

K-12

# 2023 YEAR-END REVIEW

January 18, 2024



INSTITUTIONAL COMPLIANCE  
SOLUTIONS

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A photograph of a spiral-bound notepad with a yellow cover, resting on a wooden surface. The notepad is open to a page with the words 'Year End Review' written in a cursive, gold-colored font. The notepad is partially obscured by a large, dark blue geometric shape that frames the right side of the image.

# YOUR PRESENTERS



**Courtney Bullard**  
**ICS Founder/CEO**



**Steven Richard**  
**Partner, Nixon Peabody**

# ABOUT US

## MISSION

To provide the best Care and Support for our clients, Community Partners, employees, contractors, collaborators, vendors, and all others who encounter our company.

## GOAL

To assist schools and districts in providing a safe and healthy learning and working environment for students, faculty and staff.



# BEFORE WE GET STARTED

- Slides
- Recording
- Virtual Environment
- Overview
- Not Legal Advice



# Agenda



- 01 Regulatory Updates
- 02 Resolution Agreements
- 03 Litigation Updates
- 04 Takeaways
- 05 Questions



# REGULATORY UPDATES



# REMINDER: 2 DIFFERENT RULE UPDATES



## Athletics

NPRM released April 2023 seeking to amend Title IX regulations. If adopted proposed to prohibit categorical bans on transgender students participating in sports consistent with their gender identity but would allow some restrictions that- for each grade level, sport, level of competition - are substantially related to an important educational objective and are aimed to minimize harm.



## Sexual Harassment/Misconduct

Amend the 2020 regulations to alter a school's responsibilities in cases of sexual harassment and define scope of Title IX prohibition against sex discrimination to include discrimination based on SOGI.

### RESOURCES

# STATUS OF THE NEW REGS: STILL WAITING.....

**May 2023**

Originally scheduled to release both athletics regulation and revised sexual misconduct regulation

**March 2024**

Department of Education announced now scheduled for release in March of 2024. Still needs to go to OIRA for review. Previously in 2020 OIRA held over 100 meetings with stakeholders between Nov. 2019 and March 2020.

**Implementation?**

Predict a March or April release with an implementation of August.



# WHAT WE EXPECT AFTER RELEASE:



- Litigation challenges especially to the athletics regs; SOGI incorporation into "sex" in the sexual harassment regs
- Implementation deadline
- OCR webinar and fact sheets

# TOP 5

**1** **Communicate** (Now!)  
Stakeholders

**2** **Update**  
Policies & Procedures  
(who is involved); Summer

**3** **Evaluate**  
Title IX team and  
infrastructure

**4** **Train**  
Required training for  
Community, Team

**5** **Implement**  
Regs will have an implementation  
deadline; dissemination of policies  
is first step

**BONUS:**  
Take a deep breath!!!!



# OCR RESOLUTION AGREEMENT TAKE-AWAYS





The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.

The Office for Civil Rights enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. Discrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964; sex discrimination is prohibited by Title IX of the Education Amendments of 1972; discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973; and age discrimination is prohibited by the Age Discrimination Act of 1975.

## OCR

# OCR COMPLAINT PROCESS



Complaint submitted to OCR and reviewed to determine if have authority to investigate.

OCR determines if enough info for complaint to proceed.

OCR investigation - collect and analyze relevant evidence.

Before end of investigation, school or college may reach a settlement with the person.

If OCR determines a Title IX violation occurred, will attempt to negotiate and sign a written resolution agreement with the school. The terms of the agreement will correct any violations found by OCR. OCR then monitors.

# TITLE IX: NASH COUNTY PUBLIC SCHOOLS



Female students reported felt unsafe as a result of sexual violence made online and implementation of the District's dress code.

Anonymous post on Instagram; school generally aware of potentially harassing posts. A few days after the initial post at issue, email sent out reminding students of dress code and held an all-girls assembly. Parents complained that during the assembly school staff blamed female students for harassment.

*Resolution:* Update dress code if necessary to ensure no discrimination based on sex, training of faculty and staff, review past reports to assess necessity for investigation and supportive measures.

Resource



# TITLE IX: SEXUAL HARASSMENT



**Mingo County Schools:** District did not complete investigation of alleged serial misconduct and may have treated males less favorably than female respondents; failed to identify Title IX Coordinator; failed to adopt and publish grievance procedures; failed to adopt recordkeeping practices.

**Val Verde Unified School District:** OCR found failure, persisting today, to coordinate responses to sexual harassment (including identifying emerging patterns), implementation of grievance procedures did not comply with 2020 regs.

**Garland Independent School District:** Routinely delayed investigation of Title IX complaints when law enforcement was involved and, at times, only relied on law enforcement findings; lack of centralized system or tracking/maintaining Title IX complaint files; inadequate training of employees and Title IX team; Title IX Coordinator's inability to coordinate efforts while holding multiple positions in the district; violations with policies/procedures.



# TITLE IX: SEXUAL HARASSMENT



**Newark Public Schools:** Compliance review - finding Title IX Coordinator did not, and currently does not, coordinate district's efforts to comply with its responsibilities under Title IX; failed to investigate employee-student allegations and deferred to state agency; recordkeeping issues.

**Alpine School District:** OCR found failure to investigate, including when reported to law enforcement, failure to provide interim measures, failure to consistently notify students/parents of outcomes and of Title IX Coordinator.

**New London Public Schools:** District violated Title IX by not ensuring adequate Title IX coordination and oversight, failing to adopt/publish compliant grievance procedures; failing to respond equitably to complaints of employee-sexual harassment - did not investigate because being investigated by police and Department of Children and Families.





# TITLE IX: SAN FRANCISCO CONSERVATORY OF MUSIC



Student reported sexual assault. OCR found Conservatory failed to respond to the report consistent with regs. Also found policy and notice of non discrimination did not comply with the regs.

OCR found school deliberately indifferent in its response to 2 alleged sexual assaults and alleged stalking. Respondent alleged retaliation. Referral to website that lists supportive measures not sufficient- did not engage interactive process; initiated an AAO versus a mutual no contact directive. Also failed to maintain records re: Conservatory's response.

Investigation: No NOA or information re: grievance process; did not receive evidence to review prior to completion of the investigator's report; investigator's report deficient.

Determination: Coordinator declined to move it to a hearing in violation of regs.

Grievance Procedures, Notice of Nondiscrimination, Training: Not compliant with regs.

**\*Note:** Training materials did not include info about their own policy.

Resource



# Takeaways

- OCR enforcing 2020 regs
- Cannot rely on and/or wait on police investigations in Title IX matters
- Training, training, training
- Record keeping
- Climate surveys



Key  
Takeaways



# TITLE IX: ATHLETICS



**Dover County Schools:** Allegations of disparity in District's scheduling of boys' and girls' high school varsity basketball games.

OCR Review: OCR compares boys' program and girls' program on an overall basis, not on a sport by sport basis. "OCR has a cause for concern that the varsity boys' basketball team plays more games on Friday and Saturday nights, whereas the varsity girls' basketball team plays most of its games on either weeknights or Saturday early afternoons. The evidence also shows that, collectively, boys' sports teams play more Friday and Saturday night games than girls' sports teams."

**Morgan Hill Unified School District:** Concerns district failed to provide female student athletes with equivalent opportunities with respect to equipment, scheduling of game times, travel, coaching, locker room and facilities and publicity.

[Resource on Equal Athletic Opportunities Under Title IX.](#)



# TITLE IX: SOGI



**Texas Charter School:** ACLU files complaint against a Texas public charter school. Choir programs for girls and boys changed audition requirements to require unaltered copy of birth certificates and update handbook to define boys as biological males and girls as biological females. ACLU filed on behalf of transgender student's family.

**Rhineland School District:** OCR concerned district response to persistent harassment limited participation in school activities; records miscoded sex-based harassment as "peer mistreatment"; did not document properly the complaints or district response. Title IX Coordinator reported unaware of reports until complaint filed with OCR.



# ALPHABET SOUP: FORSYTH COUNTY SCHOOLS



Whether removal of books created a hostile environment based on sex, race, color or national origin.

Complaints re: district providing students access to library books parents deemed inappropriate - explicit content and LGBTQI+ subject matter.

OCR: Book screening process created hostile environment and District's steps in response were insufficient to ameliorate resultant racially and sexually hostile environment.

Resolution Agreement: Climate survey

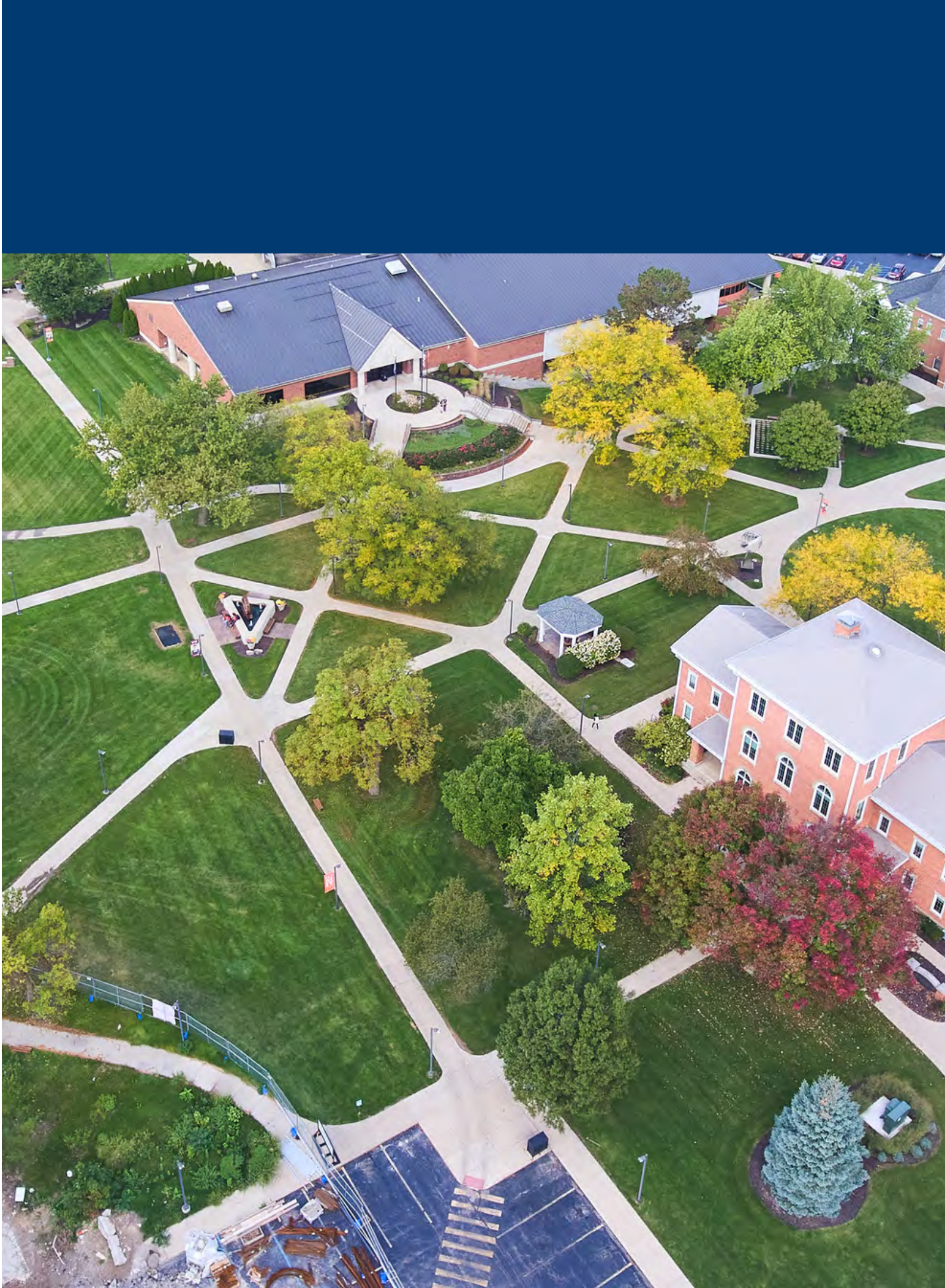
Resource



"As part of the Biden-Harris Administration's continued efforts to take aggressive action to address the alarming nationwide rise in reports of antisemitism, anti-Muslim, anti-Arab, and other forms of discrimination and harassment on college campuses and in K-12 schools since the October 7 Israel-Hamas conflict, today the U.S. Department of Education's (Department) Office for Civil Rights (OCR) released a list of the higher education and K-12 institutions under investigation for alleged shared ancestry violations of Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits race, color, or national origin discrimination, including harassment based on a person's shared ancestry or ethnic characteristics."

November 16, 2023

DCL



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## TITLE VI:

# THE UNIVERSITY OF VERMONT AND STATE AGRICULTURAL COLLEGE



Once a recipient has notice of a national origin hostile environment, OCR evaluates the appropriateness of the responsive action by assessing whether it was ***reasonable, timely and effective.***

Recipient need not adopt a grievance procedure to resolve Title VI violations, OCR will evaluate whether it followed any such procedure it chooses to adopt. Concerns University failed to investigate allegations of antisemitic harassment which amounts to University officials treating individuals differently based on national origin and may have allowed a hostile environment for some Jewish students to persist.

Takeaways: Clarify roles/responsibilities of bias response team, ***training for those responsible for investigating Title VI cases.***

Resource



# TITLE VI: RACE DISCRIMINATION



**Beecher:** OCR concerns-District did not conduct adequate investigations of possible racially harassing conduct, the totality of the circumstances and cumulative effects of the racial harassment, and did not appear to take steps reasonably designed to prevent harassment from recurring and remedy the effects on students.

Agreement: Training! Annual of all staff, all employees who receive or involved in matters, mandatory annual age-appropriate orientation. Climate survey.

**Winston-Salem/Forsyth County School District:** Committed to take steps to ensure its disciplinary practices do not discriminate against students on basis of race after a compliance review.





# SECTION 504 AND TITLE II

**Spectrum Academy:** Compliance review resulted in resolution agreement to ensure restraint and seclusion policies and practices do not deny students with disabilities their civil rights in violation of Section 504 and Title II.

**Allegheny Valley School District:** OCR determined that the district violated 504 and Title II when student subjected to disability harassment. Agreement included training all school staff and offering individual remedies to the student.



# Department of Justice Enforcement

The Department of Justice has two roles to play in Title IX enforcement: coordination of federal agency implementation and enforcement, and legal representation of the United States and the funding agency. Pursuant to Exec. Order No. 12250, the Attorney General shall "coordinate the implementation and enforcement by Executive agencies" of Title VI, Title IX, Section 504 and "any other provision of federal statutory law which provides, in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance." Exec. Order No. 12250 §1-201.

[Title IX Legal Manual](#)



# Reminder: Election Year



# LITIGATION



Litigation



# *Gebser* and *Davis* at the Quarter Century Mark

- The seminal decisions addressing Title IX institutional liability for actionable sexual harassment remain *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), and *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).
- Nearly twenty years ago, the Supreme Court recognized a cause of action for Title IX retaliation in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).
- While the Supreme Court has not revisited *Gebser* and *Davis*, compare the administrative changes that have ensued over the past quarter century across five Presidential administrations (Clinton to Biden) with Title IX regulatory guidance and amended regulations (e.g., 2001 Guidance, April 2011 DCL, April 2014 Q&A, September 2017 Rescission, two-year process leading to August 2020 amendments, and two-year process leading to impending 2024 amendments)



# The Elements of Gebser and Davis Lead to Conflicting Interpretations

Courts reach nuanced or contrasting rulings in answering key questions, such as:

- What constitutes “actual knowledge”?
- Who is “an official authorized to take corrective action”?
- What constitutes “substantial control of the alleged harasser and the context in which the harassment occurs”?
- When does alleged deliberate indifference “cause students to undergo harassment” or “make them vulnerable to it”? (Courts split in causation analysis)
- If this slide looks familiar from the program last year, the same questions again divided courts during 2023 and continue to do so into 2024.



# Don't Overlook the Risk of "Official Policy" Claims

- Key language in *Gebser*: “[I]n cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s program or activities and fails to adequately respond.”

524 U.S. at 290 (emphasis added).

- Typically, courts look for a policy of deliberate indifference to reports of sexual misconduct, which created a heightened risk that was known or obvious. (These cases can impose liability under “pre-assault” theories).
- These claims often arise in context of claims pertaining to athletic teams or Greek life.



# A Response Must Evolve to Avoid Deliberate Indifference Liability

*Grace v. Bd. of Trs., Brooke East Boston, 85 F. 4th 1 (1st Cir. 2023)*

- While deliberate indifference remains a “high bar” to show Title IX liability, courts pay careful attention to adequacy of responsive actions.
- The mother of a heterosexual charter school student who alleged that her son was subjected to homophobic harassment by classmates for years is entitled to a jury trial on her Title IX claim that school officials had actual knowledge of the hostile environment yet failed to take reasonable steps to address it.
- Responsive measures are not static actions. Schools must review and evaluate whether they are working and must be changed in light of evolving circumstances.





# Schools Can Face Liability simultaneously under Both “Before” and “After” Title IX Claims



*S.C. v. Metropolitan Gov't of Nashville & Davidson Cty., TN, 86 F.4th 707 (6th Cir. 2023)*

- S.C., a high school student, sued her high school alleging to have been video recorded while sexually assaulted by another student on school property. Students disseminated the video across social media and a pornography web site, prompting cyberbullying against S.C.
- S.C. alleged she reported the assault to the principal and the school directed her and her mother to the police. Title IX coordinator was not notified, nor was a school investigation initiated.
- Differing versions of interactions between family and school ensue in the record.

# S.C. Brought Three Types of Claims

- A Title IX “before” claim alleging deliberate indifference by the school before she was assaulted.
- A Title IX “after” claim alleging deliberate indifference by the school during the investigation into her harassment.
- A Fourteenth Amendment “equal protection” claim under § 1983.
- At the trial court level, the court granted summary judgment on the “before” claim and held a bench trial on “after” and § 1983 claims.
- At trial, the court found the school liable on the “after” claim, but not liable under the § 1983 claims. Cross-appeals were filed to 6th Circuit.



# The “Before” Claims May Go to Trial

- The Sixth Circuit vacated the award of summary judgment on the “before” claim.
- The record reflects that a reasonable jury could find that the unwelcome sexual contact was a result of the school’s deliberate indifference to the problem of “pervasive sexual misconduct.”
- Court considered similar incidents involving other student victims, as well as statistical evidence over several years of reported student-on-student sexual misconduct (e.g., other instances of spreading of videos of unwelcome sexual contact and photographic sexting).
- Court also allowed the “before” claim to proceed under § 1983 based on theories of inadequate training and deliberate indifference.



# S.C. Showed an “After Claim”

- While school imposed swift discipline to students circulating the video, the school’s response to bullying and threats (beyond directing her to police) were inadequate.
- School has Title IX obligations that are separate and apart from any criminal matter.
- Evidence at trial supported the conclusion that some of the threats were made during school hours or, at a minimum, in connection with school environment.
- Court rejected school’s argument that it lacked “substantial control” over the context in which most of the threats occurred: social media.



# Takeaways from the Ruling

- Training is key and will be evaluated regarding the sufficiency of implemented response.
- Actual notice requires a response, even where law enforcement is involved, which poses vexing issues requiring careful balancing.
- Schools can face liability for failing to exercise control over the conduct of students outside of the school's gates that contributes to harassment within school, or where the effects impair a student's equal access to educational programs or activities.
- Courts look to scope of disciplinary authority of schools and expect enforcement.



# The Challenges of Off-Site Social Media Speech and Conduct

- Schools must understand the First Amendment free speech implications posed by social media proliferation (Where does the law stand after the “angry cheerleader” case – *Mahoney Area Sch. Dist. v. B.L.*, 141 S.Ct. 2038 (2021))?
- In *Kutchinski v. Freeland Community Sch. Dist.*, 69 F.4th 350 (6th Cir. 2023), a high school student created a fake Instagram account impersonating one of his teachers, which became graphic, threatening, and harassing as it spreads in viewership and comments.
- Student, who created the account, claimed that he could not be liable since others created the offending posts, which court rejected.
- Student challenged a rule that permitted discipline for “gross misbehavior, persistent disobedience or having habits detrimental to the school,” as unconstitutionally vague. The court rejected the argument, given the need for a school to have flexible rules that don’t need to be as detailed as a criminal code.
- Don’t overlook First Amendment concerns when analyzing Title IX compliance. Remember *Davis’s* language about “substantial control” over harassment and “context” of harassment.



# Reinstatement of Transgender Athletics Case

- The Second Circuit (sitting as a full court) reinstated the case brought by female athletes who challenged a conference rule allowing high school students to participate on athletics teams consistent with their gender identity. *Soule v. Ct. Assoc. of Schs., Inc.*, 2023 WL 8656832 (2d Cir., Dec. 15, 2023).
- Four non-transgender female track and field athletes sued the conference and member school districts, alleging that allowing transgender girls to participate in girls' track and field deprives them of equal athletic opportunity in violation of Title IX.
- The court did not consider the merits, but it held that the plaintiffs had suffered sufficient injuries to be able to proceed with it.
- How will courts evaluate these claims in the face of impending conflicts between Title IX regulations and state legislation?



# Trends that We're Seeing In Courts and Looking Ahead

- Don't lose sight of negligence liability, as such claims (which allow for the recovery of emotional injury damages) are often pled front and center with Title IX claims. These claims can pose significant risks to school districts and schools under a "special relationship" analysis, holding the district or school responsible for the assaultive conduct of a student (even off-campus).
- More cases are surviving past summary judgment and proceeding to trial (often resulting in large verdicts)
- We can expect a proliferation of litigation after the issuance of amended Title IX regulations with their expanded jurisdictional definitions and boundaries.
- To conclude where we started – Is it time for the Supreme Court to revisit *Gebser* and *Davis* to clarify Title IX liability in context of today's realities?





# Questions?



# Upcoming Trainings



**Save \$100**

Use Code

**Webinar24**

Offer good through  
Feb. 29, 2024

