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## Sixth Circuit ruling widens judicial split on the parameters of institutional liability in Title IX cases

By Steven M. Richard

On December 12, 2019, the United States Court of Appeals for the Sixth Circuit issued a significant ruling on the proof to support a private Title IX cause of action against a college or university based upon student-on-student sexual harassment. The court held that a student-victim plaintiff must plead, and ultimately prove, that the school had actual knowledge of actionable sexual harassment and that the school's deliberate indifference to it resulted in *further actionable sexual harassment* against the same student that caused the Title IX injuries. Without such proof, the plaintiff did not suffer any actual harassment attributable to the school and thus fails to meet the required causation element to sustain Title IX institutional liability. *Kollaritsch, et al. v. Michigan St. Univ. Bd. of Trs., et al.*, Nos. 17-2445/18-1715, 2019 WL 6766998 (6th Cir. Dec. 12, 2019).

Beyond its controlling impact within its federal districts (Kentucky, Michigan, Ohio, and Tennessee), the Sixth Circuit's ruling has national implications because it widens a growing judicial split over whether a plaintiff must show the occurrence of subsequent harassment after the school has actual notice or merely has to show a vulnerability to the possibility of further harassment. Some courts have agreed with the Sixth Circuit that students must show that the school's deliberate indifference actually led to further harassment, not that it only made such harassment more likely. *See, e.g., K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057-58 (8th Cir. 2017);<sup>1</sup> *Reese v. Jefferson Sch. Dist. No. 14J*, 45 F.3d 736, 740 (9th Cir. 2000). Other courts have held that a plaintiff must show only that the school's deliberate indifference made future harassment more likely, not that it actually led to any harassment. *See, e.g., Farmer v. Kan. St. Univ.*, 918 F.3d 1094, 1103-04 (10th Cir. 2019);<sup>2</sup> *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009); *Fryberger v. Univ. of Ark.*, No. 5:16-CV-5224, 2019 WL 6119253, at \*9 (W.D. Ark. Nov. 18, 2019).<sup>3</sup>

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<sup>1</sup> "Eighth Circuit upholds dismissal of non-student's Title IX claim," Nixon Peabody Higher Education Alert (Aug. 4, 2017), available [here](#).

<sup>2</sup> "Must a Title IX plaintiff allege further post-incident harassment to plead a plausible Title IX claim," Nixon Peabody Higher Education Alert (Mar. 19, 2019), available [here](#).

<sup>3</sup> "Court finds that a student's perceived vulnerability to additional harassment may support a deliberate indifference claim," Nixon Peabody Higher Education Alert (Dec. 5, 2019), available [here](#).

## **Background**

The Michigan State case stems from female students' complaints to campus police and proper administrative authorities that they had been sexually assaulted by male students. The university investigated each report and implemented responsive actions. The complainants sued the university contending that the university's responses were inadequate, causing them physical and emotional harms and denials of educational opportunities.

The university moved to dismiss the Title IX claims arguing that no deliberate indifference had been shown. The district court allowed the Title IX claims to proceed based upon the conclusion that the plaintiffs had plausibly shown that they were vulnerable to the threat of further sexual harassment after the university's responses. In an atypical step, the district court certified its ruling at the initial stage of the litigation for interlocutory appellate review because of the split in case law nationally regarding the deliberate indifference analysis.

The Sixth Circuit accepted the interlocutory appeal on the controlling legal question of "whether a plaintiff must plead further acts of discrimination to allege deliberate indifference to peer-on-peer harassment under Title IX."

## **The Sixth Circuit's Title IX analysis**

Citing to the Supreme Court's controlling precedent in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 650 (1999), the Sixth Circuit noted that a private Title IX cause of action against the school for its response to student-on-student sexual harassment must meet a "high standard" of proof that applies only "in certain limited circumstances." As addressed below, the appellate court applied a conservative and narrow reading of Title IX institutional liability under *Davis*.

### ***Actionable sexual harassment***

For student-on-student sexual harassment to be actionable, the Sixth Circuit emphasized that it must be severe, pervasive, and objectionably offensive. Severity requires more than just juvenile behavior among students, even behavior that is antagonistic, non-consensual, and crass. Pervasiveness requires multiple incidents of harassment; one incident is not enough. (We note that the Sixth Circuit's conclusion regarding the legal insufficiency of a single incident has not been uniformly adopted by courts.) Finally, offensiveness must look objectively to the underlying circumstances, not merely the subjective impacts upon the victim.

### ***The deliberate indifference analysis***

The school must first have actual knowledge of the occurrence of an incident of actionable sexual harassment. Once the school is on proper notice, there must be a showing of a further incident of actionable sexual harassment committed by the same student-perpetrator against the same student-victim. Significantly, the plaintiff cannot meet the further harassment requirement based upon conduct by the perpetrator directed at a third party.

To support causation, the plaintiff must show that the further incident of actionable sexual harassment "would not have happened but for the objective unreasonableness of the school's response" to the initial incident. Specifically, the school's alleged deliberate indifference must be shown to have "subjected" the student to the subsequent harassment.

As we have noted in prior alerts, courts have differed in their interpretation of the following two-part causation statement in *Davis*: "the deliberate indifference must, at a minimum, cause students

to undergo harassment or make them vulnerable to it.” 536 U.S. at 644 (italics added). The plaintiffs argued that *Davis*’ reference to “mak[ing] them vulnerable” harassment negates the need to show an actual occurrence of a subsequent incident because vulnerability alone is sufficient to support institutional liability. The Sixth Circuit disagreed by its interpretation that *Davis*’ language actually reveals two possible ways that the school’s “clearly unreasonable” response could lead to further harassment: “that the response might (1) be detrimental action, thus fomenting or instigating further harassment, or it might (2) be an insufficient action (no action at all), thus making the victim vulnerable to, meaning unprotected from, further harassment.” In the Sixth Circuit’s view, this central statement in *Davis* requires a showing of a further incident of harassment caused either by the school’s action or inaction.

Finally, a Title IX plaintiff must show a recoverable injury, which entails the deprivation of access to the educational opportunities or benefits provided by the school. Emotional harm standing alone is not a redressable Title IX injury.

### **The Sixth Circuit’s application of its analysis**

In its review of the plausibility of each plaintiff’s Title IX claim against the university, the Sixth Circuit analyzed “whether the perpetrators’ behavior after the school’s response, . . ., satisfies the causation element, [], or whether the post-response behavior could not, as a matter of law, satisfy the standard for *actionable* sexual harassment and, consequently, could not satisfy the causation element.” (italics in original).

One plaintiff, Student 1, reported that a male student, John Doe 1, sexually assaulted her. The university disciplined John Doe 1 by placing him on probation and forbidding his contact with Student 1. Subsequently, Student 1 encountered John Doe 1 at least nine times, which she deemed to be stalking, harassment, and intimidation and led her to file a retaliation complaint. The university’s investigation determined that no retaliation occurred. The Sixth Circuit ruled that Student 1 failed to plead any actionable harassment because she did not show that any of the subsequent encounters were sexual in nature or were severe, pervasive, and objectively unreasonable. The encounters arose only from the students’ mutual presence on campus. Because Student 1 did not plead any actionable further sexual harassment, she did not state a plausible deliberate indifference claim against the university.

A second plaintiff, Student 2, reported that John Doe 1 sexually assaulted her (after the proceedings regarding Student 1’s complaint). The university’s investigation determined that there was insufficient evidence to find that a sexual assault occurred. Thereafter, John Doe 1 did not have any contact with or commit any further harassment of Student 2; in fact, he withdrew from the university and never returned. Although Student 2 feared that John Doe 1 could still be on the campus, her subjective beliefs were insufficient to support a plausible deliberate indifference claim in the absence of any subsequent encounter, much less the occurrence of any further actionable sexual harassment.

A third plaintiff, Student 3, reported that a male student, John Doe 2, sexually assaulted her. The university expelled John Doe 2 and initially denied his appeal. When John Doe 2 filed a second appeal, a university administrator set aside the prior findings and ordered a new investigation undertaken by an outside law firm, which found no sexual assault. Thereafter, John Doe 2 did not have any contact with or commit any further harassment of Student 3, so her Title IX claim was legally implausible given the absence of any further actionable sexual harassment.

## Takeaways

The plaintiffs have petitioned for *en banc* review by the entire Sixth Circuit, which remains pending as of the writing this alert. While appellate courts do not typically conduct an *en banc* review of unanimous panel rulings, the important Title IX issues at stake could prompt the Sixth Circuit to do so. Further, if the result stands at the Sixth Circuit, the plaintiffs will likely petition for the United States Supreme Court to issue a writ of certiorari in light of the split in circuit court authority. Although the Supreme Court hears only a small number of writs of certiorari per term, the high court may be receptive to resolving the differing judicial determinations of what it meant in *Davis*' statement referencing a student's vulnerability to harassment and what is required to show causation to support institutional liability under Title IX.

In the meantime, a school must understand the controlling precedent in its jurisdiction for risk management assessments and the proper framing of a defense in a civil lawsuit arising from student-on-student sexual misconduct. Regardless of where your jurisdiction may stand in the civil liability analysis, schools must remain fully cognizant of their obligation to undertake prompt and equitable responses to sexual misconduct complaints and prevent the perpetuation of a reported hostile educational environment, which mandates not just the undertaking of responsive measures but also the continuing evaluation of their effectiveness. A Title IX response is not a static snapshot, but rather is an evolving process often posing new dynamics as it moves forward.

Also, the Sixth Circuit's ruling emphasized that, under *Davis* and its progeny, a student-complainant's subjective dissatisfaction with a school's Title IX response is not dispositive to the deliberate indifference analysis. Still, schools should recognize in their defense of a Title IX lawsuit that courts nonetheless often factor in a student's subjective beliefs as part of the overall liability analysis, including the evaluation of whether there have been any deprivations of access to educational opportunities. This aspect of the ruling will be important to reevaluate upon the issuance of the Department of Education's impending Title IX regulations (perhaps finalized and issued within the next month), given their procedural requirements applicable to a school's responsive investigation and adjudication of student-on-student sexual misconduct complaints.

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