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Higher Education Alert

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Ninth Circuit holds that university is not liable under Title IX for assault in an off-campus residence

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The Ninth Circuit concludes that the university did not have contextual control over the off-campus residence where the incident occurred.



What's the Impact?

- / The ruling stresses Davis' two-pronged requirement of substantial control over the alleged harasser and the context in which the harassment occurs
- / Off-campus locations can meet the contextual control requirement, so the test is not solely based upon the physical location
- / The split in the panel's analysis shows that the assessments can be very fact-specific and lead to different conclusions

Under the Supreme Court's precedent in *Davis v. ex. rel. LaShonda D v. Monroe County Board of Education*,¹ Title IX liability can occur for student-on-student harassment when an educational institution exercises substantial control over *both the harasser and the context in which the*

¹ 526 U.S. 629 (1999).

known harassment occurs. On January 25, 2022, a United States Court of Appeals for the Ninth Circuit three-judge panel unanimously held that *Davis*' control-over-context requirement was not met based upon the plaintiff's theory that the university had substantial control over the context of her former boyfriend's prior abuse of other victims and failed to take proper responsive measures. The plaintiff cited to these prior assaults as support for her Title IX claim relating to her assault in her former boyfriend's off-campus house. Further, the majority's opinion rejected the dissenting judge's analysis that Title IX liability could be imposed because the perpetrator, a varsity football player, required university approval to live off-campus and his housing was paid for with university-provided scholarship funds. While its precedential impact applies to federal courts within the Ninth Circuit,² *Brown v. State of Arizona, et al.* provides important parameters for colleges and universities to understand the boundary lines defining their risks of Title IX liability for off-campus student-on-student sexual assault or harassment.³

"Education program or activity" under Title IX and *Davis*' two-pronged substantial control requirement

Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Where an educational institution does not directly violate Title IX through an official policy or direct action, the institution is liable in damages for another actor's discriminatory conduct only if it exercises control over that actor and an institution official with authority to take corrective action has actual knowledge of the misconduct and responds with deliberate indifference. *Davis*, 526 U.S. at 642-44.

In *Davis*, the Supreme Court addressed student-on-student misconduct and provided guidance about the control that an educational institution must exercise for Title IX liability to arise in this context. *Id.* at 643-45. Under § 1681(a), Title IX prohibits discrimination that occurs "under any education program or activity receiving Federal financial assistance." Education "program or activity" is defined as "the operations of" an educational institution subject to Title IX. 20 U.S.C. § 1687. The Court explained that this text "cabins the range of misconduct that the statute prescribes . . . based on the [institution]'s degree of control over the harasser *and* the environment in which the harassment occurs." 526 U.S. at 644 (*italics added*). Because Title IX addresses misconduct that occurs "'under' 'the operations of' a recipient, the harassment must take place in a context subject to the school['s] . . . control." *Id.* at 645 (*internal citation omitted*).

Davis establishes five elements that a plaintiff must prove in a Title IX claim arising from student-on-student harassment or assault:

/ "[T]he school . . . exercise[d] substantial control over both the harasser and the context in

² The Ninth Circuit has appellate jurisdiction over federal district courts in the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

³ *Brown v. State of Arizona, et al.*, No. 20-25568, 2022 U.S. App. LEXIS 2140, 2022 WL 212030 (9th Cir. Jan. 25, 2022).

which the known harassment occur[red]”;

- / “[T]he plaintiff . . . suffered harassment that is so severe, pervasive, and objectively offensive that it can be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school”;
- / “[A] school official with authority to address the alleged discrimination and to institute corrective measures on the [school’s] behalf must have had ‘actual knowledge’ of the harassment”;
- / “[T]he school must have acted with ‘deliberate indifference’ to the harassment, such that the school’s response to the harassment or lack thereof [was] clearly unreasonable in light of the known circumstances,” and
- / “[T]he school’s deliberate indifference . . . subject[ed the plaintiff] to harassment.”

Id. at 640, 644, 648, 650. As discussed below, the first element was the central issue in the Ninth Circuit’s analysis in *Brown*.

Background

Mackenzie Brown was physically assaulted during her sophomore year by her boyfriend, Orlando Bradford, a sophomore varsity football player. Near the end of their freshman year, the two began their dating relationship. Previously during that academic year, Bradford was accused of physically assaulting two other female students on campus, which resulted in responsive measures such as no-contact orders and relocation of Bradford to a different dormitory.

For his sophomore year, Bradford was granted permission to live off-campus under a football team rule, allowing players to live off-campus after their freshman year, and he resided in an off-campus house with some of his teammates. One evening during the fall semester, Brown went to Bradford’s off-campus house where he physically assaulted her several times after they had an argument. The next night, Brown returned to his house, where they argued and he physically assaulted her again, inflicting significant injuries. Brown’s mother reported the assaults to the police, who arrested Bradford. The university placed Bradford on an interim suspension, and the football coach removed him from the team. Bradford was later expelled from the university.

Brown sued the university alleging that it violated Title IX by failing to respond properly to the reports of Bradford’s prior actions, giving him the opportunity to abuse Brown. The university moved for summary judgment, and the district court entered judgment in its favor. The district court held that although it “was undeniable that [the university] exercised substantial control over Bradford,” Brown “ha[d] not offered any evidence that [the university] exercised control over the context in which *her* abuse occurred.” Brown timely appealed to the Ninth Circuit.

The Ninth Circuit’s analysis of contextual control

Brown argued that her claims should be allowed to proceed to a trial because the university knew about Bradford’s prior abuse of two other students and *these* attacks occurred in a context (in on-campus settings) that the university controlled. Rejecting this argument, the Ninth Circuit stated that, “[i]n [Brown’s] view, the proper focus of the control inquiry is ‘the context of the

harassment that the university is being accused of failing to correct,' not her abuse specifically. This argument misreads [Davis'] precedent." The Ninth Circuit stressed that *Davis* rejected Title IX liability based upon negligence theories, but rather the Supreme Court adopted a deliberate indifference standard for which the institution has actual knowledge as it pertains to *the plaintiff* suing the school. *Davis* "does not open the door to satisfying the control-over-context element by reference to the events other than those involving the plaintiff." The panel's three judges agreed that *Davis*' "control-over-context" requirement must be addressed as it applied to the assault against Brown, but they disagreed whether the university had contextual control over Bradford's off-campus housing.

A dissenting judge maintained that Brown had sufficiently posed questions of fact allowing her case to proceed to a trial, concluding that the "key consideration" in determining whether the institution controlled the context where the misconduct occurred "is whether the school had disciplinary authority over the harasser in the setting in which the harassment takes place." The majority found the dissent's analysis to take *Davis*' context requirement too far:

The control-over-context requirement arises from the limitation that Title IX addresses discrimination occurring only under an "education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). That a person subject to an educational institution's rules or authority engages in misconduct does not necessarily mean that his misconduct occurs *under* that institution's education program. Stated another way, not everything that a person subject to a school's disciplinary control does can be attributed to the school's operations. This is particularly true of student conduct.

While Bradford received approval under the football team's rule to live off campus after his freshman year, that fact was insufficient to satisfy the context requirement. The majority concluded "[u]ndoubtedly, this rule, among others, gave the [u]niversity disciplinary authority over Bradford—the first control requirement [under *Davis*—but it does not follow that it also gave the [u]niversity control over Bradford's off-campus residence in the way that it controls its own property or the context of team or school activities regardless of where they occur . . . Disciplinary authority over a student is not enough by itself to establish that the school controls the locations or contexts where the student is found."

The dissenting judge maintained that, while the physical location of the harassment can be an important indicator of a school's control over the "context" of the harassment, the key consideration concerns whether the school had disciplinary authority over the harasser in the setting in which it took place. Bradford resided in an off-campus residence through university scholarship funds and with the football coaching staff's approval. In the dissent's view, these factors gave the university control over the "context" in which Bradford assaulted Brown.

Takeaways

The Ninth Circuit's split ruling may not be the final word in the litigation. The plaintiff could petition for the appellate court's *en banc* review of the application of *Davis*' control-over-context

requirement to her Title IX claim. It will be interesting to watch whether the Ninth Circuit's full bench deems the issue of such significance to merit its further review.

The control-over-context analysis is relevant not only to assessing Title IX institutional risk for student-on-student sexual harassment, but also in defining the jurisdictional boundaries applicable to a school's Title IX grievance process. In enacting the 2020 amendments to its Title IX regulations, the Department of Education interpreted "program or activity" in accordance with Title IX statutory (20 U.S.C. § 1687) and regulatory definitions (34 CFR 106.2(h)), as well as the Supreme Court's analysis in *Davis*. In § 106.44(a), the regulations state that "education program or activity" includes locations, events, or circumstances over which the school exercised substantial control over both the context of the harassment and the respondent. The Title IX grievance process may apply to off-campus events or locations, but the factors must demonstrate the school's contextual control.

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