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Court finds that a student's perceived vulnerability to additional harassment may support a deliberate indifference claim

By Steven M. Richard

Federal courts have divided on the question of whether a plaintiff, who reported student-on-student sexual misconduct to a school administrator authorized to take responsive action, can pursue a Title IX claim in the absence of subsequent harassment.¹ Some courts have held that the plaintiff must show post-incident harassment to sustain a deliberate indifference claim. Other courts have concluded that a student must show only a “vulnerability” to further harassment. Recently, an Arkansas federal district court ruled that a plaintiff is entitled to a jury trial on her Title IX claim because she had a reasonable fear of encountering her assailant on campus after the university did not effectively communicate the result of its disciplinary process. *Fryberger v. University of Arkansas, et al.*, No. 5:16-cv-5224, 2019 WL 6119253 (W.D. Ark. Nov. 18, 2019).

Background

A former student filed a Title IX lawsuit against the University of Arkansas in Fayetteville regarding her October 2014 report that she was sexually assaulted in her dorm room by another student. The complainant left the campus during the university's prompt investigation. From her home, she requested academic accommodations and a change in housing assignment upon her return to school. Through an advocate, the complainant expressed her belief that the university was not fully responsive to her requests.

The university convened a disciplinary hearing panel on December 11, 2014, to address sexual misconduct charges against the respondent. In addition to its review of the investigative report, the panel received a record of the respondent's prior disciplinary history, which included three incidents of threatening and disruptive behavior against students and resulted in sanctions of probation and a suspension. The panel held the respondent culpable for sexual misconduct violations against the complainant and recommended his immediate expulsion.

¹ *Must a Title IX plaintiff allege further post-incident harassment to plead a plausible Title IX claim*, Nixon Peabody Higher Education Alert (March 19, 2019).
<https://www.nixonpeabody.com/en/ideas/articles/2019/03/20/title-ix-on-pleading-requirements>

The respondent appealed the panel's decision. In a letter dated, January 29, 2015, the appeal officers notified the respondent of their decision to uphold the panel's findings of code violations. Their letter, however, stated that because the respondent completed his graduation requirements before the disciplinary hearing, an immediate expulsion would not be imposed. Rather, the letter stated that the respondent's expulsion would take effect on the day after his graduation in May 2015.

A day later, the university provided the complainant with electronic notice of the decision. It notified her that the panel's finding of a code violation was upheld, but omitted certain details of the respondent's punishment. The notice stated that the university upheld the expulsion sanction, but made no mention of the decision to delay the expulsion until May 2015. The complainant's advocate requested clarification regarding the expulsion date, and the university's general counsel responded that it took effect in May.

On February 10, 2015, the university issued an updated letter to the respondent and notice to the complainant. The university indicated that its January 29 letter was transmitted in error based on an incorrect version of the appeal decision, which had not received final approval. The university clarified that it expelled the respondent effective as of December 11, 2014—the date of the disciplinary hearing.

The complainant alleged that the university's initial communication regarding the appeal decision confused her, impacted her mental health, and caused her to question whether the respondent was still allowed on campus. During the spring 2015 semester, the complainant resumed her studies on campus but struggled academically. She did not return to the university for the following academic year. She filed suit against the university alleging Title IX violations before and after her October 2014 sexual assault, and the university moved for summary judgment. Weighing the record evidence in a light most favorable to the plaintiff, the Arkansas federal district court granted the university's dispositive motion on the "pre-assault" claims but held that there are triable questions of fact on the "post-assault" claims.

Pre-assault claims

Plaintiff argued that the university should not have permitted the respondent to be on campus as of the October 2014 assault, based upon his prior disciplinary history. The court found no Title IX liability because the university investigated each prior matter and responded with sanctions. The plaintiff portrayed the university's sanctions as "meaningless" with "little effect."

The court stressed that it must not second-guess a university's disciplinary measures. The university investigated each incident and responded with a sanction that it deemed appropriate. "Whether or not that sanction was, in fact, appropriate, there is no dispute that the [u]niversity in good faith believed it was appropriate." Therefore, the university could not be held liable for alleged deliberate indifference prior to the October 2014 assault.

Post-assault claims

The university argued its response to the reported assault was objectively reasonable. Plaintiff raised three claims of deliberate indifference by the university: (1) it allowed the respondent to remain on campus during the investigation; (2) it failed to provide her with sufficient accommodations; and (3) it mishandled the appeal process.

Regarding the first claim, the court found no deliberate indifference. Because the respondent denied the allegations, "[i]mposing an interim suspension without a proper investigation may have implicated [his] due process rights." The university implemented appropriate safeguards through no-contact orders.

Regarding the second claim, the court found triable issues of fact. The university argued that there was no deliberate indifference because it provided all of the accommodations that plaintiff requested. The court, however, focused on the timing and responsiveness of the university's measures, not just their ultimate implementation. Particularly, the court noted that the plaintiff felt compelled to leave campus shortly after the assault and raised concerns about the university's consideration of her accommodation requests.

Regarding the third claim, the court focused on the mixed messages in the university's communications during the appeal phase, initially conveying that the respondent's immediate expulsion was not an appropriate sanction. "A reasonable jury could easily conclude that delaying expulsion until after graduation is not expulsion at all, and so find that the [u]niversity took no action after finding [plaintiff] was sexually assaulted." Particularly, as it communicated with the parties, the university was aware of the plaintiff's emotional difficulties, which caused her to leave the campus for the remainder of the fall 2014 semester before returning for the spring 2015 semester. "The issue is not with the ultimate decision of the appeal—that decision favors [plaintiff]. The problem is with the [u]niversity's handling of the appeal and the contents of its original decision and subsequent communications with [plaintiff]."

The university argued that it should still prevail because there was no evidence that the plaintiff was subjected to sexual harassment by the respondent after she reported the October 2014 assault, which it contended is a necessary causation element for post-assault liability under Title IX. The controlling precedent is *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645 (1999), in which the United States Supreme Court held that "deliberate indifference must, at a minimum, cause students to undergo harassment or *make them liable or vulnerable to it.*" (italics added).

Applying *Davis*, the court disagreed with the university's causation argument. The absence of subsequent harassment was not dispositive. "A victim may be vulnerable to harassment based on her depression or fear of encountering the assailant on campus." The university contended that its second corrective letter negated any such vulnerability, confirming the respondent's immediate suspension. The court, however, ruled that a jury could conclude that it was reasonable for the plaintiff to still question during the spring 2015 semester whether she would encounter the respondent on the campus.

Takeaways

The court's summary judgment ruling is not the end of the case. At trial, the university will present its evidentiary defenses. Yet, the summary judgment analysis offers important lessons for colleges and universities to minimize the risks against deliberate indifference claims.

In a Title IX lawsuit, the school's accommodations (particularly interim measures) will be analyzed not only from the perspective of whether they were afforded and to what extent, but also factoring in the timing and efficiency of their implementation. As addressed above, the court was concerned about the apparent difficulties that the plaintiff encountered as she requested accommodations, which impacted the judicial analysis of the school's responsive measures in their entirety.

Starting from the initial reporting through the adjudicative process, clarity and consistency are vital in the defense against a Title IX deliberate indifference claim. Not only should the contents of official determinations be carefully reviewed before their issuance but, as an often-overlooked practical matter, administrators must remain cognizant that informality in email communications with students can provide fodder for scrutiny in depositions and on the witness stand. The Arkansas case provides a judicial warning that mixed (or worse contradictory) communications can be indicia of deliberate indifference, where plaintiffs can assert that, regardless of the ultimate

responsive action, there was a reasonable fear of remaining “vulnerable” to the risk of further harassment even if it never actually occurred.

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