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Higher Education Alert

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Seventh Circuit addresses the assessment of risk in the Title IX actual knowledge and deliberate indifference analysis

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The risk analysis determines when actual notice has been triggered and responsive measures are necessary.



What's the Impact?

- / The line between actual notice of past or ongoing misconduct and a risk of future misconduct can be unclear.
- / Only once the misconduct line has actually been crossed does Title IX impose an affirmative obligation to act—to remedy the existing misconduct and prevent further foreseeable risks.
- / The totality of the circumstances indicate whether sex-based discrimination has occurred or is occurring under a school's watch.

Over two decades have passed since the Supreme Court prescribed in *Gebser*ⁱ and *Davis*ⁱⁱ the standard—requiring actual knowledge and deliberate indifference—to hold an institution liable under Title IX for sexual harassment within its education program or activity. In a recent en banc ruling, the Seventh Circuit acknowledged that its precedents have, at times, found the application of these distinct requirements “challenging . . . to articulate in clear and practical

terms.” The Seventh Circuit sought to “reconcile the interplay” between the requirements, striving “to provide more discrete guidance to those tasked with complying with Title IX in the challenging settings of today’s schools.”

This alert reviews the Seventh Circuit’s Title IX analysis in *C.S., by her Parents as Next Friends v. Madison Metropolitan School District*.ⁱⁱⁱ Although the case arose in a K–12 setting, the analysis similarly applies to colleges and universities. As the Seventh Circuit noted, all schools subject to Title IX encounter highly fact-specific circumstances, requiring real-time assessments of actual knowledge of sexual misconduct and responses that will not be deliberately indifferent (e.g., measures that are not clearly unreasonable to constitute an “official decision” to permit discrimination).

Background

The allegations in the case were troubling. C.S. claimed that she was sexually abused by a security assistant at her middle school throughout her eighth grade year. She sought redress against her school district under Title IX.

During her seventh grade year, C.S., like many of her classmates, was drawn to the security assistant, a popular figure among the students who supervised lunch and recess and monitored various student activities. The school’s principal was aware that the assistant was viewed as a mentor and confidant to many students. The principal saw the assistant hugging male and female students and noticed that most of the hugs were student-initiated. School employees observed C.S. initiating hugs with the assistant, meeting privately in his office, and trying to kiss him on the cheek—an act which he rebuffed. The principal met with the assistant and warned him to limit contact with C.S. No further complaints followed this warning, and it was believed that the assistant had heeded the warning.

During C.S.’s eighth grade year, the principal was unaware of any new interactions between C.S. and the assistant. After C.S. completed her middle-school studies, her family reported that she was sexually abused by the assistant.

In C.S.’s Title IX lawsuit, she sought to hold the school district liable for the assistant’s conduct during C.S.’s eighth grade year based on the principal’s knowledge of their interactions the prior academic year—a relationship that C.S. contended reflected a pattern of grooming behavior. The dispositive question concerned whether a reasonable jury could find that the principal had actual knowledge of the assistant’s misconduct. The district court concluded that the record evidence did not support such a conclusion as a matter of law and entered summary judgment in the school district’s favor. C.S. appealed the judgment to the Seventh Circuit, and a panel affirmed the ruling.

The Seventh Circuit granted en banc review and heard oral argument before the full court (which included now-Supreme Court justice Amy Coney Barrett, who did not participate in the decision). The eleven participating judges agreed unanimously in affirming the judgment in the school district’s favor. Seven of the judges joined a majority opinion seeking to provide guidance on

Title IX institutional liability standards (beyond addressing the factual merits), while four judges joined a concurrence critical of the majority for looking beyond the record in the case.

The majority's guidance and holding

Analyzing *Gebser* (which controls in the faculty-on-student context), the majority began by “[r]einforcing *Gebser’s* central instruction . . . that the relevant school official acquires actual notice upon learning that *misconduct rising to the level of sex discrimination* has occurred.” (Emphasis added). “Title IX does not permit institutional liability based solely on the risk of future misconduct.”

The majority noted that “[t]he line between actionable actual knowledge of past or ongoing misconduct and non-actionable appreciation of a risk of future misconduct can get very blurry in cases like this.” Allegations involving teacher-on-student misconduct often “reveal escalating wrongdoing, and that is where the challenging realities of risk enter the picture.” *Gebser’s* actual knowledge requirement is only met when the “misconduct line has actually been crossed,” requiring responsive actions to “remedy the existing misconduct and to prevent further foreseeable risks from materializing.” But when does risk cross that line if *Gebser* does not permit the imposition of liability based upon risk alone? The majority acknowledged that many situations “do not so clearly show misconduct and thus next steps are not as evident.”

The majority attempted to provide guidance through a hypothetical involving a teacher sending three texts to a student “that are disconcerting, revealing of risk, but not themselves clearly indicative of ongoing misconduct. In such a circumstance, Title IX does not impose an obligation to act.” The majority then layered facts “a shade or two darker,” with more texts with more concerning language and clear indications that a teacher has severely crossed the line. At that point, the school will be obligated to take action because it “possessed knowledge that a form of sex discrimination—the teacher’s pervasive and escalating texting of the student—has already occurred.” The majority used this example to illustrate that “as a legal matter[,] . . . a school[’s] duty to act is not triggered until it has actual knowledge of facts which, in the totality of the circumstances, indicate that sex-based discrimination has occurred or is occurring under its watch.”

The majority noted that, unlike the first prong in Title IX liability analysis (actual knowledge of sexual discrimination that has occurred or is ongoing), the concept of risk comes into play in the second prong (the deliberate indifference evaluation). Once the actual knowledge threshold has been met, a school must respond to mitigate against risk, including the risk of escalation. The majority candidly acknowledged that its Title IX precedents have often blurred the actual knowledge and deliberate indifference prongs and “have not always described the line between misconduct and risk” in the clearest manner.

While purporting to offer guidance through hypotheticals, the majority acknowledged that “the complexities of life do not always offer clear conclusions. Reality often manifests in shades of gray.” Ultimately, the majority proffered that, when acting in real time, “the best course will be to err on the side of reactive and preventative measures to ensure compliance with Title IX.”

Applying this framework to C.S.'s case, the majority acknowledged that by the end of her seventh grade year, the principal knew facts that were a "cause for some concern." The majority avoided the determination of whether the circumstances known as of that time (before the unknown acts of sexual abuse during the next academic year) amounted to ongoing discrimination to satisfy the actual knowledge requirement. Instead, the majority concluded that regardless of whether the circumstances reflected ongoing discrimination, the principal took responsive action "properly calibrated to the risks inherent in [the security assistant's] conduct." "All told, even assuming that [the principal] had actual notice of misconduct in seventh grade, we cannot say that the risk of escalation was so apparent that her response to that knowledge—telling [the assistant] to impose strong boundaries in his interactions with C.S.—was insufficient."

Perhaps in its most insightful language, the majority stated in simple terms that "[t]he law in this area is hard and messy[.]" The majority concluded by expressing its hope that the guidance outlined in its opinion would help to further clear and workable guidelines. Four concurring justices felt that the majority fell short of this goal.

The concurrence's reaction

The concurring judges agreed with the result in the case because the principal neither knew of any misconduct by the security assistant nor was deliberately indifferent to the implications of what she did know. Further, they agreed that Title IX does not permit the imposition of liability based on risk alone. Yet, they warned that the majority had overstepped through its usage of hypotheticals with nuances going beyond the facts before the court, especially because supplying guidance is the job of the Department of Education with the power to issue regulations.

The concurrence also criticized the majority's conclusion that Title IX liability is possible only if the responsible official knows "that the misconduct rising to the level of sex discrimination has occurred," noting that this language is too narrow. Knowledge of misconduct can occur without that misconduct having become sexual or discriminatory (e.g., if the security assistant had taken C.S. on a date to a local movie theater, that would be egregious enough conduct to result in actual notice necessitating a reasonable response, even if nothing sexual happened on the date).

Takeaways

The advisory nature of the majority's opinion evidences that Title IX sexual misconduct cases are hardly clear cut, posing vexing nuances and blurred lines. As we addressed in a [recent alert](#), the Supreme Court may revisit the Title IX institutional liability paradigm in a case raising questions regarding what constitutes actual knowledge and what causation standard applies in the deliberate indifference analysis. On May 16, the Court entered an order inviting the Solicitor General to submit a brief addressing the issues. This could be an indication that the Court will grant certiorari next term and revisit *Gebser* and *Davis* nearly a quarter century after their issuance. Meanwhile, we await the Department of Education's impending publication of its proposed amendments to its Title IX regulations, which will certainly prompt numerous and divergent responsive public comments before they ultimately take effect (likely several months

or perhaps more than a year from now). Meanwhile, as the Seventh Circuit noted, real-time challenges will continue within “the delicate educational settings in which facts unfold.”

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ⁱ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (addressing Title IX institutional liability for faculty-on-student sexual harassment).

ⁱⁱ *Davis, as Next Friend of LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (addressing Title IX institutional liability for student-on-student sexual harassment).

ⁱⁱⁱ No. 17-1521, 2022 WL 1466249 (7th Cir. May 10, 2022).