



Eighth Circuit rules that university's interim measures were not deliberately indifferent

By Steven M. Richard

Pending an investigation and determination of a Title IX sexual misconduct complaint, colleges and universities face vexing challenges and competing considerations when balancing how to prevent a complainant's exposure to an alleged hostile education environment and how to protect the respondent's rights without pre-judging the allegations. This is especially challenging in a residential educational environment. Addressing these concerns, the United States Court of Appeals for the Eighth Circuit has ruled that a university did not violate Title IX when it declined to relocate an accused student from a dormitory near the complainant during the course of its investigation of a reported sexual assault. *Melissa Maher v. Iowa State University*, No. 18-1559 (8th Cir. Feb. 15, 2019).

The plaintiff Melissa Maher appealed a federal district court's ruling granting summary judgment in favor of Iowa State University (ISU), which concluded that the university did not act with deliberate indifference in its response to Maher's report that she was sexually assaulted by another student. ISU began its investigation in May 2014 near the end of its semester and issued a no-contact order prohibiting the respondent from interacting with Maher. When Maher returned to campus in the late summer of 2014, she discovered that the respondent lived in student housing close to her own. Maher, her parents and her roommate met with ISU administration to discuss the housing situation. ISU explained that it could not move the respondent until the investigation and hearing process concluded. ISU presented at least two alternative housing assignments for Maher: a converted housing den space with other women or a room at a local hotel. Maher declined these options. In late September 2014, ISU's investigative report concluded that the respondent sexually assaulted Maher. Maher withdrew from ISU shortly thereafter. The respondent was later found responsible for violating ISU's Code of Conduct and was expelled.

In September 2016, Maher sued ISU under Title IX, asserting that she was "excluded from participation in and denied the benefits of the educational programs at ISU as a result of ISU's response to the sexual assault." In addition to finding that Maher's lawsuit was not timely filed within the applicable limitations period, the district court granted summary judgment in ISU's favor on the merits. It concluded that there were no material questions of fact as to whether ISU was deliberately indifferent and that Maher failed to demonstrate any factual dispute as to

“whether ISU engaged in severe, pervasive, and objectively offensive discrimination against Maher because of her sex.” Maher appealed the judgment to the Eighth Circuit.

The Eighth Circuit assumed without deciding that Maher filed a timely Title IX lawsuit against ISU and affirmed the judgment in the university’s favor on its merits. The appellate court stated that Maher’s Title IX claim must demonstrate that ISU was: (1) deliberately indifferent; (2) to known acts of discrimination; (3) which occurred under its control. Maher argued that ISU acted with deliberate indifference in failing to relocate the housing of the respondent during its investigation. The Eighth Circuit cited to the United States Supreme Court’s Title IX precedent that a school is deliberately indifferent when its “response to harassment or lack thereof is clearly unreasonable in light of the known circumstances.” The “clearly unreasonable” standard is intended to afford flexibility to school administrators.

Before concluding its investigative report, ISU had offered Maher at least two reasonable housing alternatives that would have resolved her objection to housing near the respondent. Maher’s dissatisfaction with the housing options and her contention that the respondent should have been relocated does not equate to deliberate indifference by the school in response to her sexual assault complaint. ISU did not act inappropriately in waiting for the completion of its Title IX investigative and hearing process to remove the respondent because it was respecting his procedural due process rights, while simultaneously offering Maher alternative housing to avoid the alleged hostile educational environment. Further, ISU instituted a no-contact order between the students when the complaint was first reported and no evidence suggested that it was violated. Consequently, the Eighth Circuit held that the district court properly granted ISU’s motion for summary judgment.

Takeaways

As we await the Department of Education’s finalization of its Title IX regulations, the most relevant current guidance on the issue of interim measures is found in the September 2017 Q&A on *Campus Sexual Misconduct*. In Question 3, the Department states: “It may be appropriate for a school to take interim measures during the investigation of a complaint. In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over the other, nor may a school make such measures available to only one party. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of his or her education. The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students’ evolving needs.”

The Department’s Q&A, as reinforced by the analysis in the Eighth Circuit’s ruling, makes clear that a school must carefully examine the specifics of each situation when confronting the appropriateness and scope of interim measures, especially in light of the competing demands, rights and needs of both the complainant and the respondent. Most important, the evaluation of interim measures must not be a static determination. Rather, the process requires careful and continuous analysis of both student’s concerns, especially where investigations and hearings take time to complete. Mechanical approaches to the determinations are inappropriate and will likely expose the school to Title IX claims (perhaps by both students). The Department has stated that interim measures must be “appropriate” under the existing circumstances and “every effort” must

be made to “avoid depriving any student” of access to their education. Schools should also remain aware that the Department’s draft regulations, currently under review in light of substantial public comments, have an “interim risk of harm” test before a student may be removed from campus. Schools must undertake diligent and documented threat assessments before implementing relocation or removal actions, especially to avoid having such actions later deemed to have been premature or too draconian before an investigation was completed or charges were formally adjudicated.

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