2nd Circ. Defamation Ruling May Chill NY Title IX Reports

By **Nicole Donatich** (December 1, 2023)

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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, the U.S. Department of Education announced that it received 240,000 public comments on the proposed rule it released in June 2022[1] and was delaying its anticipated release of the Title IX final rule until October 2023.[2] 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 U.S. Court of Appeals for the Second Circuit, which includes Vermont, Connecticut and New York.

On Oct. 25, the Second Circuit vacated the Connecticut district court's dismissal of former Yale student Saifullah Khan's defamation claim brought against Yale University, several named Yale employees, and former Yale student "Jane Doe," who accused Khan of sexual assault on Yale's campus in 2015.[3]

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 alleging Yale violations of Title IX and other tort claims, including defamation.

In January 2021, the U.S. District Court for the District of Connecticut 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.[4]

Khan appealed. On preliminary review, the Second Circuit was unable to determine whether Connecticut state law would recognize the Yale disciplinary proceeding as a quasi-judicial proceeding, which would support the finding of absolute immunity by the district court. After preliminary review, the Second Circuit certified questions of state law to the Connecticut Supreme Court.

For those following the case, the Second Circuit's decision did not come as a surprise after the Supreme Court of Connecticut's June 2023 answers to the certified questions of Connecticut state law.[5] One question the Second Circuit posed 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."[6] Some of the procedural safeguards

highlighted by the Connecticut Supreme Court as missing from the Yale disciplinary proceeding included:

- An oath requirement;
- Meaningful cross-examination;
- Ability to call witnesses;
- Assistance of counsel; and
- 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. On this question, the court ruled in the affirmative.

In doing so, the court detailed Connecticut's extensive legislative action surrounding campus sexual assault, including a 2014 move permitting anonymous reporting and providing additional services and adopting a statewide affirmative consent standard in 2016. The court 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."[7] The Connecticut Supreme Court's ruling referenced similar ones made under Maryland and Virginia law.[8]

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.[9] At the motion to dismiss stage, according to the Connecticut Supreme Court's June ruling in Khan, as 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."[10]

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 postsecondary institutions would similarly be denied the cloak of absolute immunity.

As stated by New York's highest court in its 2018 Stega v. New York Downtown Hospital ruling, "The broad principles of immunity in defamation law are well established."[11] In Stega, the New York Court of Appeals explained that "absolute privilege," as it is referred to in New York, functions to "entirely immunize[] an individual from liability in a defamation action, regardless of the declarant's motives."[12] 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."[13]

In comparison, as outlined in the Stega opinion, a statement will be subject to qualified privilege when it "is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his [or her] interest is concerned."[14]

As under Connecticut law and as addressed in Khan, New York's qualified privilege will only protect statements that are not made with malice.[15] 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, as long as the complaint sufficiently pleads malice on behalf of the speaker.

As stated by the New York court in Stega, 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." The Stega court explained that 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 has "reiterated that as a matter of policy, the courts confine absolute privilege to a very few situations."[16]

The Stega opinion clarified that 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.[17]

For example, in Stega, the court determined that statements made by a hospital and its chief medical officer about a doctor's termination, to an investigator from the U.S. Food and Drug Administration, 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 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.[18]

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 Section 3020-a of New York Education Law.[19]

Notably, though, Section 3020-a 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 Section 3020-a hearings are also subject to judicial review pursuant to Section 7511 of New York Civil Practice Law and Rules.

Significantly for this discussion, the Second Circuit has similarly ruled that 3020-a hearings and certain arbitrations are quasi-judicial administrative actions.[20] In Burkybile v. Board of Education of Hastings-on-Hudson Union Free School District, the Second Circuit ruled in 2005 that 3020-a hearings are quasi-judicial administrative actions, although the court did

not address the question of absolute immunity, as the issue in the case was whether the findings from the hearing were entitled to preclusive effect in subsequent judicial proceedings.

The Second Circuit separately ruled in Austern v. Chicago Board Options Exchange Inc. in 1990 that absolute immunity extends to arbitrators and in Rolon v. Henneman in 2008 that absolute immunity extends to witnesses at employment-related arbitration proceedings.[21]

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.[22]

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."[23]

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."[24]

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 postsecondary student disciplinary hearing is not subject to state statute. New York's Enough Is Enough statute, enacted in 2015, afforded students at all colleges and universities in New York state with many rights related to matters of campus sexual violence.[25] 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, catalogs and handbooks.[26]

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 advisers 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 affect Title IX practice moving forward?

Colleges and universities in New York state should evaluate the impact of the Second Circuit's decision in Khan v. Yale on their current adjudication processes, including how this precedent may influence the decision of students and other potential witnesses to testify at

sexual misconduct hearings or participate in the adjudication process at all. 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, institutions should already be reviewing these processes. The current Title IX regulations, issued in 2020 under the Trump administration, require allegations of Title IX sexual harassment to be resolved through a formal grievance process, which culminates in a hearing with cross-examination. However, based on the rule proposed by the Biden administration, hearings would be optional.[27]

With the possibility of more flexibility, and with 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.

Nicole Donatich is of counsel at Cullen and Dykman LLP.

[1] See https://www.cullenllp.com/blog/u-s-department-of-education-releases-proposed-amendments-to-title-ix-regulations/.

[2] See https://blog.ed.gov/2023/05/a-timing-update-on-title-ix-rulemaking/; see also https://www.cullenllp.com/blog/department-of-education-delays-release-of-title-ix-regulations-until-october-2023/.

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

[4] 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. See Khan v. Yale University, 511 F. Supp.3d 213, 219 (D. Conn. 2021).

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

[6] Id. at 36.

[7] Id. at 54.

[8] 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).

[9] Id. at 54-55.

[10] Id.

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

[12] Id.

[13] Id. (internal citations omitted).

[14] Id. 669-670.

[15] Id.

[16] Id. at 670. (internal citations omitted).

[17] Id. at 671.

[18] Id. at 671-673.

[19] 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).

[20] Burkybile v. Board of Education of Hastings-on-Hudson Union Free School District, 411 F.3d 306, 308 (2d Cir. 2005).

[21] 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).

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

[23] Id. at 146.

[24] Id.

[25] New York Educ. Law Article § 129-B.

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

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