

**IT'S 2020: NEW YORK FEDERAL COURT HOLDS THAT
NEW TITLE IX REGULATIONS APPLY RETROACTIVELY**

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It was too good to be true. Not only had the Office of Civil Rights ("OCR") stated in the preamble to the new Title IX regulations that the regulations would NOT apply retroactively, but OCR further explained in a posting in August that the new regulations would "*not apply to schools' responses to sexual harassment that allegedly occurred prior to August 14, 2020.*"

Yes, it WAS too good to be true. It took only until mid-October for a federal court to decide to ignore OCR's guidance and grant a preliminary injunction against an institution barring it from continuing to conduct a hearing in a case (where allegations dated back to January 2020) under its old hearing procedures. *Doe v. Rensselaer Polytechnic Institute* ("RPI").

The case involved two college students at RPI who filed competing Title IX complaints against each other following what started out as a consensual relationship. RPI investigated both complaints under its old policy and determined that there was sufficient evidence to find that John Doe may have been responsible for sexually assaulting Jane Roe, but that Doe had failed to meet his burden of proving that Roe had sexually assaulted him. The regulations went into effect while the investigation was still pending. RPI had amended its policies for new complaints moving forward, but informed Doe that his hearing would be held pursuant to the old policy, which afforded Doe much less in the way of due process.

Doe filed a complaint in federal court claiming that RPI's handling of the complaints amounted to sex discrimination against him in violation of Title IX. First, he claimed that RPI discriminated against him on the basis of sex by electing to hold his hearing under the 2018 policy instead of the 2020 policy. Second, he claimed that RPI engaged in sex discrimination when it dismissed his complaint against Roe but allowed her claim against him regarding the same encounter to move forward.

The Court issued a preliminary injunction prohibiting RPI from conducting a hearing under its old rules during the pendency of Doe's litigation. The Court seemed concerned that RPI's decision not to use the new 2020 procedures to hear the plaintiff's case created two parallel procedures "*solely to ensure that at least some respondents would not have access to new rules designed to provide due process protection such as the right to cross-examine that have long been considered essential in other contexts.*" The Court also found that it was an adverse action to afford the plaintiff a lesser standard of due process protection than that provided in the new policies.

Although the case is from a federal court in New York and thus is not technically binding on colleges and universities in Connecticut, its reasoning might well be found to be persuasive. Schools therefore need to think twice about whether to process older Title IX sexual harassment complaints under their old procedures. Depending upon, among other things, the differences between the old procedures and the procedures adopted to comply with the new regulations, a court might find, as did the federal court in New York, that a decision to proceed under old procedures is suggestive of gender bias. After all, we are still in 2020 and stranger things have happened than a federal court deciding to ignore the guidance of the very agency which issued the rules in question.

Pullman & Comley has templates and other useful resources to assist institutions in complying with the new Title IX Regulations. It also provides general training regarding the new regulations as well as specific training for Title IX coordinators, investigators and decision-makers. Please contact Attorneys Karen Jeffers at kjeffers@pullcom.com or Melinda Kaufmann at mkaufmann@pullcom.com for more information.

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