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Legal Sidebar

University Liability Under Title IX for Off-Campus Sexual Harassment

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Title IX of the Education Amendments of 1972 (Title IX) requires schools that receive federal funding to respond to the sexual harassment or assault of students by fellow students in certain circumstances. The Supreme Court has established a framework for holding a school liable under Title IX in cases of sexual harassment between students. That framework includes a requirement that a school have "substantial control" over the harasser and the context in which the misconduct occurred. As lower courts have applied the Supreme Court's framework, one question that has arisen concerns the responsibility of a college or university to respond to student misconduct that occurs off-campus. Whether a school exerts substantial control over off-campus activity, and thus incurs an obligation to respond to sexual harassment and assault in that context, can have important implications for colleges and universities. More broadly, it is not always clear when a university has "control" over its students.

Recently in *Brown v. Arizona*, the U.S. Court of Appeals for the Ninth Circuit, in a divided en banc opinion, reversed a district court's dismissal of a Title IX suit against a university involving an off-campus assault of a student. The Ninth Circuit ruled that a factfinder could determine that the university had sufficient control over the context of the misconduct to hold the school liable under Title IX. The majority opinion drew on prior appellate opinions for support, although its reliance on those cases was disputed by several dissenting judges who argued that other appellate decisions were more analogous.

To place the issue in context, this Sidebar begins with background on the Supreme Court's decisions that have established liability standards for schools under Title IX in cases of sexual harassment. The Sidebar then discusses several federal appellate decisions addressing whether a school has substantial control over harassment that the Ninth Circuit's majority and dissenting opinions in *Brown* relied on for support. With this background, the Sidebar continues by examining the Ninth Circuit's decision in *Brown* concerning university liability for off-campus harassment. The Sidebar concludes with considerations for Congress in the context of Title IX and sexual harassment, including a related proposed rule from the Department of Education (ED).

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Background: Title IX and Sexual Harassment

Title IX prohibits sex discrimination in any "education program or activity" that receives federal financial assistance. Most colleges and universities (as well as K-12 public school districts) are recipients of federal funds and thus must comply with the statute and its implementing regulations (although the statute does have various exceptions). The law is mainly enforced through private rights of action directly against schools in federal courts and by agencies that distribute federal funding to education programs. ED's Office for Civil Rights (OCR) enforces Title IX in schools that receive funding from the agency.

Title IX's text does not explicitly create a cause of action, specify judicial remedies available to plaintiffs, or mention sexual harassment. The Supreme Court has nevertheless interpreted Title IX to extend to sexual harassment and has established the relevant standards and available judicial relief in such cases.

Two Supreme Court cases set out the general framework for establishing liability under Title IX in cases of sexual harassment. First, the Supreme Court has interpreted Title IX's bar against sex discrimination to authorize holding school districts liable for damages in certain cases when a teacher sexually harasses a student. In *Gebser v. Lago Vista Independent School District*, the Court ruled that schools can be liable for a damages claim under Title IX for a "deliberately indifferent" response to known acts of harassment.

The Court soon extended the reasoning in *Gebser* to peer-to-peer sexual harassment, ruling in *Davis v. Monroe County Board of Education* that federally funded schools with actual knowledge of such harassment can be held liable for a deliberately indifferent response if certain conditions are met. For one thing, according to the Court, the discrimination must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." In crafting this standard for actionable harassment under Title IX, the Court pointed to its prior decision in the Title VII context, in which the Court recognized a claim for "hostile environment" sexual harassment in the workplace. A hostile environment claim under Title VII must show the harassment is "sufficiently severe *or* pervasive."

The Supreme Court explained that in Title IX cases alleging peer harassment, a school will not be held liable unless its deliberate indifference "subjects" students to harassment. The school's response must, "at a minimum, 'cause students to undergo' harassment or 'make them liable or vulnerable' to it." The harassment thus must occur when the school has "substantial control" over the harasser and the context in which the misconduct occurs. For example, the standard would be satisfied if misconduct occurs on school grounds during school hours. A recipient may be liable for its deliberate indifference to sexual harassment if "the harasser is under the school's disciplinary authority"—the Supreme Court in *Davis* particularly emphasized the school board's authority to take adequate "remedial action" against the harassment. The majority explained that the test accounts for variations in case-specific facts, including "the level of disciplinary authority available to the school." The Court observed a university might not "exercise the same degree of control over its students that a grade school would enjoy."

ED's current Title IX regulations generally track the Supreme Court's standard for schools in cases of sexual harassment between students, although a pending proposed rule would modify that standard in the administrative context.

Substantial Control: Relevant Appellate Decisions

While the Supreme Court's decisions in *Gebser* and *Davis* concerned the K-12 education context, courts have looked to these cases when considering claims of sexual harassment at postsecondary institutions that receive federal financial assistance. As the Court in *Davis* observed, the relative "control" that universities have over their students is distinct in some ways from that in the elementary or secondary education context. A developing issue under Title IX for postsecondary institutions is the extent to which

a university is responsible for harassment that occurs off-campus. The divided opinions in *Brown* disagreed over the relevance of several prior appellate decisions addressing the circumstances in which a university can be said to exercise substantial control over harassment.

Eighth Circuit: *Roe v. St. Louis University*

In *Roe v. St. Louis University*, the Eighth Circuit affirmed a grant of summary judgment for a university in a Title IX sexual harassment suit. The plaintiff student alleged sexual assault by a student fraternity pledge off-campus. The court reasoned in part that *Davis*'s requirement for "control" over the context of misconduct was not satisfied. Because the alleged assault occurred at a private party at an off-campus apartment, the court determined there was no evidence to establish that the university had control over student misconduct in that situation.

Tenth Circuit: *Simpson v. University of Colorado Boulder*

In *Simpson v. University of Colorado Boulder*, the Tenth Circuit ruled that a university could be liable under Title IX for misconduct that occurred off-campus, although the circumstances of the case were relatively unique. In *Simpson*, the plaintiffs alleged they were sexually assaulted by football players and recruits at an off-campus party. The assaults occurred on a recruiting visit, in which the university's football program brought in high school players to be shown "a good time" and paired with female "Ambassadors" from the school.

As an initial matter, the Tenth Circuit determined that the framework established by the Supreme Court in *Davis* for peer-to-peer harassment was an "imperfect" model for the claims at issue. The alleged assaults were not simply incidents that happened to occur between students; instead, plaintiffs alleged that the assaults stemmed from an "official school program" of football recruiting and were the "natural, perhaps inevitable consequence of an officially sanctioned but unsupervised effort" to provide a "good time" for recruits. Looking to the principles laid out in *Gebser* and *Davis*, the Tenth Circuit ruled that a school can violate Title IX through an "official policy," such as "a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient." The panel concluded that "[i]mplementation of an official policy" can satisfy *Davis*'s requirement that a school has "control over the harasser and the environment in which it occurs."

Ultimately, the Tenth Circuit decided that evidence supported a finding that the university violated Title IX; as it had an official policy of showing football recruits a "good time," the alleged assaults were caused by a failure to "provide adequate supervision and guidance" of the program, and the likelihood of "misconduct was so obvious" that the college's "failure was the result of deliberate indifference."

Fourth Circuit: *Feminist Majority Foundation v. Hurley*

In *Feminist Majority Foundation v. Hurley*, university students allegedly harassed the student plaintiffs through an anonymous social media application called "Yik Yak," which allowed students to generate and view anonymous messages known as "Yaks." The district court dismissed the plaintiffs' Title IX claim for sex discrimination, reasoning that the university did not have sufficient control over the context of harassment that largely transpired online. The Fourth Circuit vacated that dismissal, concluding the plaintiffs' complaint survived a motion to dismiss. The panel majority reasoned that although much of the alleged harassment occurred online, the university nonetheless maintained substantial control over the conduct because the harassment "actually transpired on campus." In particular, "harassing and threatening messages originated on or within the immediate vicinity" of the university campus. Some of the messages were posted using the school's wireless network, and the harassment "concerned events occurring on campus and specifically targeted" certain university students. According to the complaint, the university

had the ability to identify and discipline students who posted the messages. The Fourth Circuit accordingly ruled that the plaintiffs had sufficiently alleged facts to establish that the university had substantial control over the context of the harassment and could exercise disciplinary authority over the responsible students.

Can a University Be Held Responsible for Off-Campus Harassment? Ninth Circuit Says Yes

In *Brown v. Arizona*, a University of Arizona student was assaulted by her boyfriend (a fellow student and member of the school's football team) at an off-campus house. The student victim sued the school under Title IX, but a district court initially granted summary judgment to the University of Arizona, ruling that the school did not exercise control over the context of the abuse. The Ninth Circuit, sitting en banc, reversed this decision, concluding the student had presented sufficient evidence that a responsible school official had control over the context of the assault to support liability under Title IX. The perpetrator in the case had previously assaulted two other students; while school officials were notified of these incidents, the misconduct was not conveyed to the university athletic director or football coaching staff.

The en banc Ninth Circuit reasoned that while the location of harassing conduct is important in determining whether a school has control over the context of the misconduct, it is only one relevant factor. Quoting the dissent, the majority opinion explained that in order for a school to "control an off-campus context, an element of 'school sanction, sponsorship, or connection to a school function is required.'" Here, the University's rules and disciplinary authority satisfied this requirement because the University's Student Code of Conduct applied to behavior both off- and on-campus, and the school could issue disciplinary orders to students applicable to conduct off school premises. The Ninth Circuit pointed to the *Feminist Majority* case, in which "the Fourth Circuit identified all the disciplinary and remedial tools that [the university] could have mobilized to mitigate or prevent the on-and off-campus harassment."

Further, in the Ninth Circuit case, the student responsible for the assault was a member of the football team, subject to "increased supervision" through rules specific to the team. Under those rules, permission to live off-campus could be revoked for misbehavior. The court explained that had the football coach known of the student's prior assaults, the perpetrator would have been kicked off the team, resulting in a loss of scholarship. The Ninth Circuit reasoned, pointing to the Tenth Circuit's decision discussed above, that "[a]s in *Simpson*, the University failed to impose its supervisory power and disciplinary authority over an off-campus context, despite having notice of the high risk of misconduct." The court concluded that a jury could find that had the coach known of the prior assaults, the assaults on the plaintiff would not have occurred.

Several judges dissented, distinguishing the cases relied on by the majority opinion and arguing that the court's reasoning had "collaps[ed]" or "conflate[d]" the dual requirements of *Davis* regarding control over a student as well as the context of harassment. One dissenting opinion argued that the majority's reasoning "sever[ed] the pivotal tether to programs and activities of the educational institution that is at the core of Title IX." In addition, that dissent distinguished the *Simpson* case, which concerned an officially sanctioned University program, from the facts of the Ninth Circuit case. The dissent likewise distinguished *Feminist Majority*, where the "pivotal events occurred on campus and ... programs and activities of the University were at the heart of the harassment."

Another dissenting opinion argued that the facts of the case were more like the Eighth Circuit's decision in *Roe v. St. Louis University*, in which there was no Title IX liability for an assault that occurred at an off-campus private party. Under the majority opinion's reasoning, which focused solely on disciplinary control of a student, this dissent claimed, "there are no discernible limits on the circumstances that could

create Title IX liability." For example, a school could be held responsible "for what happens within completely private, unsupervised settings such as spring break trips abroad, online communication, and students' family homes." Further, this dissent argued, the majority opinion relied "only on its own speculation about what might have happened if [the perpetrator] was kicked off the team earlier to conclude that the University controlled the context of this abuse."

The Ninth Circuit's decision is currently stayed, allowing time for the defendants to petition for Supreme Court review.

Considerations for Congress

Some commentators have argued that the Ninth Circuit's decision in *Brown* expands the scope of liability for universities in the context of Title IX sexual harassment cases beyond that of previous cases. Given the fact-specific nature of the "substantial control" standard in Title IX sexual harassment cases, however, it is unclear how far *Brown* might extend beyond the specific facts involved there (where a student repeatedly assaulted other students, remained on the football team, and assaulted yet another fellow student).

Separately, ED's OCR issued a Notice of Proposed Rulemaking (NPRM) in 2022 to amend its Title IX regulations that could impact the scope of liability for universities in some circumstances. The NPRM would, if adopted, provide that schools have an obligation to respond to sexual harassment that creates a "hostile environment" in its education programs or activities. The NPRM further would require that schools must do so "even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States." According to OCR, its current Title IX regulations do not require schools to address harassment occurring outside of its education programs or outside the country.

Congress has a number of options available if it decides to alter the applicable requirements and standards of Title IX. As an initial matter, while Title IX's text does not explicitly address sexual harassment, Congress can amend the law and establish standards applicable to sexual harassment cases. For instance, Congress could define what behavior constitutes harassing conduct or establish a threshold for when schools must respond to harassment.

With respect to a school's responsibility to respond to harassment that occurs off-campus, Congress could resolve uncertainty in this area and establish a statutory standard for courts to apply. For instance, Congress could amend Title IX and explicitly define what counts as an "education program or activity" under the statute. Further, legislation could mandate how ED is to approach the matter, including through the promulgation of regulations consistent with the standard Congress adopts. Alternatively, if ED's proposed rule took effect and Congress disagreed with its provisions, pursuant to the Congressional Review Act, Congress could pass a joint resolution of disapproval within the time limits established by that statute.

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