SAUL EWING ARNSTEIN & LEHR LLP

ALERT

Higher Education Practice

JUNE 2021

The Department of Justice Weighs in on Title IX Peer Harassment and Retaliation

Joshua W. B. Richards | Zachary B. Kizitaff

The Department of Justice recently filed a Statement of Interest in *Thomas v. Bd. of Regents of the University of Nebraska*, a case pending in the United States District Court for the District of Nebraska asserting peer harassment and retaliation claims under Title IX. Following a motion to dismiss and opposition briefing, DOJ (with co-signature from Department of Education attorneys) filed a Statement of Interest, seeking to "explain the legal standards governing peer sexual harassment and retaliation claims for damages under Title IX." The Statement of Interest stakes out a number of DOJ positions on unsettled or areas of split authority under Title IX and provides a valuable guide for how the current administration interprets Title IX.

DOJ Analysis of Post-Assault Claims

The Statement of Interest explains that post-*Davis* case law instructs courts to group peer sexual harassment cases as "post-assault" or "pre-assault." Notably, while the United States Supreme Court has recognized "post-assault" claims, only one Circuit Court has expressly recognized the so-called "pre-assault" claims that DOJ seems to suggest are commonplace. *See Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093 (9th Cir. 2020).[1] Nevertheless, because the plaintiffs' allegations in *Thomas* deal only with the response to complaints of sexual misconduct—as opposed to events leading up to alleged sexual misconduct—DOJ's statement in *Thomas* deals only with post-assault claims. DOJ has taken the following notable positions:

1. A plaintiff need not allege that an institution had actual knowledge that the accused harasser(s) posed a ***prior risk of sexual harassment.***
    - For post-assault claims, DOJ says that plaintiffs are only required to allege facts supporting two elements:
        - The institution had ***actual knowledge*** of the sexual assault and/or harassment; ***and***
        - The institution's ***deliberately indifferent response*** to that knowledge subjected the plaintiffs to discrimination by ***either*** causing them to ***undergo further harassment or making them vulnerable to further harassment.***
2. Post-report harassment does not have to be by the same harasser(s) responsible for initial, pre-report harassment.
    - The DOJ instructs that the "same harasser" is not required under either *Davis* prong.
        - Claims under the ***"cause to undergo"*** prong can succeed even if the subsequent harasser differs from the initial harasser "so long as there exists a ***'causal nexus'*** between the school's deliberate indifference to the initial instance of harassment and the later harassment that occurs."
        - Claims under the ***"make vulnerable"*** prong need not even allege subsequent harassment, much less that the subsequent harasser was the same individual as the initial harasser. This position is at odds with holdings in several circuit courts.[2]

3. A single instance of sexual misconduct can be enough to satisfy *Davis*'s "pervasiveness" requirement when it involves the rape or assault of one student by another student.

   - "[S]ingle acts of rape or other sexual assault may be sufficiently severe and pervasive under *Davis* when the rape or assault is ***of a student by another student***." (emphasis added).

4. Plaintiffs who allege harassment because of their sex do not also need to allege hostility based on their gender.

   - "[A]llegations of hostility to a victim's gender are unnecessary where, as here, Plaintiffs have already alleged that they suffered harassment because of their sex."

DOJ Analysis of Peer Retaliation Claims

DOJ takes the position that peer retaliation is actionable under Title IX under certain circumstances. The Statement of Interest highlights that both the Fourth[3] and Tenth[4] Circuits have recognized that students who suffer retaliation by their student peers may bring claims for damages under Title IX ***when the institution knows of the retaliation and responds to it with deliberate indifference***. "When a student reports sexual assault or other sexual harassment and the school is deliberately indifferent to subsequent peer retaliation sparked by the report, the school should compensate the student subject to the retaliation for any resulting denial of educational opportunity and emotional distress caused by the school's deliberate indifference." Statement of Interest at 18.

A copy of the DOJ's Statement of Interest can be found here. The authors will continue to closely monitor developments in this area. If you have questions about this alert or the regulations and guidance referenced in it, please contact the authors or your customary Saul Ewing Arnstein & Lehr point of contact.

---

1. The 9th Circuit decision relied heavily on the reasoning in *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1173 (10th Cir. 2007), a 10th Circuit case that did not expressly recognize "pre-assault" liability. In addition to the 9th Circuit Court of appeals, federal district courts outside of the 9th Circuit have also grappled with "pre-assault" liability. *See, e.g., Posso v. Niagara Univ.*, No. 19-CV-1293-LJV-MJR, 2021 WL 485699, at *11 (W.D.N.Y. Feb. 10, 2021) (allowing pre-assault claim to proceed).

2. Several circuits have held that post-notice harassment is an essential element of a Title IX claim, contrary to DOJ's position. *See,e.g., Kollaritsch v. Michigan State Univ. Bd. of Trustees*, 944 F.3d 613, 622-25 (6th Cir. 2019), cert. denied, No. 20-10, 2020 WL 6037223 (U.S. Oct. 13, 2020); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017) (quoting Davis, 526 U.S. at 644) (plaintiff failed to "allege Case 1:16-cv-02009-RDM that [defendant's] purported indifference 'subject[ed] [her] to harassment'" where plaintiff alleged no post-assault harassment and thus "identified no causal nexus between [defendant's] inaction and K.T.'s experiencing sexual harassment"); *Escue v. N. OK Coll.*, 450 F.3d 1146, 1156 (10th Cir. 2006) (affirming grant of summary judgment where the plaintiff did not "allege that [defendant's] response to her allegations was ineffective such that she was further harassed"); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000) (affirming grant of summary judgment where there was "no evidence that any harassment occurred after the school district learned of the plaintiffs' allegations," and thus "the school district cannot be deemed to have 'subjected' the plaintiffs to the harassment"). DOJ's Statement of Interests notes that courts in the First, Eleventh, and Tenth Circuits have declined to require further actual harassment in Title IX sexual harassment claims. See *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 171-73 (1st Cir. 2007) (same), *rev'd on other grounds*, 555 U.S. 246 (2009); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296-97 (11th Cir. 2007); *Farmer v. Kan. State Univ.*, Case No. 16-CV-2256-JAR-GEB, 2017 WL 3674964, at *4 (D. Kan. Aug. 24, 2017), *aff'd,* 918 F.3d 1094 (10th Cir. 2019).

3. *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 695 (4th Cir. 2018).

4. *Doe v. Sch. Dist. No. 1, Denver, Colo.*, 970 F.3d 1300, 1313-14 (10th Cir. 2020).

This alert was written by Joshua W.B. Richards, Vice Chair of the Firm's Higher Education Practice, and Zachary B. Kizitaff, a member of the Firm's Litigation Practice. Joshua can be reached at (215) 972-7737 or at Joshua.Richards@saul.com. Zachary can be reached at (215) 972-7714 or Zachary.Kizitaff@saul.com. This alert has been prepared for information purposes only.

Did you find this information useful? Please provide your feedback here and also let us know if there are other legal topics of interest to you.