

CLIENT NEWS BRIEF

Title IX and "Pre-Assault": Closing the Flood Gates

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A new ruling by the Ninth Circuit Court of Appeals amended a January 2020 opinion on the liability of colleges and universities for "pre-assault claims," or the argument that inadequate Title IX policies created a "heightened risk" of sexual misconduct. The intent of the amendment was to clarify the test for liability with respect to such "pre-assault claims," limiting exposure of Title IX liability to cases where the claimant can show the heightened risk of sexual harassment was **known or obvious** to the educational institution and, as a result, the claimant suffered harassment that was **so severe, pervasive, and objectively offensive** that the claimant was deprived of access to the educational opportunities or benefits provided by the school.

Background

Under Title IX, institutions receiving federal funding face potential liability when they have knowledge of sexual harassment and exhibit "deliberate indifference" to the misconduct, meaning they fail to adequately respond or take appropriate action. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

January 2020 Opinion

In January 2020, a decision by the U.S. Court of Appeal for the Ninth Circuit permitted a case to move forward to determine whether a university maintained a policy of deliberate indifference that increased the risk of sexual harassment on its campus. In *Karasek v. Regents of the University of California*, three former students, all women, filed a complaint against the UC Board of Regents alleging that UC Berkeley failed to adequately respond to their individual sexual assault complaints and that the university maintained a general policy of deliberate indifference to reports of sexual misconduct, which resulted in a higher risk of being assaulted. The District Court found that the women failed to plausibly allege that UC Berkeley was deliberately indifferent while handling their cases, which is a criteria needed to prevail in a lawsuit against an educational institution on a Title IX claim. The case was dismissed, and the women appealed.

In the January 2020 opinion ((9th Cir. 2020) 948 F.3d 1150), the Ninth Circuit established a test for Title IX pre-assault claims. Specifically, the court held that claimants asserting a "pre-assault claim," also referred to as a "before theory," must prove the following:

- The educational institution maintained a policy of deliberate indifference to reports of sexual misconduct;
- The educational institution created a heightened risk of sexual harassment in a context subject to the institution's control; and
- The claimants were harassed as a result of the policy.



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As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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April 2020 Amended Opinion

After attorneys for the UC Board of Regents submitted a petition for the appeal to be reheard in the Ninth Circuit, the court, on April 20, 2020, amended the language of the test set forth in its January 2020 opinion (discussed above), clarifying that, in order for Title IX liability to apply, the heightened risk of sexual harassment must be **known or obvious** and as a result, the claimant must have suffered harassment that was **so severe, pervasive, and objectively offensive** that the claimant was deprived access to the educational opportunities or benefits provided by the school. Claimants asserting a pre-assault claim now must prove the following:

- The educational institution maintained a policy of deliberate indifference to reports of sexual misconduct;
- The educational institution created a heightened risk of sexual harassment, that was known or obvious to the institution, in a context subject to the institution's control; and
- The claimant suffered harassment, which was so severe, pervasive, and objectively offensive, that they were deprived of access to the educational opportunities or benefits provided by the school.

The April 2020 opinion amends the previous opinion by adding heightened standards to "pre-assault" claim test, laid out by the Ninth Circuit in January 2020. Without the amended language, educational institutions could have experienced an influx of exposure to damages under Title IX, if their official acts or omissions were determined to have increased the risk of sexual misconduct on their campuses, even if they were unaware of the risk.

Takeaways

While the Ninth Circuit's clarification of the test for "pre-assault" claims may have the effect of making it harder for claimants to prevail under this theory, educational institutions must still ensure that they have effective policies and procedures in place that require a prompt and adequate response to sexual harassment and sexual assault complaints. These policies should ensure that, among other things, allegations of sexual harassment and assault are timely and fairly investigated and that victims are offered protections from further harm.

If you have any questions about this case, or need assistance in conducting Title IX investigations or policy review, please contact the author of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).