

March 23, 2020



The Sixth Circuit speaks again on Title IX deliberate indifference

By Steven Richard and Kacey Houston Walker

The United States Court of Appeals for the Sixth Circuit continues to be a leading federal circuit court in addressing the scope of liability in private Title IX lawsuits. Its rulings control over the federal district courts of Kentucky, Michigan, Ohio, and Tennessee, but its analysis must be understood nationally. As other federal circuits agree or disagree with the Sixth Circuit's Title IX analysis, binding precedents will either expand in jurisdictional scope or create conflicts that could prompt review by the United States Supreme Court.

In its ruling issued on December 12, 2019, in *Kollaritsch v. Michigan State University Board of Trustees*, the Sixth Circuit held that, in order for a school to be held liable under Title IX for deliberate indifference, the school's response to a complaint of harassment must have failed to protect the plaintiff against actual further harassment.¹ Other courts, most notably the Tenth Circuit, have differed in their deliberate indifference analyses, finding a student's vulnerability to further harassment—even without its actual occurrence—may be sufficient to support a deliberate indifference claim.²

On March 11, 2020, the Sixth Circuit issued another significant ruling that builds upon its analysis in *Kollaritsch*. In *Foster v. Board of Regents of the University of Michigan*, the Sixth Circuit addressed whether a university could be found to have acted with deliberate indifference where the accused student committed further acts of harassment against the plaintiff after the school had implemented responsive measures. As we address below, the three judges who presided over the appeal split 2-1 in their analysis of what constitutes sufficient deliberate indifference to support Title IX liability. The majority's opinion concludes that a jury trial should proceed under Title IX,

¹ See our alert analyzing *Kollaritsch*: "[Sixth Circuit ruling widens judicial split on the parameters of institutional liability in Title IX cases](#)," January 02, 2020.

² We issued an alert analyzing the Tenth Circuit's holding in *Farmer v. Kansas State University*, 918 F.3d 1094 (10th Cir. 2019): "[Must a Title IX plaintiff allege further post-incident harassment to plead a plausible claim?](#)" March 19, 2019.

particularly to assess the reasonableness of the university's responsive measures with a focus on issues relating to the foreseeability of further harassment and its resulting causation. The dissenting opinion raises practical concerns about holding a university liable for instituting proportionate responses, particularly as it seeks to balance the concerns of a complainant and the rights of a respondent.

Background

Plaintiff Rebecca Foster and a male respondent student were enrolled in the University of Michigan's executive MBA program, which was held off-campus at a hotel in Los Angeles over monthly weekend sessions. Foster and the respondent student became friends, but the respondent sought a romantic relationship with her while Foster wished their relationship to remain platonic. For several months, the respondent sent Foster unsolicited gifts and expressed a desire to marry her. The respondent's conduct escalated to unwanted touching of Foster and visits to her hotel room, where he attempted to force himself upon her.

In March 2014, as the program was nearing its completion, Foster reported that the respondent had sexually harassed her, and the university commenced a prompt investigation. As an interim measure, it imposed a no-contact order against respondent. Shortly thereafter, the respondent violated the order by sending Foster a text message that stated "Really." Regarding the upcoming and final weekend session in April, the university imposed accommodations, requiring the respondent to stay in a different hotel from the one where the residency would be held, eat in a separate location from Foster, avoid any social activities where Foster was in attendance, and refrain from interacting with Foster during the classes. When a university investigator confronted the respondent about his text message to Foster, the respondent claimed that he sent it to her in error and gave verbal assurance that he would refrain from any harassment.

During the first evening of the final weekend session, the respondent sent a crude email to various university administrators, complaining about the restrictions and disparaging Foster. Upon its receipt, the university considered removing the respondent from class, but decided not to do so out of concern over escalating the situation and an administrator's belief that there was no imminent danger necessitating his removal. That same day, the respondent failed to adhere to the imposed boundaries, creating situations where he was near Foster and made her feel uncomfortable. That evening, he posted on Foster's Facebook wall disparaging comments about her and a threat against her boyfriend. The university prevented the respondent from attending the remaining weekend classes, which prompted him to send emails to classmates protesting his plight.

After the April residency session ended, the respondent sent several emails to university administrators and professors involved in the ongoing Title IX investigation into his conduct. His emails criticized the university's handling of the Title IX matter, used aggressive language, and conveyed various demands. The university's general counsel responded by informing the respondent that he was precluded from participating in the program's upcoming commencement activities and warned that any further harassment "will put your receipt of a degree in grave danger." In the interim, Foster obtained a restraining order in California against the respondent.

In late April, Foster informed the university that she learned through social media and conversations with friends that the respondent would be travelling to Ann Arbor for the commencement. The university planned security measures in case the respondent did so. During a graduation gathering, Foster saw the respondent from a distance and reported his presence to a plainclothes security officer, who told the respondent to leave. The next day, Michigan law

enforcement officers arrested the respondent for violating the restraining order that Foster obtained. He was released into the custody of the university's police department and taken to the airport to board a flight back to California.

Foster sued the university under Title IX, and the trial court entered summary judgment in the university's favor. The trial court held that, as a result of the university responding "promptly, compassionately, and effectively" to Foster's complaints and the respondent's actions, "it would be simply impossible" for a reasonable jury to conclude that the university was deliberately indifferent under Title IX. Foster appealed to the Sixth Circuit.

The majority opinion

Citing the Supreme Court's precedent in *Davis v. Monroe County Board of Education*, the majority reviewed the three elements to support a claim against a school for student-on-student sexual harassment: (1) that the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to an educational opportunity or benefit; (2) that the school had actual knowledge of the sexual harassment; and (3) that the school was deliberately indifferent to the harassment. Applying this three-part test, the majority concluded that Foster showed questions of fact meriting a trial of her Title IX claim against the university and that the district court erred in granting summary judgment.

The record showed that Foster was subjected to "severe, pervasive, and objectively offensive" conduct to satisfy the first prong, and the university did not meaningfully contest this point. Of significance, in assessing the severity, pervasiveness, and objective offensiveness of the harassment, the majority stated that the assessment was not limited only to the period of time after Foster made her report to the university. Rather, the focus concerns "the full scope of the respondent's behavior" before and after Foster's reporting. Regarding the second prong, the university had actual knowledge of the nature of the respondent's prior harassment, which had to be considered as it dealt with and adjusted its responses to the further, post-reporting harassment.

The third prong of the analysis presented the central issue in the case: that is, whether the university was deliberately indifferent to the respondent's harassment of Foster after he signaled that he would not comply with the no-contact order. Citing the Sixth Circuit's recent ruling in *Kollaritsch*, the majority focused on whether the university's responsive actions were "clearly unreasonable in light of the known circumstances," which could show deliberate indifference to "the foreseeable possibility of *further* actionable harassment of the victim." In light of the respondent's "Really" text message to Foster upon the issuance of the no-contact order and his disparaging email to the university (before the students were to attend the April residency session), a jury could reasonably conclude that "these two incidents manifested a clear intention to subject Foster to further harassment, warranting a swift and severe response from the [u]niversity as a means of deterring future misconduct."

Also, the majority noted, the university's responsive measures could be deemed inadequate because the harassment escalated during the April residency through commencement. For example, before the commencement activities, the university "could have taken numerous further responses," ranging from a no-trespass order relating to its campus facilities or an interim suspension. Of significance, the majority stated, "[t]hat some of the respondent's continued misconduct took place over the Internet would not preclude a jury from finding that it was pervasive and deprived Foster of educational opportunities" resulting from the university's alleged deliberate indifference.

The dissent

The dissenting judge maintained that the university did not act with deliberate indifference, as evidenced by its proportionate, escalating responses, “ratchet[ing] up the protections at every turn: from a no-contact order at the outset to a requirement that the harasser stay in a separate hotel for the last three-day session to a removal from the third day of the program to an order that he not attend graduation.” In the dissenting judge’s view, these actions could not be deemed “clearly unreasonable” to reach the “high bar” to prove deliberate indifference. Particularly, the dissent stressed the university’s obligation to protect the rights of the respondent as it instituted its interim measures and Title IX procedures, noting that respondents have often sued schools for denying them educational opportunities without the requisite notice and process. Sending a warning signal regarding the impacts of the majority’s Title IX analysis, the dissent cautioned: “one wonders when the day will come that two different juries will find the same school loses coming and going over the same incident—by insufficiently protecting the rights of the victim in one case and by insufficiently protecting the rights of the accused in another.”

Takeaways

The Sixth Circuit’s ruling has implications beyond its jurisdiction, sending a clear signal that colleges and universities must continually evaluate the effectiveness and proper scope of their interim measures, particularly whether the facts of a given case compel a more draconian response such as an interim suspension. All such actions must be carefully evaluated and documented to defend the responsive measures as they are instituted and in the event of future litigation (whether brought by the complainant or respondent). As the dissent appropriately states, schools face differing expectations, practical boundaries, and equitable balances as they evaluate, implement, and adjust their interim actions.

The majority’s analysis should not prompt a “suspend first” approach to responding to complaints of harassment, but does portend the necessity of thoughtful and thorough threat assessments, not only as of the time of the reporting but throughout the investigative and adjudicative processes. The challenges of conducting such assessments have become more vexing and difficult during the current national emergency, with students now participating in programs and activities remotely and still interacting electronically. The paradigm to evaluate whether a school’s response was “clearly unreasonable in light of the known circumstances” is now subject to considerations that have not been previously encountered or even reasonably foreseen. Consequently, in their ongoing implementation of investigations and responsive actions, colleges and universities must monitor judicial decisions analyzing what is necessary to avoid deliberate indifference to a complainant’s reporting while concurrently protecting the respondent’s rights. To assist in these efforts, we will continue to issue alerts addressing important developments both judicially (particularly to the extent that courts allude to or address directly the current national emergency) and administratively (if the Department of Education finalizes and issues its forthcoming Title IX regulations in the near future).

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

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