

## Application of Common Law Negligence to Cases of Peer Sexual Misconduct: Potential Implications for the Scope of Institutional Liability

In a [decision](#) on April 10, 2020, the U.S. District Court for the Southern District of New York denied a college's motion to dismiss a claim of common law negligence in a lawsuit challenging its administrative response to allegations of sexual assault. Application of this common law standard to such cases is infrequent, and the court's analysis highlights important differences between a common law theory of negligence and the federal "deliberate indifference" standard applied under Title IX.

In denying the college's motion to dismiss the complaint, the court analyzed the plaintiff's allegations without making any determination as to their truth. The allegations were brought by a female undergraduate student, Jane Doe, against a male student. Among other things, Jane argued that the college acted with deliberate indifference and negligence in its administrative response to the alleged assault.

### The Allegations

Jane alleged that three days after the assault she reported the incident to the college's Title IX Office which was tasked with addressing sexual misconduct. She characterized the meeting as disorganized, informal and lacking documentation. She claimed that her rights and options were not explained to her, and that the institution did not conduct an investigation of her complaint.

Jane further alleged that the college took measures to protect the male student who assaulted her, stating that the Title IX coordinator helped him transfer to another school, but it failed to take measures to protect and accommodate her. Instead, she claimed the Title IX coordinator informed the male student of her complaint despite her request that it remain confidential, and the male student called and texted her multiple times as a result. She stated that she did not receive effective academic accommodations from the college, rather, after the Title IX investigator and dean of students encouraged her to prioritize her mental health and reduce her course load, she faced academic dismissal for missing classes and receiving poor grades. As a result, Jane stated that the college informed her she could no longer continue as a student and must leave within 48 hours.

Subsequently, Jane applied for a medical leave in order to convert her dismissal to a suspension. After the college granted the leave, she alleged she was pressured to leave campus immediately. Jane submitted that she attempted to commit suicide in response to that pressure and was hospitalized thereafter.

When Jane's mother contacted the college to learn the status of her daughter's Title IX case, she was informed that Jane had never filed a formal complaint, and that the matter had not been investigated. Jane claimed that only after her mother's prompting the college initiated an investigation and formal hearing which found the male student "not responsible" for sexual assault. Jane appealed the decision, and the matter was remanded to a new internal hearing panel. The second panel also found the male student "not responsible," and their decision was affirmed in the college's internal appeal process.

Jane filed the instant lawsuit in response.

### **The Court's Analysis**

The court's analysis of Jane's allegations highlights the scope of institutional liability relating to the administrative handling of internal sexual misconduct complaints. Applying the federal standard of deliberate indifference and the common law theory of negligence, the court reasoned that liability could attach if the alleged facts were found to be true. The discussion of each standard reveals a marked difference in the scope and nature of each legal theory.

#### *Deliberate Indifference*

Federal law creates a private right of action against colleges and universities that receive federal funds if they are deliberately indifferent to claims of peer sexual harassment. In order to establish liability under this theory, a plaintiff must prove: (1) a college or university is deliberately indifferent to sexual harassment, (2) of which they have knowledge, (3) that is so severe, pervasive and objectively offensive that it deprives plaintiff of access to the educational opportunities or benefits provided by the school. Stated differently, the deliberate indifference standard requires that colleges and universities respond reasonably to allegations of peer sexual harassment.

In finding that plaintiff's allegations gave rise to a deliberate indifference claim, the court found two types of factual allegations important:

- *Failure to explain rights and options.* Jane alleged that the college's Title IX office failed to apprise her of her rights and options under their internal policies. The court noted that this had significant adverse implications for Jane: she refused a no-contact order in fear of retaliation, and she did not understand that keeping her complaint confidential would hinder the college's ability to investigate. The court found these types of failures unreasonable and evidence of deliberate indifference.
- *Failure to listen to the complainant.* During the same meeting, Jane stated she expressed fear of retaliation and specifically asked that her complaint be kept confidential. Despite this, she believes that the Title IX coordinator immediately informed the accused student of the complaint. If true, the court opined that this disregard for Jane's concern was also unreasonable and evidence of deliberate indifference.

#### *Common Law Negligence*

Relying on the same facts, the court found that the college could also potentially be found liable for common law negligence. Specifically, the court reasoned it plausible that the college owed plaintiff a special common law duty which was breached by its mishandling of her investigation. In so finding, the court noted that the college had been scrutinized for its handling of similar complaints in the past. It also noted that while generally a college does not have an affirmative legal duty to protect students from assault by other students, a duty may be imposed where a college has encouraged its students to participate in an activity and has taken affirmative steps to supervise and control the activity.

### **What Does this Difference Mean?**

While it is important to note that the court's decision considered whether the plaintiff's allegations stated a legally cognizable claim, and did not consider the truth of those allegations, the allegations themselves are instructive as many institutions work on revising their Title IX procedures in response to the newly issued regulations from the United States Department of Education (DOE). The court's analysis shows us how courts may interpret the scope of an institution's duty as it relates to sexual assault response differently under federal statutory law and the common law.

### *Federal Law Requires Reasonableness*

To avoid liability for deliberate indifference, colleges and universities must ensure that their sexual misconduct responses are reasonable. Reasonableness should be evident in internal policies that incorporate key elements such as notice of rights and options for involved parties, clear procedures and identification of places to ask questions and seek support. Title IX regulations and advisory materials issued by the DOE will provide the framework for reasonable terms that institutions should incorporate in internal policies, and institutions should also ensure effective implementation of the policies they adopt.

### *Common Law May Create an Affirmative Duty to Protect*

Compliance with a special, affirmative duty to protect students is less straightforward. While compliance with Title IX regulations and guidance will likely shield institutions from deliberate indifference claims, this case suggests the existence of a special common law duty to *actively protect* students in college and university programs and activities. While the court seems to rely on the same details that would give rise to a claim of deliberate indifference under federal law, this independent legal duty would survive even if the scope of exposure under Title IX narrows.

Although the plain language of this decision states that the affirmative duty to protect would extend to activities “supervised and controlled” by an institution, the court allowed plaintiff’s claims to survive the college’s motion to dismiss even though the alleged assault happened in the private room of a residence hall following a party hosted at a student’s apartment. It is therefore unclear how courts will view an institution’s responsibility with respect to the non-academic interactions of students on campus, where an assault may take place outside of an event hosted or directly supervised by the school. It is also unclear whether the scope of this duty would extend to all instances of assault or misconduct, even those perpetrated on grounds other than gender/sex. In this case, the court seems to acknowledge the inherently private nature of some forms of sexual violence, and its application of a special duty of care in these instances poses a unique challenge for colleges and universities seeking to protect students in ways that respect personal privacy and autonomy and that are also administratively feasible.

If you have questions about the application of this common law duty to your administrative policies and procedures, please contact [Sarah Luke](#), any [attorney](#) in the [Higher Education Practice Group](#) or the attorney in the firm with whom you are regularly in contact.



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