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## Ninth Circuit Confirms Title IX Protections for Perceived Sexual Orientation

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The U.S. Court of Appeals for the Ninth Circuit recently held that Title IX of the Education Amendments Act of 1972 prohibits discrimination on the basis of perceived sexual orientation.

### Background

In *Grabowski v. Arizona Board of Regents* (9th Cir. June 13, 2023) Case No. 22-15714, Michael Grabowski alleged that while he was a “first-year student-athlete, his teammates subjected him to frequent ‘sexual and homophobic bullying’ because they perceived him to be gay.” Grabowski alleged that his teammates directed homophobic slurs at him on a nearly daily basis and posted an “untrue,” “harassing, homophobic [and] obscene video” about him in the team’s public chat group. Grabowski alleged that he and his parents brought the harassment to the attention of the team coaches, who ignored and dismissed their complaints. After bringing his complaints to the team coaches, Grabowski was dismissed from the team and lost his athletic scholarship.

Grabowski filed suit against the Arizona Board of Regents and the University of Arizona, alleging Title IX was violated when the university responded to his complaints of harassment with deliberate indifference and retaliated against him. Grabowski also sued the coaches individually for violating his due process rights by removing him from the team. The district court granted the defendant’s motions to dismiss and for judgment on the pleadings. Grabowski appealed.

### The Ninth Circuit’s Holding

The Ninth Circuit affirmed dismissal of the cause of action against the coaches individually but reversed the district court’s decision on the other two causes of action.

In reaching its decision, the court analyzed whether “on the basis of sex” under Title IX includes a perception of a person’s sexual orientation. Harmonizing the Supreme Court’s decision in *Bostock v. Clayton County* (2020) 140 S. Ct. 1731 that brought sexual orientation within Title VII’s embrace, and the Ninth Circuit’s decision in *Doe v. Snyder* (9th Cir. 2022) 28 F.4th 103 finding consistency between Title VII and Title IX, the court held that discrimination on the basis of sexual orientation is a form of

sex-based discrimination under Title IX. The court went on to say that “in *Bostock* the Supreme Court established that, when an employer fires an employee for traits that it would tolerate in an employee of the opposite sex, that employer discriminates in violation of Title VII.” The court also looked to another Supreme Court decision holding that Title VII protected against firing a woman for failing to conform to traditional gender norms and a Ninth Circuit case finding that the same reasoning could be applied to a man who is discriminated against for being too feminine. The court’s analysis and harmonizing of these rulings led to its holding that discrimination on the basis of perceived sexual orientation is actionable under Title IX.

## Takeaway

While the Title IX regulations are set to be revamped in a few months, the Ninth Circuit provides some clarification and confirmation as to the protections of Title IX and what “on the basis of sex” means in that context. Accordingly, school districts and community college districts should consider that perceived sexual orientation is now firmly within Title IX’s purview.

If you have any questions about the *Grabowski* case or Title IX in general, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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