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Off-Campus Harassment: Identifying the Geographical Reach of Title IX Compliance

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Out of this nettle - danger - we pluck this flower - safety.

—William Shakespeare (1564–1616),

Poet and Playwright

Off-Campus Harassment: Identifying the Geographical Reach of Title IX Compliance

| *Paula A. Barran and Jeffrey D. Jones, Barran Liebman, LLP*

Abstract: Under Title IX, colleges and universities must work to prevent discrimination and sexual harassment in their programs and activities. However, what is the duty of colleges and universities to prevent such harassment during off-campus activities or programs? This article provides a survey of different cases in which harassment occurred off campus and what the findings of the courts were in those cases. With this information and helpful best practices for managing both on- and off-campus discrimination, higher education risk managers will be better equipped to manage and mitigate the risks of harassment of their constituents, wherever such harassment may occur.

Introduction

We tend to think our Title IX responsibility stops when we cross the street that separates campus from the real world when, in fact, the law is more intricate and complicated. This confusion often causes institutions to limit their monitoring and oversight to "the four corners of the campus." The error in this view is obvious when we consider that Title IX applies to "any education program or activity," defined as "all of the operations" of educational institutions.[1] Lots of school programs and activities occur off campus; some take place in other cities, states, and countries. It is pretty obvious that educational institutions have to prevent sexual harassment in their own programs and activities wherever they occur, but what about student activities in which schools aren't involved, especially activities or events happening off campus?

Educational institutions have to prevent sexual harassment in their own programs and activities wherever they occur, but what about student activities in which schools aren't involved, especially activities or events happening off campus?

Consider the case of *Rouse v. Duke University*.[2] In the early morning hours of an off-campus house party, Ms. Rouse said she was raped by a person who was unaffiliated with Duke. Rouse sued Duke under Title IX, alleging a hostile educational environment. Duke first moved, unsuccessfully, to dismiss the claim. The district court eventually granted a later motion for summary judgment. How could Duke possibly be held responsible for these events? The school argued it had no power to monitor private house parties thrown or attended by its students and that it couldn't control the assailant, who wasn't even known by any Duke officials. Nonetheless, the district court "assumed without deciding that an educational institution's response to an off-campus rape by an unaffiliated third party may trigger Title IX institutional liability, either by direct acts or by 'deliberate indifference' as defined by the Supreme Court."

The district court's decision to entertain Rouse's Title IX claim in the first place creates much worry but offers little wisdom for educational institutions. The court offers no guidance on when an educational institution might have Title IX responsibilities for personal off-campus student activities. To be sure, there were some unique allegations. The plaintiff alleged that she was raped at a party hosted by a university fraternity which was under the university's control and that the university had reason to believe the hosts provided alcohol to underage guests. She also alleged that there was on-campus fallout from the rape and her decision to report it.

While we probably can't do much to minimize the expense of defending claims like this, the costs of eventually securing a dismissal of such claims should buy educational institutions greater insight into how legally to protect themselves (and their students) when students are harmed during personal off-campus conduct.

Here are some analytical steps and practical recommendations to help educational institutions gauge their Title IX responsibilities when students meander off campus. This advice will also help educational institutions understand when they need to take action to satisfy their legal responsibilities.

Stop Thinking, "On-Campus vs. Off-Campus"

To hold an educational institution liable for damages for sexual harassment under Title IX, a plaintiff must show that an official with authority to address harassment had actual knowledge of, and was deliberately indifferent to, harassment that deprived the victim of access to the educational benefits or opportunities provided by the school.[3]

Title IX damages liability is limited to circumstances where the educational institution exercises substantial control over both the harasser and the environment in which the harassment occurs. This limitation is especially important for claims of off-campus sexual harassment. Whether an educational institution has the requisite control will depend on who is doing the harassing (e.g., teacher, staff member, another student, an unaffiliated third party) and where and when the harassment occurs (e.g., school-sponsored off-campus program, informal gathering initiated by school faculty or staff, wholly private gathering with no formal or informal school involvement). Certainly, it is easier to see that "on-campus" events are more likely to lead to liability than "off- campus" events, but the analysis doesn't end there.

Start Thinking, "How Much Control Do We Have Over the Situation?"

The "control" aspect of Title IX undercuts the view that geographical borders alone define an educational institution's Title IX liability. Instead, educational institutions need to consider the people and places it can legitimately influence to minimize the risks of discrimination. The Supreme Court has usefully broken down at least three contexts of sexual harassment with generally differing degrees of institutional control: staff-student harassment, student-student harassment, and proxy harassment, where, much like association discrimination, one student claims to have suffered sexual harassment by unaffiliated individuals associated with another student.

Here is where this is headed: it is easiest to show the requisite control in staff-student sexual harassment. So far, courts have rejected proxy harassment as too far beyond the control of educational institutions. Whether the requisite control is present in student-student sexual harassment claims depends on the specific context in which harassment occurs.

You Control Staff-Student Harassment, So Act Like It

Educational institutions are most in control when the offender is an agent of the school itself. This was true in *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), a leading case on Title IX sexual harassment. Alida Star Gebser was a high school student who had sex with a teacher both on and off school property. Gebser never reported the relationship. The school district terminated the teacher when it learned of the relationship, but Gebser sued under Title IX anyway. The *Gebser* case articulated the degree of control necessary for an educational institution to be liable for teacher-student harassment. Notably, the *Gebser* majority held that a plaintiff may not rely upon *respondeat superior*—that the teacher's actions should be treated as the school's actions—to establish a Title IX claim. Instead, the majority held that the only theory upon which damages liability may lie is if the school district is *directly liable* for its deliberate indifference to sexual harassment, assuming control and knowledge. Direct liability holds an educational institution responsible for its *own* failure to act within the span of its control in the face of knowledge that harassment is occurring.

A couple of recent off-campus sexual harassment cases clarify the degree of control needed to hold an educational institution liable for staff-student harassment.

Faculty and Beer Pong Don't Mix

Hunt v. Forbes and the Illinois State University, 2010 WL 1687863 (C. D. 2010), highlights the many risks surrounding informal staff-student interaction. Defendant Michael Forbes was a tuba professor at Illinois State University (ISU) who perhaps enjoyed off-campus student house parties way too much. Several years before plaintiff Megan Hunt's claim, another female student had made two complaints against Forbes' conduct toward her at two separate student house parties. The student alleged that at one party, Forbes asked

her to take off her shirt and make out with other male tuba students and put his hand up the shirt of another student. The student alleged that at another house party Forbes started rubbing her back, eventually leaning in and kissing her on the cheek. Additionally, a 19-year-old student at a different college alleged she had a sexual encounter with Forbes while he was visiting the school for a music program involving visiting college staff. ISU wasn't able to substantiate any of these allegations. Nonetheless, it instructed Forbes to stay away from situations that involved both students and drinking, restrictions which it lifted after ISU's Office of Diversity and Affirmative Action (ODAA) failed to substantiate any of the allegations.

Hunt alleged in her complaint that ISU was deliberately indifferent to Forbes' sexual harassment of students. She claimed that she was harassed by Forbes at one of the same 2005 house parties described earlier, when Forbes bumped up against her, put his hand on her stomach, and told her she felt really good. By the time of Hunt's complaint in 2006, she alleged Forbes had harassed her in stairwells of the school, in Hunt's car, in a practice room at school, and a final incident where Hunt felt compelled to engage in sexual acts with Forbes while babysitting for Forbes and his wife at their home.

The *Hunt* court didn't question that ISU had the requisite control over Forbes to support a duty to prevent sexual harassment by Forbes while at off-campus student house parties. The actual steps taken by the school bear this out, because the school actually exercised that control by instructing Forbes to avoid places with students and drinking, later lifting the restrictions following the ODAA's failure to substantiate any of the complaints against Forbes, and making the decision to terminate Forbes on the heels of Hunt's complaint. There is a lesson here: faculty and staff interact with students because of their employment; their employers have a right (and possibly the responsibility) to regulate the nature and quality of that interaction regardless of the location.

The lesson in one case: faculty and staff interact with students because of their employment; their employers have a right (and possibly the responsibility) to regulate the nature and quality of that interaction regardless of the location.

Two Out of Three Ain't Bad

Doe v. Boulder Valley School District, 2012 WL 4378162 (D. Colo. 2012), calls attention to a high-risk area for Title IX sex harassment claims: tournament travel. Tournament travel is a high-risk activity because it involves both school agents—teachers, coaches, and administrators—and school-supervised programs, including sports teams, bands, debate, and drama and other clubs. In this context, educational institutions should be motivated to manage risks of sexual harassment, ideally preventing it altogether.

Defendant Travis Masse was a college student studying to become a licensed teacher. Masse needed a field placement to observe other teachers as part of his curriculum. Masse obtained full-time field placement at Monarch High School in 2001. In 2001, Masse also volunteered as an assistant wrestling coach at Broomfield High School under the supervision of the head wresting coach. Masse lost his job at Monarch when the school learned he made unwelcome advances toward a student. The principal at Monarch terminated Masse, banned him from school premises, and notified the wrestling coach at Broomfield of the reasons for Masse's termination. In spite of that notice, however, Masse stayed on as volunteer assistant wrestling coach.

After graduation, Broomfield hired Masse as a part-time history teacher and assistant wrestling coach. Masse was later promoted to a full-time teacher and head wrestling coach. Masse selected female team managers to accompany him and the team to out-of-district and out-of-state wrestling tournaments. Jane Doe won the wrestling team manager position in 2006. She began receiving inappropriate text messages from Masse in 2007 and later began returning nude texts of herself. Doe and Masse had sex several times at away tournaments from December 2008 to February 2009.

The plaintiff in *Boulder Valley* had a factually difficult case: it hinged on proving that the school's awareness of Masse's 2001 termination from Monarch High School

eight years earlier put it on actual notice that Masse posed a substantial risk to students. The court didn't buy this argument and noted that the plaintiff's claim would fail in any case because the school wasn't deliberately indifferent to her harassment.

But the circumstances of *Boulder Valley* reveal how difficult this kind of Title IX can be to defend against. First, in this context, expect lots of witnesses. Several other coaches, the superintendent, many other students were at the tournament. Second, plaintiffs will have a good chance of showing both sexual harassment and actual knowledge in these cases, leaving educational institutions to defend only by showing no deliberate indifference. Third, these cases just look bad. Imagine jurors looking quizzically at one another, wondering how a bus full of faculty, staff, and students couldn't figure out until an away tournament that a teacher or coach was sexually harassing a student. As a result, it can be difficult to get over the deliberate indifference hurdle in these cases should the claim make it to a jury.

Imagine jurors looking quizzically at one another, wondering how a bus full of faculty, staff, and students couldn't figure out until an away tournament that a teacher or coach was sexually harassing a student.

Student-Student Harassment and Proving Notice

One year after *Gebser*, the Supreme Court addressed the question whether under Title IX an educational institution could be liable for student-student sexual harassment in *Davis, as Next Friend of Lashonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999). LaShonda Davis was a fifth-grade student who suffered a six-month period of sexual harassment by one of her fifth-grade classmates. The offensive conduct included touching the plaintiff's breasts and genitalia, rubbing up against the plaintiff, vulgar statements, and other suggestive behavior. During this period, LaShonda's grades dropped and her father discovered that LaShonda had written a suicide note. The offending student ultimately pleaded guilty to sexual misconduct.

LaShonda routinely reported her harassment to her mother and classroom teacher. LaShonda claimed that her classroom teacher assured her that the school principal was kept informed of the incidents. LaShonda's mother sued, claiming deliberate indifference to knowledge of LaShonda's harassment. To support their position, plaintiff alleged that the offending student had not been disciplined at all for his misconduct and also that no effort had been made to separate LaShonda from the offender.

The Supreme Court held that an educational institution can be held liable for student-student sexual harassment only when the harasser is under the school's disciplinary authority and the behavior is so severe, pervasive, and objectively offensive that it denies the victim equal access to the education Title IX is designed to protect.[4] The majority imported the standard for workplace sexual harassment into analysis student-student sex harassment claims in order to shield educational institutions from the "dizzying array of immature, sometimes gender-based, behavior that students will forever engage in but which does not deprive students of any educational benefit protected by Title IX."[5]

Moore v. Marion Community Schools Board of Education, 2006 WL 2051687 (N. D. Ind. 2006), provides a fuller explanation of this rationale and in a context that involves off-campus conduct. *Moore* involved escalating meanness between former friends. Plaintiff K.M. was a 12-year-old sixth-grade student, and defendant T.G. was a seventh-grade student at the same school. T.G. had a notebook that contained derogatory, but non-sexual, comments about K.M. Next, T.G. told another student over the phone that she and K.M. had engaged in sex acts. The student to whom T.G. told the rumor carried it back to school and the rumor spread. The school investigator believed that he only had jurisdiction to address the conversation that occurred at school but not the telephone conversation that had occurred away from school; remember the "four corners of campus" mistake? T.G. was later removed from school for misconduct unrelated to K.M., but other students continued to tease and taunt her. As a result, K.M. did not finish the school year.

The district court was quick to explain that, however humiliating and offensive, T.G.'s conduct simply was not severe enough to state a student-student sex harassment claim. The district court first cited to *Davis* for the proposition that "peer harassment, in particular, is less likely to satisfy [the requirements of Title IX sex harassment claims] than teacher student harassment."[6] The district court then explained why plaintiff's Title IX claim failed as a matter of law. The district court's explanation is instructive:

> In this case, it simply cannot be emphasized enough that this case is spurred by the conduct of pre-pubescent eleven-year-old girls who are still developing the skills necessarily to appropriately interact with their peers while on the verge of significant physical and hormonal changes. This court has no doubt that the rumor started by T.G. that spread throughout the school was a subjectively mortifying event for K.M. …This sort of treatment has become so commonplace in schools that similar conduct to that alleged here, namely gossiping and starting rumors at school, was the subject of a recent Paramount Pictures movie entitled *Mean Girls* (Paramount Pictures 2004). As unfortunate and common as this situation is, given the nature of the alleged harassment here, the court cannot conclude that it rises to the level of actionable harassment. …There can be no doubt given the age and social development of these children that having rumors of one's sexual orientation being circulated through a middle school is humiliating and offensive. Yet, this isolated event, without more, is simply not the type of conduct that is so severe and pervasive that it rises to the level of actionable sexual harassment. Indeed, the conduct complained of and the school's reaction to it is far less egregious than that of other cases that have failed to meet the Title IX standards.[7]

In *Davis*, the seminal student-student sex harassment case, the Supreme Court overturned the Eleventh Circuit's grant of defendant's motion to dismiss. In overturning the circuit court, the Supreme Court said plaintiff had alleged facts sufficient to state a claim:

> Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G.F. over a five–month period, and there are allegations in support of the conclusion that G.F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G.F. ultimately pleaded guilty to criminal sexual misconduct. Moreover, the complaint alleges that there were multiple victims who were sufficiently disturbed by G.F.'s misconduct to seek an audience with the school principal. Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education. The complaint also suggests that petitioner may be able to show both actual knowledge and deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment. On this complaint, we cannot say "beyond doubt that [petitioner] can prove no set of facts in support of [her] claim which would entitle [her] to relief."[8]

Recent student-student sex harassment cases have been less successful, often due to failures to give educational institutions adequate notice that harassment is happening. As in the *Moore* case, student-student sex harassment cases often involve juveniles who may not report for a variety of reasons. Also, the confluence of events that give rise to student-student sexual harassment can look quite different from the perspectives of school administrators and students. Plaintiffs in student-student harassment often assume that educational institutions were on notice of sexual harassment simply because schools received reports of (and perhaps responded to) a series of misconduct directed at one student over a period of time. Educational institutions tend to see this as ordinary day-to-day management of young, developing students.

Courts have been clear the notice required to state a harassment claim under Title IX is "actual notice," not simply awareness of ongoing student-student misconduct of a sexual nature. A prime example of this is *Tyrrell v. Seaford Union Free School District*, 792 F.Supp.2d 601 (E.D. N.Y. 2011).

Megan Tyrell was a 21-year-old female who had attended Seaford High School for ninth and tenth grade. On April 1, 2005, Tyrell went drinking with friends and acquaintances from another high school, first at one of the friend's homes, then in the parking lot of a Dunkin' Donuts, a teen hangout. Tyrell admitted she was drunk and that she remembered little from the night, including what time or how she got home. She later learned of that evening that she had sex with her female friend in the back of a car in the Dunkin' Donut's parking lot with three male teens watching and taking pictures. The next day, one of the male students from another high school who photographed the encounter loaded his pictures onto a photo sharing website from which Tyrell was able to confirm that she was depicted nude with another girl performing oral sex on her. Within a week, word spread about Tyrell's internet pictures. Students at her high school began ignoring her, making fun of her, and calling her names such as "lesbian carpet-muncher." A week later, Tyrell found graffiti in a school bathroom that said, "Megan Tyrell is a lesbian and has herpes." Tyrell left the school only two weeks after the internet posting and was home schooled for the remainder of the school year.

Seaford High School learned of the incident in a roundabout way. A friend of Tyrell's at another high school told one of his counselors that he was worried about Tyrell because she had been raped. The school counselor called Seaford officials and reported the incident. Seaford then interviewed Tyrell on April 1, 2005. Up to this point, Tyrell "had not told any adult at Seaford of the harassment, provide[d] them with the names of any of the students harassing her, or communicate[d] in any way" about the incident. Although plaintiff claimed that she "noticed that some of the teachers were getting a little concerned [and] always asked [her] if [she] needed somebody to talk to or if [she] was upset [she] could always go and turn to them," she did not talk to any teacher about the incident or harassment because she did not want to talk to anybody about what happened, "especially not a teacher if they already knew about it."

Following Tyrell's interview, a Seaford administrator confirmed the existence of the pictures. During the school investigation, several students reported Tyrell's pictures had been posted as background, or "wallpaper," on school computers in the computer labs for a few days, but the investigation didn't yield anyone who had actually seen the pictures. Seaford's director of technology confirmed that Tyrell's pictures had been accessed once from school computers. The technology director then blocked all access to Tyrell's pictures from school computers.

The failure to prove actual notice in *Tyrell* is a common issue in student-student harassment claims. In such cases, student perceptions do not always translate into institutional knowledge.

But Tyrell's sexual harassment claim failed as a matter of law on the narrow legal issue: Title IX does not protect against sexual orientation or gender stereotyping discrimination.[9] If she had not lost on that point, she would have lost on another. The court explained that Tyrell's claim would have failed in any case because Seaford didn't have actual notice of any alleged sexual harassment by Tyrell's peers. "Requiring actual, as opposed to constructive, knowledge [of the alleged sexual harassment] imposes a greater evidentiary burden on a Title IX claimant [than a Title VII claimant]."[10] Despite all of the rumors milling about, the evidence showed that only one Seaford administrator saw the pictures on one occasion and that was to confirm the existence of the pictures. Tyrell's allegation that the pictures had been downloaded or uploaded as "wallpaper" onto Seaford computers by a Seaford student or students wasn't supported by anyone with personal knowledge thereof. Additionally, other than Tyrell informing one Seaford administrator that a "few" unidentified students had called her names, Tyrell proffered no evidence that any one Seaford official or employee had actual knowledge of any pervasive harassment of plaintiff by her peers following the April 1, 2005, incident.[11]

The failure to prove actual notice in *Tyrell* is a common issue in student-student harassment claims. In such cases, student perceptions do not always translate into

institutional knowledge. Meeting Title IX's enhanced notice requirement is even more difficult when some or all of the alleged harassment occurs off campus, like in *Tyrell*.

But this is not a sanction for educational institutions to bury their heads in the sand. Most courts agree that "the actual notice standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student."[12] Certainly the notice requirement is satisfied by something less than a formal complaint, but requires something more than suspicion.

A Note About "Proxy" Harassment

The term "proxy discrimination" is borrowed from *Doe v. Derby Board of Education*, 451 F.Supp.2d 438 (10th Cir. 2006). In July 2002, plaintiff Sally Doe, a 13-year-old student at Derby Middle School, was sexually assaulted by Christopher Porto, Jr., a 17-year-old student at Derby High School. The assault occurred during summer recess and off school grounds. Porto was eventually arrested and charged for the sexual assault of Doe.

In fall 2002 after the arrest, both Doe and Porto returned to school. At the time, Derby High School and Middle School students attended classes in the same building. Although the classes were held separately, students from the high school could interact with students from the middle school, and vice versa.

The plaintiff's father, John Doe, learned Porto was still in school and met with the school principal, Charles DiCenso, to complain, arguing the school had actual knowledge of the sexual assault after Porto's well-publicized arrest. Additionally, Porto's father was a voting member of the Derby Board of Education, indicating the school should have had knowledge of the arrest. After the meeting, Porto was suspended for 10 days with the school instructing that plaintiff Sally Doe would need to provide a statement about the sexual assault and cooperate with school authorities to initiate expulsion proceedings against Porto. Because of the traumatizing nature of the assault, plaintiff Doe never presented her claims to the institution, Porto was allowed to return to school, and it was alleged that the school never attempted to contact the police about the facts of the sexual assault.

Throughout the 2002-2003 school year off of campus, plaintiff Doe suffered teasing and harassment not only by the defendant but also by the defendant's friends, who spit at her and called her a "slut." Sometimes, plaintiff Doe experienced off-campus mistreatment by defendant's friends when the defendant wasn't present, such as when the defendant's friends would spot Doe while they were driving and yell things at her. The defendant's friends were not students at the school. Plaintiff Doe transferred to another school and the defendant was ultimately expelled from Derby for sexually assaulting another female student.

Evidence of "proxy harassment" can be used to bolster a plaintiff's sex harassment claim concerning the severity and offensiveness of the surrounding circumstances.

No one in *Derby* questioned that Doe might have a claim against the school for deliberate indifference to the conduct of the student defendant. Title IX student-student sexual harassment claims were recognized in *Davis v. Monroe County Board of Education*.[13] The novel question raised by plaintiff's complaint was whether Doe could also state a claim against the school for the conduct of the *defendant's friends*, who had no school affiliation. The court said "no," with a "but": "That [plaintiff] was harassed by [defendant's] friends, even if on his behalf, off school grounds, is not actionable because Davis mandates that the Board cannot be liable for any deliberate indifference to harassment in a context over which the Board has no control." However, the court went on to say that evidence of "proxy harassment" can be used to bolster a plaintiff's sex harassment claim concerning the severity and offensiveness of the surrounding circumstances.[14]

Does It Hurt to Investigate?

Does it hurt to investigate? It may be better to worry over what could happen if you don't investigate. The Office of Civil Rights April 2011 Dear Colleague Letter makes clear that schools must process complaints of sexual harassment using established procedures *regardless*

of where the conduct occurred.[15] Moreover, the purpose of a Title IX investigation of sexual harassment is different from a criminal or campus safety investigation of the same conduct. Because students may need ongoing protection from impacts relating to sexual harassment, educational institutions cannot wait for other investigations to conclude before taking "immediate action" to address sexual harassment.

Legally, institutional liability depends on the answers to three questions:

1. Does the institution have substantial control over the alleged wrongdoer and the environment in which the wrongdoing is carried out?
2. Is there actual notice of the wrongdoing?
3. Is there deliberate indifference?

Courts still have the responsibility to decide whether the *legal* standards have been met. The issue is *substantial* control, and that is something a court could decide on summary judgment. Similarly, there is actual notice, and there is inquiry notice, the latter being the kind of notice that makes you queasy even if you don't know why. You could investigate and find out whether you ought to be queasy. Or you could decide to do nothing, because you don't have actual notice.

When an institution sets out to investigate and remedy the wrongdoing, might the admittedly perverse result be that it loses the ability to defend itself against two of the three elements of the claim? Maybe. Here is how that might work: if the institution investigates and remedies an event, it plainly had notice and it plainly had some level of control. That may mean that, by carrying out the investigation and remediation, the institution is admitting that it could do so, and that admission might be enough evidence that the institution had substantial control and actual notice. Is that meaningful? Is it one of those situations in which the right moral answer could be the wrong legal answer? Taking action can easily undercut the institution's position as to the first and second of the elements. However, we also think that isn't a material consideration. Do the investigation. Do the remediation, if appropriate. A court may be able to sort out whether the evidence establishes substantial control and whether the queasiness amounted to "actual notice."

It seems that the better choice, and the better legal defense, is to focus on the last of the three elements of the claim. Don't be indifferent. Suppose you guess wrong on how the law might view your degree of control and you really did have substantial control over the situation. What if that queasiness you felt came out of a level of knowledge that the law might view as actual notice? If you have done nothing, you lose. However, there is even more at stake. By making a choice to do nothing based on a narrow legal analysis, you may have elected to be deliberately indifferent and may also have missed an opportunity to do the right thing by your students.

Conclusion

The cases discussed in this article illustrate the pertinent legal principles that guide courts in deciding legal issues, but they also offer real-life examples of how other schools have handled similar events and how those choices looked later in the unforgiving light of litigation. There is much to be learned from others' mistakes or successes. One of the lessons is that ambiguous situations cry out for a more conservative approach—that is, perhaps assume that you may be responsible and act accordingly—and clear situations have their own answers. Understanding the law is critical.

At the same time, however, the practical lessons from the real-life examples also demonstrate that institutions that allow their actions to be guided less by the law and more by the desire to do the right thing for their students are better positioned to survive legal challenges. While you should never forget about what the law says, it makes sense to borrow a page from physician training: the page that says, "first do no harm."

About the Authors

Paula A. Barran, a founding partner at Barran Liebman, LLP, has been practicing labor and employment law since 1980. She has written extensively on management law and is a national speaker and trainer. In addition to providing regular employer advice, Ms. Barran handles employment litigation in state and federal courts, labor disputes, and employment arbitrations, and she develops and presents "train the trainer" programs to introduce comprehensive but cost-effective training programs into workplaces. Ms. Barran has also earned an ATIXA Title IX Coordinator and Administrator Certificate and works with colleges and universities on their Title IX compliance. Since the first publication of the *Oregon Super Lawyers* magazine in 2006, Ms. Barran has repeatedly been named as a "Top Ten Lawyer" in Oregon. In 2008 and 2010, she was honored as the "Top Point Getter" for the year. Ms. Barran is ranked #1 (with partners Ed Harnden and Rick Liebman) for Labor and Employment Law defense in the State of Oregon by *Chambers & Partners USA*, America's Leading Business Lawyers, 2003-present. She is also a fellow of The College of Labor and Employment Lawyers, a fellow of the American Bar Foundation, and has been named in T*he Best Lawyers in America* directory since 2001.

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Endnotes

1 *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, Definitions. See 34 C.F.R. § 106.2(h).

2 *Rouse v. Duke University*, 2012 WL 6681786 (M.D.N.C., 2012).

3 See *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998); *Doe v. Boulder Valley School District*, 2012 WL 4378162, at *4 (citing *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1246 (10th Cir. 1999).

4 *Davis, as Next Friend of Lashonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999), at 646-647, 652.

5 See *Broadsky v. Trumbull Board of Education*, 2009 WL 230708 (D. Conn. 2009); in this case in which a middle school student claimed that she suffered numerous instances of rude and unkind treatment by various peers, including name-calling, insults, the placement of a pencil under her bottom, and the slapping of her bottom in the hallway, it was found the actions were not sufficiently severe or pervasive to give rise to a claim under Title IX.

6 *Davis*, 526 U.S., at 6.

7 Ibid., 6-7.

8 *Davis*, 526 U.S., at 654.

9 *Tyrrell*, 792 F.Supp.2d 601, at 622-623.

10 Ibid., 623.

11 Ibid., 623-624.

12 *Doe v. Derby Board of Education*, 451 F.Supp.2d 438, 446 (2006); fact issue exists whether board received actual notice of sexual assault through substantial media attention devoted to the investigation and arrest of assailant and because assailant's father was a member of the board.

13 *Davis*, 526 U.S., at 629, 653.

14 *Doe v. Derby*, 451 F.Supp.2d, at 445.

15 US Department of Education Office of Civil Rights (OCR) Dear Colleague Letter (DCL), "Sexual Violence Background, Summary, and Fast Facts," April 4, 2011, https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.html.

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