



Analyzing the two avenues of Title IX liability to a victim of sexual misconduct

By Steven Richard

Title IX of the Education Amendments of 1972 (“Title IX”) is enforceable through an individual’s private right of action, which has given rise to two general avenues for sexual discrimination claims in litigation. The first avenue concerns an alleged “official policy” of intentional gender discrimination by a recipient of federal financial assistance, which has typically arisen in matters of admissions, scholarship administration or athletic programming. The second avenue has typically applied to claims of sexual harassment or assault, where the primary elements are: (a) actual knowledge that a student has faced sexual misconduct in the institution’s program and activities and (b) deliberate indifference with respect to addressing the sexual misconduct that the institution knows is occurring.

Increasingly, plaintiffs are relying upon both avenues in Title IX lawsuits seeking redress for sexual misconduct. As noted above, plaintiffs typically assert the institution responded with deliberate indifference *after* they reported the sexual misconduct. Plaintiffs are also asserting concurrently that *before* their initial reports of the sexual misconduct, the institution engaged in an “official policy” of discrimination posing a heightened risk to students. This alert addresses a recent judicial ruling analyzing such expansively pled Title IX claims. *Jane Does 12-15 v. Baylor Univ.*, Case No. 6:17-CV-236-RP (W.D. Tex. September 29, 2018).¹

Background

Four plaintiffs alleged that, while each was a student at Baylor University, she was sexually assaulted by another student. The university contends that its investigations were prompt and reasonable. Plaintiffs, however, allege that when they were sexually assaulted, Baylor discouraged them from reporting their assaults, failed to adequately investigate each of the assaults, misled them about their options for reporting and accommodations and obstructed their access to medical and mental health treatment.

¹ The plaintiffs alleged both Title IX and state law claims. This alert focuses on the liability standards addressed under the Title IX claims. Additionally, the court undertook a statute of limitations analysis of the pre- and post-reporting claims of all four plaintiffs, finding that one plaintiff asserted untimely post-reporting claims. The reader should refer to the decision for a further elaboration of the state law and limitations period aspects of the court’s rulings. See 2018 U.S. Dist. LEXIS 169710.

Post-reporting sexual harassment or assault

Addressing first what it considered a “traditional” claim for sexual assault under Title IX, the court concluded that the plaintiffs had pled sufficiently plausible post-reporting allegations. The plaintiffs have placed at issue sufficient facts suggesting that “appropriate persons” at Baylor had actual knowledge of the reported sexual assault allegations and may have responded to plaintiffs’ reports in a manner that was clearly unreasonable.

In arguing for the dismissal of the post-reporting claims, Baylor stressed that the university was not required to deliver any particular accommodation or remedy to the plaintiffs after they reported their assaults. Plaintiffs countered that, after receiving several reports of alleged sexual assaults, “high-level, policy setting” university officials did not effectuate any change in the sexually hostile environment. Taking plaintiffs’ allegations as true at the pleading stage, the court concluded that they pled a “body of evidence” suggesting that the university failed to respond to reports of sexual assault in a reasonable manner.

Further, Baylor argued that plaintiffs failed to plausibly allege that they were subjected to further harassment after reporting their sexual assaults. The court rejected this argument for dismissal, citing the Supreme Court’s Title IX precedent in *Davis v. Monroe Cty. Bd. Educ.*, 526 U.S. 629 (1999). Specifically, the court found that *Davis* “made clear” that to subject a student to harassment, a school only needs to make the student vulnerable to that harassment. It is important to note that not all federal courts have similarly interpreted and applied *Davis* in this manner, requiring more than vulnerability to satisfy post-reporting Title IX liability.

Heightened risk of sexual harassment or assault

As to the “official policy” avenue, plaintiffs alleged that the university’s insufficient handling of reports of sexual assaults created a heightened risk of sexual misconduct throughout the university’s student body. The court concluded that the plaintiff’s “heightened risk claims fit squarely within the official-policy rubric” of Title IX’s avenues for institutional liability. In allowing the claims to survive dismissal, the court expressed some caveats, including the concerns that this theory of Title IX liability could be read to imply that “higher education institutions, due to the prevalence of sexual assaults among college-aged individuals, would face near constant liability.” In response, the court confirmed that a claim cannot be premised on the occurrence of sexual misconduct alone, but the incident must be shown to have been *caused by* an official policy or custom of the university. The court, however, did not articulate in detail precisely what causation factors could sufficiently tilt the evidentiary scales in favor of Title IX liability.

At the pleadings stage, the court rejected the university’s several arguments that the plaintiffs’ heightened risk liability claims should fail as a matter of law. Baylor argued that the plaintiffs failed to show that the university had control over the alleged assailants at the time of the alleged assaults, including incidents that occurred off-campus. The court relied again upon its “official policy” analysis to conclude that the allegations suggest plausibly that the university could have taken more steps in response to reports to have prevented the alleged assaults, including the off-campus activity. Further, Baylor argued that “official policy” liability could only ensue through a formal institutional decision, which the court rejected. In doing so, the court referenced several allegations that senior officers and employees had discouraged sexual assault victims from reporting or had failed to properly direct complainants to available supportive resources.

Implications for Title IX lawsuits

The “heightened risk,” pre-reporting aspects of this ruling require particular attention, as there is a split in courts regarding the plausibility and extent of such a claim. Several Title IX cases have ruled that an institution must have prior actual knowledge that a particular student assaulted or harassed another student, yet was deliberately indifferent to that assault or harassment, making more likely that the individual would sexually assault or harass someone else. This *Baylor* ruling goes beyond that scope and allowed the plaintiffs to survive a motion to dismiss by focusing on alleged lax responses by the institution in general, subjecting the institution to potential liability even though it had no actual notice that a particular student had ever sexually harassed or assaulted anyone previously.

It is important to note that the court’s ruling arose in the initial stage of the litigation, the adjudication of Baylor’s motion to dismiss the complaint. Given the procedural posture, the court had to accept the truth of plaintiffs’ well-pled factual allegations and determine only whether plaintiffs had asserted plausible Title IX claims for relief. The ruling allows the litigation to proceed to discovery for the development of a factual record, where both sides will fully define the factual support for their respective positions and the university may move for a pre-trial disposition via a summary judgment motion. Discovery relating to “heightened risks” could be especially broad, where the parties may disagree over the appropriate relevancy and proportionality of the examination into alleged campus “environment” or “atmosphere” considerations.

For purpose of Title IX litigation defense strategy, this ruling provides an important reminder to colleges and universities regarding the potential for expansively pled and litigated claims in a Title IX lawsuit. When facing a Title IX lawsuit, a college or university must recognize that its response to a particular reported incident might not be analyzed solely by a court in isolation, but in connection with other temporally connected or similarly arising incidents. As a sound defense strategy, a college or university should establish early in the litigation, either through pre-trial rulings or conferences with the court, the precise scope of the applicable claims and permissible discovery, particularly where Title IX causes of action are premised upon theories of intentionally discriminatory policies or customs pre-dating the harassment or assault directed at the plaintiff.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Steven M. Richard at srichard@nixonpeabody.com or 401-454-1020
- Michael J. Cooney at mcooney@nixonpeabody.com or 202-585-8188
- Tina Sciocchetti at tsciocchetti@nixonpeabody.com or 518-427-2677
- Eliza T. Davis at etdavis@nixonpeabody.com or 312-977-4150
- Kacey Houston Walker at kwalker@nixonpeabody.com or 617-345-1302