

NOW +

NEXT

HIGHER EDUCATION ALERT | NIXON PEABODY LLP

MAY 24, 2017



Federal court's preliminary injunction order suggests heightened level of scrutiny for University disciplinary proceedings

By Laura Bacon and Eliza Davis

An Indiana federal court recently issued a preliminary injunction, granting a John Doe student's request to compel the University of Notre Dame to allow him to sit for two final exams at the end of his senior year. Although the court's ruling was issued at a preliminary stage of the litigation and a full record remains to be developed as the case moves forward, Judge Philip P. Simon's opinion lists several perceived defects with the University's handling of cross-complaints of sexual misconduct made between a female student complainant and the male student respondent. We highlight five notable takeaways from the court's decision, which will assist higher education institutions during both their sexual misconduct disciplinary process and their defenses in litigation cases challenging the proceedings and result.

Background

In *John Doe v. Univ. of Notre Dame*, Case No. 2:17-cv-298 (N.D. Ind. May 8, 2017), the plaintiff filed a complaint against Notre Dame alleging, among other things, that the University breached the parties' contract and violated Title IX when it dismissed him for violating Notre Dame's Standards of Conduct, known as the "Red Book," weeks before his graduation. Plaintiff sought immediate injunctive relief so that he could complete two final examinations necessary to complete his coursework for the final semester of his senior year. Plaintiff claimed irreparable harm would result if he was not permitted to complete the exams because, even if he ultimately prevailed in the lawsuit, he would be forced to repeat an entire semester's coursework to complete his degree. Judge Simon found plaintiff demonstrated plausible proof that he may be able to prevail on his breach of contract claim. Finding that the contract issues sufficiently justified the entry of a preliminary injunction allowing plaintiff to take his final examinations, Judge Simons did not address the merits of the Title IX claims.

Five takeaways:

First, Judge Simon analyzed, and in some ways scrutinized, the fundamental fairness of Notre Dame's proceeding and did not simply look at whether Notre Dame complied with the Red Book's disciplinary procedures. For example, the court explained that the University's letter advising John Doe that Jane Roe alleged a violation "of the University's policies related to sexual assault, sexual

This newsletter is intended as an information source for the clients and friends of Nixon Peabody LLP. The content should not be construed as legal advice, and readers should not act upon information in the publication without professional counsel. This material may be considered advertising under certain rules of professional conduct. Copyright © 2017 Nixon Peabody LLP. All rights reserved.

misconduct, dating and domestic violence/stalking, and/or conduct that creates a hostile environment” amounted to “no notice at all” to the substance of the allegations against him. Judge Simon also noted that the administrative hearing notification letter, which John Doe received two weeks prior to the hearing, was insufficient to put John on notice of the alleged violations. And, while the University gave John Doe access to over 300 pages of support for the allegations against him, including the report, exhibits and statements, the court concluded that providing this material only ten days prior to the hearing “might be found insufficient [notice] for this volume of material.” Judge Simon also criticized Notre Dame’s policy that limited students’ access to counsel during the hearing. Notre Dame allows the claimant and respondent to be accompanied by a non-speaking advisor, which the court found essentially left the student on his own during the proceedings. Furthermore, the court expressed concern about Notre Dame’s justification for this policy (that it was an “educational” rather than “punitive” process for the student) because of the disciplinary punishment at stake.

Judge Simon’s fundamental fairness analysis suggests that courts may not simply defer to an education’s application of its policies and procedures. Here, the court applied a more probing due process analysis rather than a mere analysis of whether the private university applied its disciplinary procedure as written.

Second, Judge Simon expressed repeated concern that Notre Dame did not collect all of Jane Roe’s text messaging history with John Doe. Notably, upon receiving a no contact order from the University, John Doe deleted Jane Roe from his phone and their entire text messaging history. Therefore, the University relied solely upon Jane’s voluntary production of text messages during its investigation. The court was concerned that University relied upon Jane’s “cherry-picked text messages.” Unlike the University, the court had the benefit of seeing all text messages between the two students, and relied heavily on those text messages throughout its decision—particularly those text messages that revealed Jane’s pursuit of John at critical points over the course of the disciplinary proceedings. This aspect of the opinion suggests that a school must make reasonable efforts to obtain the production of relevant text messages from the students involved in an investigation. But the court fails to address a school’s limitations in compelling a student to produce voluntarily text messages (or documents relating to any of the various means of student communications). It remains to be seen then, whether and to what extent a school’s more proactive pursuit of complete production of student texts or social media postings (even if unsuccessful) would be deemed a sufficient inquiry.

Third, Judge Simon expressed concern over Notre Dame’s limitations on character evidence. Notre Dame’s policies allow for a respondent to invite witnesses but not “character witnesses.” Instead the only witnesses allowed to testify are those who are witnesses “to the incident”—meaning a person who had contact with one of the parties “before, during[] or after the incident.” The court found this limitation could be “arbitrary or capricious in several respects,” especially when some of Jane’s supporting witnesses seemed to be simply character witnesses. In hearings that essentially boil down to a he-said, she-said, at the very least a prohibition on character evidence must be applied equitably to both students.

Fourth, this case raises the question of what is the “incident.” Here, the students had been involved in an (admittedly consensual) romantic relationship for over a year. Jane Roe’s complaint related to the nature of the relationship and not one specific incident. Does the “incident” for purposes of the disciplinary proceeding include the entirety of their relationship? And if so, what is the proper scope of relevant evidence in a university disciplinary proceeding in such situations? These are questions that any school confronting a similar factual situation should consider in its investigation.

Fifth, focusing on the potential for irreparable harm to John Doe, Judge Simon focused upon the educational and professional impacts of a “gap” in John’s undergraduate education, especially with the suspension on the eve of his scheduled graduation. Particularly, the court wrote: “The questions the gap raises, and the explanation it requires, are potentially damaging to John in a manner not compensable by money damages and not repaired by permanent injunctive relief that might be granted after a decision on the merits in John’s favor.” Judge Simon concluded that immediate preliminary injunctive relief was appropriate because of its narrowness—an injunction allowing John to take his last two final exams to be administered off-campus at the University’s option. Importantly, the preliminary injunction did not otherwise alter Notre Dame’s disciplinary decision—including John’s expulsion from campus and the withholding of his degree—pending further proceedings in the litigation. Judge Simon’s analysis on “irreparable harm” reached a different result than courts in other recent rulings such as the District Court of Connecticut in *Montague v. Yale University, et al.*, but again his granting of a preliminary injunction was significantly based upon the limited scope of relief necessary to preserve the status quo.

The big picture:

While Judge Simon’s analysis was undertaken at an initial stage of the litigation pending further development of a full record and did not address plaintiff’s Title IX claims, the ruling is one of a growing number where courts are undertaking a more proactive scrutiny of sexual misconduct disciplinary proceedings. Universities and colleges may have to defend not only compliance with their own policies and procedures, but also their underlying fairness. With numerous lawsuits challenging disciplinary proceedings being filed nationally and often surviving motions to dismiss, courts are increasingly weighing the appropriateness of preliminary injunctive relief and allowing the cases to proceed through extensive discovery before a final disposition on the merits (whether by a motion for summary judgment or a trial). We will continue to report on important developments in these cases, such as the ruling in the Notre Dame case, particularly if courts are inclined to apply a heightened level of judicial scrutiny to the fairness of disciplinary proceedings themselves, beyond adherence to the stated policies and procedures.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Michael J. Cooney, 202-585-8188, mcooney@nixonpeabody.com
- Tina Sciocchetti, 518-427-2677, tsciocchetti@nixonpeabody.com
- Laura B. Bacon, 312-977-4403, lbbacon@nixonpeabody.com
- Eliza T. Davis, 312-977-4150, etdavis@nixonpeabody.com
- Julianna Malogolowkin, 617-345-1069, jmalogolowkin@nixonpeabody.com
- Emily L. Sy, 617-345-1077, esy@nixonpeabody.com
- Melanie C. Nevin, 617-345-1098, mnevin@nixonpeabody.com
- Kacey Houston Walker, 617-345-1302, kwalker@nixonpeabody.com