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Third Circuit Rules Universities May Face Title IX Liability for Sexual Misconduct By Nonstudent Guests

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On January 11, the U.S. Court of Appeals for the Third Circuit issued a precedential decision in *Hall v. Millersville University*, holding for the first time that colleges and universities may face damages liability under Title IX for deliberate indifference to known sexual harassment committed by nonstudent guests. The three-judge panel unanimously reversed the U.S. District Court for the Eastern District of Pennsylvania's ruling on this issue, and remanded the matter for further proceedings.

Case Overview

In February 2015, Karlie Hall was a freshman at Millersville University when she was murdered in her dorm room by her high school boyfriend Gregorio Orrostieta. Orrostieta was not a Millersville student, but was a frequent guest of Hall's on campus. While visiting, Orrostieta exhibited abusive behavior observed by both Hall's roommate and resident advisor. On one occasion in October 2014, after Orrostieta injured Hall's eye in her dorm room and she asked him to leave, Hall's resident advisor enlisted the help of campus police to remove Orrostieta from campus. Following Millersville's Title IX policy, the resident advisor also filed an incident report with Millersville's area coordinator and assistant director of judicial affairs/deputy Title IX coordinator. However, contrary to the university's Title IX policy, these university administrators failed to forward the report to the university's Title IX coordinator, and no one at Millersville contacted Hall. Further, the university police officer who assisted in removing Orrostieta from campus did not file an incident report until ordered to do so four months after Hall's murder.

On February 7, 2015, Hall and Orrostieta were observed fighting at a party. After the pair returned to Hall's dormitory, other residents heard the sounds of furniture moving in Hall's room and a female voice screaming for help. The resident advisor knocked on Hall's door, but heard nothing and took no further action. That night, Orrostieta killed Hall through "strangulation and multiple traumatic injuries." He was later arrested and convicted of third-degree murder.

Millersville's Title IX policy governed "all areas of Millersville operations, programs, and sites, and included the conduct of employees, students, visitors/third parties, and applicants." As noted, the policy also required deputy Title IX coordinators and area coordinators to report instances of sexual misconduct to the Title IX coordinator and ensure such reports were received. Separate and apart from its Title IX policy, the university also maintained policies addressing guests' presence and permissions on campus, including policies establishing check-in procedures, limiting lengths of stay, restricting residence hall access to students with valid ID, and requiring that guests be escorted by residents. The university also maintained the ability to ban individuals from campus by

issuing a “No Trespass Order.”

District Court’s Decision

Hall’s parents sued Millersville, alleging the university violated Title IX, and the District Court for the Eastern District of Pennsylvania granted summary judgment to the university. Because Title IX was enacted under Congress’ spending power, a private damages action is available only if the institution had adequate notice that the conduct at issue could subject it to liability. The District Court held that, because neither the U.S. Supreme Court nor the Third Circuit had held that a school could be liable for deliberate indifference to sexual harassment by a student-invited guest, Millersville lacked sufficient notice for liability. Despite its dispositive ruling on notice, the District Court reached the merits, holding there were genuine disputes of material fact that would otherwise entitle the family to a trial on its Title IX claim.

Third Circuit Decision

The Third Circuit reversed, holding that existing precedent put Millersville on notice that it could be held liable in damages under Title IX based on the conduct of a nonstudent guest, even when the guest was invited by a student.

In the Third Circuit’s view, the Supreme Court’s decisions in *Gebser v. Lago Vista Independent School District*, *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, and *Jackson v. Birmingham Board of Education* gave Millersville sufficient notice. *Gebser* gave notice that schools could be held liable if they had actual knowledge of sexual harassment by a teacher against a student and were deliberately indifferent to it. *Jackson* put schools on notice that intentional conduct, in that case retaliation, could give rise to damages liability under Title IX. And *Davis*, which recognized a private right of action under Title IX for a school’s deliberate indifference to student-on-student sexual harassment, put schools on notice that, as the Third Circuit put it, they “may be liable for acts of sexual harassment by individuals other than students” if they had “control over the harasser and the context of the harassment.” The Third Circuit found *Davis* in particular to be important, because in the court’s view, *Davis* hinged on the university’s level of control, not the harasser’s classification as a student or nonstudent.

With these cases in mind, the panel found that Millersville had sufficient notice that, under Title IX, it could be held liable in damages for deliberate indifference to a nonstudent’s sexual harassment. The panel noted that Millersville knew and intended for its Title IX policy to apply to nonstudents, including visitors and third parties, and that the university expressly defined sexual misconduct as a violation of its Title IX policy. The panel also rejected the District Court’s interpretation of guidance from the Office for Civil Rights that sexual harassment by third parties — “e.g., a visiting speaker for members of a visiting athletic club” — could result in liability. While the District Court found this language limited an institution’s potential liability only to university-invited guests, the panel found this reading too narrow, determining that the use of “e.g.” meant the ensuing list should be read as “illustrative” rather than “exhaustive,” and therefore, could encompass student-invited guests. Finally, the panel cited recent decisions in which sister courts declined to bar private causes of action, where the federal funding recipient intentionally violated Title IX’s plain terms, such as by failing to respond to a single known incident of sexual assault.

On the merits of Hall's Title IX claim, the Third Circuit agreed with the District Court that factual disputes precluded summary judgment in Millersville's favor. Millersville had in place guest policies on which it relied to remove Orrostieta from campus and which permitted Millersville to issue "No Trespass Orders" to third parties. Regardless of whether Millersville had formal disciplinary authority over Orrostieta, the Third Circuit believed that the university's policies created a factual dispute as to whether it had sufficient authority to take remedial action against him. There also was a material factual dispute as to whether Millersville had actual notice of the harassment, insofar Orrostieta's abusive conduct against Karlie Hall was known to several people at Millersville. The court further agreed that there was a factual dispute as to whether Millersville acted with deliberate indifference because reports of Hall's abuse were not given to Millersville's Title IX coordinator, as required by the school's policies, and because the school did not reach out to Hall.

Implications

The Third Circuit's decision in *Hall v. Millersville University* deserves careful consideration by colleges and universities.

Hall appears to be the first time an appeals court has held that a university can be held liable under Title IX for deliberate indifference to sexual harassment committed by a student-invited guest to campus, which is a very broad interpretation of the limiting principle in *Davis* that schools are only liable where they "exercises substantial control over **both the harasser** and the context in which the known harassment occurs." Additionally, the decision placed great emphasis on the university's alleged failure to abide by its own policies, which the court believed created a triable issue of fact, notwithstanding that many courts have held that failure to follow a school's own policy is not deliberate indifference. In articulating the cause of action for a Title IX claim, the court also fails to articulate or develop the concept of causation — other than to briefly note in a footnote that a school's deliberate indifference is actionable if it "results in a student being excluded from participation in, being denied the benefits of, or being subjected to discrimination under its programs."

Hall adds to the list of differing opinions from the federal courts of appeal interpreting *Davis*. Clarity may be coming, however, as a petition for certiorari is currently pending in the case of *Doe v. Fairfax Cnty. Sch. Bd.*, 10 F.4th 406 (4th Cir. 2021), which asks the court to clarify *Davis* on a number of important issues.

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