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Legal Sidebar

Title VI and Peer-to-Peer Racial Harassment at School: Federal Appellate Decisions

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Section 601 of Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in federally funded programs. While that mandate applies broadly to programs of various types, one significant area that Title VI covers is schools. All public and most private colleges and universities receive federal financial assistance, as do all K-12 public school districts. Individuals subjected to racial discrimination by a recipient of federal funds may sue to enforce Section 601.

Because Title VI applies to federally funded schools, rather than students, reports of racial harassment by students raise the question of what responsibilities a recipient institution may have under Title VI to respond. For instance, in the wake of protests on numerous college campuses related to the Israel-Hamas conflict and associated U.S. policies, individuals and organizations have filed lawsuits alleging that some protest conduct included discriminatory racial harassment and that schools' responses violated Title VI. As explained below, borrowing from caselaw interpreting another civil rights statute, federal appellate courts have determined that a school's inadequate response to peer-to-peer racial harassment can amount to race discrimination in violation of Title VI. However, the judicial standard for holding schools liable on this basis is "exacting," requiring plaintiffs to make several showings, which can prove difficult. This Sidebar examines how federal appellate courts have approached peer racial harassment claims at school under Title VI, including one recent decision—specific to university campus protests and allegations of antisemitism—that reflects the stringency with which courts examine Title VI harassment claims. (The circumstances in which Title VI applies to antisemitism is a complex issue of its own; for more on that question, see these separate Legal Sidebars.)

While this Sidebar focuses on judicial enforcement of Title VI in the specific context of racial harassment, the Department of Education's Office for Civil Rights (OCR) also enforces the statute against schools the agency funds. OCR's administrative role in enforcing Title VI is explored in other CRS products; as a general matter, OCR's administrative standards may not always mirror the judicial standard for holding schools liable under Title VI.

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Title IX of the Education Amendments of 1972

Although Title VI does not explicitly address harassment, a potential claim could assert that a school failed to respond adequately to racial harassment of students. This basis of liability draws from Supreme Court cases interpreting another law that applies to certain recipients of federal funds, Title IX of the Education Amendments of 1972 (Title IX). Title IX bars sex discrimination in federally funded education programs and was modeled after Title VI. The Supreme Court has reasoned that Congress "passed Title IX with the explicit understanding that it would be interpreted as Title VI was." As explained below, lower courts have drawn on cases recognizing peer-to-peer sexual harassment claims under Title IX to determine liability under Title VI for racial harassment claims.

The Supreme Court has ruled that a federally funded school district's inadequate response to sexual harassment between students can constitute sex discrimination in violation of Title IX. In *Davis Next Friend LaShonda D. v. Monroe County Board of Education*, the Court held that federally funded school districts with (1) actual knowledge of sexual harassment of a student by peers can be held liable for (2) a deliberately indifferent response to the harassment if (3) the harassment is "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 explained that liability is thus limited to situations where the harassing conduct has the "systemic effect of denying the victim equal access to" education programs. According to the Court, determining whether harassment is actionable under Title IX will often be fact-intensive. In crafting this standard under Title IX, the Court pointed to a prior decision addressing Title VII of the Civil Rights Act of 1964 (Title VII), in which the Court recognized a claim for "hostile environment" sexual harassment in the workplace.

The Court in *Davis* also made clear that schools are not liable for student-to-student sexual harassment unless the school's own deliberate indifference subjects students to harassment. In this peer-to-peer context, harassment thus must take place in situations in which the school has "substantial control" over the harasser and the context in which the misconduct occurs. The standard is easily satisfied when misconduct occurs on school grounds during school hours. The Court in *Davis* particularly emphasized the school board's authority to take adequate "remedial action" against the harassment in that case; if "the harasser is under the school's disciplinary authority," a recipient school district may be liable for its deliberate indifference to sexual harassment. The Court also explained that a school is deliberately indifferent only when its response is "clearly unreasonable in light of the known circumstances."

Application of Title IX Sexual Harassment Standard to Title VI Racial Harassment Claims

The Supreme Court has not taken up a Title VI racial harassment case or expressly addressed the standards that govern such a claim. However, a growing number of federal appellate courts have drawn from the standards established in *Davis* to impose liability in Title VI cases alleging racial harassment between students. The Tenth Circuit was the first to do so, reversing a district court that held there was no cause of action under Title VI to remedy a racially hostile educational environment. In that case, the Tenth Circuit ruled that the plaintiffs had pled a Title VI claim by alleging the school had "facilitat[ed] and maintain[ed] a racially hostile environment." The panel reasoned that because Congress based Title IX on Title VI, the Supreme Court's interpretation "of what constitutes intentional sexual discrimination under Title IX directly informs our analysis of what constitutes intentional racial discrimination under Title VI (and vice versa)." The Tenth Circuit instructed the district court on remand to apply the test from *Davis* for liability, meaning the plaintiff had to show that the school district had actual knowledge of, and was

deliberately indifferent to, racial harassment that was so severe, pervasive, and objectively offensive that it deprived students of access to educational benefits or opportunities.

"Severe, Pervasive, and Objectively Offensive" Standard

One important analytical factor under *Davis* is whether harassment is so "severe, pervasive, and objectively offensive" that it deprives a student of equal educational opportunities. Courts sometimes refer to this prong of *Davis* as asking whether a plaintiff has alleged "actionable harassment." As in Title IX sexual harassment cases, precisely when the standard is met under Title VI turns on the specific facts at issue, including the frequency of harassing conduct, its severity, and the effect on a student's ability to learn or participate in school activities.

Courts typically look closely at the frequency and gravity of harassing incidents in assessing whether the standard is met. In general, continuous harassment is more likely to raise a claim than a few scattered incidents. For instance, the First Circuit recently affirmed the dismissal of a Title VI case against a university involving allegations that campus protests related to the Israel-Hamas conflict created a hostile educational environment for Jewish students. The court acknowledged allegations of certain potentially antisemitic incidents. For instance, one plaintiff alleged that she was prevented from accessing a school building, as well as the protest encampment, "because she was Jewish"; plaintiffs also alleged that protestors heckled another individual "because he was visibly Jewish"; and a graduate student issued a tweet that equated Jews with Nazis. The court observed, however, that some of these incidents affected different students (not all of them plaintiffs) and determined that they were simply too isolated and not serious enough to meet the "severe, pervasive, and objectively offensive" standard. Without more, the court concluded (among other things) that plaintiffs failed to establish a "systemic" deprivation of educational opportunities required under *Davis*. (For a more focused discussion of the details of this particular case, see this Legal Sidebar.)

By contrast, the Fifth Circuit ruled that plaintiffs sufficiently alleged a racially hostile environment when they were subjected to multiple years of "regular and continuous harassment" consisting of repeated racial slurs and threats. Quoting a pre-*Davis* Ninth Circuit Title VI case, the Fifth Circuit reasoned that it was undeniable that "repeatedly 'being referred to by one's peers by the most noxious racial epithet in the contemporary American lexicon, [and] being shamed and humiliated on the basis of one's race' is harassment far beyond normal schoolyard teasing and bullying." Further, a noose along with a note full of racial epithets was placed by a student's car, which "underscore[d]" the severity of the harassment.

Along these lines, courts have ruled that the standard is satisfied in cases where racial harassment includes violent attacks against a student. For example, the Second Circuit affirmed a jury verdict for the plaintiff in a Title VI harassment case where, in addition to being subjected to racial slurs nearly every day and explicit and implicit threats, the student endured physical attacks that included punching and choking and required police attention. These acts persisted for over three-and-a-half years. Likewise, the Seventh Circuit ruled that a jury could find that repeated violent attacks amounted to severe harassment. In that case, the student was subjected to multiple physical attacks, including being punched, struck with metal track spikes, and hit with sticks by multiple assailants. The Seventh Circuit distinguished these attacks from earlier name-calling and scuffles, which the court did not view as actionable harassment.

Finally, courts must take care to comply with *Davis*'s requirement that racial harassment actually deprive a student of educational benefits or opportunities in order for liability to attach. Quoting *Davis*, courts sometimes look for a "systemic" or "concrete, negative effect" on a plaintiff student's education. Harassment that causes a drop in grades, results in significant emotional and mental distress, forces a change in study arrangements, or drives a student to switch school districts or drop out of school can constitute a deprivation of educational access. Some courts have also indicated that denying a student a

school environment free of racial hostility and harassment can itself constitute a deprivation, although those decisions tend to also include at least one of the circumstances mentioned above.

Deliberate Indifference

Even when harassment is shown to be "severe, pervasive, and objectively offensive," a school will not be liable unless its response is deliberately indifferent. This is a "high bar" that will not be met simply by showing that a school was negligent. The Court in *Davis* made clear that a plaintiff must show that a school's response was "clearly unreasonable in light of the known circumstances." The clearest case of deliberate indifference is a complete failure to act or respond to known harassment. When a school does respond in some manner, whether a court will find deliberate indifference turns on the specific facts at issue.

As a general matter, and consistent with *Davis*, courts are relatively deferential to schools' disciplinary decisions. The Seventh Circuit, quoting the Fifth Circuit, declared that "[j]udges make poor vice principals." Under the deliberate indifference standard, school administrators retain a fair measure of flexibility in crafting an appropriate response to harassment. In particular, students do not have a right to specific remedial actions, and administrators have discretion to consider the particular circumstances of the school. A school might consider the rights of other students in crafting remedies. More broadly, in determining whether a school's response to harassment was deliberately indifferent, courts look at both the school's disciplinary decisions and the overall response to harassment, which can include things like accommodations, training, and counseling.

One important consideration for courts is whether a school appropriately adapts its response as a situation evolves. Courts have sometimes ruled that a school's response is not deliberately indifferent, and thus does not violate Title VI, when the school intervenes in or addresses misconduct and calibrates its responses according to developing facts on the ground. Even if harassment escalates, a school may not be liable if its response escalates as well. That said, if a school's initial response fails to stop recurring or escalating harassment, a failure to take appropriate additional measures may amount to deliberate indifference. Likewise, a remedial approach that a school district knows is ineffective can be clearly unreasonable. Further, listening to a complaint, and even efforts to encourage reporting of harassment, without more, may not count as remedial actions responsive to harassment.

By way of illustration, in the Fifth Circuit case discussed above, the court ruled that the plaintiffs had sufficiently alleged a racially hostile environment when they endured repeated racial slurs and threats. The court nonetheless concluded that the school district was not deliberately indifferent and thus not liable under Title VI. The court reasoned that the school district "took some action in response to almost all of the incidents" and took "relatively strong action to address the most egregious incidents." After the noose incident, the district provided the students various accommodations, including allowing one student to park in the teacher's lot and do school work in the counselor's office and providing an aide to walk another student to school. In addition, some students were suspended for using racial slurs.

By contrast, the Fourth Circuit ruled that a school system was deliberately indifferent to actionable racial harassment because the "sum total" of the administration's response was to invite the victim to discuss the issue. After notice from a parent that more outreach was needed, administrators did nothing.

Considerations for Congress

The test that federal courts apply under Title VI for claims of racial harassment between students is judicially constructed and derived from standards the Supreme Court set out for evaluating Title IX sexual harassment claims. Congress can choose to leave development of these issues to the courts, but it has a number of available options if it wants to alter the applicable legal requirements. As an initial matter, Congress can amend Title IX and alter the standards applicable for sexual harassment under that law. Congress may also amend Title VI to include text that addresses harassment, such as defining what harassing conduct is, setting the threshold for when harassment requires a school to respond, or codifying, rejecting, or altering the current standard of deliberate indifference applied by lower federal courts. Any new legislation is subject to constitutional constraints, such as the First Amendment.

More broadly, the Department of Education has promulgated Title IX regulations establishing specific obligations for schools when responding to allegations of sexual harassment. These requirements have shifted throughout recent presidential Administrations. The Department has not issued parallel regulations under Title VI with respect to harassment. Congress could direct the promulgation of such regulations. Likewise, Title IX regulations require schools to appoint a Title IX coordinator to oversee requirements under the law, including fielding complaints of sexual harassment. Title VI regulations do not contain this explicit requirement. Congress could direct promulgation of Title VI regulations that impose a similar obligation; alternatively, it could add such a requirement directly through legislative text. For instance, one bill from the 118th Congress would have amended Title VI to require recipient schools to designate an employee as a Title VI coordinator; another would have amended the Higher Education Act (HEA) to require institutions of higher education to designate a Title VI coordinator as a condition of participating in federal student aid programs. Similarly, a bill introduced in the 119th Congress would amend the HEA to require institutions to display a link on their home page to the Department of Education's Office for Civil Rights, where they can submit complaints of discrimination in violation of Title VI.

Another option for Congress is altering the current enforcement scheme. While Title VI is currently enforced by private plaintiffs in court through an implied private right of action and by agencies through the administrative process, Congress could, for instance, decide to eliminate one method of enforcement. For example, if legislators believe school districts are overburdened by litigation, Congress could eliminate individuals' ability to sue in court. Conversely, Congress could cabin enforcement by administrative agencies and rely primarily on judicial enforcement of the law.

Further, Title VI claims address discrimination based on race, color, and national origin. Congress could also pass legislation that adds additional protected classes to the law, consistent with constitutional limitations. In either case, Congress could require agencies, such as the Department of Education, to promulgate new regulations consistent with the revised law. Finally, beyond the harassment context, Congress can refine through legislation what conduct amounts to race discrimination under the statute.

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