselves
 - Test credibility
 - Effective assistance of counsel
 - Call witnesses
- “Due process” practice is not just about compliance with Title IX regulations
- TIXC must develop ability to provide fundamental fairness for both parties, including in your “Process B”

Chen v. Albany

56 F.4th 708 (9th Cir. 2022)

Facts:

- The School Board expelled two students after their violent and racist Instagram posts about classmates circulated around their high school
 - Private IG account
 - Cruel, racist, and violent posts about other students
 - Posts became public and several students became extraordinarily upset
 - Police and mental health counselors
 - Not attending class and withdrawing from school
 - “The impact has been **significant and ongoing.**”

Chen v. Albany

56 F.4th 708 (9th Cir. 2022)

Question:

- Did the off-campus nature of the speech place it outside of the school's authority to discipline?

Holding:

- **Substantial disruption and/or sufficient nexus** to the school environment
 - Degree and likelihood of harm to the school
 - Whether it was reasonably foreseeable that the speech would reach and impact the school
 - Relation between the content and context of the speech and the school
- Bullying aspect played a role and implicated the school's responsibility to protect other children

BATHROOM ACCESS AND GENDER IDENTITY

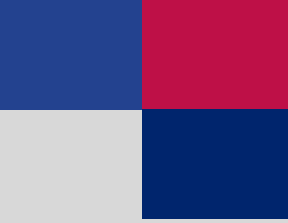
- Circuit courts with holdings supporting access
 - 3rd circuit: Boyertown
 - 4th circuit: Grimm
 - 7th circuit: Martinsville, Whitaker
 - 9th circuit: Barr
- Circuit courts with holding upholding exclusive policies
 - 6th circuit: Tennessee v. ED
 - 11th circuit: Adams v. St. John's County
- Influence of *Bostock* decision from Supreme Court

ATHLETICS PARTICIPATION AND GENDER IDENTITY

- Notable decisions in support of trans participation:
 - Soule v. CT Association of Schools
 - A.M. v. Indianapolis Pub. Schools
 - Hecox v. Little
 - Doe v. Horne
- Notable decisions against trans participation:
 - B.P.J. v. West Virginia

DOING YOUR OWN RESEARCH

- Follow ATIXA on social media and read “Keeping Up With the Courts” and other blog posts or publications
- Join ATIXA for “Time with IX” monthly topical discussions
- Google Title IX and click on recent articles
 - Title IX Today
- Ask your legal counsel how they “keep up”
 - Legal databases
 - Listservs
 - Association Memberships



QUESTIONS?

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