Deliberate Indifference: Can a School be Liable for Acting When the Victim Requests Inaction?

BY LYNETTE PACZKOWSKI • JUNE 5, 2018

In the Northern District of Indiana, the University of Notre Dame successfully obtained a dismissal of the Plaintiff's Title IX claim in a case with an unusual circumstance: the alleged victim wanted the school to stand down and take no action. Notre Dame, however, opened a Title IX investigation, and Jane Doe later challenged its handling of the matter in *Doe v. Univ. of Notre Dame Du Lac*.

Jane Doe was an undergraduate student at Holy Cross College (across the street from Notre Dame in South Bend, Indiana), and was a participant in the Gateway Program, designed to transition her to enrollment at Notre Dame. Her complaint alleged that she was sexually assaulted by a Notre Dame football player in his dorm room. Although Jane Doe wanted to handle the assault "in privacy," Notre Dame learned of the alleged assault from another student. At that time, there was a report of an assault on a second woman by the same football player. The Court held that, "it was certainly not unreasonable for Notre Dame to initiate an investigation into claims that the football player had assaulted two female students. To the contrary, it would have been unreasonable *(and potentially actionable under Title IX)* for Notre Dame to fail to open investigations into the 'known circumstances' of the two reported incidents" (*emphasis added*). Put simply, "Title IX does not support liability for a university's undertaking its investigation obligation simply because the alleged victim does not want an official investigation."

This case was even more unusual due to the seemingly contradictory nature of Jane Doe's complaints. She complained that Notre Dame opened the investigation against her wishes, but also that Notre Dame later closed the investigation. She alleged that Notre Dame "violat[ed] her privacy rights" by opening the investigation in the first instance, and then "orchestrat[ed] the closing of the Title IX investigation so that the student athlete who attacked her, a football player, could transfer to another university with a clean record." But she also identified "facing her attacker on campus" as her "paramount concern," and she, at the time, agreed to the closing of the investigation. The Court noted that while Jane Doe was now dissatisfied with an outcome that she saw as favorable to her alleged attacker, "by her own account, this outcome (a) ameliorated her 'paramount concern,' namely encountering the attacker on campus, and (b) resulted from her agreement [to close the investigation]." Under such circumstances, there could be no plausible claim of "deliberate

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indifference" or "clearly unreasonable" conduct.

Client Tip: The Office for Civil Rights (OCR) has previously provided guidance on a school's obligations when an alleged victim requests that there be no investigation or disciplinary action. OCR has stated that the school "will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students." One of the factors to be considered, according to OCR, is whether there are multiple complaints against the same alleged perpetrator. In this case, there were reports of two sexual assaults on fellow students by the same alleged perpetrator, and Notre Dame took action to investigate the matter. That was, in the Court's judgment, "a plainly reasonable response to a possible danger on campus." The Court's decision in this case thus seemingly affirms OCR's guidance on this topic.

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