



Fourth Circuit adopts Title IX plausible inference standard and holds that “but-for” causation must be shown to support a challenge of disciplinary process

By Steven M. Richard

The United States Court of Appeals for the Fourth Circuit has joined the Third, Seventh, Eighth, and Ninth Circuits in adopting a pleading standard in Title IX lawsuits challenging disciplinary proceedings that focuses on whether “the alleged facts, if true, raise a plausible inference” of discrimination “on the basis of sex.” This standard is more flexible than the often-applied “erroneous outcome” or “selective enforcement” theories. Of significance, the Fourth Circuit also held that a plaintiff must sufficiently plead causation in a Title IX challenge to a disciplinary process, adopting a requirement of “but-for” causation.¹

Background²

Malcolm Sheppard, a student at Virginia State University (“VSU”), was involved in an altercation with his former girlfriend (“Student A”) on October 25, 2016. Sheppard noticed that personal items were missing from his dorm room, and he learned that Student A and her female friend (“Student B”) had been in his room. Seeking to retrieve his items, Sheppard confronted Student A outside of her dorm room, and the two became involved in a scuffle.

Student A filed an incident report accusing Sheppard of pushing her. Student B submitted a written statement to the Department of Police and Public Safety, acknowledging her involvement in taking items from Sheppard’s dorm room and corroborating Student A’s account of Sheppard’s pushing and grabbing. The Department referred all three students to the Office of Judicial Affairs (“OJA”). Sheppard was referred for assault, and Students A and B were referred for larceny. The next day, OJA issued a pre-hearing notice to Sheppard of the charges against him and ordered him off-campus, while allowing him to continue his courses online.

¹ *Malcolm X. Sheppard v. The Visitors of Virginia State University; Henry Debose, individually*, No. 19-2452, 2021 WL 1227809, 2021 U.S. App. Lexis 9670 (4th Cir. Apr. 2, 2021).

² The facts stated in this section reflect the allegations as pled in the student’s complaint, which were accepted as true at the motion to dismiss stage.

Six days after the incident, OJA held a hearing on October 31, 2016, which Sheppard attended. He was found responsible of charges, with sanctions including community service, anger management sessions, relationship violence education, and probation. He was not suspended or precluded from completing his coursework. Sheppard appealed the result, but received no response from OJA.

As the disciplinary process ensued against Sheppard, Student A obtained a protective order from a court, prohibiting Sheppard from entering the university's campus or being within 100 feet of her. Sheppard claims that he was not notified of the judicial proceedings, nor did he receive a copy of the protective order (which was extended through January 2017).

Based upon the protective order, the university contacted Sheppard's professors requesting that they permit him to complete his courses online, but one professor declined to allow him to do so. Henry Debose, a university administrator, informed Sheppard that his suspension would remain in effect and he was deemed withdrawn from his courses. Sheppard claims that this was the first time that he learned that he had been suspended.

Regarding the charges against Students A and B, they were handled at a slower pace. In January 2017, the OJA found Student B not responsible for theft. In April 2017, OJA found Student A responsible for theft and imposed sanctions. Sheppard filed a complaint with the Department of Education's Office for Civil Rights ("OCR"), alleging that the university treated him differently on the basis of sex due to the time delay in OJA's proceedings against Students A and B compared to his disciplinary process. Thereafter, OCR and VSU entered into a resolution agreement.

Sheppard sued VSU alleging a Title IX gender discrimination claim and a due process claim under 42 U.S.C. § 1983. He also pled a claim against Debose asserting a § 1983 equal protection violation. The university defendants moved to dismiss Sheppard's complaint. The federal district court dismissed Sheppard's Title IX claim, pled under the selective enforcement framework established in *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994), because he failed to show that he was treated less favorably than a similarly situated female student. The court held that his equal protection claim failed for the same reason, and his due process claim failed because Debose was entitled to qualified immunity. Sheppard appealed the judgment to the Fourth Circuit.³

What pleading standard applies to the Title IX claim?

Under the *Yusuf* framework, Title IX challenges to disciplinary proceedings fall into two categories: (1) erroneous outcome (alleging particular facts sufficient to cast articulable doubt on the outcome's accuracy and indicating that gender bias was a motivating factor), and (2) selective enforcement (alleging that the severity of the punishment and/or the decision to initiate the proceeding was affected by the student's gender). The Fourth Circuit surveyed the pleading standards adopted in other circuits, noting that the First and Fifth Circuits have applied *Yusuf's* framework. In 2019, the Seventh Circuit rejected *Yusuf* as an all-inclusive framework for student disciplinary proceedings. Instead, the Seventh Circuit focused on Title IX's statutory language to assess the sufficiency of a pleading, by asking "do the alleged facts, if true raise a plausible inference

³ The Fourth Circuit affirmed the dismissal of the equal protection and due process claims, which are not analyzed within this alert.

of gender discrimination against a student on the basis of sex?⁴ The Third, Eighth, and Ninth Circuits have adopted the Seventh Circuit’s approach.⁵

The Fourth Circuit became the latest circuit to adopt the plausible inference test, finding that it best adheres to the text of Title IX. The court, however, noted that it will not disregard the utility of *Yusuf’s* framework, because allegations asserting an erroneous outcome or selective enforcement may support a plausible inference of gender discrimination. The Fourth Circuit concluded that the ultimate decision of a claim’s plausibility should focus on Title IX’s statutory prohibition of discrimination “on the basis of sex.”

What causation must be shown to support a Title IX claim?

The Fourth Circuit stated that inherent in the plausible inference standard is a requirement that a Title IX plaintiff must adequately plead causation — “that is, a causal link between the student’s sex and the university’s disciplinary proceeding. Not just any causal link will suffice because, again, the text of Title IX controls.” Specifically, Title IX prohibits discrimination “on the basis of sex.” The causation analysis presented a question of first impression in the Fourth Circuit.

The Fourth Circuit held that “on the basis of sex” requires “but-for” causation in Title IX claims. Specifically, a plaintiff bears the burden of showing (including at the pleadings stage) that the school acted in the alleged manner because of his or her sex (i.e., if he were not male, the university would not have disciplined him). “But-for” causation is a more rigorous standard than a “motivating factor” causation analysis, which is applied under the statutory text of Title VII in employment actions. The Fourth Circuit noted that other circuits, while not squarely addressing the causation requirement in a Title IX disciplinary proceeding, have suggested that it might be sufficient for sex to be a motivating factor. But, Congress has not incorporated “motivating factor” language into Title IX’s text, so the requirement of discrimination “on the basis of sex” compels “but-for” causation.

Applying “but-for” causation, the Fourth Circuit affirmed the dismissal of Sheppard’s Title IX claim. He pled only conclusory allegations that he was similarly situated to Student A, who was charged with larceny, an event “temporally and elementally distinct from Sheppard’s assault charge.” The time difference between his and Student A’s disciplinary cases was likewise unpersuasive, because “even in a joint disciplinary proceeding with two identically situated students, one party would have to go first.” There was no plausible inference that Sheppard’s sex was the “but-for” cause of his treatment under VSU’s disciplinary proceedings.

Takeaways

The Fourth Circuit’s ruling adopting the plausibility standard, which governs federal cases in Maryland, North Carolina, South Carolina, Virginia, and West Virginia, enhances the likelihood that a Title IX claim challenging a disciplinary process may survive past the motion to dismiss stage. The precedential decision adds to the growing trend among the federal circuits to move away from strict reliance upon *Yusuf’s* framework—at least at the pleadings stage.

⁴ *Doe v. Purdue Univ.*, 928 F.3d 652, 667 (7th Cir. 2019) (holding *Yusuf’s* categories merely describe ways a party could allege discrimination on the basis of sex) (opinion by then Circuit Judge Amy Coney Barrett).

⁵ *Doe v. Univ. of Sciences*, 961 F.3d 203, 209 (3d Cir. 2020); *Doe v. Ark-Fayetteville*, 974 F.3d 858, 864 (8th Cir. 2020); *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 947 (9th Cir. 2020).

Nonetheless, the Fourth Circuit’s articulation of the “but-for” causation requirement adheres to Title IX’s textual protections against discrimination “on the basis of sex.” Causation issues, which can be fact-specific, may not be ripe for adjudication at the motion to dismiss stage, where the allegations in a complaint must be accepted as true. Yet, purely conclusory allegations should not satisfy “but-for” causation. Careful review and strategic evaluations should occur in determining whether a motion to dismiss will be a practical strategic filing or whether the challenge to a plaintiff’s proof should wait for the summary judgment stage, with an established factual record.

Finally, with the Department of Education’s announcement on April 6 that its Office for Civil Rights will commence a “comprehensive review” of the 2020 Title IX sexual harassment regulations, we will likely see shifts in Title IX administrative standards and requirements in the coming months and possibly years (whether by the issuance of sub-guidance and/or notices of rulemaking), addressing how schools must respond to Title IX sexual harassment. In the meantime, Title IX challenges to disciplinary processes will evolve in our courts, where matters of first impression or nuances in precedents will require ongoing evaluations by colleges and universities as part of their Title IX compliance.

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