

Is there any  
chance the Title  
IX Regulations  
will be enjoined?





# Title IX Litigation Update

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# Congressional Challenges

## Legislation Introduced

H.R. 7614 & H.R. 5388

- May not Enforce New Rule
- May not Publish any Similar Rule

## Congressional Review Act

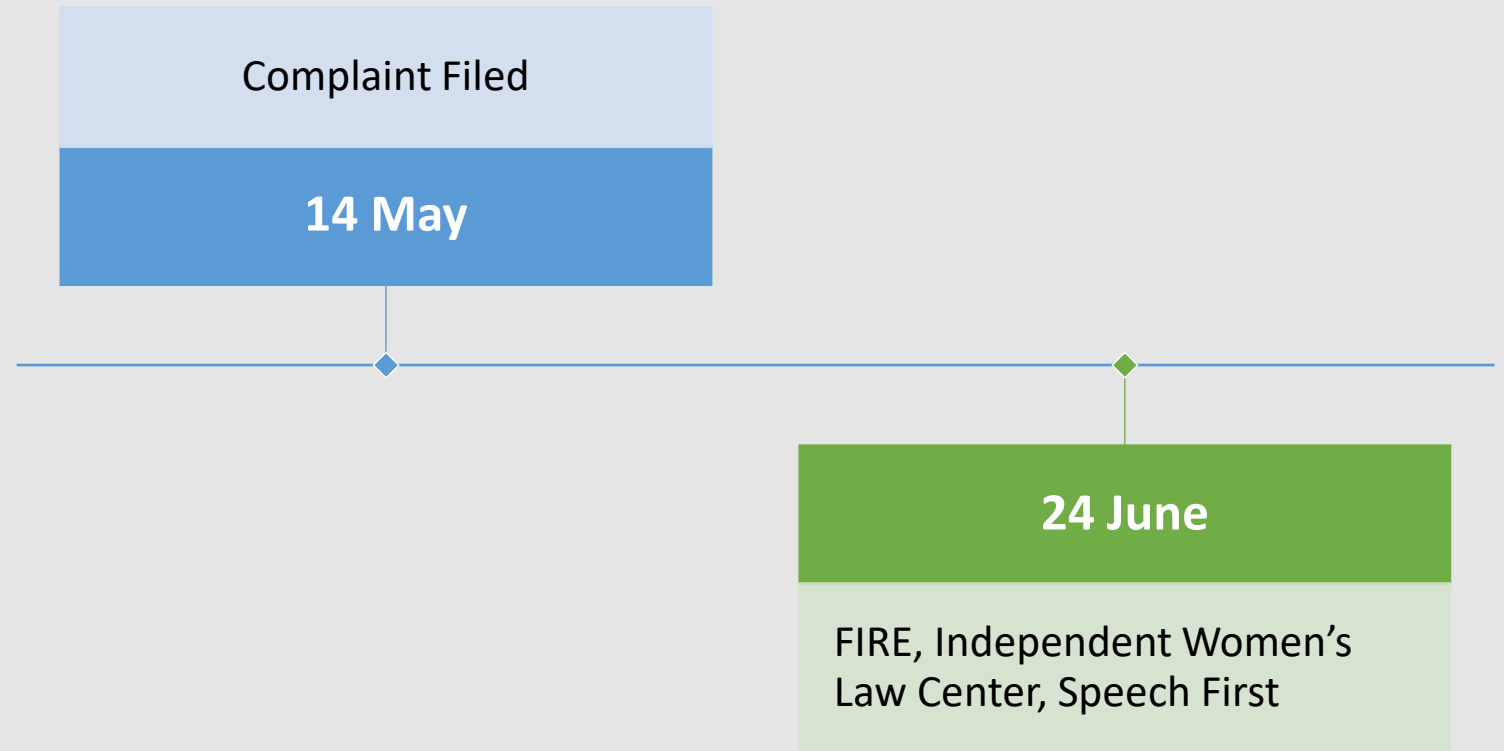
Joint Resolution of Disapproval

- May not Enforce New Rule
- May not Publish any Similar Rule

# Know Your IX v. Devos,

No. 1:20-cv-  
01224 (D. Md.  
May 14, 2020)

[https://www.courtlistener.com/  
docket/17165109/know-your-  
ix-v-devos/](https://www.courtlistener.com/docket/17165109/know-your-ix-v-devos/)



## **CAUSES OF ACTION**

**Sections 106.8, 106.30, 106.44, and 106.45 of the Rule Are Contrary to Law, and Arbitrary, Capricious, and an Abuse of Discretion**

**(Administrative Procedure Act, 5 U.S.C. § 706(2))**

Know Your IX  
Arguments

- Narrowing Definition
- Compared to Title VI & ADA/504
- Breaks with Established Policy
- Contrary to Evidence
- Failed Regulatory Impact Analysis

# Commonwealth of Pennsylvania,

1:20-CV-01468

(D.D.C. June 24,  
2020)

<https://www.courtlistener.com/docket/17223160/commonwealth-of-pennsylvania-v-devos/>



June 4 – Complaint 18 State AG's



June 23 – Preliminary Injunction



July 8 – ED opposes Preliminary Injunction

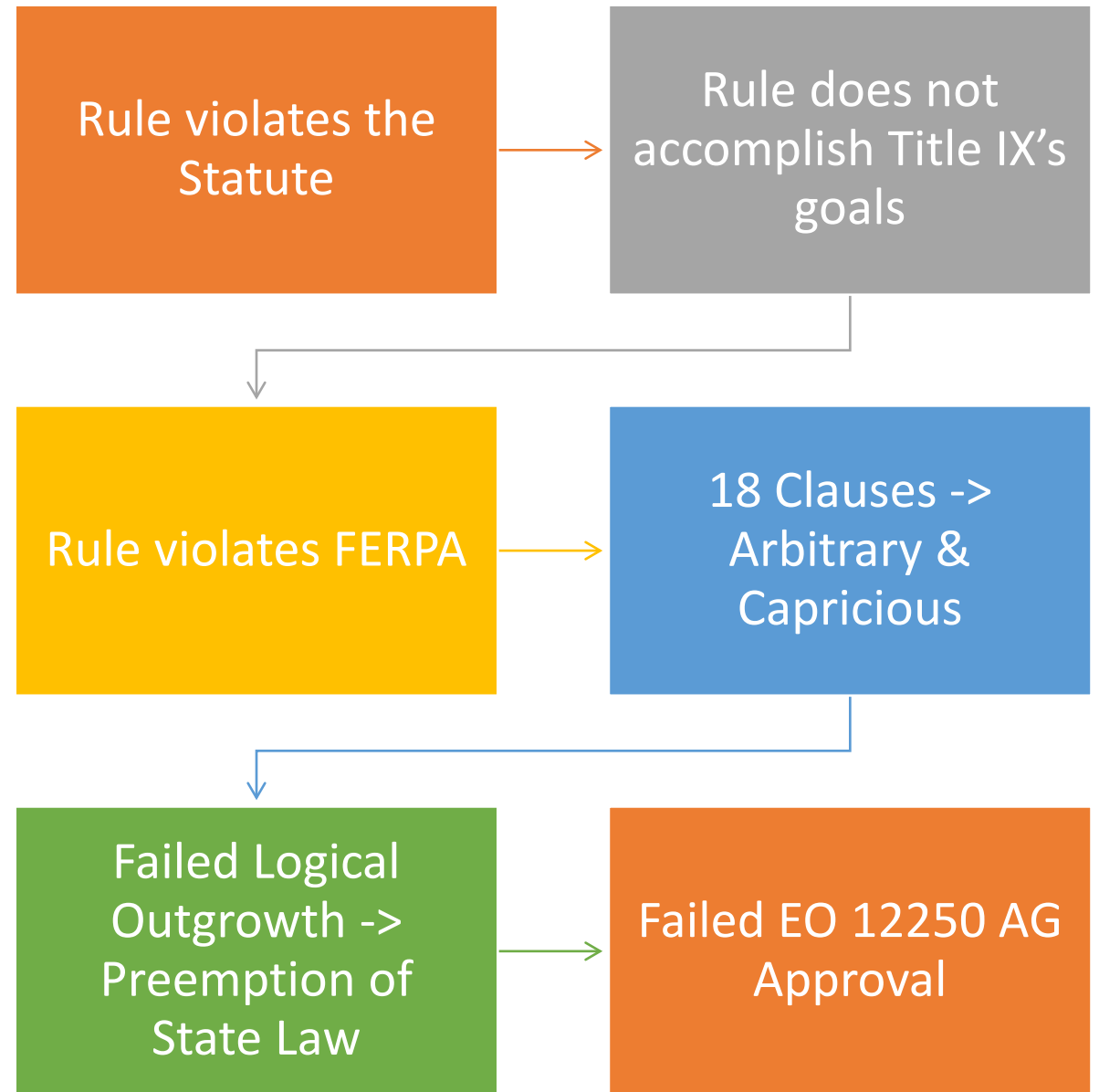


July 15 – Amicus Brief 14 States



# AG's Against Rule Argument

Pennsylvania, New Jersey, California, Colorado, Delaware, District of Columbia, Illinois, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, Wisconsin





# AG's For Rule Argument

Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Oklahoma, South Carolina, South Dakota, Tennessee, Texas

1<sup>st</sup> Amendment

Student Due Process

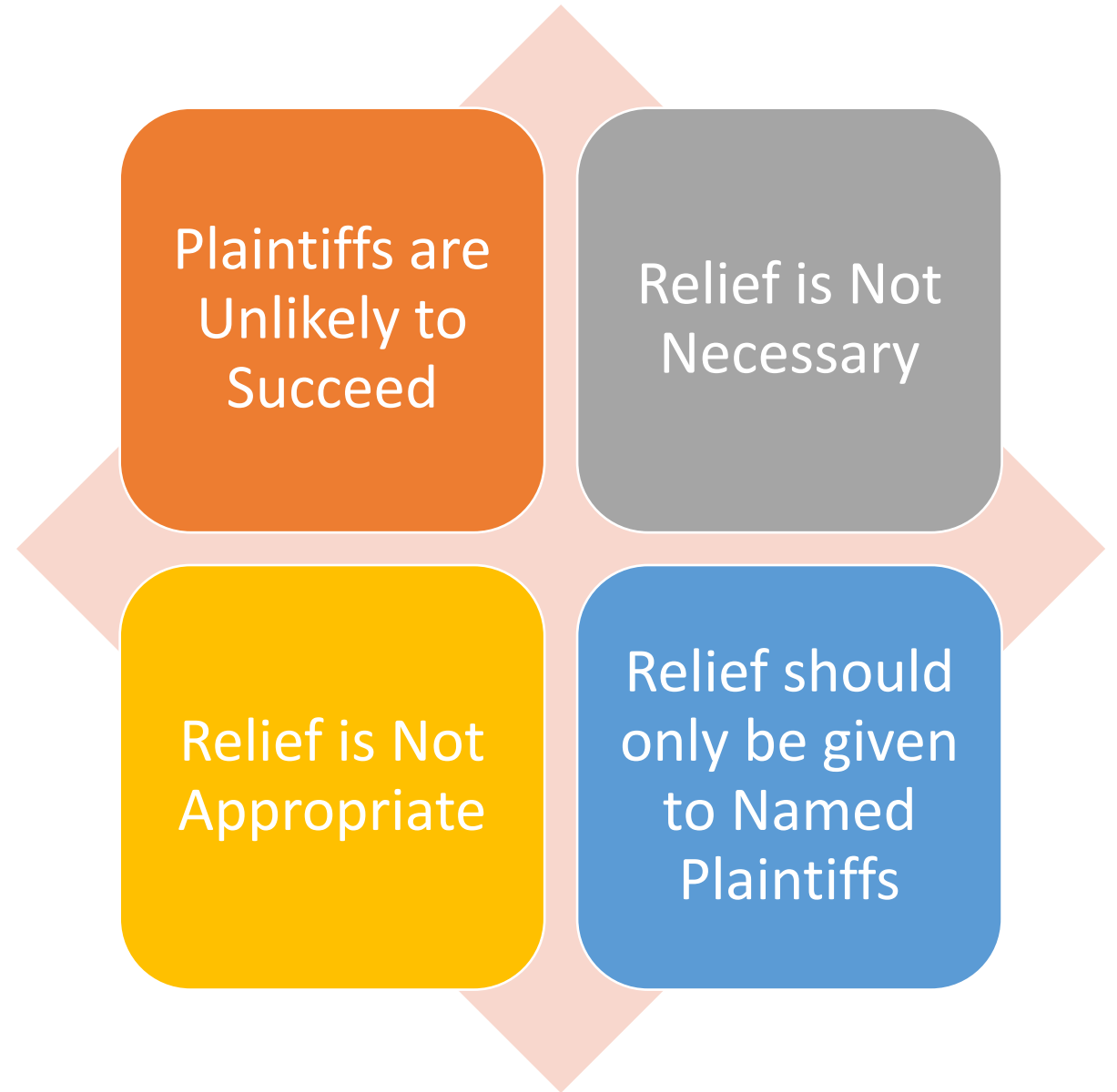
- Goss v. Lopez, 419 U.S. 565 (1975)
- Mathews v. Eldridge, 424 U.S. 319 (1976)

Conscious Failure

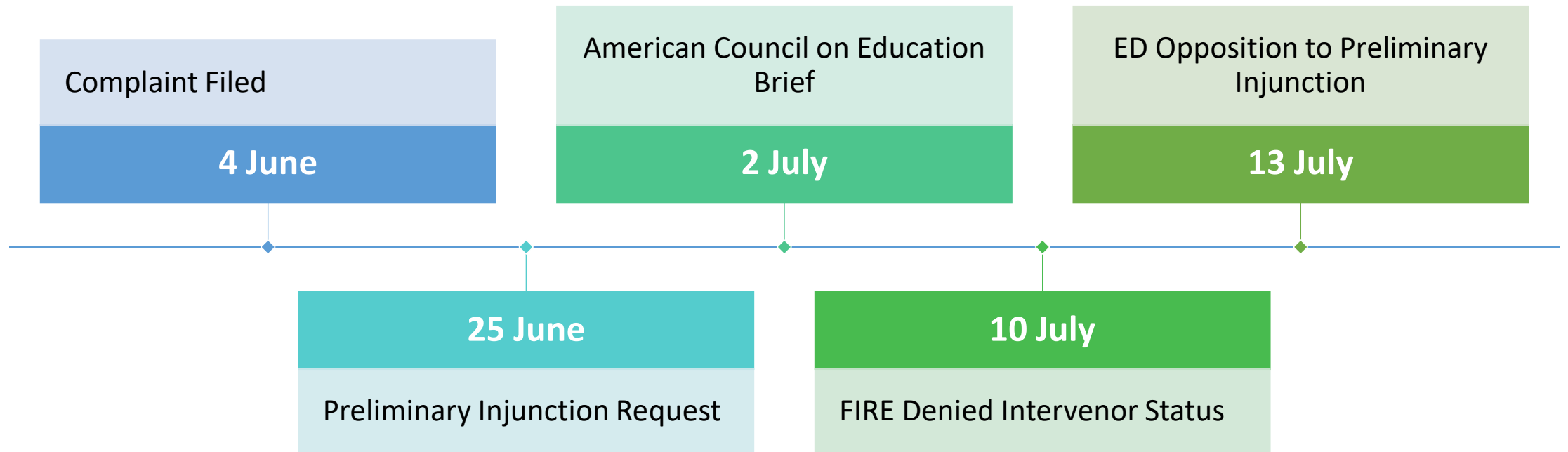




# ED's Response to Injunction



# State of New York, 1:20-cv-04260 (S.D.N.Y. June 24, 2020)



<https://www.courtlistener.com/docket/17222258/state-of-new-york-v-united-states-department-of-education/>

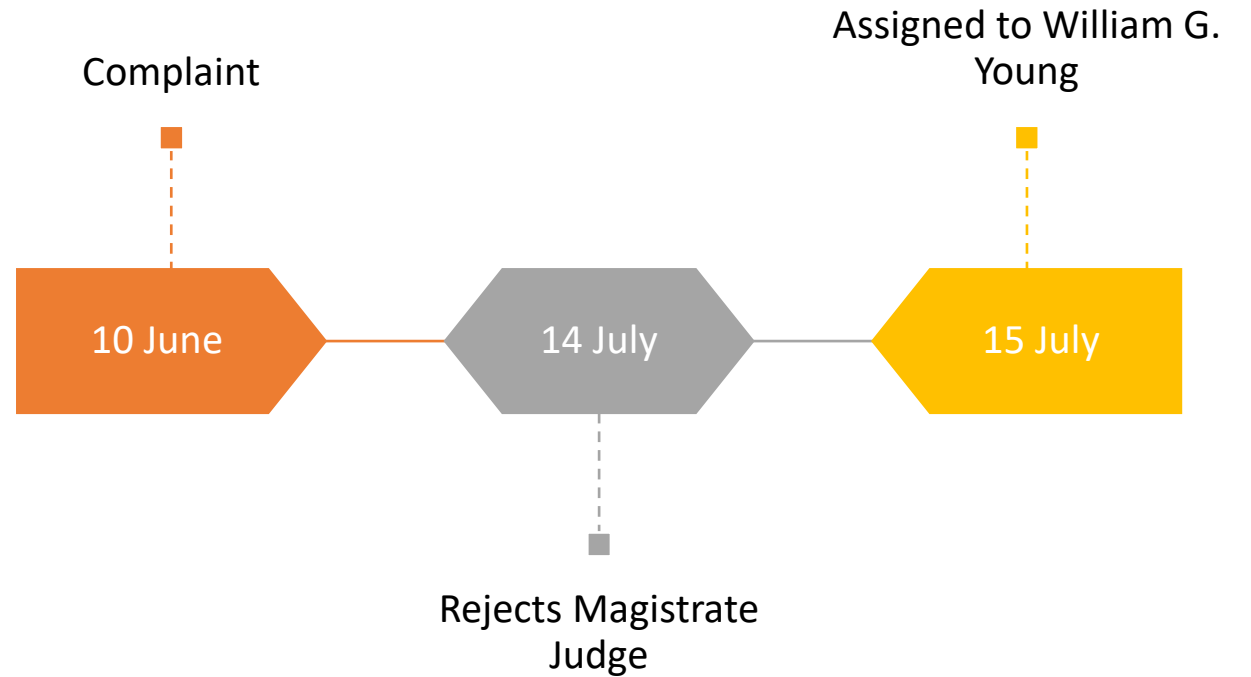
# New York Arguments

- Non-compliance with Regs  $\neq$  Discrimination
- Narrowly redefines Program or Activity
- Conflicts with EO 12866
- Predetermined Outcome
- Mandatory Dismissal



Victim Rights Law  
Center v. Devos,  
1:20-cv-11104 (D.  
Mass. June 10,  
2020)

<https://www.courtlistener.com/docket/17238997/victim-rights-law-center-v-devos/>



# VRLC Argument

- Clery Act
- 5<sup>th</sup> Amend. Equal Protection
  - Gender Stereotypes
  - Disparate Impact on Women



Can you explain the Supreme Court decisions & how they may impact higher education institutions?



Any developments  
in Texas case law?

# Texas 212 Enforcement

- Failure to Report
- > Job Terminated
- > Criminal Misdemeanor



# Local police chief arrested over failure to report student's allegations



## Title IX – Deliberate Indifference

- Doe v. Edgewood Independent School District, 2020 WL 3634519 (5 App. 7/6/2020)

**Title IX** requires actual notice to an “appropriate person” and “an opportunity for voluntary compliance.”

Title VI -> Bhombal v. Irving Independent School District, 809 Fed. Appx. 233 (5th Cir. App. 5/5/2020)

# Teacher on Student Deliberate Indifference



- “We think, moreover, that the response must amount to deliberate indifference to discrimination.”
- Damages remedy requires: An **Appropriate person** has **Actual Knowledge & fails to adequately respond**.
- App. Person: an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf
- Actual Knowledge: Not constructive knowledge or should have known standard.

The Principal only had knowledge of inappropriate comments made in class. Fired when discovered sexual relationship.

Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998)

## Title IX – Erroneous Outcome

- Klocke v. Univ. of Texas at Arlington, 938 F.3d 204 (5th Cir. App. 9/10/2019)
- “Gender bias was a motivating factor behind the erroneous finding.”
- “A plaintiff alleging an **erroneous outcome** must point to “particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding” —for instance, “a motive to lie on the part of a complainant or witnesses, [or] particularized strengths of the [disciplined student’s] defense.”

## Title IX – Selective Enforcement

- Klocke v. Univ. of Texas at Arlington, 938 F.3d 204 (5th Cir. App. 9/10/2019)

“Regardless of the student’s guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student’s gender.”

# Title IX – Student Due Process

- Plummer v. Univ. of Houston, 860 F.3d 767 (5 Cir. App. 6/23/2017)
- Student Interest -> Texas Constitution
- Video Evidence of Misconduct
- Mathews Balancing Test



# Employee Title IX Lawsuits?

- Lakoski v. James, 66 F.3d 751 (5th Cir. App. 1995)

Vs.

- Doe v. Mercy Catholic Med. Ctr. 850 F.3d 545 (3d Cir. 2017)
- Muslow v. Board of Supervisors of LSU, 2020 WL 1864876 (4/14/2020)



What about  
nationally?



# Deliberate Indifference

Supreme Court (Gebser & Davis v. Monroe County Board of Education,  
526 U.S. 629 (1999))

“That is, the deliberate indifference must, at a minimum, “cause [students] to undergo”  
harassment or “**make them liable or vulnerable**” to it.” – Davis

Circuit Split (Farmer v. Kansas State Univ., 918 F.3d 1094 (10th Cir. 2019)  
Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613 (6th Cir. 2019))

# Doe v. Oberlin, 2020 WL 3495298 (6th Cir. June/29/2020)

- Intoxication v. incapacitation
- (1) cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome, and
- (2) demonstrate a particularized causal connection between the flawed outcome and sex discrimination.
- “When the degree of doubt passes from "articulable" to grave, the merits of the decision itself, as a matter of common sense, can support an inference of sex bias.”
- Expands Erroneous Outcome pt 2 Considerations

# 7<sup>th</sup> Circuit Splits from all other circuits

## Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019)

- “We see no need to superimpose doctrinal tests on the statute. All of these categories simply describe ways in which a plaintiff might show that sex was a motivating factor in a university's decision to discipline a student.”
- **Do the alleged facts, if true, raise a plausible inference that the university discriminated against John "on the basis of sex"?**

# University of the Sciences, No. 19-2966 (3d Cir. May 29, 2020)

We agree with the Seventh Circuit and "see no need to superimpose doctrinal tests on the [Title IX] statute." Thus, we adopt the Seventh Circuit's straightforward pleading standard

**Pleadings must support a plausible inference that a federally-funded college or university discriminated against a person on the basis of sex.**

External Pressure + Sex as motivating factor.  
DCL 2011 + No investigation of Accusers

## Pre-Assault Claims

- Karasek v. Regents of Univ. of California, 956 F.3d 1093 (9th Cir. 2020)
- Simpson v. Univ. of Colorado Boulder, 500 F.3d 1170 (10th Cir. 2007)

(1) a school maintained a policy of deliberate indifference to reports of sexual misconduct,

(2) which created a heightened risk of sexual harassment that was known or obvious

(3) in a context subject to the school's control, and

(4) as a result, the plaintiff suffered harassment that was so severe, pervasive, and objectively offensive that it can be said to have deprived the plaintiff of access to the educational opportunities or benefits provided by the school

# Title IX- Negligence

Doe v. Univ. of St. Thomas, 368 F. Supp. 3d 1309  
(D. Minn. 2019)

-> Abbariao (Minn.) = Academic Expulsion was  
Arbitrary

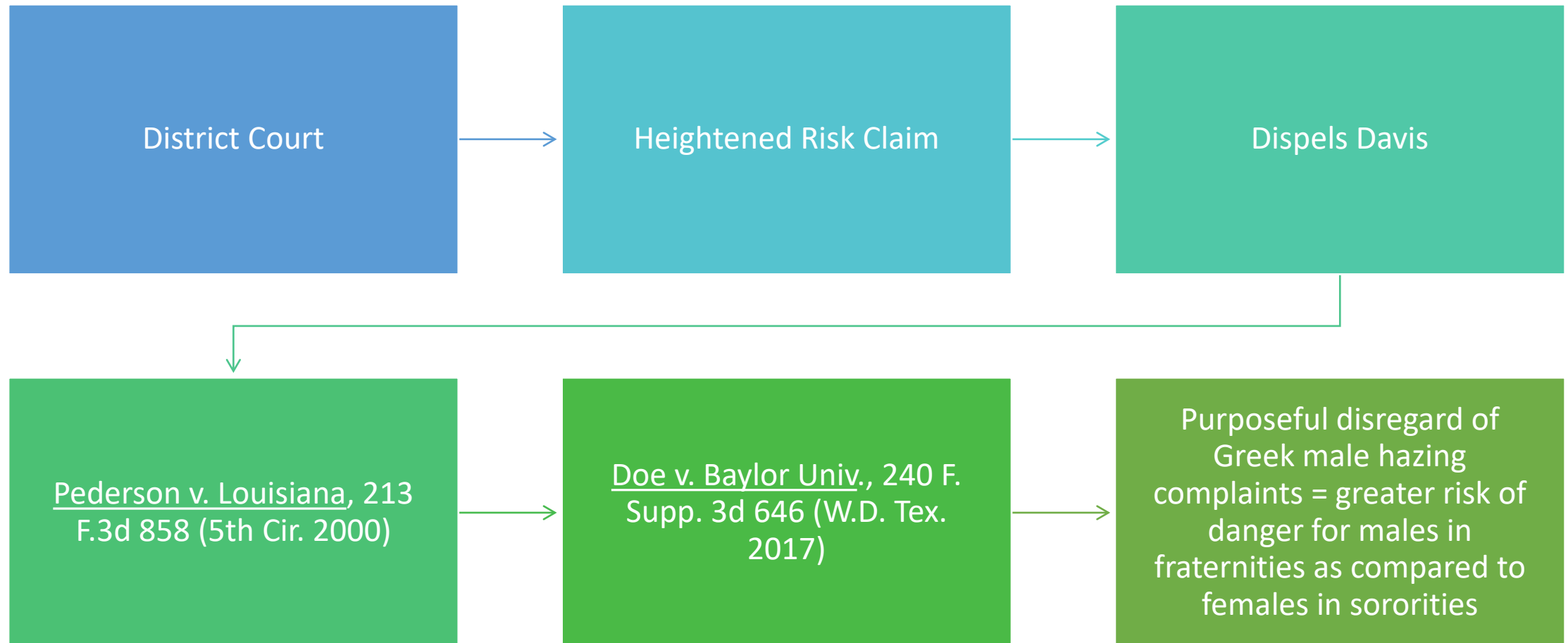
(The requirements imposed by the common law  
on private universities parallels those imposed by  
the Due Process Clause on Public Univ. )

-> Rollins (MN. App. CT) = Non-Academic  
Expulsion was Arbitrary

= UST owed Doe a Duty of Reasonable Care

Logic used again in Vanegas v. Carleton Coll., No.  
CV 19-1878 (MJD/LIB), 2020 WL 2092918 (D.  
Minn. May 1, 2020)

# Gruver v. Louisiana, 401 F. Supp. 3d 742 (M.D. La. 2019)



McCluskey v.  
State of Utah,  
2:19-cv-00449  
(D. Utah June  
27, 2019)

<https://www.courtlistener.com/docket/15844919/mccluskey-v-state-of-utah/>

Complaint filed

Equal Protection // Deliberate Indifference under Title IX

School's Omission led to Death

MTD Hearing -> July 29, 2020





Any themes?



Thank You!