



# Failure on Campus— Litigating Title IX

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The decision to pursue Title IX sexual misconduct cases against educational institutions can be overwhelming. Here are some tips for bringing claims while emphasizing a trauma-informed perspective.

**T**his year we celebrate the 50th anniversary of Title IX of the Education Amendments of 1972—a law that explicitly prohibits discrimination in any education program or activity that receives federal funding. Since its enactment, Title IX has been a driving force for developments in gender equality in sports and education—and in addressing sexual assault on college and university campuses. Here’s how Title IX has been used to address peer-to-peer<sup>1</sup> sexual harassment and sexual assault in higher education, with tips for using a trauma-informed, survivor-centric approach to litigating claims.

Title IX provides that “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.”<sup>2</sup> Title IX’s dual goals are to “avoid the use of federal resources to support discriminatory practices” and “provide individual citizens effective protection against those practices.”<sup>3</sup>

Individuals have an implied private right of action to enforce Title IX’s prohibition on, among other things, intentional sex discrimination.<sup>4</sup> Under the implied cause of action, “plaintiffs can file directly in court” and “can obtain the full range of remedies.”<sup>5</sup> Survivors may bring claims against educational institutions across the country as most educational institutions receive federal funds, thereby requiring those institutions to abide by Title IX. Survivors may decide to initiate a lawsuit because they feel it is important to have their story heard, especially if they believe the school wrongly dismissed their claims and fears. Moreover, litigation can help drive systemic changes to an institution’s official policies.<sup>6</sup>

### Peer-to-Peer Cases

The U.S. Supreme Court has held that, under certain circumstances, peer-on-peer sexual harassment may give rise to a private Title IX cause of action for intentional sex discrimination, allowing a plaintiff to seek damages against an educational institution that receives federal funds.<sup>7</sup> That case, *Davis Next Friend of LaShonda D. v. Monroe County Board of Education*, involved a fifth grade student who alleged she was the victim of a prolonged pattern of sexual harassment by a classmate.<sup>8</sup>





The student reported the sexual abuse to her mother, who in turn reported the unlawful conduct to the girl's teacher and principal, yet no disciplinary action was taken and the requests for protection went unfulfilled.<sup>9</sup> The mother filed suit in federal district court against the school board and several school officials, alleging Title IX claims.<sup>10</sup>

The Supreme Court held that a private action for damages may lie against a school board under Title IX in cases of peer sexual harassment.<sup>11</sup> The Court explained that to state a plausible Title IX claim based on student-on-student conduct, a student must allege that

- the educational institution receiving federal funds had actual knowledge of peer sexual harassment<sup>12</sup>
- the educational institution responded to this knowledge with deliberate indifference that “subject[ed] [the student] to harassment” by either “caus[ing] [the] student[] to undergo harassment or mak[ing] them liable or vulnerable to it”<sup>13</sup>
- the harassment to which the student was subjected is “so severe, pervasive, and objectively offensive that it effectively bars the [student’s] access to an educational opportunity or benefit.”<sup>14</sup>

Since the Court’s decision in *Davis*, and in recognition of the various contexts in which peer sexual harassment may occur,<sup>15</sup> case law has developed to recognize two different theories of Title IX liability commonly referred to as “post-assault” and “pre-assault” Title IX claims. A post-assault theory of a Title IX claim, like in *Davis*, is more common and is premised on “a school’s response to a [plaintiff’s] complaint of sexual misconduct” after the assault has occurred.<sup>16</sup>

**Pre-assault cases.** In recent years, an increasing number of lawsuits have been based on the more novel pre-assault theory

of Title IX liability. Though commonly brought as multi-party lawsuits or class actions, these cases also can be brought as an individual action. In contrast to the post-assault theory, the developing pre-assault theory of Title IX liability “relies on events that occurred before [the plaintiffs’] assaults” and considers a more widespread, systemic context at an educational institution that may give rise to future sexual misconduct.<sup>17</sup>

These cases allege that the educational institution’s policies for the reporting and investigation of sexual misconduct allegations systematically caused unlawful discrimination of survivors. For example, a 2018 class action alleged Dartmouth College knowingly permitted three of its professors to sexually harass and assault female students for more than 16 years.<sup>18</sup>

In 2021, there was a flurry of action in this area. For example, 10 women sued Louisiana State University over the handling of sexual assault claims involving student-athletes, alleging that the university’s Title IX office was not involved and the complaint process did not follow normal reporting requirements.<sup>19</sup> Similarly, 12 women filed a Title IX action against Liberty University alleging that the institution intentionally created a campus environment where sexual assault is more likely to occur due to the university’s official policies.<sup>20</sup>

Moreover, a class action was recently filed alleging Brown University failed to comply with Title IX in connection with its systematic mishandling of complaints of sexual misconduct from female students.<sup>21</sup> These cases that have made it past the pleading stage have put colleges and universities on notice that they can be generally liable under Title IX for having policies and practices that make peer-on-peer and other forms of sexual misconduct more likely to occur on their campuses.

## Working With Survivors

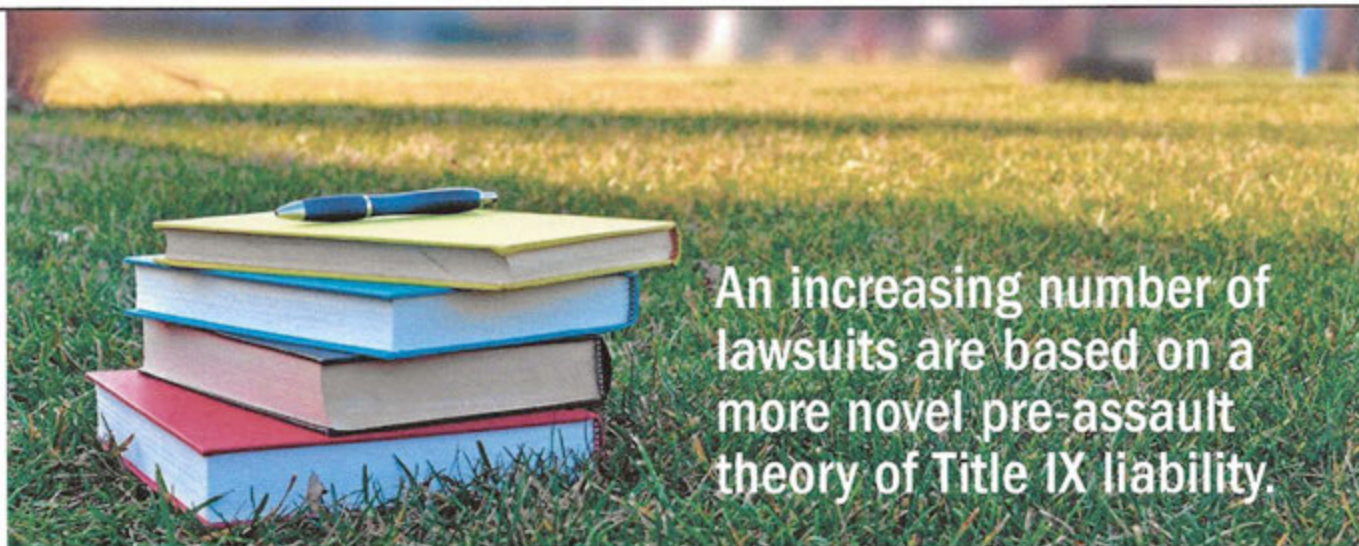
First and foremost, when handling Title IX sexual misconduct cases, you and your staff should learn and practice trauma-informed, survivor-centric advocacy.<sup>22</sup> You are representing sexual misconduct and abuse survivors who often need help when they are understandably very vulnerable and emotional. Using trauma-informed advocacy helps you empower your clients and return to them a sense of control.<sup>23</sup>

The four key characteristics of trauma-informed advocacy include

- identifying trauma by understanding what the client is describing
- making client-specific adjustments to the attorney-client relationship as trauma manifests (for example, scheduling more in-person meetings than usual and being patient and consistent when a client requires multiple conversations about the same topic or additional time to process requests and make decisions)
- adapting your litigation strategy by making certain considerations for the client (for example, giving thought to the client’s ability to testify about traumatic experiences at deposition or in court and enlisting the support of a mental health provider or other support person)
- preventing vicarious trauma (the impacts of the client’s trauma on yourself) through self-care.<sup>24</sup>

Also work to develop cross-cultural lawyering skills, which means understanding that both your and the client’s ethnic and cultural heritages affect the attorney-client relationship.<sup>25</sup> Cultural norms can be based on, among other things, ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation,





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physical characteristics, marital status, role in a family, birth order, immigration status, religion, accent, and skin color.<sup>26</sup> People also can be part of the same culture and make different decisions while rejecting norms and values from their culture.<sup>27</sup> You must develop an awareness of your own culture and skills, while recognizing those of your clients.

One strategy for developing and enhancing cross-cultural competence is to attend a diversity-focused training or conference. However, increasing your cultural competency really starts with working on your own cultural assumptions by having an open mind, being more sensitive to others, and being more adaptable. Doing so can help you foster better attorney-client relationships, anticipate difficulties clients may be experiencing, and more accurately communicate with clients.

### Moving Targets in Title IX Litigation

As a Title IX litigator, stay current on developments in the law and jurisdiction-specific approaches.

**Regulatory changes.** Over the past several years, Title IX administrative requirements have evolved through guidance documents and regulatory amendments.<sup>28</sup> Be mindful of which Title IX regulations apply to your client. Notably, Title IX sexual harassment regulations that took effect in August 2020 offer a new definition of “sexual

harassment”—limiting it to unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies the person access to the program or activity.<sup>29</sup>

Keep in mind that this new definition is not retroactive. The 2020 regulations continue to reference sexual assault under the Clery Act but now also include dating violence, domestic violence, and stalking in the definition of sexual harassment as that term is defined in the Clery Act and the Violence Against Women Act.<sup>30</sup> The 2020 regulations also narrow which individuals whose knowledge of sexual misconduct or reports will be imputed to an educational institution in higher education.<sup>31</sup>

**OCR complaints.** In addition to litigation, students can file complaints with the Department of Education’s Office for Civil Rights (OCR). While an OCR complaint may lead to systemic changes in how an institution prevents and responds to campus sexual violence, a civil lawsuit is often the best avenue for survivors to obtain justice. You’ll need to assess whether to file an OCR complaint simultaneously with a civil lawsuit to assert additional pressure on the academic institution.

Prior to the 2020 regulations, the OCR’s enforcement standard was to hold a school responsible for addressing peer-to-peer harassment “about

which it knows or reasonably should have known.”<sup>32</sup> If the pre-2020 rule is applicable to a survivor’s claims, an OCR complaint will provide a better opportunity for the survivor to recover some relief, in the form of institutional change, under this easier-to-satisfy standard.

The 2020 regulations significantly changed the OCR standard, however, to the higher “deliberate indifference” standard—the same standard used in federal civil actions.<sup>33</sup> If you are in a conservative jurisdiction, consider the benefit of the OCR applying the same standard as a federal court and how OCR findings can be used in civil litigation. For example, if the OCR found a Title IX violation under the deliberate indifference standard, it puts pressure on the educational institution to resolve the matter or it can be cited in briefings submitted to the court.

**Circuit splits.** Be mindful of circuit splits in Title IX litigation. Similar to the pre-assault theory discussed earlier, various circuits interpret standards differently. Just last year, the Fourth Circuit joined the Third, Seventh, Eighth, and Ninth Circuits in adopting a pleading standard in Title IX actions that challenges disciplinary proceedings—these circuits now require plaintiffs to show that “the alleged facts, if true, raise a plausible inference” of discrimination “on the basis of sex.”<sup>34</sup>



## Other Considerations

To best represent your client in a Title IX action, understand the perennial issues in these cases.

**Institutional procedures.** Title IX requires that recipient institutions adopt and publish procedures indicating how individuals may file Title IX grievances. Familiarize yourself with the specific grievance procedures of the educational institution at issue. While the existence of procedures does not affect the right to file a federal complaint, knowledge of an institution's grievance procedures will help dictate your strategy against the institution. For example, it will inform you on what should be included in the institution's investigative file related to the student's Title IX complaint. In addition, it's worth evaluating the institution's policies and procedures to identify whether they violate Title IX.

**Other claims.** Also consider which supplemental jurisdiction claims to include in any Title IX action. Often, Title IX actions include counts for related state law claims (such as intentional and negligent infliction of emotional distress) or claims pursuant to 42 U.S.C. §1983.<sup>35</sup> However, be mindful that the standards of proof may vary among such claims.<sup>36</sup> Additionally, filing in federal court, as opposed to state court, is often advantageous due to the multitude of federal case law available, including a more extensive analysis of Title IX by district courts that serves as persuasive authority.

**Social media.** Be aware of the impact of social media in the Title IX space, which can both positively and negatively impact a Title IX action. Social media platforms present a medium to harass survivors and create a hostile environment. Given the prevalence of social media platforms, it is no surprise that a review of both private and public social media communications (including posts to social media platforms) is often

at the center of institutional Title IX investigations. Student and faculty social media posts often have been used in support of survivor claims.<sup>37</sup>

Talk to your clients about social media management. Have presuit discussions about using social media while litigation is pending, and emphasize that all social media posts and communications are discoverable.

But also consider that social media often can provide a space for survivor healing. Numerous social media accounts have recently emerged nationwide created by anonymous survivors of sexual misconduct on university and college campuses. These social media forums provide a space for survivors to share their experiences. For clients in active litigation, we recommend discussing social media use generally, including accessing anonymous pages—some clients take comfort in reading supportive social media posts by others who have experienced similar trauma.

Peer-to-peer Title IX cases are emotionally difficult, and often re-traumatizing, for survivors. Support clients by working to understand their perspectives, offering them choices, and staying abreast of legal changes. ■



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### NOTES

1. Peer-on-peer sexual abuse is sexual abuse that takes place between students who are peers (students who are generally around or of the same age attending the same academic institution).
2. 20 U.S.C. §1681(a) (1986).
3. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524

U.S. 274, 286 (1998) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)) (internal quotation marks omitted).

4. *Cannon*, 441 U.S. at 702–03.
5. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009).
6. Institutional betrayal is a form of betrayal trauma that occurs when an institution has violated an individual's trust in a way that exacerbates the impact of a survivor's traumatic experience. When an institution betrays a survivor's trust by, for example, responding to a claim of sexual assault with insensitive investigation practices, a survivor likely will experience enhanced psychological distress. See Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 *Am. Psychologist* 575, (Sept. 2014).
7. *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 640 (1999).
8. See *id.* at 633.
9. *Id.* at 633–34.
10. *Id.* at 635–36.
11. *Id.* at 637–40.
12. *Id.* at 650.
13. *Id.* at 644–45 (internal quotation marks omitted).
14. *Id.* at 650.
15. While peer-on-peer sexual misconduct can occur anywhere, such misconduct commonly occurs at social events and gatherings on campus, including fraternity parties and sports-related celebrations or in student dormitories or other housing provided by the educational institution for students.
16. *Karasek v. Regents of Univ. of Cal.*, 500 F. Supp. 3d 967, 970 (N.D. Cal. 2020).
17. *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1099 (9th Cir. 2020).
18. *Rapuno v. Tr. of Dartmouth Coll.*, 334 F.R.D. 637, 644 (D.N.H. 2020).
19. See *Owens v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, No. 3:21-cv-00242 (M.D. La. 2021); see also U.S. Dep't of Educ., Off. for Civil Rights, *Questions and Answers on the Title IX Regulations on Sexual Harassment*, June 28, 2022, <https://www.2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>.
20. *Jane Does 1-12 v. Liberty Univ., Inc.*, No. 2:21-cv-03964 (E.D.N.Y. 2021).
21. *Soenen v. Brown Univ.*, No. 1:21-cv-00325 (D.R.I. 2021).
22. For more on trauma-informed advocacy, see James Marsh & Margaret Mabie, *Trauma-Informed Advocacy*, *Trial*, Aug. 2022, at 38.
23. See, e.g., Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 *Clinical L. Rev.* 359 (2016).
24. *Id.* at 392.

25. See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 *Clinical L. Rev.* 33, 40–41 (2001).
26. *Id.* at 64 n.114.
27. *Id.* at 41.
28. The Department of Education has recently proposed additional rules changes. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 *Fed. Reg.* 41,390 (July 12, 2022).
29. 34 C.F.R. §106(a)(2) (2020). For more on the 2020 rules changes, see Adele Kimmel & Alexandra Brodsky, *A Step Back for Student Sexual Harassment Claimants*, *Trial News*, Oct. 9, 2020.
30. The Clery Act requires all colleges and universities that participate in federal financial aid programs to maintain and disclose campus crime statistics, including statistics on sex offenses. See 1990 Clery Act, 20 U.S.C.A. §1092(f) (2020), as implemented at 34 C.F.R. §§668.41(e)(2021), 668.46(2015).
31. In higher education, “actual knowledge” occurs when an institutional official, with authority to take corrective action, observes or receives a report of sexual harassment occurring in the institution’s education programs or activities. See 34 C.F.R. §106(a).
32. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 *Fed. Reg.* 30,026-01 (May 19, 2020), for a discussion of prior rules and changes.
33. *Id.*
34. See *Sheppard v. Visitors of Va. State Univ.*, 993 F.3d 230, 235 (4th Cir. 2021). Under the framework provided by *Yusuf v. Vassar Coll.*, 35 F.3d 709 (2d Cir. 1994), which the Fourth Circuit previously followed but will not entirely disregard, Title IX challenges to disciplinary proceedings fell into two categories: erroneous outcome (alleging particular facts sufficient to cast articulable doubt on the outcome’s accuracy and indicating that gender bias was a motivating factor), and selective enforcement (alleging that the severity of the punishment and/or the decision to initiate the proceeding was affected by the student’s gender). The Fourth Circuit also held in *Sheppard* that a plaintiff must sufficiently plead causation in a Title IX challenge to a disciplinary process, adopting a requirement of “but-for” causation.
35. See, e.g., *Fitzgerald*, 555 U.S. at 258.
36. See, e.g., *id.* at 257–58 (While a Title IX claim only requires a showing of “deliberate indifference” of a single school administrator, a §1983 claim requires a showing “that the harassment was the result of municipal custom, policy or practice.”).
37. See, e.g., *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 797 (M.D. Tenn. 2016) (coach and athletic team posted photo supporting accused perpetrator on social media); *Rex v. W. Va. Sch. of Osteopathic Med.*, 119 F. Supp. 3d 542, 547 (S.D. W. Va. 2015) (students and faculty commented about plaintiff’s rape on social media, making it the subject of ridicule and mockery).