MASSACHUSETTS LAWYERS WEEKLY

Volume 46
Issue No. 14
April 3, 2017

Students making headway fighting wrongful discipline

BC sex assault case seen as key test of fair hearing right

By Pat Murphy
pmurphy@lawyersweekly.com

While plaintiffs' attorneys can herald two recent successes vindicating the rights of students wrongfully disciplined for alleged sexual misconduct, a case against Boston College currently before the 1st U.S. Circuit Court of Appeals may hold the key to opening the door to further avenues of litigation.

A federal jury in New Hampshire recently returned a verdict in favor of a male high school student who sued Phillips Exeter Academy claiming he was expelled following a one-sided, biased internal investigation into his sexual encounter with an underage female student.

And in February, U.S. District Court Judge Mark G. Mastroianni in Springfield denied a motion to dismiss breach of contract, breach of covenant of good faith and fair dealing, and Title IX gender discrimination claims against Amherst College. The plaintiff in that case claimed he was expelled as the result of a biased investigation into a female student's accusation that he had continued sexual activity with her after she withdrew her consent.

The "John Doe" plaintiffs in both actions are represented by Max D. Stern and Megan C. Deluhery of Todd & Weld in Boston. Stern said he sees his clients' cases as being symptomatic of misguided attempts by school officials to respond to the very real problem of sexual violence on campus.

"This situation where untrained and inexperienced Title IX officials are allowed to write the rules, administer the rules, and make decisions without the stabilizing effect of a true adversarial system has caused all kinds of mistakes," Stern said.

"It's pretty clear that they had information that perhaps both students had complaints there had been misconduct committed by the other in the course of this one interaction"

— Megan C. Deluhery

"This situation where untrained and inexperienced Title IX officials are allowed to write the rules, administer the rules, and make decisions without the stabilizing effect of a true adversarial system has caused all kinds of mistakes."

— Max D. Stern

Hot practice niche

Boston attorney Jeffrey E. Dolan is among those who foresaw the rise of litigation against colleges and universities in the wake of the issuance in 2011 of the "Dear Colleague" letter by the U.S. Department of Education's Office for Civil Rights.

In 2015, he and Mark W. Shaughnessy, both of Boyle, Shaughnessy & Campo, wrote a piece for Lawyers Weekly describing the projected battleground. Dolan said he is not surprised by the level of litigation in this area.

"The case law is still developing," he said. "Courts are still grappling with what are the viable causes of action that a plaintiff may have and under what circumstances can they prevail."

The OCR's Dear Colleague letter spotlighted the problem of sexual violence on campuses. Moreover, the letter threatened the loss of federal funding should universities fail to adopt rules and procedures making it easier for victims of sexual assault to make and prove their claims, and discipline students who engage in misconduct.

"It shouldn't get lost that schools can lose federal funding," Dolan said. "So they do have a very serious incentive to comply with Title IX and the guidance provided through the Dear Colleague letter."

The letter advised schools that, in order to comply with Title IX, they must apply the low preponderance-of-evidence standard in sexual assault cases. Further, it strongly discouraged the cross-examination of accusers.

According to Stern, the OCR's guidance spurred colleges and universities to create disciplinary systems biased in favor of the accuser and against the accused.

"They have essentially taken the view that the path of least resistance is to credit the allegations of the complainant almost always," Stern said. "If they do that and expel the [accused] student, they feel they can't be criticized. The result has been a wave of expulsions and suspensions."

Boston lawyer Norman S. Zalkind said student rights cases have been a staple of his firm, Zalkind, Duncan & Bernstein, for years, but that there has been a recent "explosion" of Title IX cases, which he attributes largely to the OCR letter.

"It is a very large part of our practice right now," Zalkind said. "We get calls all week long."

Twin wins

In the case against Phillips Exeter Academy, the jury found in favor of the plaintiff on his claims for breach of his enrollment contract and student handbook, breach of the covenant of good faith and fair dealing, and promissory estoppel.

In February, U.S. District Court Judge Joseph N. Laplante issued a consent order awarding $27,904 in damages under the jury's verdict as well as $16,863 in costs.

Deluhery, Stern's co-counsel in *Doe v. Amherst*, said that case was complicated by the fact that the plaintiff was incapacitated by alcohol at the time of the alleged assault. The way the college appeared to discount her client's intoxication is evidence of discrimination, Deluhery said, noting that the school's student handbook states that someone who is incapacitated cannot consent to sex.

"So it's pretty clear that they had information that perhaps both students had complaints there had been misconduct committed by the other in the course of this one interaction," Deluhery said. "The woman was encouraged to file her complaint, but the man was never advised of his rights and his incapacitation was not given the consideration it should have been given."

In denying in part Amherst's motion to dismiss, Mastroianni concluded that the plaintiff had stated a claim for selective enforcement under Title IX.

In support of that conclusion, the judge noted that "when the College learned [the accuser] may have initiated sexual activity with Doe while he was 'blacked out,' and thus incapable of consenting, the College did not encourage him to file a complaint, consider the information,

or otherwise investigate. Doe also alleges the severity of his punishment was due to his gender because the College intended his punishment to appease campus activists who sought the expulsion of a male student."

Stern said he has detected a palpable shift in the deference judges are affording schools in their handling of student discipline, with the older cases tending to emphasize the wide discretion schools have to determine discipline.

"But in more recent decisions, clearly the judges see that there's really something wrong here," Stern said. "More and more, judges are holding the university to the explicit terms of their handbooks. And more and more, they're able to see the possibility that there can be gender discrimination even when there's a woman complaining [about sexual misconduct] against a man."

'Kafkaesque proceedings'

One of Zalkind's colleagues, Naomi R. Shatz, has established something of a niche practice representing high school, college and graduate students accused of sexual assault, sexual harassment and academic misconduct.

Shatz said one of the more important Massachusetts decisions for plaintiffs on the issue is federal Judge F. Dennis Saylor IV's ruling last year in *Doe v. Brandeis University*.

In *Brandeis*, the plaintiff had a disciplinary warning placed on his educational record indicating that he had committed "serious sexual transgressions." The allegations involved conduct with another male student.

Saylor recognized that school disciplinary hearings must be conducted with "basic fairness." In denying the school's motion to dismiss in part, the judge concluded that the plaintiff sufficiently alleged that the procedures employed by Brandeis did not provide him with the "basic fairness" to which he was entitled under Massachusetts law.

In particular, the judge noted that discipline was imposed under a preponderance-of-evidence standard without adequate notice of the charges, a right to counsel, or a right to confront and cross-examine his accuser.

Saylor concluded that the plaintiff "was charged with serious offenses that carry the potential for substantial public condemnation and disgrace. He was required to defend himself in what was essentially an inquisitorial proceeding that plausibly failed to provide him with a fair and reasonable opportunity to be informed of the charges and to present an adequate defense."

Shatz said the significance of *Brandeis* cannot be overstated.

"Once you start getting judicial decisions outlining the parameters of what is fair and what is unfair, you're going to see more litigation because students are realizing there is a check on what the schools are doing," she said.

Brandeis takes on added significance in light of *Doe v. Trustees of Boston College*.

Decided in October, U.S. District Court Judge Denise J. Casper in *Boston College* granted a defense motion for summary judgment on a claim for breach of contract brought by a student accused of sexual assault, concluding that the school's disciplinary process afforded him "basic fairness."

Boston College is on appeal before the 1st Circuit. The plaintiffs' attorneys, Matthew J. Iverson of Boston and Charles B. Wayne of Washington D.C., declined to comment. But in a brief filed requesting oral argument, Wayne wrote that federal regulations essentially require colleges and universities to hold "trials" for students accused of sexual assault, conduct normally considered to be within the province of the criminal justice system.

"But there is no impartial judge, no prosecutor with an ethical duty, and no defense lawyer with the right to speak in these Kafkaesque proceedings," Wayne wrote. "Instead, there are ill-trained administrators, faculty, and students 'investigating' the alleged criminal conduct, sitting in judgment, and meting out lifelong punishments."

Attorneys anticipate the 1st Circuit in *Boston College* will "fill in the blanks" as to what constitutes basic fairness in school disciplinary proceedings, perhaps going so far as putting its stamp of approval on the approach taken by Saylor in *Brandeis*. The lower court in *Boston College* appeared to defer to the school's decisions, whereas *Brandeis* gave greater scrutiny to whether the process afforded the student basic fairness.

"What stands to be clarified by the 1st Circuit is how the concept of basic fairness comes into play under the umbrella of breach of contract," Dolan said. MLW