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Appellate Courts Divided on Whether a Single Incident of Sexual Harassment Can Trigger Title IX Liability for Schools

August 26, 2025

Title IX of the Education Amendments of 1972 (Title IX) prohibits sex discrimination in education programs and activities that receive federal financial assistance. Recipient schools can be liable under Title IX for an insufficient response to sexual harassment by a teacher or between students in certain circumstances. Federal appellate courts have taken diverging positions over when a school may be liable for its response to student-on-student (peer) harassment. The disagreement turns in part on how to interpret Supreme Court decisions establishing the general parameters of school liability in cases of sexual harassment, as well as legislation enacted pursuant to Congress's spending power under the Constitution. The Supreme Court has repeatedly interpreted Title IX as enacted pursuant to Congress's authority under the Spending Clause, which means legal obligations that flow from the law must be clear and unambiguous.

A decision from the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit), *Arana v. Board of Regents of University of Wisconsin System*, has deepened the divisions among federal appellate courts on two distinct but closely related legal questions that arise under the framework adopted by the Supreme Court for establishing school liability in cases of peer harassment. First, courts disagree about whether a single instance of harassment that is sufficiently severe can trigger Title IX liability; second, courts are split as to whether a plaintiff must show that a school's deliberate indifference to harassment resulted in *further* acts of harassment, or whether simply leaving a student more vulnerable to harassment is sufficient.

This Sidebar begins by briefly describing the legal framework for sexual harassment claims available under Title IX, as established by two major Supreme Court decisions: *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*. It continues with a discussion of the developing splits among federal appellate courts on how to interpret those decisions. Next, the Sidebar turns to the Seventh Circuit's decision in *Arana*, which identifies and deepens those divisions. The Sidebar concludes with considerations for Congress.

Congressional Research Service
https://crsreports.congress.gov
LSB11352

Supreme Court Cases on Sexual Harassment and Title IX

All public school districts and most colleges and universities receive federal funds and, as such, must comply with Title IX's sex discrimination prohibition. While Title IX does not explicitly create a cause of action or mention sexual harassment, the Supreme Court has interpreted the statute to include an implied private right of action and to extend to sexual harassment. The Court has also crafted the relevant standards for determining liability and specified what judicial relief is available in such cases.

In doing so, the Court has stressed that Title IX was enacted pursuant to Congress's power under the Spending Clause. The Court has characterized such legislation as akin to a contract: in exchange for funds, recipients agree to comply with "federally imposed conditions." Because a recipient must voluntarily and knowingly accept the terms of this "contract," the Court requires that the obligations set forth in legislation be "clear" and "unambiguous[]." This requirement contrasts with "ordinary legislation," which can impose requirements on regulated parties without their consent.

Two Supreme Court cases set the general framework for establishing school liability under Title IX in cases of sexual harassment. First, in *Gebser*, the Supreme Court interpreted Title IX's bar on sex discrimination to authorize holding school districts liable for damages in certain cases of sexual harassment of a student *by a teacher*. The Court ruled that school districts can be liable on a damages claim under Title IX for a deliberately indifferent response to known acts of harassment in such circumstances. Under *Gebser*, in addition to showing a school's deliberate indifference, plaintiffs must show that "an appropriate person" had "actual knowledge of discrimination." An appropriate person is defined as "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf." In such circumstances, liability attaches based on "an official decision … not to remedy the violation."

The Court soon extended this reasoning to sexual harassment of a student *by another student*, ruling in *Davis* that the "misconduct" in *Gebser*—a school's deliberate indifference to known harassment—violates Title IX if certain conditions are met. First, the harassment 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." The Court expressed that this determination would often be fact-intensive and indicated that it was "unlikely that Congress" would have intended that a single instance of harassment would meet the standard.

Additionally, the Court in *Davis* indicated that when a recipient school does not engage in harassment directly, it is only liable if the school's own 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." As a result, a school is only liable for harassment that occurs in situations in which the school has "substantial control" over the harasser and the context in which the misconduct occurs. One important consideration in making this determination, the Court observed, is whether a school has disciplinary authority over the harasser.

In sum, to establish Title IX liability for peer sexual harassment, a plaintiff must establish that

- an appropriate person at the recipient school had actual knowledge of harassment;
- the harassment was "so severe, pervasive, and objectively offensive" that it deprived the victim of educational opportunities; and
- the school's response was deliberately indifferent and subjected students to harassment.

Division Among Federal Appellate Courts

Federal appellate courts have split on two closely related questions that have arisen under the *Davis* framework for peer sexual harassment liability: (1) whether a single incident can amount to harassment

that is "severe, pervasive, and objectively offensive" and that deprives a student of educational opportunities; and (2) whether a school's deliberately indifferent response to harassment must subject a student to *additional* incidents of harassment for liability to attach, or if a response that simply renders a student more vulnerable is sufficient.

Single Incident Cannot Suffice for Title IX Liability

Some courts have read Title IX and *Davis* to mean that a single incident of student-on-student harassment cannot establish Title IX liability for recipient schools. These courts have focused on *Davis*'s requirement that harassment be "pervasive" and that a school's deliberate indifference "subjects" students to harassment in order to establish liability under the law. For instance, in *K.T. v. Culver-Stockton College*, the U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit) affirmed dismissal of a college student's Title IX claim against her college after she was allegedly sexually assaulted by a student on campus. The panel ruled that because the allegation was limited to a single sexual assault, the plaintiff failed to allege "pervasive" harassment. In turn, the court held that it could not conclude that the alleged misconduct had the systemic effect of denying the student access to educational opportunities. Further, the Eighth Circuit ruled that the plaintiff failed to plead deliberate indifference by the college, as there was no allegation that the college's response "caused the assault."

Similarly, in *Kollaritsch v. Michigan State University Board of Trustees*, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) held that student-on-student harassment complaints must show actual knowledge by the recipient school of actionable harassment and that a school's deliberate indifference resulted in further actionable harassment against the same victim. In that case, a number of college students who were sexually assaulted sued the university alleging that the school's response to their harassment violated Title IX. The panel explained that in its view, the requirement of "pervasive" harassment meant "multiple incidents ...; one incident of harassment is not enough."

In addition to establishing actionable harassment, the court determined that a student-on-student harassment claim must also plead the elements of what it described as a "deliberate indifference intentional tort," including four elements: knowledge, an act, injury, and causation. Under the causation element, the court indicated, a plaintiff must show that a school's response was "clearly unreasonable," and it "must bring about or fail to protect against … further harassment." The panel rejected the argument that the Supreme Court's language in *Davis*, which described the deliberate indifference standard as a response that would "cause students to undergo harassment or to make them liable or vulnerable to it," should be read to mean that vulnerability alone is enough to satisfy this requirement. Instead, the panel wrote, the clear meaning of that standard is that if students do experience further harassment once the school is on notice, they can prove a Title IX violation either on the basis that the school took action that instigated further harassment or did not take sufficient action to protect the victim. The court acknowledged that other courts read *Davis* differently but found their reasoning to be unpersuasive. Because the plaintiffs in the case were each assaulted only once, they did not plead any actionable *further* sexual harassment and thus could not establish the causation necessary to state a claim for deliberate indifference under Title IX.

One judge wrote a concurring opinion in light of the disagreement among federal courts on the issue. He stressed that because Title IX is enacted pursuant to Congress's spending power, conditions on receipt of federal funds must be unambiguous. In his view, even if there were ambiguity on the issue at hand, that ambiguity itself "would require us to adopt the less expansive reading of Title IX." Perhaps revealing continued disagreement over the proper interpretation of *Davis*, subsequent decisions by different panels in the Sixth Circuit have distinguished *Kollaritsch* in Title IX lawsuits.

Single Incident Can Be Sufficient in Certain Situations

By contrast, particularly in cases of sexual assault, some courts have read Title IX and *Davis* to authorize damages liability against a school in situations where only a single incident of harassment occurred. For instance, in a case brought by a high school student alleging a single instance of sexual assault, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) observed in *Doe v. Fairfax County School Board* that while a single or isolated incident of harassment generally does not trigger Title IX liability, one incident can be sufficient if it is "extremely serious." In *Doe*, the panel determined that the alleged sexual assault and the "lasting trauma [it] caused" were so serious that a reasonable jury could find that they deprived the plaintiff of educational opportunities. The panel also pointed to a First Circuit decision that adopted similar reasoning.

The Fourth Circuit also ruled that a reasonable jury could find that the school board acted with deliberate indifference in response to the harassment even though there was not a subsequent assault. The panel rejected a dissenting judge's argument that the board could not be liable because no school action caused any *further* harassment of the student. The panel observed that the *Davis* Court indicated liability was available under Title IX for a school's deliberately indifferent response that renders students "liable or vulnerable" to harassment. As such, the Fourth Circuit agreed with the First and Eleventh Circuits that schools can be liable based on a single incident if their deliberately indifferent response makes a plaintiff more vulnerable to future harassment or deprives them of access to educational opportunities.

Similarly, in *Williams v. Board of Regents of the University System of Georgia*, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) ruled that it was sufficient for plaintiffs to allege that a school's deliberate indifference to an incident made them more vulnerable to harassment, rather than that they suffered further harassment. In that case, the plaintiffs alleged that they were raped by fellow students at fraternity parties and that the university refused to investigate because the incidents occurred off campus. The Tenth Circuit ruled that the plaintiffs had sufficiently pled that the university's deliberate indifference to their reports made them more vulnerable to harassment. In particular, fear of running into their alleged rapists on campus caused the plaintiffs to struggle with their studies, lose a scholarship, withdraw from school activities, and avoid walking around campus alone. The court concluded that the plaintiffs had thus adequately alleged that the school's response to their harassment deprived them of educational opportunities.

Seventh Circuit Decision

The Seventh Circuit's decision in *Arana v. Board of Regents of University of Wisconsin System* deepened these divisions. In *Arana*, a university expelled a star football player for sexually assaulting two students. The player was later found not guilty of a distinct charge in state court criminal proceedings. Under pressure from "influential" parties, and without hearing from the alleged victims, the chancellor of the university readmitted the player. One of the alleged victims sued the school for a deliberately indifferent response to her harassment.

On appeal, the university argued that a single instance of harassment does not meet the requirement that harassment be "pervasive" under the *Davis* standard of "severe, pervasive, and objectively offensive harassment." The panel observed that, according to the reasoning of the Eighth and Sixth Circuits (in the decisions discussed above), a victim of a single sexual assault is unable to recover under Title IX. The Seventh Circuit, however, joined those circuits that allow a single incident to trigger Title IX liability when the incident is sufficiently severe or "vile" and the school's unreasonable response has the systemic effect of denying access to educational opportunities. That standard, the panel wrote, promotes the aims in *Davis* of preventing students from being deprived of educational opportunities on the basis of their sex and holding institutions liable for their failure to take action.

Regarding *Davis*'s requirement that a school's deliberate indifference subject a student to harassment, the court took note of judicial disagreement on this issue as well—namely, whether a plaintiff must show further acts of harassment or simply that they were left more vulnerable to harassment. The court rejected the university's argument that it was not liable since the harassment did not repeat. In line with the reasoning of the U.S. Courts of Appeals for the First, Fourth, Tenth, and Eleventh Circuits, it concluded that under *Davis*, liability extends to situations where a school's deliberately indifferent response places a student at risk of further harassment.

The majority opinion drew a dissent. The dissenting opinion took the view that under *Davis*, a single instance of harassment is not actionable. For the dissent, the majority's contrary reading relegated *Davis*'s determination that it was "unlikely that Congress would have thought such behavior sufficient" to mere dicta. The dissent argued that the Court in *Davis* laid out "a comprehensive framework to limit the new cause of action the Court was creating." Accordingly, the "discussion of conduct that does not suffice to create liability is integral to understanding how this framework should be applied."

The dissent also criticized the majority's ruling that liability can attach when a school's deliberate indifference leaves students vulnerable to further harassment. Pointing to the reasoning of the Sixth Circuit's decision in *Kollaritsch*, the dissent argued that to "subject" students to harassment requires further harassment. Finally, echoing the concurrence in *Kollaritsch*, the dissent argued that because Title IX imposes liability "in the nature of a contract," the scope of that liability must be "unambiguous." For the dissent, the "sweeping liability" allowed by the majority did not "arise[] unambiguously from the text of Title IX or *Davis*."

Considerations for Congress

As described above, federal appellate courts interpreting Title IX and *Davis* are divided as to whether student-on-student harassment claims alleging only a single incident can trigger liability for recipient schools. Congress is free to leave Title IX as it is; it also has authority to repeal or modify the law. As mentioned, the framework for liability in such situations was crafted by the Supreme Court through decisions recognizing an implied private right of action to enforce the statute, rather than through an explicit cause of action with accompanying standards set by Congress. Congress may alter the existing legal framework and pass legislation if it wants to resolve the disagreement among federal appellate courts.

In the past, Congress has amended other civil rights statutes in response to judicial decisions interpreting their text. For instance, when the Supreme Court held in *General Electric Co. v. Gilbert* that Title VII did not prohibit discrimination based on pregnancy, Congress amended Title VII to do so. Were Congress to amend Title IX, a relevant example it might draw from is the Civil Rights Restoration Act of 1987 (enacted in 1988), in which Congress amended Title IX, Title VI, and Section 504 of the Rehabilitation Act (as well as the Age Discrimination Act of 1975). The legislation superseded portions of a Supreme Court decision that concluded Title IX applied only to the specific program receiving federal funds, rather than to an entire institution that receives funds. For all four statutes, Congress provided a new, expansive statutory definition of "program or activity."

If Congress were to legislate in this context, one consideration in doing so would concern the authority generally regarded as underlying Title IX—the Spending Clause. Congress has broad authority to set civil rights conditions on the receipt of federal funding; however, as mentioned above, unlike legislation enacted on other constitutional bases, the Supreme Court has characterized Spending Clause legislation as akin to a contract that must have clear and unambiguous terms.

Congress could also enact legislation directing federal agencies that fund education programs to promulgate regulations addressing recipient schools' obligations when responding to sexual harassment allegations consistent with standards Congress adopts.

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