



## CAMPUS COUNSEL

A legal blog written for administrators, HR professionals, in-house counsel, and deans at colleges and universities

### Federal Court Grants Penn State's Motion to Protect Title IX Documents, Sacks Student Athlete's Call for Unfettered Disclosure

BY BOWDITCH & DEWEY • AUGUST 23, 2022

The United States District Court for the Middle District of Pennsylvania has ruled that investigative materials regarding alleged hazing in the Penn State football program will remain confidential. In January 2020, Isaiah Humphries ("Humphries"), a former student football player, filed suit against the University, head football coach, James Franklin ("Coach Franklin"), and fellow student-athlete Damion Barber ("Barber"). Humphries, the son of former Penn State and NFL defensive back Leonard Humphries, alleged that he was subjected to a campaign of hazing, as well as physical, emotional, and sexual abuse by Barber and other teammates, and that the University and Coach Franklin turned a blind eye to the abuse.

As noted in the complaint, in 2019, the University received an anonymous report regarding gender-based harassment and hazing that allegedly occurred in 2018; those allegations were investigated by the University's Office of Sexual Misconduct Prevention and Response ("OSMPR") pursuant to its Title IX policies and procedures. Those policies provide that the University's Title IX process is not open to the general public and that documents prepared in connection with the same are not to be disclosed outside of the hearing process, "except as may be required or authorized by law or legal proceedings." In his complaint, Humphries noted that following its investigation, the OSMPR issued a 75-page investigative report (the "Investigative Report"). Consistent with OSMPR's practice, near the conclusion of its investigation, Humphries was shown a copy of the draft Investigative Report, on the express condition that he maintain its confidentiality.

As set forth in Humphries' federal court complaint (which was amended three times), Humphries asserted:

- Title IX harassment and retaliation claims against the University;
- assault and battery, intentional infliction of emotional distress, and civil conspiracy counts against his former teammate, Barber;
- violations of the Pennsylvania antihazing statute by the University and Barber; and

- negligence and negligent infliction of intentional distress claims against all three defendants.

## THE UNIVERSITY AND COACH FRANKLIN'S MOTION TO DISMISS

Following successive motions to dismiss earlier iterations of the complaint, on September 24, 2021, Judge Matthew W. Brann dismissed, with prejudice, all of Humphries' claims against the University and Coach Franklin. In its memorandum opinion, the court found that Humphries failed to allege facts sufficient to support a Title IX harassment or retaliation claim against the University.

As to his Title IX harassment claim, Judge Brann noted that Humphries' claim failed, "not because the allegations he makes could never support a claim for sexual harassment, but because he never ties his abuse and harassment to a gender stereotype." Regarding his Title IX retaliation claim, the court found that Humphries, "tries to conflate the elements of a Title IX harassment claim with those of a Title IX retaliation claim" and that he failed to even attempt to allege causation. On these bases, Humphries' Title IX claims were dismissed.

Turning to Humphries' negligence and negligence per se claims, the court rejected Humphries' argument that, under Pennsylvania law, a "special relationship" exists between colleges and student-athletes, finding that the University and Coach Franklin did not owe a legal duty to protect Humphries, eviscerating Humphries' common law and per se negligence claims against them. In dismissing the negligent infliction of emotional distress claims against the University and Coach Franklin, the opinion noted that Pennsylvania courts "have found that 'the relationship between a college and its students does not hold the potential of deep emotional harm...even if the athlete-coach or athlete-university relationship met the special relationship standard under Pennsylvania negligence law, those relationships would still not support an NIED claim.'" Judge Brann also ruled that Humphries failed to allege an underlying hazing violation sufficient to establish a claim against the University under the Pennsylvania antihazing statute.

## THE UNIVERSITY'S MOTION FOR PROTECTIVE ORDER REGARDING TITLE IX INVESTIGATIVE MATERIALS

Following the dismissal of the claims against the University and Coach Franklin, the case proceeded through discovery as to the claims against Barber. In March 2022, Humphries' counsel issued a subpoena to the University (then a non-party) seeking confidential records, including the final draft of the Investigative Report. Significantly, the subpoena identified with particularity certain confidential documents that were referenced in the draft Investigative Report. In response to the subpoena, the University agreed to produce the records sought by Humphries, subject to the parties entering into a confidentiality agreement. While Barbers' counsel agreed to do so, Humphries' counsel refused, "providing no explanation and offering no alternative terms."

On June 15, 2022, the University filed a motion seeking a protective order limiting the use and disclosure of documents arising out of the OSMPR's investigation. As set forth in its motion, the University asserted that during the course of the OSMPR's investigation, Humphries had apparently misappropriated a copy of the Investigative Report by taking photos of each individual page, which were then appended to a draft complaint Humphries' counsel shared with the University prior to filing suit. The motion argued that the documents sought constituted "confidential records containing sensitive information belonging to the University and its students," including information regarding interactions with student athletes *other* than Humphries and Barber. The University noted that such personally identifiable information is ordinarily protected by the Family Educational Rights and Privacy Act ("FERPA"). Moreover, the University argued that Humphries' counsel issued the subpoena for an improper purpose, including "his hope of harassing or embarrassing the University into paying his client money to settle this case." The University asserted that any general public interest in investigations is "far outweighed" by the public interest to maintain the confidentiality of investigations; "it is more 'important to protect the integrity of an investigation and to encourage future complainants to come forward than it is to disclose the discrete confidential and sensitive information related to a specific investigation.'" By its motion, the

University noted that it was not opposing the production of relevant information, rather, it was “request[ing] the ability to do so with assurance that the relevant information it produces will not be disclosed outside this litigation.”

In his opposition, Humphries asserted that he and the general public’s interest in disclosing the OSMPR’s Investigative Report outweighed the University’s privacy interest, asserting that the University had “no legitimate interest in shielding the unlawful, criminal conduct of an adult student from public view.” Humphries’ opposition also argued that because Penn State is a beneficiary of public funds, “citizens have an interest in knowing whether or not the University complies with the investigatory and enforcement provisions of Title IX, and an interest in a law suit [sic] which involves the University.” Humphries also asserted that the passage of time since its 2019 investigation negated the University’s privacy interests. As to the University’s FERPA concerns, Humphries argued that the OSMPR was a “law enforcement unit” within the meaning of FERPA and that, as such, the Investigative Report was not an educational record within the meaning of the statute. The opposition suggested that an in-camera review and potential redaction could ameliorate any embarrassment to private individuals. Humphries also objected to certain language in the University’s proposed protective order, including:

- a provision requiring all recipients to be bound by the terms of the protective order;
- language restricting Humphries from discussing information with his family members or significant others;
- a requirement that Humphries, at his own expense, notify the University of any subpoenas for confidential information and that Humphries return or destroy confidential information at the conclusion of the matter; and
- a provision that all documents containing confidential information be maintained under seal.

Humphries’ opposition did not dispute nor address the University’s allegation that he surreptitiously misappropriated a copy of the Investigative Report.

In the reply filed by the University, it contested Humphries’ assertion that the OSMPR was a “law enforcement unit,” noting that pursuant to FERPA, a law enforcement unit is “an office ‘such as a unit of a commissioned police [officers] or non-commissioned security guards’ that is ‘officially authorized’ by a school to enforce the law or ‘[m]aintain the physical security and safety of the agency or institution.’” The University characterized Humphries’ argument on this point as a “strawman,” as the University was not arguing that it was prohibited by FERPA from disclosing those records. The University pointed out that, “the mere fact that Congress ‘has concerns about maintaining the confidentiality of’ educational records supports that there is a legitimate privacy interest in those records” sufficient to justify the entry of a protective order shielding the dissemination of those documents outside of the litigation process. Moreover, the University argued that Humphries ignored relevant precedent which “makes clear that documents created and collected in the course of the University’s investigation into allegations of sexual assault should be protected from unfettered disclosure.” As set forth in its Reply, the University rejected Humphries’ sundry arguments regarding the alleged overbreadth of its proposed order.

## DISTRICT COURT GRANTS THE UNIVERSITY’S MOTION

On August 4, 2022, Judge Brann granted the University’s motion for a protective order. In doing so, the court acknowledged that the OSMPR’s investigation went “well-beyond” the alleged interactions between Humphries and Barber, noting that the investigative materials sought by Humphries included “statements that were made by students, about other students [which] brings them within the ambit of [FERPA], notwithstanding Humphries’ attempt, through bare assertions, to transform the University’s [OSMPR] into a law enforcement agency, which would render them unprotected by the Act.” In its order, the court rejected Humphries’ “public interest” argument, noting that the pending litigation “now involves just two private litigants” and observing “the public arguably has a lesser interest in a partially publicly funded University than it does in its city government or police department.” The Court was unpersuaded by

Humphries' objections to the scope of the University's proposed order and, instead, adopted the University's proposed order in full.

The claims brought by Humphries (who left Penn State to play for the University of California, and now plays for the University of Louisiana at Monroe) against Barber (who transferred to Austin Peay State University and is now finishing his college football career at Marshall University) remain pending. Discovery in the matter is set to close by February 7, 2023, with a final pretrial conference scheduled for September 26, 2023.

## CLIENT TIP

Institutions should continue to be mindful of maintaining the confidentiality of Title IX investigative materials and reports. They should also be cognizant of the potential for such materials being disclosed in subsequent litigation and be prepared to take necessary steps to protect the privacy interests of non-party students, most significantly, protections afforded under FERPA.

For more information, please contact the author or your Bowditch attorney.