

Court Issues Preliminary Injunction Against Institution That Declined to Apply New Title IX Regulations Retroactively

On May 6, 2020, the U.S. Department of Education (DOE) issued new Title IX regulations which imposed significant changes in the way in which colleges and universities must investigate and adjudicate sexual assault cases. The revised Title IX regulations have an effective date of August 14, 2020. On August 5, 2020, the DOE's Office for Civil Rights (OCR) announced that the new regulations do not apply to institutional responses to sexual assaults that allegedly occurred prior to August 14 relying on the preamble to the regulations. Despite OCR's seemingly clear position on retroactivity, a recent federal court case out of the Northern District of New York raises new questions as to whether and when the new Title IX rules must be applied retroactively to cases preceding their effective date.

In *Doe v. Rensselaer Polytechnic Institute*, a federal court judge granted a male respondent's motion for a preliminary injunction to halt RPI's disciplinary proceedings. Plaintiff commenced a lawsuit alleging that RPI's handling of his case and, specifically the Institute's refusal to apply its 2020 sexual misconduct policy to a case of sexual assault alleged to have occurred on January 23, 2020 constituted sex discrimination in violation of Title IX.

A few days after the January 23 encounter, the female student, Jane Roe, filed a sexual assault complaint against the plaintiff, a male senior. The plaintiff filed a complaint against Roe several months later based on the same January 23 encounter. RPI found the plaintiff responsible for sexually assaulting Roe. On the same day, RPI dismissed the plaintiff's cross-complaint against Roe on the ground that his complaint failed to prove a violation. RPI's determination was based, in part, on the conclusion that he failed to prove that he did not willingly consume alcohol or initiate sexual activity with Roe, which the Institute determined made his complaint insufficiently credible.

On August 11, 2020, the plaintiff demanded that RPI afford him a hearing -- with cross-examination -- pursuant to the new policy RPI had recently adopted to comply with the Title IX regulations. RPI declined to apply its new Title IX policy because the case had arisen prior to August 14, the effective date of the regulations, and therefore RPI determined that its prior policy, not its new policy, applied to the case. In making this decision, RPI relied on OCR's announcement that the new Title IX regulations did not apply to incidents alleged to have occurred prior to August 14.

Thereafter, the plaintiff, commenced an action in federal court alleging that RPI was discriminating against him on the basis of his sex and seeking a preliminary injunction to enjoin RPI from proceeding with his disciplinary proceeding.

To grant an injunction, a court must find that the plaintiff has a reasonable likelihood of success on the merits of the underlying claim. The court found that the plaintiff was likely to succeed on the merits of his claim that RPI discriminated against him on the basis of his sex. The court relied in part on RPI's decision to move forward with Roe's complaint against the plaintiff while it dismissed the plaintiff's complaint against Roe. The court found the fact that the plaintiff's complaint was dismissed because he failed to prove that he had not voluntarily consumed alcohol and that he did not initiate sex with Roe -- elements which were not applied to Roe's complaint against the plaintiff -- led to an inference of gender bias. In addition, however, the court also found that the fact that RPI did not apply its new Title IX policy that guaranteed a hearing with cross-examination to an incident of alleged assault that occurred prior to August 14, 2020 (the effective date of the regulations) was evidence of gender bias against the plaintiff as a male student.

In response to RPI's argument that OCR's interpretation indicated that the new mandates did not apply retroactively, the court ruled that OCR's position on retroactivity was not the type of "authoritative statement" to which the court itself was bound or must even grant deference. The court went on to hold that OCR's interpretation regarding retroactivity did not preclude RPI from deciding to apply its new policy to any pending and future cases. The court found that the fact that RPI had decided not to apply its new policy, with what the court characterized as greater due process protections, was suggestive of gender bias against male respondents.

A plaintiff seeking a preliminary injunction also must show that the plaintiff would suffer irreparable harm. The court found that "the harm plaintiff risks by allowing defendant to use [its prior Title IX] policy is that in the absence of the important due process protections afforded by the new Title IX rules and the 2020 policy, plaintiff will be going into a hearing at which there is substantial evidence that the factfinder is biased against him based on his sex and will thus lean toward finding guilt based on his sex alone. It is the fear of gambling his future on a rigged game that plaintiff asks to be freed from, not the fear of losing the game itself."

As a result of this decision, RPI is currently enjoined from conducting a disciplinary hearing or otherwise imposing any discipline or sanctions against plaintiff John Doe for Jane Roe's complaint of sexual assault until after the resolution of the plaintiff's federal court lawsuit. According to the court, the only circumstance in which the disciplinary proceedings may continue prior to the outcome of the plaintiff's sex discrimination lawsuit is if the parties reach a mutual agreement to hold a hearing that complies with the new Title IX regulations.

Many colleges and universities that adopted new policies to comply with the Title IX regulations have determined that these policies will not apply to cases in which the underlying incident and/or the complaint occurred prior to August 14, 2020. These institutions should consult with their counsel as to the effect of this decision on the handling of pre-August 14, 2020 Title IX cases.

Please contact any member of Bond's Title IX Task Force ([Mallory Campbell](#), [Christa Cook](#), [Laura Harshbarger](#), [Gail Norris](#), [Jane Sovern](#) and [Philip Zaccheo](#)) or the attorney at Bond, Schoeneck & King with whom you are regularly in contact.



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