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Higher Education Alert

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Will the Supreme Court revisit *Davis'* causation requirement?

By Steven M. Richard and Caitlyn Smith

Circuits have differed whether *Davis'* causation requirement permits Title IX liability for a single incident.

What's the Impact

- The scope of Title IX liability remains a vexing challenge in balancing the rights of complainants and respondents.
- Clarification of *Davis'* causation requirement would be welcomed in the deliberate indifference analysis.
- As judicial decisions evolve, institutions await the impending notice of proposed amendments to the Title IX regulations.

As the Supreme Court held in *Davis v. Monroe County Board of Education*, a victim of "student-on-student sexual harassment" has a cause of action under Title IX of the Education Amendments of 1972 (Title IX) against a school that receives federal funding.[1] A school "may be liable for 'subjecting' [its] students to discrimination" when it is "deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's

[1] 526 U.S. 629, 647-48 (1999).

disciplinary authority."[2] To be liable for damages under a Title IX private right of action, the school must act with deliberate indifference that either "cause[s] students to undergo harassment" or "make[s] them liable or vulnerable to it."[3] The interpretation of *Davis'* reference to a student's *vulnerability* to harassment has led to conflicting judicial conclusions regarding the allowable scope of Title IX lawsuits for peer-on-peer harassment.

Davis' causation analysis applies upon a showing that the school had actual knowledge of actionable sexual harassment and its response was deliberately indifferent ("clearly unreasonable in light of the known circumstances").[4] Interpreting *Davis*, federal circuits have split on what impact of such deliberate indifference must be shown to support the Title IX claim. The First, Tenth, and Eleventh Circuits have held that a school is liable under *Davis* if its deliberate indifference causes *either* further sexual harassment or vulnerability to further sexual harassment.[5] By contrast, the Sixth, Eighth, and Ninth Circuits have held that a school is liable under *Davis* if its deliberate indifference causes further sexual harassment.[6]

Two years ago, the United States Supreme Court declined to address the circuit split by denying a petition for a writ of certiorari to review a Sixth Circuit ruling.[7] The issue is presented again to the Court as a result of the Fourth Circuit's ruling in *Jane Doe v. Fairfax County School Board* addressed in this alert, which resulted initially in a 2–1 panel ruling (with a dissent warning of the implications of holding a school liable under Title IX when it received notice of a single incident of peer-on-peer sexual harassment *after* the harassment occurred),[8] followed by a 9–6 split among the circuit judges declining an *en banc* review (with the unusual result of a concurring opinion and two dissenting opinions, which articulated contrasting positions on *Davis*' causation requirement).[9] The School Board has filed a petition for a writ of certiorari, which the Supreme Court will review in conference on May 12, 2022, with a decision on whether the Court will hear the appeal expected this month.[10]

As one of the dissenting Fourth Circuit judges wrote, "we now leave the Supreme Court as the only possible venue for review of this important legal issue that will implicate educational

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[2] *Id.* at 646-47 (alterations adopted).

[3] *Id.* at 645 (citations and internal quotations and original alterations adopted).

[4] *Id.* at 648, 650.

[5] *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103, 1106 (10th Cir. 2019); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 171 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1295-97 (11th Cir. 2007).

[6] *Kollaritsch v. Mich. St. Univ. Bd. of Trs.,* 944 F.3d 613, 620-23 (6th Cir. 2019), *cert. denied.*, 141 S.Ct. 554 (2020); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017); *Reese v. Jefferson Sch. Dist. No.14J*, 208 F.3d 736, 740 (9th Cir. 2000).

[7] The Supreme Court declined to review *Kollaritsch, supra*. n. 6.

[8] 1 F.4th 257 (4th Cir. 2021).

[9] 10 F.4th 406 (4th Cir. 2021).

[10] Sup. Ct. Docket No. 21-968.

institutions across the country."[11] We outline below the differing interpretations of *Davis*' causation analysis as articulated by the Fourth Circuit's opinions and framed for the Supreme Court's consideration.

Background

The case arose from an encounter between two high school students—"Jane Doe" and "Jack Smith"—on a school-sponsored band trip, in which Jack inappropriately touched Jane and coerced her to touch him during a bus ride on the trip. Concerned members of the school community reported the incident to school officials during and after the trip, and the efficiency of the school's responsive actions and accommodations was disputed in the litigation. Jane avoided Jack at the high school out of fear and her absences from school grew. Jane did not suffer any subsequent actionable sexual harassment by Jack.

Jane sued the School Board, alleging that it had been deliberately indifferent to her report of sexual harassment in violation of Title IX. She did not allege that the board was liable for the assault itself, but only for its response. After a trial, the jury found that Jack had sexually harassed Jane, and that the harassment had been so severe, pervasive, and objectively offensive as to deprive her of educational opportunities. The jury, however, found that the school lacked actual knowledge of the harassment, thereby resulting in a verdict and judgment in the School Board's favor. Accordingly, the jury reached its verdict without addressing whether the school's response (if it had actual knowledge) was deliberately indifferent.

The Fourth Circuit Judges' contrasting interpretations of Title IX liability

Jane appealed to the Fourth Circuit, resulting in a divided 2–1 panel reversing and remanding the case for a new trial. The majority opinion by Judge Wynn held that the school's receipt of Jane's complaint alleging sexual harassment was sufficient to establish actual knowledge under Title IX and the jury erred in concluding otherwise.[12] Additionally, the majority addressed the dissent's view that the judgment should still be affirmed (notwithstanding the school's actual knowledge of the reported harassment) under *Davis*' causation requirement (contending that the school could not be held liable without proof of further harassment after its receipt of actual notice). The majority countered that "Title IX liability based on student-on-student harassment is not necessarily limited to cases where such 'occur[s] after [the school] receives notice' and is 'caused' by the school's own post-notice conduct."[13] The majority held that a school's response need not be followed by further harassment in order for Title IX liability to exist. Instead, "a school may be held liable under Title IX if its response to a single incident of severe sexual harassment, or the lack thereof, was clearly unreasonable and thereby made the plaintiff more vulnerable to future

[11] 10 F.4th at 422.

[12] 1 F.4th at 264-73.

[13] *Id.* at 273.

harassment or further contributed to the deprivation of the plaintiff's access to educational opportunities."[14]

Judge Niemeyer dissented, stating that he would have affirmed on the ground that "the school had to receive knowledge of conduct *such that the school's indifference to the known conduct actually caused the harassment* that denied the student the benefits of the educational programs or activities of the school."[15] The dissent described this requirement as "foundational, as a school is liable under Title IX only when the school's own deliberate conduct amounts to or causes sex discrimination."[16] Regarding the incident between the students, Judge Niemeyer noted that it "was a one-time act of sexual misconduct[,]" which "the school learned of . . . only after the fact, with no opportunity to prevent it[,]" so "no school conduct, or lack thereof, *caused* any sexual harassment, as is required for the school's liability under Title IX."[17]

The School Board filed a petition for rehearing en banc, which was, as noted above, denied by a 9–6 vote and resulted in three separate, principled opinions that were seemingly not only responding to the contrasting views of the circuit judges, but also framing the issues for the expected petition of certiorari to the Supreme Court. Concurring in the denial of rehearing en banc, Judge Wynn (who wrote the majority panel opinion) stated that Title IX's statutory language "refers to students who are *subjected* to discrimination,"[18] and that "*Davis* noted that one dictionary definition of 'subject' was 'to make liable or vulnerable; lay open; expose.'"[19] "And common sense tells us that a student can be made *vulnerable* to further harassment after an initial incident without actually *undergoing* additional harassment."[20]

In the first dissent, Judge Wilkinson stated that Title IX "does not even hint that a school could be held liable for peer-on-peer harassment about which it was only notified after-the-fact."[21] He contended the panel majority "imposed the prospect of liability on the School Board due to harassment that occurred without any warning signs and which the School Board had no means of preventing."[22] In the second dissent (reiterating his panel dissent), Judge Neimeyer warned

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[14] *Id*. at 274.

[15] *Id.* at 278 (italics in original).

[16] *Id.*

[17] *Id.* at 279 (italics in original).

[18] 10 F.4th at 411 (citing 20 U.S.C. § 1681(a)) (emphasis in original).

[19] *Id.* (citing *Davis*, 526 U.S. at 645) (quoting Random House Dictionary of the English Language 1415 (1966)).

[20] *Id.* at 411-12 (emphasis in original).

[21] *Id*. at 417.

[22] *Id.* at 415.

that the panel had "str[uck] out a new course for school liability under Title IX, imposing what sounds very much like strict liability, which the Supreme Court has rejected."[23]

Next, the Fourth Circuit's merits panel (again splitting 2–1) denied the School Board's motion to stay the mandate, with a new trial scheduled to begin on remand later this summer. Meanwhile, we await whether the Supreme Court will grant certiorari to address the circuit split in the interpretation and application of *Davis'* causation requirement.[24]

Takeaways

Davis established a high standard for a funding recipient's liability in the case of student-on-student harassment. Under both Title IX's statutory language in 20 U.S.C. § 1681(a) and *Davis*' application of the scope of institutional liability for peer-on-peer harassment, a school may not be liable for damages unless its deliberate indifference "subjects" its students to harassment. *Davis* explained that the funding recipient's response must "'cause [students] to undergo' harassment" or "'make them liable or vulnerable' to it."[25] As analyzed above, the Court's use in *Davis* of the phrase "make them . . . vulnerable" has led to divergent rulings on whether subsequent harassment must occur after a school's receipt of actual notice of an incident in order to establish Title IX liability. Twenty-three years after its ruling in *Davis*, the Court's clarification on the causation requirement would be welcomed to establish uniformity.

The issue may garner the Court's attention given its recent analysis of the scope of liability in lawsuits seeking recovery under a law (such as Title IX) enacted pursuant to Congress' authority under the Spending Clause of the United States Constitution (Art. I, § 8, cl. 1). As we analyzed in our recent alert addressing the Court's April 28, 2022, ruling in *Cummings v. Premier Rehab Keller, P.L.L.C.* (holding that emotional distress damages cannot be recovered in private causes of action against federal funding recipients under Spending Clause statutes), Title IX funding is much in the nature of a contract, where the recipient accepts the federal funding with notice of the extent of its potential liability exposure. If the appeal is accepted for review, the Court will again apply a Spending Clause analysis to clarify a school's potential liability under Title IX for a single incident of actionable sexual harassment between two students.

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[23] *Id.* at 422.

[24] In its petition for a writ of certiorari, the School Board raised a separate question of whether the requirement of "actual knowledge" in a private action under *Davis* is met when the funding recipient lacks a subjective belief that any harassment actionable under Title IX occurred. This question was posed in response to the panel's majority conclusion that an objective (not subjective analysis) applies to the "actual notice" requirement, "which asks whether an appropriate official in fact received such a report or complaint and whether a reasonable official would construe it as alleging misconduct prohibited by Title IX." 1 F.4th at 268.

[25] *Davis*, 526 U.S. at 645 (dictionary citations omitted).

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