TITLE IX ALERT

Presented by Jackson Lewis

Department of Education: Moving to Amend 2020 Title IX Regulations on Sexual Harassment

By Susan D. Friedfel, Carol R. Ashley and Laura A. Ahrens

The U.S. Department of Education's Office for Civil Rights (OCR) has announced it will conduct a comprehensive review of its regulations implementing Title IX of the Education Amendments of 1972, starting with a public hearing on the issues of sexual harassment in school environments, including sexual violence, and discrimination based on sexual orientation and gender identity. It also anticipates publishing a notice of proposed rulemaking to amend the Title IX regulations.

OCR says in the April 6, 2021, announcement that these steps are part of the comprehensive review required by President Joe Biden's March 8 Executive Order on "Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity."

A letter from OCR's Acting Assistant Secretary Suzanne Goldberg reiterates the purpose behind the executive order: to prohibit sex discrimination in federally funded education programs and activities under Title IX, including discrimination on the basis of sexual orientation and gender identity. The letter details that OCR will undertake a comprehensive review of DOE's Title IX regulations, orders, guidance, policies, and any other similar agency actions, including the Title IX regulations that took effect on August 14, 2020.

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Fairness in Play in WV Secondary Schools Title IX Case

By Brian Nuedling, of Jackson Lewis

At its most basic level, Title IX is about fairness. The principle that opportunities will be offered equally, that money will be spent evenly, and that the competition will occur on the playing fields, rather than in the athletic department, is the ultimate goal in what is certainly a more nuanced analysis that it might seem. For decades, courts have wrestled with the subtleties of athletic opportunities, including the crossover issue that arises when a female student-athlete wants to join the boys team (or vice versa). In such an instance, is it incumbent upon a school to grant the choice of a particular team, or is it enough that the sport of choice is sufficiently available, such that no playing time is lost, or athletic opportunities forfeited?

Faced recently with deciding where the line should be drawn, a West Virginia court leaned toward the sport, finding that a high school soccer player would not likely succeed in reversing a school decision that kept her from joining the boys team when another option was available to her.

In *Gregor v. West Virginia Secondary Schools Activities Commission,*[1] Plaintiff Joseph Gregor filed suit in the United States District Court for the Southern District of West Virginia after his daughter, a soccer player, was prohibited from joining the boys team, despite being invited to do so by the boys soccer coach. Anna Gregor, a high school junior, had hoped to join the boys squad as a means of competing at a different level and thereby improving her preparation for college soccer. Her lawsuit brought five claims against the West Virginia Schools Activities Commission and the West

1 No. 2:20-cv-00654, 2020 U.S. Dist. LEXIS 199760 (S.D. W. Va. Oct. 27, 2020).

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Jackson Lewis Reinforces Title IX Legal Team with New Hires

Jackson Lewis P.C., one of the country's leading workplace law firms, has announced the addition of Principal Josh Whitlock and Of Counsel Sarah Ford Neorr, both formerly of Parker Poe.

"Josh and Sarah will significantly enhance the depth and breadth of our Higher Education Group," said Firm Chair Kevin G. Lauri. "Both have invaluable experience with Title IX compliance, litigation, investigations, and training, which is critical as we continue to expand our capabilities for our higher education clients. Josh is considered as one of the top national thought leaders in this space, and his knowledge will be an asset for higher education institutions all over the country. Additionally, Sarah is a highly respected attorney with experience assisting colleges and universities with the complexities of handling sexual misconduct incidents. I am excited both have decided to join the firm."

Whitlock represents numerous colleges and universities and has extensive experience defending clients in a broad range of litigation and investigations, as well as counseling them on campus sexual misconduct, disability accommodation, faculty tenure, and student discipline, safety, and privacy. He frequently interacts with the U.S. Department of Education, having successfully represented schools in dozens of federal investigations and participated in multiple, invitation-only small group sessions with Education Department leadership on topics such as Title IX regulatory reform and the rights of transgender students. He is a national thought leader on Title IX- and disability-related claims and

Josh Whitlock

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Civil Rights Attorney Ashley Joins Staff

Last month, Jackson Lewis announced the addition of Carol Ashley to the firm's Washington, D.C. Region office as of counsel. She joins the firm from the U.S. Department of Education, Office for Civil Rights (OCR), where she was an Enforcement Director and a Senior Executive Service Member.

"We are thrilled Carol has decided to join the firm," said Co-Leaders of Jackson Lewis' Higher Education group Monica H. Khetarpal and Susan D. Friedfel. "She is uniquely qualified to counsel educational institutions on designing and implementing compliance plans and responding to agency complaints and investigations. Carol's experience with civil rights laws relating to students and employees will be invaluable to our clients and will greatly enhance the depth and breadth of our industry group."

Ashley has more than 25 years of experience concerning a wide range of civil rights issues arising in educational institutions, including the enforcement of federal statutes pertaining to harassment and discrimination based on disability, race, color, national origin, and gender. With particular proficiency in Title IX compliance, Ashley has led complex investigations involving some of the nation's largest educational institutions responses to allegations of sexual harassment and school districts' policies involving transgender students and student athletes. She also has vast experience in addressing issues

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FAMU Granted Summary Judgement in Lawsuit Alleging Title IX Discrimination and Retaliation

By Doriyon Glass, of Jackson Lewis

The United States District Court for the Northern District of Florida, granted a motion for summary judgement in favor of Florida Agricultural and Mechanical University's ("FAMU") in a lawsuit brought by five former FAMU women's basketball players, alleging Title IX discrimination and retaliation, as well as several state law claims.

In *Burks v. Bd. of Trs. of Fla. Agric. & Mech. Univ.*, former women's basketball players Kennedy Burks ("Burks"), Jessica Njoku ("Njoku"), Mariah Reynolds ("Reynolds"), London Holland ("Holland"), and Deann Whitlow ("Whitlow") (collectively "Plaintiffs") sued the Board of Trustees of Florida Agricultural and Mechanical University ("Defendant"). Plaintiffs alleged that they each "faced disparate treatment, harassment, and retaliation from certain members of the FAMU women's basketball coaching staff" based on their "gender, sexual orientation, association with non-heterosexual players, nonconformance with gender norms, complaints about discrimination, participation in a Title IX investigation, or some combination of these." Each Plaintiff also alleged that they were wrongfully dismissed from the team and FAMU did not properly respond to the Title IX complaints about their coaches' conduct.

During the relevant period, LeDawn Gibson ("Coach Gibson") was FAMU's head women's basketball coach. The Court record conveyed that Coach Gibson often humiliated and insulted players beyond acceptable "limits of 'tough love' or 'old school' coaching techniques." It was undisputed that Coach Gibson and some of her coaching staff used profanity, commented on players' personal relationships and private behavior, critiqued the way players dressed and spoke, and disapproved of same sex relationships. Coach Gibson also called Burks a "dummy" and other players "whores" and "nasty girls." Some of the Plaintiffs' parents raised concerns

Doriyon Glass

about the treatment of their daughter to school officials in early 2017.

Holland, who is openly gay and was in a relationship with Reynolds while Holland was still on the team, was dismissed from the basketball team, but the record was unclear on when. There was a voluntary withdrawal form with Holland's signature dated March 28, 2016, however, Holland testified that she was dismissed from the team in February 2017. In February 2017, Ms. Holland's parents also emailed a list of several complaints about the basketball coaching staff to FAMU's Deputy Athletic Director, Elliot Charles ("Deputy AD Charles"). Reynolds, who is also openly gay, was dismissed from the team in the summer of 2016, and later graduated from FAMU.

Njoku, Whitlow, and Burks were "friendly with and openly associated with gay teammates." Njoku was dismissed from the team on March 28, 2016 and graduated from FAMU in 2017. Burks testified that Coach Gibson bullied her and dismissed her from the team on April 4, 2017. Whitlow's mother, who was concerned with how the coaches treated her daughter, set up a meeting with FAMU's Athletic Director, Milton Overton ("AD Overton"), in January 2017. During the meeting, she alleged that Whitlow was being retaliated against based on the friends she hung out with because they were "considered to be bad influences and homosexual." Following the meeting, Whitlow's mother continued to send emails to AD Overton, Deputy AD Charles, and Coach Erik Rashad ("Coach Rashad"). Whitlow was dismissed from the team on April 5, 2017.

In February 2017, Deputy AD Charles received an email with an anonymous complaint about certain members of the women's basketball coaching staff, which included allegations about Title IX violations and bullying. The complaint alleged that Coach Gibson and Coach LaTasha Ganus abused their power, bullied and verbally abused players, and had violated Title IX when they dismissed two players because they disliked the players' sexual orientation. Deputy AD Charles forwarded the email to FAMU's Title IX Coordinator, Carrie Gavin ("Gavin"), who initiated an investigation. Gavin communicated with current and former players, players' parents, and coaching staff during her investigation. Njoku, Holland, Burks, and Whitlow participated in the investigation on their own or through their parents.

The investigation ran from late February 2017 through late June, and Gavin completed a report dated June 30, 2017. The report provided that the same-sex allegations were unsubstantiated based on conflicting information received during the investigation. Gavin advised that the interaction between female and male coaches needed improvement and she recommended that all coaches attend training dealing with appropriate motivational skills. FAMU received a second similar complaint about Coach Gibson in February 2019, and promptly terminated her employment in response.

To analyze Plaintiffs' Title IX discrimination claim, the Court assumed without deciding that each of Plaintiffs' theories of discrimination—discrimination based on

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FAMU Granted Summary Judgement in Suit Alleging Title IX Discrimination

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sexual orientation, association with non-heterosexual students, and nonconformance with gender norms—fell within Title IX's broader prohibition against sex-based discrimination. Title IX discrimination requires a showing of two elements: (1) an official with authority to take corrective measures had *actual notice* of the alleged discrimination; and (2) the official with that knowledge was *deliberately indifferent* to the misconduct.

Title IX requires that an appropriate person receive notice of and a chance to remedy any violation. As a result, the Court explained that Plaintiffs could not rely on the argument that it was "common knowledge" of many players and their parents that certain coaches were homophobic or bullies to establish the actual notice element. The parties agreed that the February 2017 anonymous complaint constituted actual notice, but Defendant argued that the anonymous complaint did not provide sufficient detail to give FAMU notice of each theory of discrimination raised in Plaintiffs' lawsuit. Plaintiffs disagreed and argued that FAMU also had actual notice from complaints by them and their parents to Coach Rashad, AD Overton, and Deputy AD Charles.

The Court explained that any Complaint made to Coach Rashad, who had less authority than Coach Gibson, could not establish actual notice because there was no evidence that Coach Rashad had authority to take corrective measures under Title IX. The Court also explained that although the anonymous complaint did not provide each allegation in Plaintiffs' lawsuit, the lack of necessary detail was provided through supplemental complaints to AD Overton, Deputy AD Charles, and Ms. Gavin around the date the anonymous complaint was received and during the Title IX investigation. As a result, the Court held that FAMU had actual notice in the spring of 2017.

Moving to the deliberate indifference element, under Title IX, this occurs "when the official's response to the [harassment or discrimination] or lack thereof is clearly unreasonable in light of the known circumstances." According to the Court, Plaintiffs cited no evidence that would allow a reasonable jury to find FAMU's response to the alleged discrimination was deliberately indifferent. It was undisputed that following receipt of the anonymous complaint, Gavin launched a months-long investigation, which included requesting additional information from Deputy AD Charles and communicating with current and former players (including several Plaintiffs), as well as players' parents and colleagues of Coach Gibson. Gavin concluded the investigation with a report stating that the same-sex allegations were unsubstantiated and recommended training for all coaching staff.

Plaintiffs argued that Gavin's investigation was mediocre, and her conclusions did not match the facts gathered. The Court stated that Plaintiffs were ignoring the undisputed fact that besides hearing from Plaintiffs and their parents, Gavin also heard from other players who had no disagreement with the coaches at issue or their conduct. Plaintiffs also argued that FAMU did not take any actual action to rectify the situation. The Court, however disagreed and pointed to the immediate Title IX investigation, the resulting training recommendation, and that FAMU terminated Coach Gibson's employment following the second similar complaint against her.

The Court emphasized that the question was whether FAMU acted with deliberate indifference to its Title IX obligations once it received actual notice, not whether FAMU could have done better. The Court held that Defendant was entitled to summary judgement on Plaintiffs' Title IX discrimination claims because FAMU's actions were not clearly unreasonable under the known circumstances, nor was FAMU deliberately indifferent to its Title IX obligations.

Similarly, to Title VII retaliation claims, Title IX retaliation claims require each Plaintiff to establish that: (1) she engaged in statutorily protected activity; (2) Defendant took action that would have been materially adverse to a reasonable player; and (3) a causal link existed between the two events.

Plaintiffs identified their dismissals from the basketball team as their adverse action. The Court explained that even if the February 2017 anonymous complaint and Plaintiffs' participation in the Title IX investigation constituted statutorily protected activity, Plaintiffs could not establish that these activities were causally linked to their dismissals. It was undisputed that Njoku and Reynolds' dismissals occurred months before the anonymous complaint and resulting Title IX investigation. Njoku and Reynolds argued that Njoku made complaints to her conditioning coaches and Reynolds' mother made complaints to Coach Rashad before the anonymous complaint. The Court explained that Plaintiffs cited no evidence that would allow a jury to infer that these complaints were the reason Coach Gibson dismissed the players or that she even knew of these complaints before she dismissed them.

Similarly, the Court held that Holland, who alleged she was dismissed from the team in February 2017, failed to identify evidence that would allow a jury to infer a causal connection between her dismissal and any protected activity. The Court explained that the complaint causing FAMU's actual notice was anonymous, and there was no evidence that Coach Gibson learned of it when it was first received. A jury could infer that Coach Gibson learned about the complaint during the Title IX investigation, which ranged from late February to late June 2017, but there was no evidence to infer that this happened before Coach Gibson dismissed Holland. Moreover, Holland did not participate in the Title IX investigation

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Regulatory Changes, Logistical Challenges Underscore Need for Effective and Practical Annual Title IX Team Training

Biden Administration Signals Multiple Waves of Title IX Regulatory Changes

By Joshua Whitlock, of Jackson Lewis

On April 6, 2021, the U.S. Department of Education's Office for Civil Rights ("OCR") announced that it will take the following steps regarding the sexual harassment-related Title IX regulations that took effect on August 14, 2020 (the "current regulations"):

1. issue a Q&A document "in the coming months" in an effort to provide additional clarity on how OCR interprets schools' existing obligations under the current regulations;
2. hold a public hearing to allow students, educators, and others with interest and expertise to participate by offering comments on select Title IX, sexual harassment, and sex discrimination issues; and, ultimately,
3. amend the current regulations through the formal rulemaking process.

OCR emphasized that these steps are part of the comprehensive review required by President Biden's March 8, 2021 Executive Order on *"Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*" and also emphasized that the current regulations remain in effect during the review.

These OCR actions will result in at least two significant waves of change in terms of how schools are expected and required to address sexual harassment and related behaviors: first, likely limited, but still potentially impactful, interim changes stemming from the Q&A document and, second, likely much more extensive changes stemming from the formal rulemaking process. It is important that schools pay close attention to both of these anticipated change waves while also understanding key differences in their respective timing and likely impact.

Timing and Likely Impact of the Q&A Document Versus Formal Amendments

Because the current regulations resulted from a formal rulemaking process and carry the weight of law, they can only be amended pursuant to a new formal rulemaking process. The previous administration's formal rulemaking process, which included an extensive public notice and comment period, took over two years, and the Biden administration's effort is likely to take somewhere around two years as well, due in large part to the public notice and comment period that it will necessarily involve. As a result, the widely anticipated and presumably massive (given the Trump and Biden administrations' divergent views on this front) formal amendments are likely many months away, and the more immediate question Is what effect the nearer term Q&A document will have.

The Q&A document will be heavily limited in its ability to contradict requirements specifically set forth in the current regulations, but it will likely be impactful through its treatment of (1) aspects of the current regulations open to interpretation; and (2) closely related issues not addressed by the current regulations. For example, while the current regulations set forth prescriptive requirements for the grievance procedures used by schools to address certain, specifically defined types of sexual misconduct, they leave almost entirely up to schools how to address other types of sexual misconduct. The Biden administration may step into that opening and use the Q&A document to create new expectations for the latter category of behaviors. And, while Q&A document expectations certainly wouldn't carry the legally binding weight of formal regulations, they would carry the significant weight of being issued by the agency that enforces Title IX by, among other things, conducting compliance reviews of, and investigating complaints related to, any school that receives federal funding.

On net, the nearer term Q&A document is likely to require that schools make more limited but still potentially complex and impactful changes to their sexual misconduct-related policies, procedures, and training approaches, while the still many months away amended regulations are likely to require a much more comprehensive revamping. These anticipated developments, and the new challenges that they will bring, invite a fresh look at how effectively schools are approaching annual training for employees tasked with investigating and resolving sexual misconduct allegations (namely coordinators, investigators, hearing officers, and appellate authorities).

Time for a Fresh Look at the Current Title IX Team Training Approach

Providing effective Title IX team training can be challenging, but it is essential to ensuring both compliance and campus safety. The complexity of the current regulations (which require, for example, live hearings with cross-examination) plus the incoming Biden administration interpretation combine with other factors to increase the already tremendous pressure on college and university employees charged with addressing sexual misconduct allegations. A school's annual training for

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Title IX coordinators, investigators, hearing officers, and appellate authorities must address these shifting legal requirements and equip team members to navigate sensitive situations with skill and care, while closely following institutional procedures and ensuring fairness to both parties. Given the contentious legal environment and the requirement that training materials be posted publicly, careful preparation and vetting have never been more important. At the same time, the logistical and financial constraints faced by schools have never been greater.

Now is an excellent and important time for colleges and universities to re-examine their annual Title IX team training approach and to thoughtfully seek new, creative, innovative ways to increase efficiency and effectiveness.

A simple but useful Title IX team training audit could include gathering a thoughtfully selected, multi-departmental team of stakeholders to evaluate the current approach (i.e., current annual Title IX team training activities) while carefully considering unique institutional characteristics and culture. The team could explore weighty questions like the following.

- Is our current approach truly equipping team members for success in their often daunting and always critically important roles?
- Is our current approach truly maximizing institutional resources?
- How would others evaluate the thoroughness, thoughtfulness, and ultimate success of our current approach? (OCR, courts, students, employees, parents, the broader campus community?)
- Are there other training options and activities that we should explore?
- What can and will we do better on this front?

The following are additional tips for ensuring compliance, effectiveness, and sustained Title IX team training excellence.

- Employ a combination of both (1) internal team training delivered by the Title IX coordinator and focused heavily on institutional policies, procedures, and practices; and (2) training on regulatory complexities and industry best practices delivered by an outside expert.
- Employ a combination of both (1) live training that allows for real time questions; and (2) recorded training that facilitates scheduling and remote work arrangements, cross-training of team members for multiple roles, participation and completion tracking, and re-training and spot training as necessary for concept and skill reinforcement.
- Ensure that your Title IX team training involves substantial experiential and assessment components to promote deeper processing and internalization and more effective post-training application.
- Hold Title IX team meetings at regular intervals to reinforce training through tabletop exercises, after action assessments, joint review, and discussion of select portions of recorded training modules, and team members training and mentoring each other.
- Systematically collect and distribute to Title IX team members Title IX-related updates and resources, many of which are available for free from law firm and other higher education industry blog posts, and which can be used to keep key topics fresh in team members' minds between training sessions.

It appears that the Title IX regulatory pendulum will continue to swing for at least the next couple of years. In the meantime, and especially given the high stakes and potentially extensive human impact surrounding sexual misconduct allegations plus lingering, pandemic-related logistical and financial challenges, it is more important than ever to train Title IX team members carefully, thoroughly, cost-effectively, and practically. As we await the next waves of short- and longer-term Title IX regulatory change, schools should revisit their annual Title IX team training approach with an eye toward creative and innovative ways to better equip team members for success in their critically important roles. ●

Josh Whitlock is a Principal in the Charlotte office of Jackson Lewis P.C. He focuses his practice on meeting the legal needs of higher education institutions and has extensive experience defending colleges and universities in a broad range of litigation and investigations, as well as counseling them on a variety of issues, including Title IX-related compliance and the handling of sexual misconduct allegations.

Josh frequently interacts with the U.S. Department of Education, having successfully represented schools in dozens of federal investigations and participated in multiple, invitation-only, small group listening sessions with Education Department leadership on topics such as Title IX regulatory reform and the rights of transgender students. He is a national thought leader on Title IX—related claims and compliance and frequently speaks and publishes on those matters.

Court Delivers Partial Victory to Niagara in Title IX Case

By Brian Nuedling, of Jackson Lewis

A Title IX lawsuit alleging a pattern and practice of sexual harassment on a university campus resulted in a split decision when the defendant school sought to narrow the litigation through a motion to dismiss.

In *Posso v. Niagara University,*[1] Plaintiffs Nastassja Posso, Jamie Rolf, Jane Doe-1, and Jane Doe-2 brought an action against Niagara, alleging common-law claims and violations of Title IX of the Education Amendments of 1972. The lawsuit alleged (1) unequal treatment under Title IX by all Plaintiffs; (2) gender-based harassment under Title IX by Posso, Rolf, and Doe-1; (3) negligent administration of a Title IX program by all plaintiffs; (4) negligence by all plaintiffs; and (5) breach of contract by Posso and Rolf.

Plaintiffs are females who were students of Niagara. With the exception of Doe-2, all were members of the school's swimming and diving teams. Doe-2 was a student at Niagara but not a member of the swimming or diving team.

Plaintiffs alleged that in 2017, prior to this case, Niagara had entered into a Voluntary Resolution Agreement with the United States Department of Education to resolve a sexual harassment complaint and address certain aspects of the school's Title IX compliance. Plaintiffs alleged that despite this agreement, Niagara had failed to have policies and procedures to properly administer Title IX requirements. The lawsuit alleged that the school had been deliberately indifferent to a pattern of sexual harassment and sexual violence toward Plaintiffs and other female students since at least 2016.

Causes of Action

As to the first cause of action, Posso, Rolf, and Doe-1 alleged that Niagara had subjected them to unequal treatment because the school had failed to provide separate women's teams and instead utilized a co-ed structure that fostered a male-dominated, discriminatory environment.

Brian Nuedling

As to the second cause of action, Posso, Rolf, and Doe-1 alleged that they were subjected to gender-based harassment that the swim team coach had actual knowledge of but either failed to correct or responded to with only deliberate indifference. Plaintiffs' allegations included verbal harassment, including offensive and degrading comments about women by the coach and male swimmers, and instances of physically violent behavior toward female swimmers. Doe-2 alleged that she was sexually assaulted by a male swimmer in the fall of 2018. Doe-2 alleged that after reporting the assault and being convinced by Niagara that a "mutual no-contact order" was the appropriate response, she was further traumatized by threatening and intimidating phone calls by the swimmer and other male students.

In the fifth cause of action, Rolf alleged that Niagara had breached an express or implied agreement to provide her with a scholarship to attend the school. Rolf alleged that during her first two years at Niagara (2016-'17 and 2017-'18), she was sexually harassed by male swim team members and subjected to retaliation when she complained about the abuse. Rolf alleged that in February 2018, she forfeited her swimming scholarship to escape the harassment.

Procedural History

Posso, Rolf, and Doe-1 commenced their action against Niagara on September 20, 2019. On October 17, 2019, they filed an amended complaint that added Doe-2 as an additional plaintiff. On December 6, 2019, Niagara brought a motion to dismiss Doe-2's Title IX claim (second cause of action), Plaintiffs' claim of negligent administration of a Title IX program (third cause of action), Plaintiffs' common-law negligence claim (fourth cause of action), and the breach of contract claim by Posso and Rolf. On July 29, 2020, in a memorandum in opposition to Niagara's motion, Plaintiffs consented to dismissal of the third and fourth causes of action as to all Plaintiffs and the fifth cause of action, but only as to Plaintiff Posso. As a result, the issues before the court were Doe-2's Title IX claim (second cause of action) and Plaintiff Rolf's breach of contact claim (fifth cause of action).

Niagara's motion sought dismissal of both causes of action for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Court's Analysis

Doe-2's claim of gender-based harassment (second cause of action) alleged that Niagara was liable under Title IX because it had actual notice of discrimination both before and after she was sexually assaulted by a male swimmer. Doe-2 further alleged that Niagara was deliberately indifferent to harassment that occurred during both time frames. Niagara moved to dismiss

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1 No. 19-CV-1293-LJV-MJR, 2020 U.S. Dist. LEXIS 205260 (W.D.N.Y. Nov. 2, 2020).

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the pre-assault claim on the grounds that Doe-2 had failed to allege that the school had acted with deliberate difference in responding to the prior harassment because (1) Niagara did not have notice of risk to students outside of the swim program, and (2) Niagara did not have notice of any prior sexual assaults. In seeking dismissal of the post-assault claim, Niagara asserted that Doe-2 had failed to plead facts adequate to support deliberate indifference by the school.

The court concluded that Doe-2 had plead a "plausible" pre-assault claim.[2] In reaching this conclusion, the court's detailed analysis noted that Plaintiffs had alleged a lengthy history of male swimmers bullying, intimidating, and humiliating female swimmers through sexual innuendos, degrading comments, and acts of physical violence. The court further noted that Plaintiffs had alleged that the swim coach had made sexually inappropriate remarks and that members of the athletic department and university administration had been made aware of the misconduct at various times. Thus, the court concluded, Plaintiffs had adequately pleaded that Niagara had "actual knowledge of a heightened risk" and that a reasonable jury could conclude that Niagara's response to these incidents was unreasonable. As to Niagara's second argument about notice of prior sexual assaults, the court concluded that given the type of conduct of which Niagara had notice, the school could reasonably foresee that the misconduct might escalate to sexual violence.

The court, however, reached the opposite conclusion as to post-assault claim of deliberate indifference, accepting Niagara's argument that it should be dismissed because Doe-2 had failed to allege post-reporting conduct that was "severe, pervasive, and objectively offensive." While noting that Doe-2 had made reports to Niagara that she had been sexually assaulted and had further reported a harassing telephone call from a man whom she believed to be individual who had assaulted her, the court observed that Doe-2 had not alleged that she had reported any ongoing offensive conduct after Niagara had issued the no-contact order. The court further concluded that even if the post-notice interactions amounted to actionable harassment, Doe-2 had failed to show that Niagara's initial response was clearly unreasonable and had caused further harassment.

Finally, the court analyzed Rolf's breach of contract claim, which Niagara challenged on the basis that it failed to state a plausible claim for relief under New York law. Rolf alleged that Niagara had breached express or implied agreements to provide her with an athletic scholarship and further alleged that Niagara's deliberate indifference to sexual harassment by male swimmers created a hostile environment that made her performance of the contract impossible. In concluding that Rolf had failed to bring a cognizable claim for relief, the court noted caselaw holding that a university's rules, guidelines, and general policy statements about fair and equal treatment cannot support a breach of contract claim. The court also observed that Rolf had failed to cite any New York caselaw holding that a student has a right to a harassment-free environment, including in the context of a scholarship decision. In sum, the court concluded that Rolf had failed to sufficiently allege when and how Niagara had breached a specific contractual promise. Thus, the court recommended that the fifth course of action be dismissed in its entirety.[3]

Summary

The *Posso* court was clearly troubled by detailed allegations of ongoing sexual harassment and intimidation that suggested a potentially toxic school environment. Nonetheless, the court did not sway from an analysis based not on the allegations themselves but rather on what the plaintiffs might plausibly be able to prove. In that respect, the court gave the plaintiffs every consideration but not every benefit of the doubt. ●

2 Citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999), the court noted that sexual harassment is a form of discrimination for Title IX purposes and that student-on-student sexual harassment can be actionable under the statute if sufficiently severe. The court further noted that to survive dismissal of a student-on-student sexual harassment claim under Title IX, a plaintiff must allege that (1) a federally-funded educational institution (2) was deliberately indifferent to and (3) had actual knowledge of (4) sexual harassment that was "so severe, pervasive, and objectively offensive that it could be said to have deprived the plaintiff of access to educational opportunities or benefits. Roskin-Frezee v. Columbia Univ., No. 17-CIV-2032, 2018 U.S. Dist. LEXIS 28937 (S.D.N.Y. Feb. 21, 2018) (citing *Davis, supra).*

3 This opinion was issued by United States Magistrate Judge Michael Roemer, whose findings constituted a Report and Recommendation that would be subject to objections to be considered by the District Court judge.

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Virginia Board of Education, including an alleged violation of her rights under Title IX of the Education Amendments of 1972 and unlawful retaliation in violation of Title IX.[2] While ordinarily intended as a vehicle for maintaining the status quo, Gregor sought to advance her claim by bringing a motion for a preliminary injunction against the defendants. Such a filing put the court squarely in the position of opining on Gregor's prospects for success (within the well-settled analytical framework of preliminary relief) without rendering a decision on the merits of her case.

Court Analysis

As outlined by the United States Court of Appeals for the Fourth Circuit, a plaintiff seeking preliminary relief must establish a likelihood of success on the merits, demonstrate a likelihood of irreparable harm absent the preliminary relief, show that the balance of equities falls in the plaintiff's favor, and persuade a court that an injunction is in the public interest.[3] To be granted a preliminary injunction, a plaintiff must succeed on all four prongs.

In assessing the first element—likelihood of success on the merits—the court observed that Gregor's discrimination claims were "inextricably linked" to her Title IX retaliation claim. The court noted that, in bringing the motion, Gregor had cited a Fourth Circuit case involving a female student-athlete who was offered a spot on a college football team but then prohibited from joining because of her gender.[4] The court found that case distinguishable because while football was offered to only male athletes in that case, Gregor's high school offered both a boys and a girls soccer team. The court further noted that Gregor's retaliation claim would turn on whether preventing her from practicing with the boys soccer team would be construed as an adverse action, rather than one that the school could permissibly take. Hinting that the decision on that question might not be in her favor, the court found that Gregor had not demonstrated a likelihood of success on the merits of her discrimination claims and the retaliation claim.

As to the second prong of irreparable harm, the court noted that each of Gregor's five claims alleged the same injury, that of not being permitted to practice or play with the boys soccer team. Gregor alleged that the ban would prevent her from further developing her skills and would harm her chances of being recruited to play collegiate soccer. The court observed that while courts are divided on whether a lack of athletic participation constitutes irreparable harm, most courts lean toward a finding of the harm being "irreparable" only when the student-athlete cannot participate in the sport at all.[5] Such a finding by other courts, coupled with Gregor's admission that very little of the soccer remained to be played,[6] convinced the court that irreparable harm would not occur if the preliminary injunction were denied. Having concluded that Gregor had failed to demonstrate both a likelihood of success on the merits and the presence of irreparable injury, the court dispensed with the remaining prongs of the preliminary injunction test and denied Gregor's motion.

The Limitations of Title IX

One of the byproducts of Title IX litigation is that time is not on the side of the student-athlete. The athletic season, and the particular sport at issue, will not wait for the methodical court process to be completed before letting the games proceed. Time will simply tick away for the athlete seeking to assert competitive rights. While seeking preliminary relief might be the only meaningful option for expediting the intended outcome, it forces the parties to show their hand and the court to determine what likely will be the final outcome. To the extent that student-athletes can find other ways to navigate the battle lines, they would be well-served. If, however, their hopes for playing time during a season already in progress collide with the one-step-at-a-time court process, victory might seem elusive or not entirely satisfying. Moreover, the Gregor court, and others that have faced a similar question, have found it harder to side with the plaintiff when the student-athlete's options are not limited to joining the other gender. In those instances, courts have found that the concept of equity in the world of Title IX jurisprudence does not compel the student-athlete's desired outcome, but only one that on balance appears objectively fair. ●

2 Gregor's remaining claims alleged a violation of her rights under the Fourteenth Amendment to the United States Constitution, the equal protection principles of the West Virginia Constitution, and the West Virginia Human Rights Act.

3 See, e.g., Winter v. Nat'l Res. Def. Council, 555 U.S. 7 (1998).

4 4 190 F.3d 643 (4th Cir. 1999). Gregor's motion also cited Israel v. W. Va. Secondary Schs. Activities Comm'n, 182 W. Va. 454, 388 S.E.2d 480 (W. Va. 1989), which turned on whether softball was similar enough to baseball to justify it as an alternate activity for female high school athletes who were prohibited from trying out for the baseball team. The Gregor court found that *Israel* did not directly apply because the boys and girls soccer teams at Gregor's high school were the same.

5 The court cited Reed v. Neb. Sch. Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972) (finding irreparable harm when a female athlete would not be able to play golf at all if not permitted to join the boys team), and D.M. v. Minn. State High Sch. League, 917 F.3d 994 (8th Cir. 2019) (finding irreparable harm when the boys would not have a dance team for competition if not permitted to join the girls team).

6 In a request for supplemental briefing, Gregor informed the court that there were perhaps only two games and two practices left in the season. Any further competition would be playoff games that would be contingent on the outcome of the two scheduled games.

Jackson Lewis Adds Civil Rights Attorney Carol Ashley

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of racial equity in the educational setting. Ashley has assisted in the investigation of hundreds of complaints against private and public postsecondary and K–12 schools, which uniquely suits her to defend and guide institutions through agency investigations and complaints.

Prior to her time at OCR, Ashley was Vice President of Advocacy at a national nonprofit organization committed to achieving economic and racial justice through litigation, policy development, and training. At the same time, Carol also focused on improving the diversity, equity, and inclusion of national and regional advocacy organizations. Additionally, she spent many years in private practice as lead attorney of the firm's civil rights and school equity practice group, and served as lead class counsel in federal class action lawsuits. She also worked on Title VII employment discrimination cases involving race, national origin, and gender discrimination; handled matters involving union rights, wage, and hour issues, and the Family and Medical Leave Act; and collaborated with counsel heading the firm's other class action work, including cases involving whistleblower and fraud in securities and consumer matters.

Ashley earned her J.D. from the University of Wisconsin Law School and her B.A. from Northwestern University. ●

Whitlock, Neorr Join Jackson Lewis

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compliance, frequently speaks and publishes on those matters, and has conducted Title IX- and disability-related trainings for hundreds of institutions.

Whitlock was the Leader of Parker Poe's Education Industry Team, is the former chair of the North Carolina Bar Association Education Law Section and is an active member of the National Association of College and University Attorneys. Additionally, he was part of a team of attorneys that taught the Higher Education Practicum at the Washington and Lee University School of Law. Whitlock earned his J.D. from William & Mary and his B.A. from Brigham Young.

Neorr also focuses her practice on higher education and provides Title IX training and other legal services to colleges and universities. As an employment lawyer, Neorr has experience handling sensitive issues such as claims of sexual harassment, racial bias, and disability discrimination. She brings this background to her work as a Title IX attorney, helping clients navigate the legal, practical, and ethical complexities of addressing sexual misconduct on campus. Neorr also defends educational institutions in lawsuits brought by students or employees and in inquiries conducted by state and federal agencies. Neorr earned her J.D. from New York University and her B.A. from Miami University. ●

Moving to Amend 2020 Title IX Regulations on Sexual Harassment

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At this time and during the comprehensive review, the Title IX regulations that took effect on August 14, 2020, remain in effect. In the letter, OCR states it will continue to hold schools accountable to ensure schools have grievance procedures that provide for the fair, prompt, and equitable resolution of sexual harassment and other sex discrimination reports.

According to OCR, the public hearing will allow students, educators, and others with interest and expertise in Title IX to participate by offering oral comments or written submissions. OCR states that dates and times for the public hearing will be released and additional information will be published on its website and in a Federal Register notice.

To further assist schools and students, Goldberg also announced plans for OCR to issue a Question & Answer document. The document will clarify how OCR interprets schools' existing obligations under Title IX regulations. ●

FAMU Granted Summary Judgement in Suit Alleging Title IX Discrimination

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until after her dismissal.

Although Burks and Whitlow's dismissals occurred in April 2017, about two months after FAMU received the anonymous complaint and began its investigation, the Court also concluded that there was insufficient evidence of a causal link between their dismissals and any protected activity. Plaintiffs' pointed to Whitlow and Burks' mothers' communications with school officials, the anonymous complaint, and Burks' participation in the Title IX investigation as protected activities that occurred around the time of their dismissals. Here again, however, the Court held that Plaintiffs lacked evidence that Coach Gibson knew of these alleged protected activities before she dismissed the players. As a result, the Court also dismissed the Plaintiffs' Title IX retaliation claim, and it declined to exercise supplemental jurisdiction over their state law claims. ●

