NO. 15-113098-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

NAVID YEASIN,
Petitioner-Appellee/Cross-Appellant,

v.

THE UNIVERSITY OF KANSAS,
Respondent-Appellant/Cross-Appellee.

BRIEF OF AMICUS CURIAE KANSAS STATE UNIVERSITY

Appeal from the District Court of
Douglas County, Kansas
Honorable Robert W. Fairchild, District Judge
District Court Case No. 2014-CV-102

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TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Kansas Supreme Court Rule 6.06, Kansas State University (KSU) respectfully submits this amicus curiae brief. KSU is a State of Kansas institution of higher education with an interest in the interpretation and application of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* (Title IX). KSU writes as amicus curiae to suggest that this Court's legal analysis should be consistent with Title IX's statutory language, regulations, and interpretation by the United States Supreme Court: specifically, that Title IX does not require schools to take responsibility for instances of off-campus sex discrimination (including sexual violence or sexual harassment) unless the school has substantial control over the context in which the alleged conduct occurs. KSU does not opine on the University of Kansas's (KU) policies, other than as they pertain to Title IX, nor on the ultimate outcome or other matters relevant to this case.

Title IX compliance and the safety of students is of paramount importance to KSU. KSU does not condone any sexual violence regardless of location. KSU provides advocacy, support, and resources to student victims of sexual violence, and it adheres to its non-discrimination policy, which prohibits sexual violence on its campus and at KSU-sponsored programs.

KSU's intention is for this brief to assist the Court as it evaluates any issues related to Title IX.

STATEMENT OF THE ISSUE

Relevant to KSU's amicus curiae interest, the issue in this matter is whether Title IX requires a school to discipline a student for sexual violence committed off campus and outside the school's substantial control.

ARGUMENT

Issue: Whether Title IX requires a school to discipline a student for sexual violence committed off campus and outside the school's substantial control.

A. Under Title IX, a school has responsibility to address sex discrimination only when the harassing conduct is under the school's substantial control.

Title IX, a federal law focused on gender equity in education, prohibits a university from subjecting students to sex discrimination: "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...."[1] The statute defines "program or activity" to include "all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education."[2] Thus, to be covered by Title IX, the discrimination must occur "under" the university's "operations".[3]

Although Title IX has received regular analysis and interpretation from courts, the issue presented in this appeal—whether schools are required, as a matter of federal law, to punish students for off-campus conduct—was most clearly addressed by the United

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[1] 20 U.S.C. 1681(a) (emphasis added).
[2] 20 U.S.C. 1687.
[3] *Id.*; *see also* 34 C.F.R. § 106.31(a) ("...education program or activity operated by a [federal funding] recipient" (emphasis added)).

States Supreme Court in *Davis v. Monroe County Board of Education.*[4] In *Davis*, the Court determined that a private right of action was available against schools for peer-to-peer sexual violence/harassment under Title IX, but only in very specific circumstances. The Court concluded that "recipients of federal funding may be liable for subjecting their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority."[5] All of these elements are necessary to make a school responsible for peer-to-peer harassment.

The last element, that the harasser is under the school's disciplinary authority, requires that the school exercise substantial control over: (1) the harasser; and (2) the context in which the known harassment occurs.[6] The *Davis* Court found that when the misconduct occurs during school hours and on school grounds, then the school has substantial control over the context in which the harassment occurs.[7] This "substantial control" requirement emanates directly from the plain statutory language of Title IX: "The statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs."[8] The Court reasoned that, "because the harassment must occur 'under' 'the operations of' a funding recipient, *see* 20 U.S.C. § 1681(a); § 1687 (defining "program or activity"), a school's responsibility is limited "to circumstances wherein the

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[4] 526 U.S. 629, 119 S. Ct. 1661 (1999).
[5] *Id.* at 646-47 (emphasis added) (internal brackets and quotations omitted).
[6] *Id.* at 645.
[7] *Id.* at 646.
[8] *Id.* at 644.

recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."[9]

Consistent with *Davis*, federal courts in the District of Kansas and the Tenth Circuit have recognized the limited scope of Title IX jurisdiction. In *C.R.K. v. U.S.D. 260*, a male high school student assaulted a female student off of school property during the summer and not during a school activity.[10] The court found that "[u]nder the circumstances, there was nothing unreasonable about [the principal's] conclusion that the August 1st incident was out of the school's jurisdiction and was up to criminal justice authorities to investigate, to determine what happened, and to impose any appropriate punishment."[11]

The Tenth Circuit made a similar finding in *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District.*[12] A female middle-school student allegedly was coerced into performing sexual acts with a number of boys.[13] The student's mother claimed the school district's response was unreasonable because it failed to investigate allegations, interview alleged perpetrators and the victim, and appropriately discipline the boys involved.[14] The high school principal referred the allegations to a local police officer (the school resource officer) because "he believed that none of the incidents occurred on school grounds and the incidents occurred before any of the students were enrolled at the high school."[15] The court found that the school was reasonable in its belief that it did not

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[9] *Id.* (emphasis added).
[10] *C.R.K. v. U.S.D. 260*, 176 F. Supp. 2d 1145, 1147 (D. Kan. 2001).
[11] *Id.* at 1164.
[12] 511 F.3d 1114 (10th Cir. 2008).
[13] *Id.* at 1117.
[14] *Id.* at 1120-21.
[15] *Id.* at 1121.

have responsibility or control over the incidents and that discipline of the perpetrators was not appropriate since most incidents did not occur on school grounds.[16]

Thus, a school's Title IX compliance obligations extend only to its campus or to programs and activities the school operates. Unless the harassment occurs within a school's substantial control, the school is not responsible for investigating or disciplining for it.[17] Consequently, as a matter of law, the Supreme Court's explicit limits on Title IX jurisdiction do not require universities to investigate or discipline students for off-campus, peer-to-peer misconduct.

B. Title IX's plain language leaves no room to expand Title IX jurisdiction to include harassing conduct not within a school's substantial control.

Despite the Supreme Court's unambiguous analysis in *Davis*, KU contends (incorrectly) that the U.S. Department of Education's Office for Civil Rights (OCR) guidance somehow expands Title IX's scope, requiring KU to adjudicate students' off-campus conduct. This contention fails because: (1) it is a misreading of OCR's guidance; (2) OCR's guidance is not the "law" and such an expansive interpretation would not be due any deference by this Court; and (3) as a practical matter, it is beyond a university's capabilities to adjudicate matters outside of its substantial control.

First, it is unreasonable to read OCR's guidance so expansively. A reading of the OCR guidance shows that it can be read co-extensively with the jurisdictional limitations discussed in *Davis* and Title IX's plain language. When discussing off-campus conduct in

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[16] *Id.*

[17] The Supreme Court in *Davis* recognized that universities are not expected to exert as much control over their students as grade schools do, so based on that and the cases discussed above, a university's obligations would not extend beyond the campus or university-sponsored events under Title IX precedent. 526 U.S. at 649, 119 S. Ct. at 1674.

2011, OCR suggested that universities examine off-campus conduct only to determine whether a hostile environment exists on campus: "Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus."[18] This is necessary, OCR explains, because off-campus conduct can provide needed context to evaluate the on-campus conduct: "For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment."[19]

OCR's April 2014 guidance is consistent with that. Schools should "determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity."[20] And although one might argue that OCR's 2014 "continuing effects" language appears to extend Title IX's reach to off-campus conduct (even if no conduct occurred on campus), the same "continuing effects" language also was included in the 2011 guidance and was clearly directed toward establishing context for on-campus conduct. OCR has had multiple opportunities to opine that schools are obligated to discipline for purely off-

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[18] U.S. Dept. of Ed., Office for Civil Rights, Dear Colleague Letter, at 4 (April 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html (last visited May 21, 2015).

[19] *Id.*

[20] U.S. Dept. of Ed., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, at F-4, p. 29 (April 29, 2014), *available at* http://www2.ed.gov/about/offices/list/ocr/whatsnew.html#2014 (last visited May 21, 2015).

campus conduct when there is a subjective effect on someone's thoughts or feelings on campus. OCR has not done so.

Second, OCR's guidance is not the "law" and an expansive interpretation of its guidance, as KU wrongly advocates, would not be entitled any deference. KU erroneously equates OCR guidance documents as what is "required by law" in an attempt to create a jurisdictional hook in its *Student Code*, which incorporates the "law".[21] But the "law" is what is in the statutes and regulations, and those do not mandate that a school discipline students for conduct that occurs outside the school's substantial control.

And even if OCR suggested such an expansive interpretation of its guidance, it would not be due any deference. The Title IX statute and regulations, discussed above, are not ambiguous. A court must look to the statute's plain language to determine that the conduct must occur "under" the school's "operations", just as the Supreme Court did in *Davis*.[22] An expansive interpretation that conflicts with the plain language of the law and/or the Supreme Court's construction of "unambiguous terms of the statute" is owed no deference.[23] The expansive interpretation also would not be entitled deference because

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[21] Appellant/Cross-Appellee's Brief at 5 (citing R. 3:496 (*Student Code*, Article 20)).

[22] *Davis*, 526 U.S. at 645, 119 S. Ct. at 1672; *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Townsend v. Swank*, 404 U.S. 282, 92 S. Ct. 502 (1971) ("[T]he principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the [statute]."); *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1137 (10th Cir. 2013), *cert granted* 135 S. Ct. 44 (Oct. 2, 2014) ("As a threshold matter, in order for . . . deference [to an agency's interpretation of its regulations] to be warranted, the language of the regulation in question must be ambiguous, lest a substantively new rule be promulgated under the guise of interpretation.").

[23] *Nat'l Cable & Tele. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982, 125 S. Ct. 2688 (2005); *see also Davis*, 526 U.S. at 644 ("The statute's *plain language* confines the

it would contradict OCR's own 2011 Dear Colleague Letter, which limited a school's consideration of off-campus conduct to providing context for on-campus conduct.[24] Thus, OCR's guidance cannot be read to rewrite existing law.

Lastly, it would be absurd and illogical to make universities the arbiters of all sexual or abusive conduct inflicted or suffered by their students, particularly when universities have no substantial control over the environment where the conduct occurred. For example, if a student was sexually abused by a parent over the summer, is the university now legally responsible for the subjective "continuing effects" that the student continues to experience? Is the university required to investigate the off-campus conduct and punish the parent (*e.g.*, barring them from campus) because of the possibility that the parent might someday appear on campus? Do the answers to these questions change if the parent applies for admission to the university or is already a student? If universities were required to adjudicate and punish in this manner, universities would become *de facto* police departments with worldwide jurisdiction (but lacking subpoena power), and *in loco parentis* will have returned to life after more than five decades of repeated pronouncements that it does not apply in the post-secondary education context. Fortunately, however, Title IX is focused on campuses and university programs and activities. The law has not morphed in the way KU suggests it has—*Davis*'s requirement

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scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs." (emphasis added)).

[24] USDE, Dear Colleague Letter (2011); *see also Abercrombie & Fitch Stores, Inc.*, 731 F.3d at 1137 (explaining that even if the law is ambiguous, deference is not warranted when an "agency's interpretation conflicts with a prior interpretation"); *see also Perez v. Mortgage Bankers Assn.*, 135 S.Ct. 1199, 1211-12 (2015) (Scalia, J. concurring) (calling into question whether any deference should be given under any circumstances to an agency interpreting its own rules and regulations due to the slippery slope of creating vague regulations that leave too much to later interpretation).

of a school's substantial control over the context in which the harassing conduct occurs remains the law for triggering Title IX obligations.

C. Title IX does not mandate that KU must sanction students for off-campus conduct.

The district court's determination in this case followed KU's policy, which uses language virtually identical to the "on campus" and "program or activity" language emanating from Title IX's substantial control requirement.[25] The district court concluded that KU punished Mr. Yeasin for conduct outside of KU's control: "The incident occurred inside petitioner's car while it was located at various places in Olathe, Kansas and Leawood, Kansas. No evidence was presented that any of the acts occurred on the University campus or that petitioner was participating in a University-sponsored event. Likewise, the district court found that KU presented no evidence that petitioner posted the offending 'tweets' on the KU campus or at a University-sponsored event."[26] Assuming that the district court's analysis of the facts is correct, and that none of the acts occurred on campus or as part of a university-sponsored event, then Title IX imposed no obligation on KU to sanction Mr. Yeasin's conduct.

On the other hand, if KU had punished Mr. Yeasin for conduct occurring only on its campus, then KU would have been squarely within its Title IX jurisdiction. In KU's

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[25] Article 22 of KU's *Student Code* mirrors the *Davis* substantial control requirement by providing that students are "subject to disciplinary action" "[w]hile on University premises or at University sponsored or supervised events". *See* Appellant/Cross-Appellee's Brief at 5-6 (citing R. 3:497). While KU's Article 20 includes the additional phrase, "or as otherwise required by federal, state, or local law", in an attempt "to ensure that the University could address off-campus conduct", *id.* at 5 (citing R. 3:496), KU misses the mark for Title IX purposes. Quite simply, as discussed above, Title IX does not "require" a university to respond to or institute disciplinary proceedings for purely off-campus peer-to-peer conduct if none of the conduct happened within the university's control.

[26] R. 5:761; *see also* Appellant/Cross-Appellee's Brief at 27-28.

brief, it suggests that there was some conduct occurring on campus, such as persons on campus laughing at and ridiculing Ms. W.[27] Had the KU panel made findings limited to sexually harassing conduct within KU's substantial control—such as on-campus conduct—that conduct would have required an appropriate response under Title IX, which may have included sanctions for Mr. Yeasin. KU also could have considered off-campus conduct to provide context to determine whether conduct on campus created a hostile environment.[28]

Taking off-campus conduct into consideration for contextual purposes makes logical and practical sense on a university campus. For example, if a male student sits behind a female student in class every day, then without any further context there is no evidence of a hostile environment. If, however, the male student sexually assaulted the female student outside of campus, then that fact would be important to determine whether the male student's conduct *on campus* created a hostile environment. The school would have an obligation to respond to the on-campus conduct only, because the university had substantial control over the harasser and the context in which the harassment occurred (*i.e.*, the classroom). But the university would not have substantial control over the environment where the initial sexual assault occurred, so to punish for that conduct would exceed Title IX's mandate.[29]

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[27] Appellant/Cross-Appellee's Brief at 36-37 (citing R. 2:38).

[28] *See* USDE, Dear Colleague Letter (2011); *see also supra* nn.18-20 and corresponding analysis in Section B, herein.

[29] Under Title IX, a school's response to a complaint of sex discrimination must not be clearly unreasonable. A school could, as KSU does, provide resources, support and reasonable, available changes to complainants in the educational environment, regardless of where the violence is alleged to have occurred. While that undertaking is likely beyond the jurisdiction of Title IX, it demonstrates that a school can provide a response without sanctioning an alleged perpetrator for purely off-campus conduct.

It appears from the district court's order that KU sanctioned Mr. Yeasin for off-campus conduct that was not part of a KU-sponsored activity or program. Under those circumstances, Title IX does not mandate any action whatsoever by KU.

And KU's interpretation of Title IX is not entitled any deference simply because it references the "law" in its policy. Just because a state agency references federal law in its rules does not mean that its interpretation of that federal law is entitled to any deference.[30] *Davis* explains that Title IX requires a school to respond to peer-to-peer sexual harassment only when the conduct takes place within the school's substantial control and the school has knowledge of that conduct.[31] KU's position is not supported by the requirements of the "law", and its interpretation of Title IX, which is entitled no deference, is in error.

CONCLUSION

Based on the foregoing, Title IX does not require a school to discipline a student for sexual violence committed off campus and outside the school's substantial control.

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[30] *See Pitt. State Univ./Kan. Nat'l Educ. Ass'n v. Kan. Bd. of Regents/Pitt. State Univ.*, 280 Kan. 408, 416-417, 122 P.3d 336, 342 (2005) (explaining that an agency is not entitled to deference in interpreting other state or federal statutes that it is not charged with enforcing).

[31] *Davis*, 526 U.S. at 645, 119 S. Ct. at 1672.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this *Amicus Curiae* Brief was sent by United States Mail, postage prepaid, on the 22nd day of May, 2015, to:

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