

Ninth Circuit: Universities May Be Liable Under Title IX for Off-Campus Assaults

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In a fractured decision, an en banc panel of the U.S. Court of Appeals for the Ninth Circuit reinstated a former University of Arizona student's Title IX lawsuit against the university. Vacating a divided three-judge panel's opinion affirming summary judgment for the university, the en banc panel held that the student, Mackenzie Brown, presented enough evidence for a trial on the issue of whether the university exercised sufficient control over the off-campus apartment, where she was assaulted by Orlando Bradford, her boyfriend, a fellow student and member of the football team.

Case Overview

Bradford enrolled at the University of Arizona in the fall of 2015, playing football on an athletic scholarship. According to the lawsuit, during his freshman year, he assaulted two students, one more than 100 times, and in the summer following his freshman year, he assaulted Brown multiple times. The university learned of Bradford's assaults during his freshman year, and issued a "no contact" order forbidding any contact with one of the students, either on or off campus. University officials did not inform the athletic director or Bradford's football coaches. The evidence was undisputed that, had athletic officials been informed about Bradford's conduct, he would have lost his scholarship, been kicked off the team, and likely expelled before the end of his freshman year. Instead, Bradford's coaches gave him permission to live off campus during his sophomore year, and on two successive nights that fall, he violently assaulted Brown. Brown's mother called the police and the university's athletic director, and thereafter Bradford was expelled, criminally charged, and eventually sentenced to five years in prison after pleading guilty to felony aggravated assault and domestic violence.

Brown sued the university under Title IX. The district court granted summary judgment to the university, holding that none of the abuse Brown experienced occurred within a "context" over which the university exercised control. The Ninth Circuit's three-judge panel affirmed, but the court granted rehearing and an en banc panel reversed the district court. (Because the Ninth Circuit has as many as 29 active judges, its rules provide for limited en banc review before the Chief Judge and a panel of 10 randomly selected judges, rather than the full court.)

The En Banc Ninth Circuit's Decision

Under the Supreme Court's decision in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, a school may be liable in damages under Title IX for student-on-student harassment only if, among other factors, the school had "substantial control over both the harasser and the context in which the known harassment occurs." 526 U.S. 629, 645 (1999). The en banc Ninth Circuit held that there was enough evidence that the university exercised

sufficient control over the context in which Bradford's conduct occurred to support liability under Title IX, even though his assaults on Brown occurred off campus. The court explained that, "while the physical location of the harassment can be an important indicator of the school's control over the 'context' of the alleged harassment, a key consideration is whether the school has some form of disciplinary authority over the harasser in the setting in which the harassment takes place." In the en banc court's view, Brown had presented enough evidence that a rational jury could find that the university had "substantial control" over the "context" in which Bradford assaulted her. This evidence included the university's Code of Conduct, which applied both on and off campus, and the stricter rules that applied to Bradford as a member of the football team, which included the university's authority to forbid him from living off campus.

The en banc court also considered the university's actual knowledge and deliberate indifference, which the district court had not addressed. As to actual knowledge, there was evidence that university administrators knew of Bradford's assaults of two other women during his freshman year. Those administrators' failure to report these assaults to the football coach or athletic director, who would have expelled Bradford if they had been informed, could reasonably constitute deliberate indifference.

Judge Friedland wrote a concurring opinion, while Judges Rawlinson, Nelson, and Lee each wrote dissenting opinions. Judge Friedland wrote separately to address the dissenters' arguments that Brown had disavowed the issue of the university's control over the off-campus apartment before the three-judge panel, concluding that although she had, the panel had addressed it anyway, which made it fair game for the en banc court. Judge Rawlinson, dissenting, emphasized that Title IX was enacted to remedy discrimination in athletic programs and other activities, that the implied private right of action for damages recognized in *Davis* requires the harassment to be "tethered" to such programs and activities over which the school has control, and that there was no such connection here. In Judge Nelson's view, the majority's decision allowed the control-over-harasser prong of *Davis* to subsume the control-over-context requirement. Judge Lee dissented separately to emphasize how far afield courts have wandered from Title IX's statutory text.

Implications

The Ninth Circuit's en banc decision in *Brown* warrants careful consideration by schools both in and outside of the Ninth Circuit.

It remains to be seen how courts will interpret *Brown*. If read expansively, it could suggest that a school's authority to discipline students for conduct occurring off campus could lead to potential Title IX liability in situations far removed, not only from the physical campus, but from any school-sanctioned or even school-related activity. As Judge Nelson wrote in dissent, the majority's decision suggests that "[s]chools could be liable for what happens within completely private, unsupervised settings such as spring break trips abroad, online communication, and students' family homes." On the other hand, courts could confine *Brown* to its facts, which involved especially egregious incidents of domestic violence, resulting in imprisonment for Bradford, evidence that the school had control over the apartment on the theory that he was only permitted to live there "on good behavior," and unusually clear evidence that if certain school officials had known of Bradford's prior misconduct, he would have been expelled.

Troutman Pepper's Higher Education practice will continue to monitor developments on this and other Title IX

issues.

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