

LEGAL UPDATE

WSSSC WINTER MEETING

FEBRUARY 8, 2024

AAG H. BRUCE MARVIN

Barlow v. State of Washington (WSU)

- *Barlow v. State of Washington*, 540 P. 3d 283 (2024).
- 5-4 Decision by Washington State Supreme Court
- Institutions of higher education owe a duty of care to a student when the student is on campus, similar to a business invitee, or involved in university sponsored activities
- Rejecting argument that duty of care extends beyond the college campus or outside college-sponsored programming and activities

Barlow v. State of Washington

- While enrolled at WSU Vancouver Campus, perpetrator was disciplined for two separate instances of inappropriate sexual misconduct
- Suspended for 9 days and required to write essay on consent
- Staff who reviewed essay concluded that perpetrator still did not understand concept of consent
- Perpetrator serves suspension, returns to WSU, and transfers to Pullman campus
- Perpetrator rapes another student (Barlow) in off-campus apartment

Barlow v. State of Washington

- Barlow sues on following theories
 - Title IX
 - WLAD & RCW 28B.110
 - Common law negligence
- Trial court dismisses Title IX and WLAD/RCW 28B.110 finding WSU was not deliberately indifferent
- Trial court finds Washington does not recognize “special relationship” between the parties that would give rise to common law duty for IHE to protect students from misconduct by other student

Barlow v. State of Washington

On appeal, Barlow argued that WSU is liable for negligence because:

1. WSU has a special relationship with its students similar to special relationship between K-12 schools and students
2. Special relationship imposes a duty on IHE to both control and protect students from foreseeable harm.
3. WSU's knowledge of perpetrator's prior sexual misconduct makes harm to Barlow foreseeable

Barlow v. State of Washington

- Barlow appeals to Ninth Circuit, which refers following issues to Washington State Supreme Court:
 - (1) Does Washington law recognize a special relationship between a university and its students giving rise to a duty to use reasonable care to protect students from foreseeable injury at the hands of other students?
 - (2) If the answer to question 1 is yes, what is the measure and scope of that duty?

Barlow v. State of Washington

- *Amicus* brief by SBCTC, Council of Presidents (public 4-years), and Private 4-years
 - Relationship between IHE and student is grounded in contract
 - Emphasizes differences in size, structure, and mission of Washington State IHEs
 - Unintended consequences could include:
 - Heightened scrutiny of criminal histories for applicants and enrolled students at 4-years
 - Formerly incarcerated students
 - Undermine DEI initiatives
 - Increased liability for open enrollment CTCs
 - Expansion of tort liability beyond college property and college-sponsored activities

Barlow v. State of Washington

A majority of the Washington State Supreme Court concluded:

An IHE has a special relationship with its students that imposes on the IHE a duty to take reasonable care to protect enrolled students from foreseeable acts of violence by third parties (including other students) when students are on campus or engaged in IHE controlled activities.

Barlow v. State of Washington

Court rejects plaintiff's argument that much broader duty of care applicable to K-12 schools should be applied to higher education.

- K-12 students, most of who are minors, are compelled to attend school by state law – K-12 stands in for parents
- K-12 schools exercise a significant amount of control over students
- Students enrolled in IHEs, in contrast, exercise significantly more control over their lives and are far more independent than K-12 students
- Court also rejects plaintiff's contention that the relationship between and IHE and its students is similar to the relationship between a patient and a mental health counselor, medical provider, or group home.

Barlow v. State of Washington

- Court determines “take charge” duty applicable to parole officers and corrections officials is not applicable to IHEs because IHEs exercise so little control over students
- Court finds that an IHE’s student conduct code does **not** create a duty
The code of conduct does not create control of students’ behavior in a preventative way. The code may provide the university with the ability to academically punish students after the fact, with suspensions, academic probation, or even expulsion. **The code of conduct is irrelevant to establishment of a duty.** *Barlow*, at 789.

Barlow v. State of Washington

Take Aways

- Colleges do not owe a duty of reasonable care to students who are not on campus and are not engaged in college sponsored activities
- Colleges may be held liable if they know or reasonably should have known that a student poses a foreseeable threat to the safety of other students on campus or during college-sponsored activities

Barlow v. State of Washington

Still waiting for Ninth Circuit to rule. Likelihood is that WSU will prevail, but only because misconduct occurred off campus

Student Conduct Officers need to understand how to identify, assess and address risks associated with certain behavior

If warranted, Student Conduct can reduce risk by

- 1. Expelling or suspending student
- 2. Removing/banning access to student housing
- 3. Prohibiting participation in college activities: travel, conferences, club and athletic activities, and so forth

Fact sensitive analysis

Barlow v. State of Washington

QUESTIONS?

Title IX -UPDATE

- Department of Education forwarded the final rule to the Office of Management and Budget (OMB) on February 2, 2024
- OMB has 90 days in which to review at which point final rule will issue – probably late April or early May 2024
- If time allows, AGO will be drafting model rules with assistance from stakeholders

NOTICE OF PROPOSED RULEMAKING (NPRM)

Issued on June 23, 2022 – Fiftieth Anniversary of Title IX

Imposes procedural requirements for all claims of sex-based discrimination, including discrimination arising from:

- Sexual harassment;
- Sex stereotypes;
- Sex characteristics;
- Pregnancy and other related conditions;
- Sexual orientation; and
- Gender identify.

Sexual Harassment Definitions

Hostile Environment Harassment redefined as:

Unwelcome sex-based conduct that is sufficiently severe or pervasive that, **based on a totality of the circumstances and evaluated objectively and subjectively**, the conduct denies or limits a person's ability to participate in or benefit from the IHE's education program or activity.

Quid Pro Quo Harassment redefined as:

when an employee **or other person authorized by an IHE** to provide an aid, benefit, or service explicitly or impliedly conditions that aid, benefit or service on a person's participation in unwelcome sexual conduct.

Definitions for Sexual Assault, Domestic and Dating Violence, and Stalking largely unchanged

Expanded Jurisdiction

IHEs required to address all sexual discrimination in their education programs and activities, including:

- Discrimination that occurs overseas
- Discrimination that occurs in any building owned or controlled by a student organization that is officially recognized by the IHE
- Conduct that occurs off campus when the respondent is:
 - A representative of the IHE; or
 - Otherwise subject to the IHE's disciplinary authority
- Complainants not required to be actively engaged or seeking to engage with IHE's program or activity.

Title IX does not preempt obligation to comply with state or local laws, or other requirements that provide greater protection against sex discrimination

Title IX Coordinator Response to Sex Discrimination

- ❖ At least one employee must be designated as a Title IX Coordinator
- ❖ Coordinator responsibilities may be assigned to others, but Coordinator must retain “ultimate oversight”
- ❖ Coordinator authorized to consult with disability services if complainant or respondent is a student with a disability
- ❖ Must monitor for barriers to reporting sexually discriminatory conduct and take steps to reasonably calculated to address those barriers
- ❖ Coordinator can serve as decisionmaker and/or investigator

Reporting/Notification Requirements

- Confidential employees with information about suspected sexual discrimination must refer impacted party to Title IX Coordinator
- Employees who have authority to institute corrective measures must report suspected discriminatory conduct to Title IX Coordinator
- Administrative leaders, teachers, or advisors with information about suspected discriminatory conduct against a **student** must notify the Title IX Coordinator
- Administrative leaders, teachers, or advisors with information about suspected discriminatory conduct against an **employee** must either notify the Title IX Coordinator or refer impacted employee to Title IX Coordinator
- All other employees must either report suspected discrimination to Title IX Coordinator or refer impacted party to Title IX Coordinator
- IHEs have discretion re: requirements for students who are also employees

Maintaining Activities & Programs Free from Sex Discrimination (cont.)

Confidential Employees

- IHEs should identify Confidential Employees to all participants
- Confidential employees must explain their status when informed about possible sexual discrimination and provide person with referral to Title IX Coordinator

Disclosures of sexual harassment during in-person or on-line public awareness event

- IHE not required to act unless there is an immediate and serious threat to the health or safety of college community members
- IHE must use this information to inform its efforts to prevent sex-based harassment and to address alleged sex-based harassment within particular programs or locations

Grievance Procedures Applicable to All Sex Discrimination Complaints

Sex discrimination grievance procedure only applies to allegations against an individual – “When a sex discrimination complaint that an [IHE] policy of practice discriminates on the basis of sex, the [IHE] is not the respondent”

The Decisionmaker may be the same person as the Title IX Coordinator or investigator (will allow Title IX procedures to align with standard student conduct procedures)

Respondent is presumed not responsible until completion of the discipline process

Case may be dismissed at any time if

- IHE is unable to identify respondent after taking reasonable steps to do so
- Respondent is no longer a student or employed by the IHE
- Complainant withdraws the allegations and IHE lack sufficient corroborating evidence to proceed
- IHE determines that conduct alleged in complaint, even if proven, does not constitute sex discrimination

IHE must provide all parties notice of dismissal and information necessary for appeal

Grievance Procedure for Sex-Based Harassment Complaints Involving Students

- Parties have the right to an advisor of their choosing during the investigation and disciplinary processes
- Live hearing not required
- IHE may “reasonably delay” issuing notice of allegations to address safety concerns appropriately. Safety concerns must be based on individualized assessment
- IHEs may take reasonable steps to ensure against the unauthorized disclosure of materials obtained exclusively through grievance process by parties and their advisors
- IHE must provide advisor if party does not have one
- Advisor must conduct questioning during live hearings
- Decisionmaker cannot rely on testimony of party who refuses to answer question relating to credibility

Pregnancy and Related Conditions

Discrimination based on student's current, potential, or past pregnancy or related conditions is prohibited

Student may voluntarily participate in "separate portion" of educational program or activity provided the separate portion is equivalent to what is offered to non-pregnant students

When an employee is informed about a student's pregnancy, the employee must promptly inform student about how they to contact the Title IX Coordinator for assistance

Upon learning that a student is pregnant, the Title IX Coordinator must promptly inform the student about:

- The prohibitions against sexual discrimination
- Offer reasonable modifications to IHE policies, practices, or procedures
- Allow access, on a voluntary basis, to any separate and comparable portion of the IHE's programs or activities
- Allow voluntary leave of absence
- Ensure availability of lactation space
- Grievance procedures for sexual discrimination

QUESTIONS?