

# Federal District Court Permits University to Delay Title IX Investigation Until Local Law Enforcement Review is Complete

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**PRACTICES** Higher Education, Litigation

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A federal district court for the Eastern District of Louisiana recently issued two favorable rulings for Dillard University, highlighting (1) the difficulty of conducting Title IX investigations at post-secondary institutions and (2) an opportunity for the Department of Education to further clarify institutions' Title IX obligations.

Two Dillard male students were accused of raping a fellow Dillard student based on an April 20, 2019, accident. The students were arrested but never charged with a crime. In early May, the University suspended the accused students, pending an investigation which would not begin until resolution of the parallel criminal investigation. Before the Fall 2019 semester began, the University's online class registration system allowed the students to choose classes and secure on-campus housing for what would have been the first semester of their senior year. In September, the University denied the students' access to dormitories and classes. The students sought a temporary restraining order to prevent Dillard from blocking the students' access.

In September 2019, the court refused to grant such an extraordinary remedy.<sup>1</sup> A temporary restraining order may only be granted if the movant demonstrates each of the following four factors: (1) a substantial likelihood of success on the merits, (2) a substantial threat that failure to grant the order will result in irreparable injury, (3) the threatened injury outweighs any damage the order may cause the opposing party, and (4) the order will not disserve the public interest.<sup>2</sup> The accused students argued that their ban from campus resulted in an irreparable injury – immediate homelessness. This argument was unavailing. Not only did the plaintiffs fail to expound on the nature of the harm, they never addressed their likelihood of success on the merits, the damage such an order might cause the University, or the public's interest in this matter. As such, the plaintiffs failed to establish the prerequisites for injunctive relief and lost their bid for a temporary restraining order. This decision makes clear that courts will likely uphold a post-secondary institution's temporary suspension of accused students, especially when the students cannot sufficiently articulate a serious harm.

Dillard then filed a Rule 12(b)(6) motion to dismiss due to the plaintiffs' failure to state a claim upon which relief can be granted.<sup>3</sup> The plaintiffs alleged that Title IX requires a fair and prompt review of the charges against them. Dillard's inaction, plaintiffs argued, violated Dillard's obligations under Title IX, as spelled out in 34 C.F.R. § 668.46(k)(3)(i)(A) and the Revised Sexual Harassment Guidance issued by the U.S. Department of Education (the "Department") on January 19, 2001 (the "2001 Guidance"). This argument failed. A plausible claim for relief under Title IX requires an allegation that the plaintiff was discriminated against because of his or her sex. The plaintiffs never suggested that a similarly situated female Dillard student might have received more favorable treatment. Further, when a plaintiff challenges an erroneous outcome of a disciplinary proceeding, there must have actually been a "proceeding" and an "outcome." The court noted that the

temporary suspension was just that – temporary – and was not an “outcome” of a disciplinary proceeding. In December 2019, the court granted Dillard’s motion to dismiss the Title IX claim.

This dismissal highlights two things to watch for in Title IX investigations and litigation with respect to sexual misconduct.

First, when students report allegations to post-secondary institutions and local law enforcement, the institutions can—based on this ruling—wait for the criminal investigation to fully develop before beginning the internal review. In some respects, this is practical. Compared to colleges and universities, law enforcement professionals generally have more experience with investigations, the requisite resources to complete such investigations properly, and the constitutional ability to request evidence. However, public – and, arguably private – institutions must adhere to constitutional due-process standards before taking disciplinary actions.<sup>4</sup> Waiting for months without a hearing before learning whether a temporary suspension might become permanent could qualify as a violation of due process or fundamental fairness.

Second, district courts within the Fifth Circuit have not yet decided the meaning of “prompt and equitable” in the Title IX context. Here, plaintiffs were suspended in May and the police investigation is still considered ongoing without any substantive updates. As of the December ruling on the motion to dismiss, the local district attorney had “neither accepted nor refused the criminal charges against the plaintiffs.”<sup>5</sup> The court did not comment on the reasonableness of the delay or offer its view on what “prompt” might mean. The 2001 Guidance outlines “procedures for prompt and equitable resolution” of Title IX complaints, which includes allegations of sexual misconduct. However, the 2001 Guidance does not the Department define “prompt.” Adding further complexity, in 2011 and 2014, the Department issued follow-on guidance to address Title IX investigation issues, but in 2017, that guidance was withdrawn. The 2017 guidance is explicit: “There is no fixed time frame under which a school must complete a Title IX investigation.”<sup>6</sup>

One can understand the Department’s reticence to apply a one-size-fits-all definition for “prompt,” especially given the wide-ranging application of Title IX. But, the lack of guidance on investigation timing undoubtedly harms victims, the accused, and the institutions. Students’ academic progress is in limbo during an ongoing investigation. Failure to adequately address allegations in a timely manner, could result in claims that an institution is deliberately indifferent to sexual misconduct, which is a violation of Title IX.

The September and December rulings from the Eastern District of Louisiana underscore the difficulty post-secondary institutions have in fulfilling Title IX obligations, as well as the potential due process violations of the accused. Colleges and universities need more education on what a “prompt and equitable” resolution looks like. The Department needs to hold more training, give more guidance, and use prior incidents as case studies to clarify obligations and expectations under Title IX. This would permit institutions to better serve their students and, in turn, allow students and courts to fairly assess whether an institution’s actions were within the parameters of the law.

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1. *Givens v. Dillard Univ.*, No. CV 19-12448 (E.D. La. Sept. 6, 2019).

2. *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991).

3. *Givens v. Dillard Univ.*, No. CV 19-12448 (E.D. La. Dec. 3, 2019).
4. Edward N. Stoner II & John Wesley Lowery, *Navigating Past the “Spirit of Insubordination”: A Twenty-First Century Model Student Conduct Code with A Model Hearing Script*, 31 J.C. & U.L. 1, 9 (2004); see also *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (“Students facing temporary suspension have interests qualifying for protection of the Due Process Clause.”).
5. *Givens v. Dillard Univ.*, No. CV 19-12448 (E.D. La. Dec. 3, 2019).
6. U.S. Department of Education, *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct* (September 22, 2017), available at: <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>.