Cullen | Dykman

The Title IX Development You Weren't Expecting This October

November 16, 2023

Title IX practitioners and activists continue to wait patiently (or not so patiently) for the release of the Biden-Harris Administration's Title IX Final Rule. In May 2023, the United States Department of Education (the "Department") announced that it received 240,000 public comments on the Proposed Rule, released in June 2022, and was delaying its anticipated release of the Title IX Final Rule until October 2023.[i] However, October came and went without release of the Title IX Final Rule or any update from the Department about when higher education institutions can expect its release.

While eyes were glued on news alerts related to the Title IX Final Rule this October, there was another major legal development that will have a significant impact on Title IX practice, particularly at institutions of higher education within the jurisdiction of the United States Court of Appeals, Second Circuit ("Second Circuit"), which includes New York.

On October 25, 2023, the Second Circuit, vacated the dismissal of former Yale student Saifullah Khan's ("Khan") defamation claim brought against Yale University ("Yale"), several of its named employees and former Yale student "Jane Doe" who accused Khan of sexual assault on Yale's campus in 2015.[ii]

Following Doe's accusations in 2015, Yale initiated disciplinary proceedings against Khan, who was also charged criminally (although he was acquitted of criminal charges in March 2018). After Yale determined that Khan violated Yale's sexual misconduct policy, he was expelled in November 2018. Following his expulsion, Khan brought an action against Yale University, several of its named employees, and Jane Doe, alleging violations to Title IX and other tort claims, including defamation.

In January 2021, the District Court dismissed Khan's Connecticut state law claim for defamation, reasoning that Jane Doe enjoyed absolute immunity for statements made at the 2018 Yale disciplinary hearing that ultimately resulted in Khan's expulsion from Yale.[iii] Khan appealed and on preliminary review, the Second Circuit determined that it was unable to determine whether Connecticut state law would recognize the Yale disciplinary proceeding as a quasi-judicial proceeding, supporting the finding of absolute immunity by the District Court. After preliminary review, the Second Circuit certified questions of state law to the Supreme Court of Connecticut.

For those that were following the case, the Second Circuit's decision did not come as a surprise following the Supreme Court of Connecticut's June 2023 decision on the certified questions of Connecticut state law.[iv] One of

the certified questions posed by the Second Circuit to Connecticut's highest court was whether Connecticut law would properly recognize Khan's 2018 student disciplinary hearing as a quasi-judicial proceeding.

The Supreme Court of Connecticut ruled that Yale's student disciplinary proceeding *was not* a quasi-judicial proceeding because it "lacked the adequate procedural safeguards necessary for absolute immunity to apply."[v] Some of the procedural safeguards highlighted by the Connecticut Supreme Court as missing from the Yale disciplinary proceeding included:

1. An Oath Requirement;
2. Meaningful Cross-Examination;
3. Ability to Call Witnesses;
4. Assistance of Counsel; and
5. Adequate Record for Appeal.

Although the Connecticut Supreme Court determined that Jane Doe was not entitled to absolute immunity for her participation in Yale's student disciplinary process, the Court also addressed whether, in the alternative, Connecticut law would afford Doe qualified immunity.

As to this question, the Court ruled in the affirmative. In doing so, the Court detailed Connecticut's extensive legislative action surrounding campus sexual assault (including permitting anonymous reporting and providing additional services to victims in 2014 and adopting a state-wide affirmative consent standard in 2016) and concluded that, "given the legitimate public interests that our legislature has articulated, we conclude that a qualified privilege is appropriate to afford alleged victims of sexual assault who report their abuse to proper authorities at institutions of higher education."[vi] In so ruling, the Connecticut Supreme Court referenced similar rulings made under Maryland and Virginia law.[vii]

While affording qualified immunity to accusers that participate in disciplinary processes against their perpetrators is not insignificant, there is a measurable difference in extending the protections of qualified immunity to accusers like Jane Doe, rather than the cloak of absolute immunity. While Jane Doe may ultimately be successful in defeating Khan's claims based on qualified immunity, absolute immunity would have permitted her to defeat his claims at the early stage of a motion to dismiss. As noted by the Connecticut Supreme Court, a claim of qualified immunity can be defeated if the defendant acts with malice in making the defamatory communication.[viii] At the motion to dismiss stage, so long as a plaintiff "sufficiently alleges with particular facts that the defendant acted with malice…the court must take those allegations as true, and, therefore, the privilege will be defeated at [that] stage of the proceedings."[ix]

For Jane Doe, the Second Circuit's decision permits Khan's defamation case against her to move forward to discovery. For Yale and other institutions of higher education in Connecticut, the Second Circuit's decision sets a very high bar for future participants of university and college disciplinary hearings accused of defamation to secure dismissal of claims at the pleading stage.

What about New York institutions?

As it was in Connecticut before *Khan v. Yale*, the question of whether an absolute or qualified privilege should be afforded to statements made at sexual misconduct hearings at institutions of higher education is a novel question of law that thus far remains unanswered in New York State. However, a review of existing New York law suggests that participants in sexual misconduct hearings at New York State post-secondary institutions would similarly be denied the cloak of absolute immunity.

As stated by the New York Court of Appeals in 2018, "the broad principles of immunity in defamation law are well established."[x] In *Stega v. New York Downtown Hospital*, New York's highest court explained that "absolute privilege" (as it is referred in New York) functions to "entirely immunize[] an individual from liability in a defamation action, regardless of the declarant's motives."[xi] In New York, absolute privilege is "generally reserved for communications made by individuals participating in a public function, such as judicial, legislative, or executive proceedings."[xii]

In comparison, a statement will be subject to "qualified privilege" when it "is fairly made by a person in the discharge of some public of private duty, legal or moral, or in the conduct of his own affairs, in a matter where his [or her] interest is concerned."[xiii] As under Connecticut law and as addressed in *Khan*, New York's qualified privilege will only protect statements that are not made with malice.[xiv] Similar to the outcome in *Khan*, a claim for defamation under New York law will likely survive a motion to dismiss, even when the speaker holds a qualified privilege, so long as the complaint sufficiently pleads malice on behalf of the speaker.

In New York, courts determine whether allegedly defamatory statements are subject to an absolute or qualified privilege by reviewing, "the occasion and the position or status of the speaker." As recognized by the New York Court of Appeals in *Stega*, this is a "complex assessment that must take into account the specific character of the proceeding in which the communication is made." Notably, the Court of Appeals has "reiterated that as a matter of policy, the courts confine absolute privilege to a very few situations."[xv]

While New York law will provide an "absolute privilege" in quasi-judicial proceedings, it will only do so when the procedural safeguards of the quasi-judicial proceedings "enable the defamed party to contest" any defamatory statements made during the proceedings.[xvi] For example, in *Stega*, the Court of Appeals determined that statements made by a hospital and its chief medical officer about a doctor's termination, to a Food and Drug Administration ("FDA") investigator, were not made in an adversarial proceeding and therefore, such statements were only entitled to qualified privilege, rather than absolute privilege. In reaching this conclusion, the Court of Appeals noted that the doctor was not entitled to participate in the FDA's review and did not even know about the investigation when the alleged defamatory statements were made.[xvii]

In comparison to *Stega* and representing a close analogy to student disciplinary hearings, New York law extends an absolute privilege to participants in disciplinary hearings for tenured teachers held pursuant to N.Y. Educ. Law § 3020-a.[xviii] Notably, though, the § 3020-a statute provides tenured teachers with significant due process, including, "motion practice, bills of particulars, mandatory disclosure, discovery, subpoena power, right to counsel, cross-examination, testimony under oath and a full record." The outcome of § 3020-a hearings are also subject to judicial review pursuant to CPLR § 7511.

Significantly for this discussion, the Second Circuit has similarly ruled that § 3020-a hearings and certain arbitrations are quasi-judicial administrative actions.[xix] In *Burkybile v. Bd. Of Educ. Of Hastings-on-Hudson Union Free School Dist.*, the Second Circuit ruled that § 3020-a hearings are quasi-judicial administrative actions, although the Court did not address the question of absolute immunity (the issue in the case was whether the findings from the hearing were entitled to preclusive effect in subsequent judicial proceedings). The Second Circuit has separately ruled that absolute immunity attaches to arbitrators (*Austern v. Chicago Board Options Exchange, Inc.*) and witnesses (*Rolon v. Henneman*) at employment-related arbitration proceedings.[xx]

The ruling in *Rolon v. Henneman* is particularly significant because unlike § 3020-a hearings, which are provided for by state statute, the parties in *Rolon* had contractually agreed to submit their dispute to arbitration. Nevertheless, the Second Circuit held, "that the arbitral proceeding at issue encompassed an adequate number of safeguards so as to ensure that its function and the function of the witnesses sufficiently mirrored the judicial process" to cloak the witness with absolute immunity for his testimony in the arbitration proceedings.[xxi] In *Rolon*, the Second Circuit noted that the witness testified under oath, offered testimony, answered questions on direct and cross examination and, "could have been prosecuted for perjury." Based on these facts, the Second Circuit determined the nature of the arbitration was "materially indistinguishable to that of formal judicial proceedings…"[xxii]

Relevant for this discussion however, in *Rolon*, the Second Circuit intentionally declined to opine "as to the minimum safeguards required in order for absolute immunity to attach in other arbitral settings."[xxiii]

In light of this New York precedent, it is possible but unlikely that a New York court would extend absolute immunity in the context of a college or university disciplinary proceeding.

Unlike § 3020-a hearings, a post-secondary student disciplinary hearing is not subject to state statute. New York's Enough is Enough statute, enacted in 2015, afforded students at New York State's colleges and universities with many rights related to matters of campus sexual violence. N.Y. Educ. Law Article § 129-B. But even the sweeping requirements of the Enough is Enough legislation, *did not require* New York colleges and universities to provide students with a disciplinary hearing to resolve allegations of sexual assault.

Rolon, the case involving an employee disciplinary arbitration grounded in contract, is likely the closest analogy available. Under certain circumstances, New York law recognizes an implied contract between an educational institution and its students, including whatever student disciplinary procedures are identified in the College's bulletins, circulars, catalogues and handbooks.[xxiv] While disciplinary procedures and the formality of hearings, if offered, differ at each institution, it is unlikely that even the most formal student disciplinary proceeding involving a professionally trained adjudicator, attorney advisors and cross-examination would meet the standard laid out in *Rolon*, where the Second Circuit emphasized the fact that the witness testified *under oath* and that their statements *could have been subject to prosecution for perjury*.

How does *Khan v. Yale* impact Title IX practice moving forward?

Colleges and universities in New York State should evaluate the impact of *Khan v. Yale* on their current adjudication processes, including how this precedent may impact the decision of students and other potential

witnesses from testifying at sexual misconduct hearings or participating in the adjudication process all together. It is likely that the decision will embolden plaintiffs' attorneys to file – or at least realistically threaten – defamation actions against accusers. This could quell reporting and dissuade students from participating in a formal resolution process.

With the Title IX Final Rule on the horizon, these processes should already be under review. The current Title IX regulations, issued in 2020 under the Trump Administration, require that allegations of Title IX Sexual Harassment be resolved through a formal grievance process, which culminates in a hearing with cross examination. However, based on the Proposed Rule of the Biden Administration, hearings would be optional.[xxv]

With the possibility of more flexibility and the presence of *Khan v. Yale* in Second Circuit jurisprudence, institutions will need to weigh the value of due process for the accused with the equally laudable goal of encouraging community members to report misconduct and participate meaningfully in the fact-finding process.

Colleges and universities should also utilize this waiting period to clear case backlogs, fill staff vacancies and train existing staff on the fundamentals of conducting thorough and trauma-informed investigations.

Cullen and Dykman LLP's Higher Education Practice Group is here to assist you in reviewing your policies and procedures for Title IX compliance, and provide training to students, educators, and all members of the community. If you have questions regarding any aspects of higher education law and/or any implications the Proposed Rule may have on your institution, feel free to contact Nicole A. Donatich at (516) 296-9116 or **ndonatich@cullenllp.com**, Dina L. Vespia at (516) 357-3726 or **dvespia@cullenllp.com** and Jennifer A. McLaughlin at (516) 357-3889 or **jmclaughlin@cullenllp.com.**

Thank you to Ciara Villalona, an Associate and member of the Higher Education Practice Group, who assisted in preparing this alert.

Footnotes

[i] https://blog.ed.gov/2023/05/a-timing-update-on-title-ix-rulemaking/.

[ii] *Khan v. Yale University*, 85 F.4th 86 (2nd Cir. 2023).

[iii] Initially, Khan's defamation claim also encompassed Jane Doe's allegations of rape in 2015 (as opposed to her statements at the disciplinary hearing about the same incident, in 2018), but at the time of the District Court's decision in January 2021, the parties agreed that this claim was time-barred.

[iv] *Khan v. Yale University* et al., 347 Conn. 1 (June 27, 2023).

[v] *Id.* at 36.

[vi] *Id.* at 54.

[vii] *Id.* at 51-52, citing *Doe v. Salisbury University*, 123 F. Supp. 3d 748 (D. Md. 2015); *Doe v. Roe*, 295 F. Supp. 3d 664 (E.D. Va. 2018).

[viii] *Id.* at 54-55.

[ix] *Id.*

[x] *Stega v. New York Downtown Hospital*, 31 N.Y.3d 661, 669 (2018).

[xi] *Id.*

[xii] *Id.* (internal citations omitted).

[xiii] *Id.* 669-670.

[xiv] *Id.*

[xv] *Id.* at 670. (internal citations omitted).

[xvi] *Id.* at 671.

[xvii] *Id.* at 671-673.

[xviii] *Geer v. Gates Chili Central School District*, 321 F. Supp.3d 417 (W.D.N.Y. 2018) (finding that § 3020-a disciplinary hearings are considered quasi-judicial and subject to absolute privilege); *see also Taylor v. Brentwood Union Free School District*, 908 F. Supp. 1165 (E.D.N.Y. 1995).

[xix] *Burkybile v. Bd. Of Educ. of Hastings-on-Hudson Union Free Sch. Dist.*, 411 F.3d 306, 308 (2d Cir. 2005).

[xx] *Austern v. Chicago Board Options Exchange, Inc.*, 898 F.2d 882 (2d Cir. 1990) (arbitrators); *Rolon v. Henneman*, 517 F.3d 140, 146 (2d Cir. 2008) (Sotomayor, J.) (witnesses).

[xxi] *Rolon*, 517 F.3d at 146-47.

[xxii] *Id.* at 146.

[xxiii] *Id.*

[xxiv] *In re Columbia Tuition Refund Action*, 523 F.Supp.3d 414, 421-422 (S.D.N.Y. 2021).

[xxv] In the alternative, institutions may adopt a single investigator model.

Practices

- Higher Education

Attorneys

- Dina L. Vespia
- Jennifer A. McLaughlin

- Nicole A. Donatich