

The Sixth Circuit Requires Further Student-on-Student Harassment in Order to Hold a School Liable Under Title IX

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The Sixth Circuit Court of Appeals has thrown its hat in the ring, further fueling the circuit split as to a school's liability for post-notice "student-on-student sexual harassment" in its recent opinion *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, 944 F.3d 613, 618 (6th Cir.2019). Dealing specifically in the context where a student, previously sexually harassed by another student, reports this first instance of harassment to the school and is then subsequently harassed post-notice, the question confronted by circuits is whether vulnerability alone without a second, actionable instance of sexual harassment is enough to give rise to school liability based upon deliberate indifference. The Sixth Circuit has answered in the negative.

While Title IX of the Education Amendments of 1972 ("Title IX") provides for a victim to bring a private cause of action against a school arising out of sexual harassment by a fellow student, to be actionable under Title IX, the student-on-student sexual harassment must be (1) severe, (2) pervasive, and (3) objectively offensive. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999).

The inquiry, however, does not end there. If the three-prong *Davis* test is met, a victim must then demonstrate (1) knowledge on the part of the school, (2) an act, (3) injury, and (4) causation in order to establish that the school acted with deliberate indifference to the initial report of sexual harassment.

The circuit split turns upon the interpretation of the United States Supreme Court's causation language in *Davis* and whether mere vulnerability to future harassment is enough to serve as a predicate for a Title IX deliberate indifference claim: "[T]he deliberate indifference must, at a minimum, [1] cause students to undergo harassment, or [2] make them liable or vulnerable to it." While some circuits interpret this second causation requirement to mean that vulnerability is enough, i.e. the possibility the victim could come into contact with the alleged assaulter and open the door for further harassment, the Sixth Circuit refused to adopt this reading, holding that to do so would render the first part of *Davis'* causation requirement superfluous.

It instead chose to adopt a plain reading of the two-part causation statement, interpreting two separate bases for how a school's lack of response could lead to further harassment by either being (1) detrimental so as to instigate further harassment or (2) so insufficient as to make the victim unprotected from further harassment.

Simply put, the school's conduct must either directly lead to more harassment or, in the alternative, be so deficient that no safeguards whatsoever are put in place so as to protect the victim from harassment that *actually occurs*. The "vulnerability" component was not intended, in the Sixth Circuit's view, to create broad liability based upon the possibility of harassment but rather to create liability only where a student experiences post-notice harassment. Thus, the Sixth Circuit bookends student-on-student harassing, requiring an initial act, a report by the victim to the school, and a second act. It is simply not enough for a victim to allege that he or she feels unsafe from a future, potential assault in order to bring a Title IX claim against a school. Rather, there must be a second, actionable sexual harassment to give rise to a deliberate indifference claim under Title IX.

While it remains to be seen whether this interpretation will prevail, the Sixth Circuit has drawn a line in the sand, narrowing a school's liability when it comes to reporting of (and responding to) student-on-student harassment. Next stop, Supreme Court of the United States.

If you have any questions concerning *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, or have any questions regarding Title IX liability, contact a member of our Education Law Liability Practice Group.

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