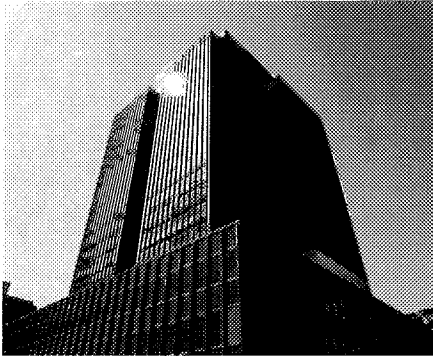


Litigation: Editor's Picks



James A. Byrne U.S. Courthouse, which houses the U.S. Court of Appeals for the Third Circuit, and the U.S. District Court for the Eastern District of Pennsylvania, in downtown Philadelphia. Photo: Diego M. Radzinski/ALM

NEWS

Attorneys: 3rd Circ. Ruling on Title IX Liability for Non-Students' Actions 'A Wakeup Call For Universities'

Attorneys whose practices focus on representing parties in Title IX investigations said the Third Circuit's recent ruling against Millersville University potentially makes it more difficult for institutions of higher learning to cast off responsibility for sexual misconduct that occurs on their campuses.

February 01, 2022 at 01:25 PM

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What You Need to Know

- Attorneys whose practices focus on representing parties in Title IX investigations said the Third Circuit's recent ruling against Millersville University potentially makes it more difficult for institutions of higher learning to cast off responsibility for sexual misconduct that occurs on their campuses.
- Attorney Patricia Hamill said the 'Millersville' decision itself did not necessarily pave new ground for Title IX enforcement, but instead cemented U.S. Supreme Court jurisprudence.
- The ruling potentially ratchets up the pressure on institutions to be more vigilant about sexual misconduct on their campuses, attorney Andrew T. Miltenberg said.

Attorneys whose practices focus on representing parties in Title IX investigations said the Third Circuit's [recent ruling](#) against Millersville University potentially makes it more difficult for institutions of higher learning to cast off responsibility for sexual misconduct that occurs on their campuses.

The U.S. Court of Appeals for the Third Circuit held for the first time in a [Jan. 11 opinion](#) in *Hall v. Millersville University* that colleges and universities can face liability under Title IX for the actions of a non-student guest. The three-judge panel unanimously reversed the U.S. District Court for the Eastern District of Pennsylvania's grant of summary judgment to Millersville University and remanded for further proceedings.

"I think it's a wakeup call for universities," Title IX attorney Patricia Hamill said. "They can't just sort of say, 'They're not a student here' or 'They're not a visiting lecturer or a visiting professor.' [Colleges] really need to be on alert if there is a spread of domestic violence."

John and Jeanette Hall sued Millersville University under a Title IX claim in January 2017 after their daughter, Karlie Hall, was murdered in her dorm room at the Pennsylvania school in February 2015, according to the opinion.

After the Halls sued Millersville, the district court granted summary judgment to the university, finding that it lacked notice under Title IX that it could face liability for the actions of a non-student guest. But the appellate panel disagreed, concluding that the text of Title IX provides the university, and other federal funding recipients, with adequate notice for liability.

"Title IX's plain terms notify federal funding recipients that they may face monetary liability for intentional violations of the statute," the panel wrote. "Moreover, it is an intentional violation of Title IX's terms for a funding recipient to act with deliberate indifference to known sexual harassment where the recipient exercises substantial control over the context in which the harassment occurs and the harasser, even if they are a third party."

Hamill is the co-chair of the Title IX and Campus Discipline practice at Conrad O'Brien in Philadelphia, and regularly represents college students and professors across the country who become involved in campus disciplinary proceedings.

Hamill said the *Millersville* decision itself did not necessarily pave new ground for Title IX enforcement, but instead cemented U.S. Supreme Court jurisprudence.

The Third Circuit said the U.S. Supreme Court's 1999 ruling in *Davis v. Monroe County Board of Education* "made clear... that a funding recipient may be liable for acts of sexual harassment by individuals other than students."

Hamill said the *Millersville* decision reinforces the need for colleges and universities to be sensitized to the issue of sexual assault and domestic violence.

"Universities need to be doubling down and doubly aware that if this is a context they control and have some control over the harasser—whatever the status of that person—they need to know that they can be liable if they know of domestic violence, sexual assault or harassment, and don't do any follow up to see what could possibly eliminate it," Hamill said. "There's still the element of 'reasonableness,' it's not that you have to know every little thing that goes on your campus. You have to have knowledge of or notice of the conduct of the issue, and then the steps the [colleges] take must be 'reasonable' and not 'deliberately indifferent.'"

Changes or amendments to Title IX have developed in the recent decade as an increasing number of cases continue to populate the courts. The biggest changes, Hamill said, have been regulatory more so than case law.

Still, the Third Circuit's *Millersville* ruling potentially ratchets up the pressure on institutions to be more vigilant about sexual misconduct on their campuses and taking more proactive measures to prevent it, such as stepping up policing or limiting access to dormitories, libraries and campus facilities, attorney Andrew T. Miltenberg said.

"I think that's what may happen; that students are going to have to assume a greater responsibility, and the school is going to have a greater responsibility," Miltenberg said. "But at some point, how much responsibility do [schools] have?"

Millersville had argued to the Third Circuit that a ruling expanding Title IX liability to include actions by nonstudent guests would open the floodgates to unwarranted liability over "anyone's on-campus conduct resulting in the disruption or outright destruction of a student's pursuit of her education."

But the appellate panel said *Davis* "forecloses Millersville's worry."

"To be liable under Title IX, the university would have to have 'substantial control over both the harasser and the context in which the known harassment occurs,'" the panel wrote, quoting *Davis*. "Moreover, the university would have to know of the harassment and ultimately respond in a manner that is 'clearly unreasonable.' We do not think it is likely that a university would have substantial control over any random third party who wanders onto an open campus and harasses students, nor it is likely that a university would have substantial control over all aspects of a campus which is open to the public."

Meanwhile, a late January decision by a split three-judge panel of the U.S. Court of Appeals for the Ninth Circuit demonstrated the limits of Title IX's reach in a case with facts that, in some ways, represented the exact opposite scenario of the one at issue in *Millersville*: an alleged assault by one student on another that occurred *off* campus.

In that case, the appeals court also looked to *Davis* for guidance, finding that the U.S. Supreme Court's holding required a finding in favor of the defendant, the University of Arizona.

"It would be unreasonable to conclude that Title IX gives educational institutions adequate notice that accepting federal education funds imposes on them liability for what happens between students off campus, unconnected to any school event or activity," the Ninth Circuit majority wrote in *Brown v. State of Arizona*.

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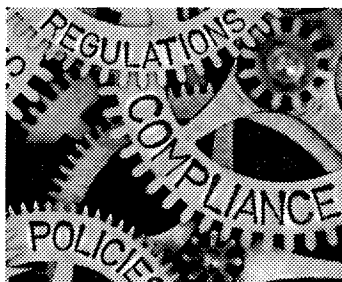
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