

Defending the Title IX Student Discipline case -Minnesota Perspectives

Moderator:

Carolyn Agin Bruno, Bruno Law PLLC, Minneapolis, MN

Panel:

Joe Tamburino, Caplan & Tamburino Law Firm, P.A., Minneapolis, MN

Christa Groshek, Groshek Law, Minneapolis, MN

Eric Rosenberg, Rosenberg & Ball, LPA, Granville, OH

Why are we discussing Title IX cases at CJI?

United States Department of Education Office for Civil Rights (OCR)

April 4, 2011

Dear Colleague Letter during President Obama's administration
from- Russlynn Ali, Assistant Secretary for Civil Rights

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

What are a school's obligations under Title IX regarding sexual violence:

Once a **school knows or reasonably should know** of possible sexual violence, it must take **immediate and appropriate action** to investigate or otherwise determine what occurred.

If sexual violence has occurred, a school must take prompt and effective steps to end the sexual violence, prevent its recurrence, and address its effects, whether or not the sexual violence is the subject of a criminal investigation.

A school must take steps to protect the complainant as necessary, including interim steps taken prior to the final outcome of the investigation.

A school must provide a grievance procedure for students to file complaints of sex discrimination, including complaints of sexual violence. These procedures must include an equal opportunity for both parties to present witnesses and other evidence and the same appeal rights. (This includes the complainant)

A school's grievance procedures must use the preponderance of the evidence standard to resolve complaints of sex discrimination.

A school must **notify both parties** of the outcome of the complaint.

<https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf>

If the University fails those duties, possibly lose federal funding and other sanctions. 358 investigations still open.

<https://projects.chronicle.com/titleix/>

Title IX THE CHRONICLE OF HIGHER EDUCATION

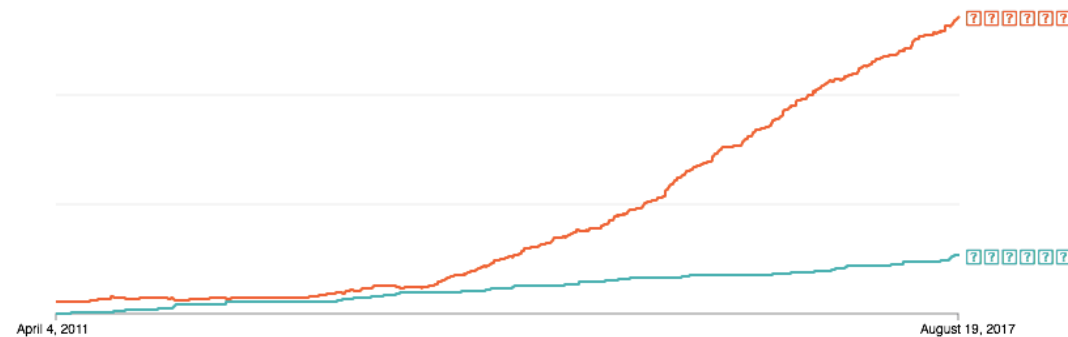
API ABOUT CONTACT SEARCH f t

Subscribe to receive
WEEKLY UPDATES

Title IX

Tracking Sexual Assault Investigations

OVERVIEW
RECENT DEVELOPMENTS
ESSENTIAL READING
ABOUT
CONTACT US



In this era of enforcement, the government has conducted 429 investigations of colleges for possibly mishandling reports of sexual violence.

So far, 71 cases have been resolved and 358 remain open.

Search by college or keyword...

Go

[View all investigations](#)

Education Secretary Betsy DeVos

Too many students have been treated unfairly by the Obama era mandates.

“No student should feel like there isn’t a way to seek justice, and no student should feel that the scales are tipped against him or her,”

No details have been given on what changes might be coming.

https://www.washingtonpost.com/news/education/wp/2017/07/13/advocates-press-devos-to-keep-protections-in-place-for-victims-of-sexual-assault/?utm_term=.b143009b10cd

Lawyers and support organizations have mobilized and students are fighting back:



Families Advocating for Campus Equality

<https://www.facecampusequality.org/our-stories.html>

Help Save our Sons

<http://helpsaveoursons.com>

National Coalition For Men Carolinas (NCFMC)

<https://www.ncfmcarolinas.com/attorneys>

Title IX

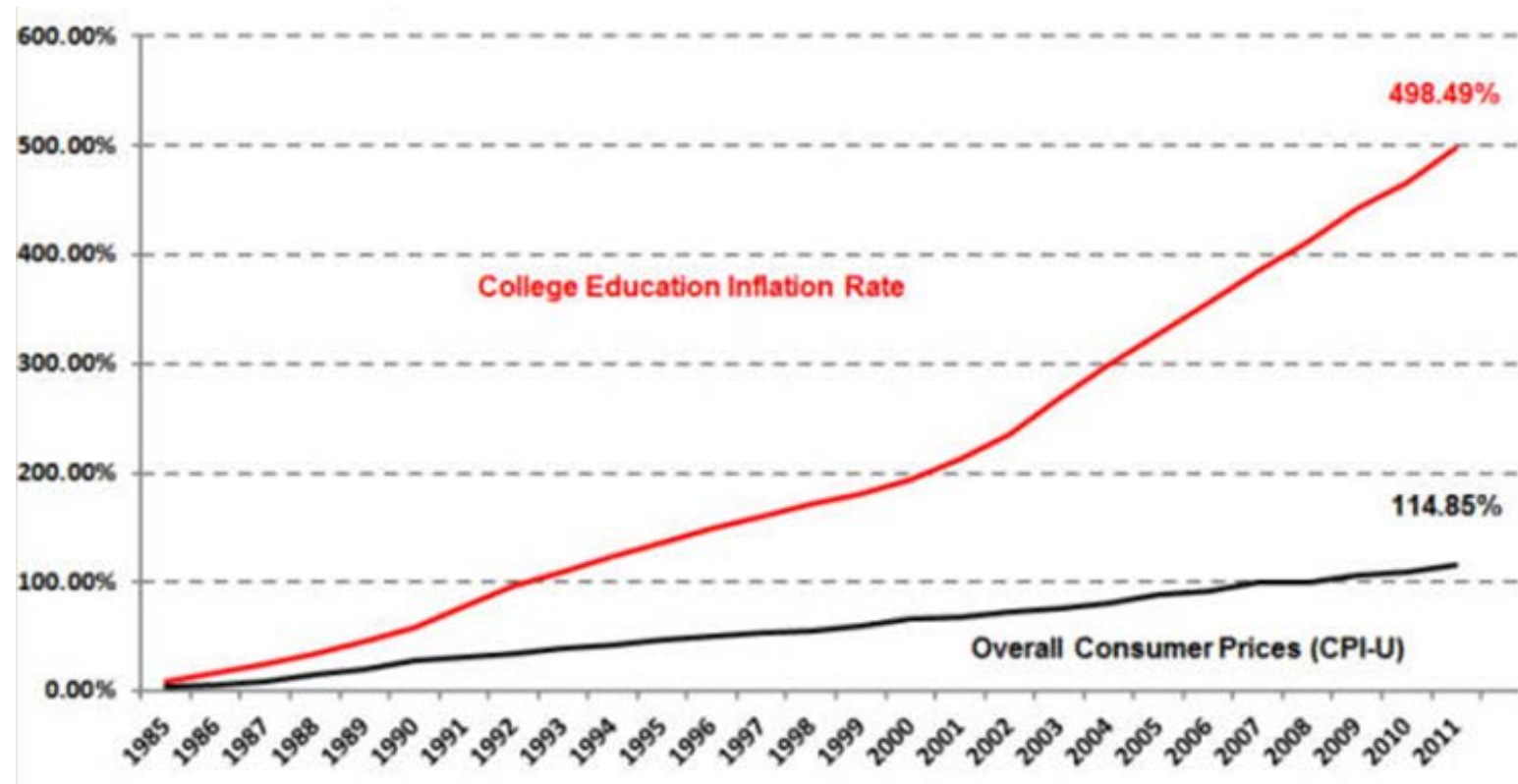
JOE TAMBURINO

CAPLAN & TAMBURINO LAW FIRM, P.A.

Cost of Living: Then and Now¹

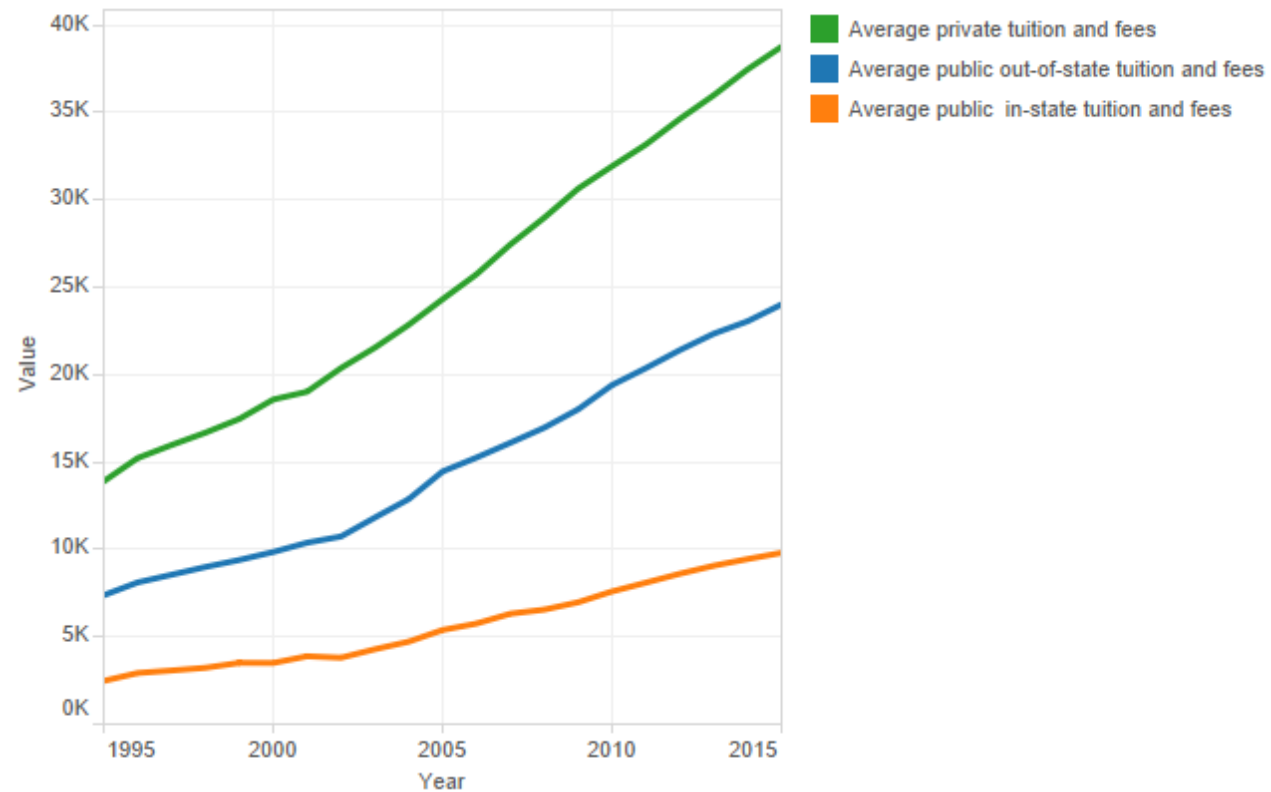
<u>1975</u>		<u>2015</u>
\$48,000	New House	\$270,000
\$12,686	Median Income	\$51,759
\$3,800	New Car	\$31,252
\$2.10/hour	Minimum Wage	\$8.25/hour
\$2.03	Movie Ticket	\$8.17
\$0.59/gallon	Gas	\$2.38/gallon
\$0.13	Stamps	\$0.49
\$1.65/gallon	Milk	\$3.49/gallon
\$1.12/pound	Coffee	\$4.91/pound

College Tuition & Fees vs. Overall Inflation²



20 Years of Tuition Growth³

Sheet 1



1995

In-State	\$2,475.76
Out-of-State	\$7,373.92
Private	\$13,891.79

2015

In-State	\$9,803.03
Out-of-State	\$24,015.04
Private	\$38,762.07

%↑

In-State	296%
Out-of-State	226%
Private	179%

BIG Business = train

Legal compliance
training for higher
education institutions
specializing in Title IX
and the Violence Against
Women Act (VAWA)⁴



Many schools throughout the country, public and private, rely on trainED⁵

Disciplinary Hearings—Panels

University of Minnesota – Twin Cities

Hearings are presented to three to five panelists on the Student Sexual Misconduct Subcommittee (SSMS) which was first implemented in the Fall of 2016. SMSS was developed to shorten the amount of time it takes to process sexual misconduct cases and to make sure that panelists receive sufficient training.⁶

University of Minnesota – Duluth

Membership of the Student Hearing Panel is comprised of students, faculty and staff of UMD undergo an extensive application and training process and must be in good standing with the University.⁷

Disciplinary Hearings—Boards

St. Thomas (Undergraduate and Graduate Programs)

A hearing board will consist of one board chairperson, one hall/area director or other professional member of the residence life staff, two faculty/staff members and one student member.⁸

Macalester

A Conduct Hearing Board will consist of two students and two staff/faculty selected from a pool of members and a chair designated by the Dean of Students.⁹

Hamline

The conduct board is appointed by the Conduct Officer and selected from a pool of members from the designated academic units. The appeals board shall have a minimum of three members in addition to the chair.¹⁰

Disciplinary Hearings—Boards

Mitchell-Hamline Law School

The committee shall consist of three full-time faculty members who serve on the Code Committee appointed by the Dean and two students appointed by the President of the Student Bar Association.¹¹

St. Catherine's

The role of Hearing Officer will be assumed by the Dean of Student Affairs, the Associate Dean for Students and Retention, the Assistant Dean of Students-Minneapolis, the Director of Residence Life, the Associate Director of Residence Life or a Residence Life Complex Coordinator. There are no students involved on disciplinary boards.¹²

Due Process

- The Due Process Clause of the Fourteenth Amendment to the United States Constitution forbids any State from depriving “any person of life, liberty, or property, without due process of law.”
- Two types of due process emanate from this clause: substantive and procedural.
 - Substantive due process “protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'”¹³
 - Procedural due process requires the government to use fair procedures when depriving an individual of life, liberty, or property. Specifically, it requires the government to “provide that individual with notice of the proposed action and an opportunity to be heard.”¹⁴

Doe v. The Ohio State U., 136 F. Supp. 3d 854, 863–64 (S.D. Ohio 2016)

Due Process

Public Schools

- Due Process burden is higher
 - State action
 - Balancing test
 - Hearings discussed throughout the Dear Colleague Letter

Private Schools

- Due Process burden is lower
 - Matter of contract
 - Minimal amount of Due Process required

Due Process – Public Schools

- The State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.
- While a university has broad discretion for academic failings, a student is afforded more due process protection when the school-imposed sanction is for misconduct.
- Determining due process requires balancing the interests and needs of the student against the interests and resources of the university. Due process requires that a student receive oral or written notice of the charges and a hearing at which the student has an opportunity to present “his side of the story.”

Goss v. Lopez, 419 U.S. 565, 574, 95 S. Ct. 729, 736, 42 L. Ed. 2d 725 (1975).

Due Process – Private Schools

- Accused student will likely not prevail on a Due Process argument
 - Not State Action
- However, accused student may have a claim for Breach of Contract
 - Contractual obligation formed from School's Equal Opportunity Policies and Procedures Handbook
 - Provides the framework for procedure to be used by the School during Title IX investigations

John Doe v. Columbia University

- United States Court of Appeals for the Second Circuit
- Decided July 29, 2016
- Allegation: Columbia University violated Title IX and state law by acting with gender/sex bias in investigating Doe and suspending him for an alleged sexual assault
- Holding: Complaint meets the low standard alleging facts giving rise to a plausible minimal inference of bias sufficient to survive a motion to dismiss
 - Vacated and Remanded to the lower court

John Doe v. Columbia University (Facts)

- Columbia investigated Doe for having non-consensual intercourse with a female student
- Doe was summoned to meet with a Title IX investigator who he alleges was biased
 - Turned questioning into cross-examination to elicit a confession
 - Was hostile
 - Did not ask about witnesses
 - Interview or follow up with witnesses
 - Failed to tell him he could submit a written statement
 - Failed to advise him that he could have an advocate
 - Failed to advise him of available resources

John Doe v. Columbia University (Facts)

- When Investigator met with complaining student:
 - Not hostile
 - Open ended questions
 - Advised as to available resources
- Doe reviewed Investigator's notes
 - Inaccurate
 - Inadequately paraphrased his account of the events
 - Doe had to submit a written statement to correct the Investigators notes

John Doe v. Columbia University (Facts)

- At this time, there was a growing concern over Columbia's lack of investigations over female sexual assault claims against male students
 - Not being firm enough
 - Public and school related paper published articles with criticism
 - 23 students filed complains with the United States Department of Education for Title IX violations alleging mishandlings of their complaints

John Doe v. Columbia University (2d Cir.)

- Court of Appeals held Title VII lays the framework for Title IX complaints
 - Reduces the facts Plaintiff needs to show to defeat a summary judgment motion prior to Defendant furnishing a non-discriminatory motivation
 - Also reduces the facts needed to be pleaded
- Allegations of fact must support a minimal plausible inference of discriminatory intent

John Doe v. Columbia University (2d Cir.)

- “The complaint alleges that, having been severely criticized in the student body and in the public press for toleration of sexual assault of female students, Columbia was motivated in this instance to accept the female’s accusation of sexual assault and reject the male’s claim of consent, so as to show the student body and the public that the University is serious about protecting female students from sexual assault by male students...”
- “Against this factual background, it is entirely plausible that the University’s decision-makers and its investigators were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect females students from sexual assault.”

John Doe v. Columbia University (2d Cir.)

■ On remand:

- The case moved forward with scheduling order
- The parties agreed to hold a mediation session with a privately retained mediator
- 10 days later, the parties agreed to a stipulated dismissal, with prejudice.

John Doe v. University of St. Thomas (D. Minn. 2017)

- United States Court of Minnesota
- Currently pending case
- Allegations: (1) Declaratory Judgment under title IX; (2) Violation of Title IX-Erroneous Outcome; (3) Violation of Title IX-Deliberate Indifference; (4) Breach of Contract; (5) Breach of the Covenant of Good Faith and Fair Dealing; and (6) Negligence.
- Holding: Granted University of St. Thomas' motion to dismiss on counts 1-5, denied motion on count 6 stated Doe plead sufficient facts to allege the University of St. Thomas owed him a duty of care.

John Doe v. University of St. Thomas (D. Minn. 2017)

- Count 1: Declaratory Judgment
- Doe's declaratory judgment claim relies solely on violations of regulation promulgated under Title IX – requiring the adoption of certain grievance procedures
- Holding: there is not private right of action, the Declaratory Judgment Act cannot be used as an independent cause of action and, therefore, Doe's claim failed as a matter of law.

John Doe v. University of St. Thomas (D. Minn. 2017)

- Counts 2 & 3: Title IX- Erroneous Outcome and Deliberate Indifference
- Doe must plausibly allege circumstances suggesting gender bias motivated by University of St. Thomas's disciplinary proceeding.
- Doe's allegations were insufficient to show University of St. Thomas' disciplinary process was motivated by gender bias based on the reasons of federal pressure to prosecute male students and similar allegations that males were being treated differently based on gender.

John Doe v. University of St. Thomas (D. Minn. 2017)

- Count 4: Breach of Contract
- Doe must allege a contract and then a breach of the contract
- Holding: Doe failed to allege a breach of contract claim under Minnesota law. The court found it unlikely that the University of St. Thomas formed a unilateral contract under Minnesota law, but also, Doe did not allege any breaches of the Title IX Policy

John Doe v. University of St. Thomas (D. Minn. 2017)

- Count 5: Duty of Good Faith and Fair Dealing
- Because the court found Doe failed to allege a breach of contract, the court must also dismiss this claim as Minnesota does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing without a underlying breach of contract claim.

John Doe v. University of St. Thomas (D. Minn. 2017)

- Count 6: Negligence
- Doe alleged the University of St. Thomas owed him a duty of care to conduct its disciplinary proceeding in a non-negligent manner
- Holding: Doe alleged fact sufficient to overcome a summary judgment motion noting at common law a university has a duty not to arbitrarily expel a student and Doe alleged several mishandlings of his case.

John Doe v. University of St. Thomas (D. Minn. 2017)

- The current pre-trial scheduling order:
 - Amended pleadings due by 5/31/2017
 - Discovery due by 10/31/2017
 - Non-dispositive Motions due by 1/31/2018
 - Dispositive Motions due by 2/28/2018
 - Ready for trial 6/1/2018

Violation of Data Practices Act

Minn. Stat. § 13.01

Applies to public universities

Private or Confidential Data

Minn. Stat. § 13.05 subd. 4

“Private or confidential data on an individual shall not be collected, stored, used, or disseminated by government entities for any purposes other than those stated to the individual at the time of collection in accordance with section [13.04](#), except as provided in this subdivision.”

Tennessee Warning

Minn. Stat. §13.04 subd. 2

“An individual asked to supply private or confidential data concerning the individual shall be informed of: (a) the purpose and intended use of the requested data within the collecting government entity; (b) whether the individual may refuse or is legally required to supply the requested data; (c) any known consequence arising from supplying or refusing to supply private or confidential data; and (d) the identity of other persons or entities authorized by state or federal law to receive the data. This requirement shall not apply when an individual is asked to supply investigative data, pursuant to section [13.82, subdivision 7](#), to a law enforcement officer.”

Other Issues Worth Discussing

- Does the public university give the student (victim, suspect, witness) a Tennessean warning?
- The student maybe asked to provide: confidential or private information.
- The student may not be warned of how the information may be used or the possible consequences from supplying or refusing to supply the information.

Violations of Data Practices Act

- Civil Damages in district court

- Minn. Stat. § 13.08

- Administrative Remedies

- Minn. Stat. § 13.085

- Criminal Charges

- Minn. Stat. § 13.09

Citations

- ¹ *Comparing the cost of living between 1975 and 2015: You are being lied and fooled when it comes to inflation data and the cost of living.* (August 4, 2015), <http://www.mybudget360.com/cost-of-living-compare-1975-2015-inflation-price-changes-history/>
- ² Gordon Wadsworth, *Sky Rocketing College Costs* (June 14, 2012), http://inflationdata.com/inflation/inflation_articles/Education_Inflation.asp
- ³ Travis Mitchell, *Chart: See 20 Years of Tuition Growth at National Universities* (July 29, 2015), <http://www.usnews.com/education/best-colleges/paying-for-college/articles/2015/07/29/chart-see-20-years-of-tuition-growth-at-national-universities>
- ⁴ <http://www.trainedsolutions.com/about-trained/>
- ⁵ <http://www.trainedsolutions.com/clients/>
- ⁶ *Summary of Student Sexual Misconduct Procedures: University of Minnesota Twin Cities*, Available at <https://diversity.umn.edu/eoaa/titleix>
- ⁷ *Student Hearing Panel*, <http://www.d.umn.edu/conduct/shp.html>
- ⁸ *University of St. Thomas Student Code of Conduct: Disciplinary Procedures Non-Academic*, <https://www.stthomas.edu/policies/undergraduate/disciplinaryrightsandprocedures/non-academic/>
- ⁹ *4.3 Student Conduct Process and Procedures*, <https://www.macalester.edu/studentaffairs/studenthandbook/04communityresponsibilities/04-03studentconductprocess.html>

Citations cont'd

¹⁰ *Student Conduct Code*, <http://www.hamline.edu/policies/student-code-of-conduct.html#conduct-process>

¹¹ *MHSL Student Handbook* (August 2016), <http://mitchellhamline.edu/students/wp-content/uploads/sites/9/2011/08/Student-Handbook-2016-17.pdf>

¹² *Student Code of Conduct and Community Expectations: VIII Hearing Procedures*, <http://catalog.stkate.edu/policies/stu-non-acad/comp-griev/code-of-conduct/#Procd%20for%20Appeal%20Hearing%20Decisions>

¹³ *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (citing *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)).

¹⁴ *Paterek v. Vill. of Armada, Michigan*, 801 F.3d 630, 649 (6th Cir.2015) (quoting *Morrison v. Warren*, 375 F.3d 468, 473 (6th Cir.2004)).