

**TITLE IX AND SEXUAL MISCONDUCT:
WHAT DOES RECENT CASE LAW MEAN FOR INSTITUTIONS IN CASES OF STUDENT-ON-
STUDENT SEXUAL ASSAULT?**

By

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INTRODUCTION

The Supreme Court decision, *Davis v. Monroe County Bd. of Ed.*, 119 S.Ct. 1661 (1999) presented us with confirmation that colleges can be liable in monetary damages under Title IX, in cases of student-on-student sexual harassment. Today, we are gaining a clearer sense of how the principles of *Davis* will be evolved and be applied from a string of sexual harassment cases against colleges and schools. Not all lessons from these cases have general applicability, but there are emerging some sound strategies to proactively avoid Title IX liability. This White Paper focuses on suggestions for colleges, in practices, procedures, training and policies, that can be used to address the mandates of Title IX as it applies to sexual assault cases.

DISCRIMINATION ON THE BASIS OF SEX

- **Sexual Assault Under Title IX.** Student-on-student sexual assault is sexual harassment. It is well settled that sexual assault is an extreme form of physical hostile environment sexual harassment. Standards that apply to other forms of sexual harassment are equally applicable to incidents of sexual assault, but given the severity of the conduct involved, it may no longer be a best practice to fold sexual assault within sexual harassment in terms of campus policies and procedures. While sexual assault can be a sexual harassment offense, it is different enough that there should also be a stand-alone policy.
- **Interaction of Sexual Assault and Sexual Harassment.** Regardless of policy format, judicial systems should be configured to allow charges for both offenses to be made against a student, arising from the same incident. Where grievances are handled separately by separate bodies, a coordination and referral system should be put in place. This would allow, for example, an ombudsperson who has investigated what was brought

forward as a sexual harassment complaint, to refer that complaint and investigation to the college's judicial affairs department, for more appropriate resolution as a sexual assault.

LIABILITY

- **Deliberate Indifference.** While threats and suits by students charged in campus sexual misconduct cases have become commonplace, we are now seeing a marked increase in complaints against colleges by alleged victims. Title IX is one cause of action that is being used to argue for college liability. A college may be required to pay monetary damages to a victim if a court finds that it was deliberately indifferent to the student's grievance. "Deliberate indifference" appears to be defined as a college's failure to act in the face of actual notice of an incident of sexual harassment or assault, where a court could conclude that the actions of the institution were clearly unreasonable in light of the known circumstances. In order for liability to arise, deliberate indifference must be accompanied by the following requirements:
 - A. The harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the institution;
 - B. The college had control over the context within which the harassment arose;
 - C. The college had control over the harasser;
 - D. The college had actual notice of and did not appropriately respond (usually by providing an investigation and adequate resolution) to the complaint of harassment or assault.

- **Systemic Indifference.** The language of the Davis opinion made it clear that one administrator's failure to act might not bring liability on a college. The Supreme Court established a standard for liability only when it could be said that the college itself was deliberately indifferent, on a systemic level. Subsequent cases are starting to determine how much deliberate indifference is necessary, and by whom. For example, in some cases, no liability has been found for a school where employees knew of harassment and failed to act, but there was no notice at the systemic level. However, colleges would be well-advised not to expect notice to the board of trustees to be the determining factor in establishing a systemic indifference. As one court recently held, deliberate indifference by the key person charged with responsibility for handling these complaints might be enough to warrant liability (*Morse v. Regents of University of Colorado*, 154 F.3d 1124 (10th Cir. 1998)).

- **Reasonable Resolution.** Does the law require colleges to adjudicate every complaint, regardless of the victim's wishes? No, colleges are required to take immediate and appropriate steps to end the harassment and/or prevent its recurrence. They need not guarantee that it stops or never occurs again, but must take reasonable steps toward achieving that result. In practice, this will require at minimum an investigation in almost all cases, to determine if harassment has occurred, to determine the extent of the harassment, the acuity of the threat it represents to students, and what might be necessary to put an end to it, if it has occurred. Single incident date-rapes may not give rise to a requirement to adjudicate in the face of a victim's reluctance, because such incidents do not represent a substantial threat of continuing harm or harassment to the victim or the campus community. However, prudent pursuit of most complaints is recommended, given the nascent level of development of post-Davis cases, and the relative simplicity of threat assessment techniques employed on campuses today.

ACTUAL NOTICE

- **Designated Reporting Authorities.** College procedures should include designating specific "Reporting Officials" who have the responsibility to receive complaints, initiate an investigation, and move it into the appropriate process by which resolution of the complaint will occur. The more people who have authority to resolve cases, the broader the potential for one or more of them to act with deliberate indifference. Therefore, it may be beneficial to limit "Reporting Officials" to campus law enforcement, student/judicial affairs administrators, and those with Title IX, Affirmative Action or Human Resources administrative authority.
- **Ombudspersons.** The role and duties of Ombudspersons have yet to be sufficiently clarified by the courts. By design, Ombudspersons are supposed to be independent, and confidential. Therefore, it may be difficult to classify the mandatory reporting role of Ombudspersons. Some colleges have required Ombudspersons to report incidents to student affairs administrators, only to find that the Ombudspersons have refused to do so, citing professional ethics. While recognizing the vital role that Ombudspersons play in quickly resolving lesser incidents, many are now questioning whether Ombudspersons should be vested with the authority to resolve the more serious physical cases. At this point, it may be unfeasible to expect Ombudspersons to breach confidentiality. Hopefully, courts will recognize this and exempt Ombudspersons from actual notice in these cases. But, colleges would be well advised to create alternate avenues of reporting severe incidents, if colleges are to ensure adequate response.

- **OCR Guidance.** The Supreme Court, in *Davis*, did not endorse the Office for Civil Rights (OCR) Guidance regarding constructive knowledge of a complaint. In fact, while the OCR Guidance suggests that colleges can be liable for incidents about which they should have known, the Court has made it clear that actual knowledge of the complaint is required before money damages will result. However, that Guidance and the constructive notice standard ("should have known") still hold force, and were recently reinforced in the 2001 version of the Guidance, issued in January by OCR, as a secondary set of requirements that may invite sanction by the U.S. Department of Education. In fact, OCR added another dimension to the constructive notice standard by including an apparent authority clause. Thus, notice will exist in cases where an official should have known, and will even exist in cases where a report is made to someone who is not deemed an "official" or "responsible employee" by the institution, but who the reporter reasonably believes to be someone who has the authority to address sexual harassment.
- **Confidentiality.** This dual enforcement possibility (Courts and OCR) sets up a conundrum with respect to confidentiality and mandatory reporting. Complete confidentiality cannot be promised in severe sexual harassment and assault matters. Title IX creates confidentiality issues for colleges and students alleging victimization. Institutional authorities who have notice of alleged sexual assaults/harassment are not likely to be able to keep those incidents completely confidential, as a result of the institution's affirmative obligation to investigate and act to resolve the incident.*

*Please note that the word "confidentiality" is used above and in this paper in the sense that it is used commonly on campuses and by the OCR Guidance, to refer to an institutionally granted ability to maintain the privacy of a report, rather than in the technical, professional or legal sense of confidentiality, as a legally mandated or ethically-based protection.

- **Mandated Reporting.** But, many colleges, to comply with the Guidance, and to ensure that no incident slips through the cracks, have imposed a mandatory reporting requirement on all faculty, staff and employees. While such a practice might be used successfully to avoid the broader liability of Title VII, a debate needs to be held on whether this is also a best practice under Title IX. For example, in the field, it is a frequent occurrence that certain groups, such as faculty members and resident advisors (RA's) tend to flout mandatory reporting requirements imposed by administrations, promising confidentiality to students who come to them for assistance. This has the potential to create liability issues that would not necessarily come to a head if these faculty members and employees were not mandated to pass along reports to institutional officials. Perhaps an effective compromise, which would also be likely to satisfy OCR standards as well,

would be to require non-personally identifiable reports by employees—such as faculty and resident advisors—to superiors of incidents about which they gain information, where in some cases it will be determined that an identity must be divulged and the institution should act to follow-up in a formal fashion.

- **Third-Party Reports.** It should be noted that under Title IX actual knowledge need not be direct knowledge of an incident as reported by the alleged victim. Actual notice can be established by third party reports. For example, if a student goes to an RA for advice, and the RA then asks the Dean of Students about the incident, and happens to mention critical details, courts would be likely to find that actual notice existed, and would impose an obligation to investigate and provide an adequate resolution.
- **Avoiding Actual Notice.** Courts would be likely to frown upon any deliberate avoidance of actual notice. It would not be a best practice to tell subordinates not to tell you something they know, to avoid actual notice. Similarly, we should avoid advising a student not to tell you something that might lead to actual notice (this is different from explaining to them about privacy and confidentiality concerns and what would lead to actual notice and letting them decide how much to tell you).
- **Interaction With the Clery Act.** A present source of confusion stems from recent changes to the Clery Act, which provides mandatory reporting requirements that are separate and different from those needed to satisfy Title IX prescriptions. Under Clery, if an acquaintance rape victim comes forward, but wants to keep the report confidential, her report must be made to a counselor, clergy, medical provider, or other individual on campus who does not have significant responsibility for campus life and activities. For all others, (incl. judicial affairs, residence life, student affairs, student activities, affirmative action, coaches, many faculty, etc.) the Clery Act requires mandatory reporting of this incident as a statistic. Therefore, confidentiality can be completely maintained under Clery, because no personally identifiable information need be disclosed. However, there is also a timely warning requirement, in addition to the mandatory statistical report, which would require that a warning go out to the community if an incident represents a substantial threat to other students. In these cases, the victim's name need never be released, but other details might be, depending on what is necessary to protect the community. There is still no duty to act in a judicial capacity imposed by Clery, ever.

BEST PRACTICES FOR COMPLIANCE

- **Jurisdiction.** A college's potential for liability will be highest in those situations wherein the college has control of the context in which the harassment arises, as well as control over the harasser, and where the harassment is sufficiently severe, pervasive and offensive as to deprive the victim of access to the educational opportunities or benefits provided by the institution. Administrators will want to take special note that this standard can require the college to take jurisdiction over some incidents that do not happen on campus. Therefore, policies that confine college jurisdiction solely to on-campus events should be redrafted.\
- **Mediation.** Mediation remedies that are available to resolve some sexual harassment offenses are not likely to be adequate to addressing the more severe sexual assault cases, as a matter of best practices. Moreover, the OCR's 2001 Guidance on Title IX states clearly that mediation is not permitted in any cases of sexual assault.
- **Uncooperative Victims.** In cases where a victim does not want a college to pursue a report, and the threat is deemed insufficient to require an adjudication, college officials would be well advised to fully document their conclusion, supported by a thorough investigation, and ask the victim to sign a statement acknowledging that he/she concurs with the college's conclusion, and asks that no further action be taken. This statement should indicate the signatory's understanding that his/her refusal to cooperate with investigators and campus judicial personnel may prevent the college from pursuing the complaint to resolution.
- **Complainants.** Colleges should not confine their judicial jurisdiction over these cases solely to situations in which the victim is a student. Where someone acts on campus to sexually harass or assault a non-student, courts could find liability under the deliberate indifference standard. Therefore, college policies should be written to allow for complaints by non-students against students, and colleges will want to explore other avenues of redress against outsiders (such as a trespass action), and the possibility of filing a campus complaint against a visiting non-student at the institution at which he or she is enrolled.
- **Investigation.** In addition to the importance clearly placed on policies and procedures, we believe that the investigation/judicial resolution is becoming an increasingly important aspect of Title IX compliance. Investigators/judicial officers should be trained in civil rights investigations and have experience with the uniqueness of a college community and its governance structure. Knowledgeable and neutral investigators/judicial officers ensure thorough, unbiased and objective conclusions. Remember that in the final analysis, the

reasonableness of a college's handling of a sexual harassment/sexual assault complaint will ultimately determine the extent of monetary liability.

- **Remedies.** One California branch office of the U.S. Department of Education's Office for Civil Rights found a college's remedy to a physical harassment case insufficient, requiring that college to expel the accused student. While the Department is not often engaged in actively second guessing the internal judicial decisions of colleges, an increase in complaints may make this practice a harbinger of things to come. This serves as a strong reminder of a college's duty to deal sternly and seriously with severe cases. Often, suspensions may not be enough.
- **Training.** Broad training of institutional constituents on these and related principles and practices is the best risk management. Too often, sexual harassment training focuses only on the making of inappropriate comments, and on quid pro quo grades-for-sex types of behaviors. Training staff, employees, and students on awareness of and responses to the sexual assault issues implicit in the EEOC language of "unwelcome sexual advances" will be a benefit to the institution. This is especially true in light of the fact that today, there is some judicial hostility to expansive interpretations of what verbal behaviors constitute the creation of a hostile environment. Therefore, many of the successful cases that go to trial and result in liability now are those involving egregious and physical behaviors which clearly fall under meaning of hostile environment, rather than the more common verbal incidents that we have tended to address with our trainings in the past.

RELATED CASES

Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998)

Davis v. Monroe County Board of Education, 119 S.Ct 1661 (1999)

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Murrell v. School Dist. No. 1, Denver, Co., 186 F.3d 1238 (10th Cir. 1999)

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University of California, Santa Cruz, OCR Case No. 09-93-2131.

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