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SIXTH CIRCUIT SAYS STUDENTS CAN WAIVE TITLE IX DUE PROCESS RIGHTS

The Sixth Circuit recently decided a case that provides important clarification about Title IX and due process. In *Doe v. Case Western Reserve University*, case no. 19-3520, a student sued Case Western University after he was found responsible for committing “non-consensual sexual intercourse.” The student said the school violated his due process rights, violated Title IX, and committed a breach of contract when it did not let him cross examine his accuser. The Sixth Circuit disagreed, finding that he failed to show there was an “erroneous outcome” and that the student had waived any right to cross examination by agreeing to an informal hearing. Although it found for the school, the court admonished Case Western to adequately articulate the basis for its decision to discipline its students. The central issues in the case all turned on one thing: The adequacy of the school’s documentation of its investigation and decision.

THE ASSAULT

Jane Doe and John Roe, both undergraduate students at Case Western, had a casual sexual relationship. That relationship did not include sexual intercourse. A few days after the pair

had broken up, John Roe received a text from a friend stating that Jane was intoxicated and suggesting that John should check on her. John found Jane and persuaded her to come back to his fraternity house. As Jane started to fall asleep, John admits that he digitally penetrated her and performed oral sex on her. The parties dispute whether John also penetrated Jane and forced her to perform oral sex on him. When Jane began to cry, John drove her back to her dorm.

THE INVESTIGATION AND TITLE IX PROCESS

Several months later, Jane Doe reported the incident and Case Western started a Title IX investigation. During John’s initial interview, he admitted that “[w]hat happened in the basement, I know I didn’t physical [sic] force her or abuse her, but it was without her consent. She was not, by definition, capable of giving consent.”

Following the factual investigation, Case Western gave Jane and John two options for the adjudication. The first was a formal hearing before a three-member board that would have allowed each student to call and cross examine witnesses. The

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second was an informal administrative “hearing” where a single adjudicator met separately with each party, reviewed the investigatory materials, and rendered a decision. In sworn statements, both John and Jane opted for the informal hearing.

The administrator who conducted the hearing considered the evidence and concluded that John was “responsible for non-consensual sexual intercourse under the university sexual misconduct policy.” The administrator recommended that John be suspended for two years, banned from campus during the suspension, and barred from residing in University housing upon return. Following an appeal, the school modified the punishment to a three-year suspension.

THE LAWSUIT

John sued Case Western two years later in federal district court. He alleged that Case Western violated Title IX and breached its contract with him. The district court rejected both claims and granted summary judgment for Case Western. John appealed on both the Title IX and breach of contract claims.

1. Title IX Claim

John argued that the school violated Title IX because Case Western’s process reached an “erroneous outcome.” The Court disagreed, noting that he had to show both that “the outcome of the proceeding was tainted by some

‘articulable doubt,’ and...that gender bias caused the articulable doubt.” The Court held that John failed to show “articulable doubt” because he admitted to digitally penetrating Jane without her consent, which violated Case Western’s sexual misconduct policy.

2. Due Process

John also raised a due process challenge, arguing that the school should have offered him the right to cross-examine witnesses. While the Sixth Circuit has never decided whether students at private institutions have due process rights, it assumed without deciding that the Title IX proceeding required due process. But the court held that John waived any right he may have had to cross examination when he voluntarily elected the administrative hearing that did not allow for the presentation of evidence or cross examination of witnesses. “Put differently,” the court found it “difficult to accept John’s claim of procedural deficiency when he received exactly the procedure he requested.”

3. Breach of Contract Claim

John claimed that Case Western breached its contract with him by failing to adhere to the procedures set forth in the University’s sexual misconduct policy. While the court acknowledged that John had a contractual relationship with Case Western, the court rejected John’s claim

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because schools need not “strictly adhere” to their policies. Rather, when a university’s adherence with a disciplinary policy is challenged, courts apply the deferential abuse of discretion standard. In other words, if the university applied its rules in a “reasonable manner,” the court must reject the student’s claim. Here, the court found that John failed to meet this high standard and therefore affirmed the district court’s dismissal of his breach of contract claim.

4. The Adequacy of Case Western’s Written Decision

Despite affirming the district court, the court included dicta criticizing the Title IX administrator’s “lack of precision” when explaining his decision. In particular, the court noted that the hearing officer failed to make express findings as to “the degree of the violation (i.e. the exact type(s) of non-consensual sexual activity that occurred).” This is a problem because the degree of violation is “potentially relevant to the punishment John received.” While John did not raise this argument on appeal, the court cautioned that “it may behoove the University, going forward, to articulate the precise basis for finding a violation and the precise basis for the punishment administered.”

TAKEAWAYS

In practical terms, *Doe v. Case Western Reserve University* underscores why it is important for schools to fully document their Title IX investigations and hearings. The University prevailed at summary judgment because it documented the plaintiff’s admission about consent and had the plaintiff sign a sworn statement waiving his right to cross examination. While it is certainly important to know that such rights can be waived, it was critical that the waiver was express, written, and clear. Otherwise, the plaintiff could have caused all sorts of evidentiary issues and the case could have turned on a credibility determination.

The dicta in the decision underscores the importance of documenting the rationale for finding a student responsible (or not responsible) for violating a sexual misconduct policy. The Sixth Circuit admonished Case Western to “articulate the precise basis for finding a violation and the precise basis for the punishment administered.” A failure to do so could lead to significant exposure. To avoid future challenges, colleges and universities should counsel their Title IX adjudicators to articulate their reasoning.