



## Recent Developments in Title IX Caselaw

*Podcast Transcript*

# Prevention and Protection a United Educators Risk Management Podcast

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### Guests:

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**INTRODUCTION:** Hello and welcome to *Prevention and Protection*, United Educators' risk management podcast. Today's guest is Robb Jones, former senior vice president of Resolutions at United Educators, who is here to discuss some recent case law developments in the area of Title IX. Hosting the discussion is Heather Salko, senior risk management counsel in United Educators' Risk Management department. Before we begin, a quick reminder that you can find other episodes of the *Prevention and Protection* podcast, as well as risk management resources, on our website, [edurisksolutions.org](http://edurisksolutions.org). This and all podcast episodes are also available on iTunes. Now here's Heather.

**HEATHER:** Thank you. I am Heather Salko, a senior risk management counsel at United Educators. And I'm joined today by Robb Jones, who has served in his capacity as senior vice president and general counsel of Resolutions, formerly known as Claims, for a number of years, and is here to share with us his views on two recent cases involving Michigan State University and some decisions that were handed down by the court that have implications for schools in the Title IX arena.

Robb, the first case that I'd like to discuss with you is a Sixth Circuit Court of Appeals decision that was rendered in December 2019. It's called *Kollaritsch v. Michigan State University*. If you could, before we get into the details of this case, talk a little bit about what the case was about and also, just for a moment, how the *Davis* case on which this decision relates and sets the precedent for Title IX private rights of action?

**ROBB:** Sure, will do, Heather. Well, let's first of all start — the Sixth Circuit is one of the second highest United States federal courts of appeals, just below the Supreme Court, and it applies in the states of Michigan, Kentucky, Indiana, and Tennessee. So it's very important for those particular states and universities within those states, but it's also, based upon this opinion, which was handed down December 12th, I think has broader significance. So let's first of all talk really briefly about the facts. There's two plaintiffs, both women, and both were challenging Michigan State's response to campus sexual assaults — where they were the survivor-victims.

In the first, there was an investigation by Michigan State and resulting discipline. But the alleged Title IX violation by Michigan State was the failure to prevent further retaliation against the woman. So despite a non-contact order, she encountered her assaulter on campus a number of times over the course of the year. She made no allegation that there was further harassment, but that she said that constantly seeing that was re-traumatizing her and thus causing her to be vulnerable to harassment, and that was retaliation by Michigan State.

In the second one, Michigan State found that there was a sexual assault, found that the male involved was responsible, and expelled him. But when he appealed, a new investigation exonerated him and he was reinstated. Now, there was no allegation, again, of any continuing type of harassment by this individual. But the complaining party there said that she could have had encountered him on campus more because of that, and that, therefore, was a Title IX violation by Michigan State.

**HEATHER:** And can I interrupt and just say —

**ROBB:** Sure.

**HEATHER:** — even though in the second instance, he had been found not responsible?

**ROBB:** Correct.

**HEATHER:** OK.

**ROBB:** In a way the plaintiff here, she was challenging both the procedural exoneration the second time and saying that it's subjecting her to continuing vulnerability to harassment. Now, the case was framed up, and this is also important in the context of a motion to dismiss, where the court has to accept everything pled in the complaint by the plaintiffs as true. And normally, and what happened here, was the district court had denied the appeal or denied the motion to dismiss. And normally, there is no appeal from that. But here, the district court together and the court of appeals believed that the issue was important enough to make an exception to that general rule that you have to wait until the end of the case and allowed what's called an interlocutory appeal.

Now, how the issue is framed up by the court is always important to how the court decides the case, and that's where I think this case becomes important. The court said that under Title IX any sexual harassment must be pervasive, and it must cause further injury. There's that causation requirement to Title IX that's private right of action, which brings us to the Supreme Court standard for liability under Title IX.

**HEATHER:** Right. So, if you could just talk a minute about that Supreme Court standard, *Davis* does require a plaintiff to prove a number of things in order to prevail in a private right of action where there has been student-on-student sexual harassment.

**ROBB:** Right. And so important to remember this was a K-12 public school case, and it was decided in 1999 — so over 20 years ago. And it was the first time that the Supreme Court decided whether the school had any liability under Title IX for student-on-student sexual misconduct. And this came a year after the *Gebser* case, also one of the most famous Supreme Court cases on Title IX liability, where the Supreme Court had said that the school must have actual knowledge of harassment or sexual misconduct and then act in a highly unreasonable manner in response to it in order to have liability for damages in a lawsuit.



Now, in *Gebser*, the court decided that a school had no Title IX liability for a teacher's sexual misconduct with a student, because no official with the power to remedy that harassment had any kind of actual knowledge that the misconduct by the teacher was ongoing. It's important to note that was a 5-4 decision, so the court was split, and Justice Sandra Day O'Connor, now retired, but then, of course, one of the most important voices on the Supreme Court, she there wrote the majority opinion. There were four dissenters, and a very powerful dissent in that case that said the school should have been responsible under the circumstances.

So *Davis* comes down a year later. Justice O'Connor also wrote that opinion, and in this case, she joined the four dissenters in the *Gebser* case to hold that the school district was liable for student-on-student sexual misconduct. But, in order to do so, she applied the *Gebser* test that the school had to have actual knowledge of the sexual harassment, that it had to act in a highly unreasonable manner to address it, which is called the deliberate indifference standard — that we well know — and that that deliberate indifference caused the student in Justice O'Connor's words, and this is the important quote, “to undergo harassment or make them liable or vulnerable to it,” meaning harassment.

So what does that phrase mean? Does further harassment have to occur? How serious does this harassment have to be and, most particularly, what does the “vulnerable to it” phrase in Justice O'Connor's language really mean? And are those just loose words that she used, or are they meant to have some kind of independent meaning from actually undergoing harassment? And that's where the courts were not really in agreement over the last 20 years since the *Davis* case. And the case had — the issue hadn't come up very much, at least in the court of appeals, but certainly the other lower federal courts were all over the place in trying to figure out what exactly that phrase meant.



**HEATHER:** And now in this Michigan State case, that actually becomes the crux of the discussion of the court's holding regarding deliberate indifference, correct?

**ROBB:** Exactly. And there in the *Kollaritsch* case was written by Judge Alice Batchelder, who's a long-time judge on the Sixth Circuit, and she held for the Sixth Circuit majority and actually it was a — although there were three separate opinions, they all agreed on this particular phrase, that the additional phrase had no independent meaning, that it was part and parcel of the same idea, meaning either wrongful conduct of commission by the school or omission by the school that places the student in a position to suffer additional harassment. The problem is — and from future survivor-victims — is that Judge Batchelder's opinion, and underscored by another judge's concurring opinion, meant that actual harassment had to occur. It's not enough that the plaintiffs subjectively feel vulnerable to further harassment.

**HEATHER:** So seeing your alleged harasser on campus after a finding of the allegations of harassment is not enough?

**ROBB:** Exactly, and that's the real crux of it. Because at least one other federal court of appeal has come down the other way in an opinion just about nine months previous to the *Kollaritsch* opinion.

**HEATHER:** And that's the *Tenth Circuit Farmer v. Kansas State University* case.

**ROBB:** Correct. Similar type of case of similarly decided on a 12(b)(6) motion and again, you have to emphasize that what that means is that the Tenth Circuit, just like the Sixth Circuit, had to accept everything pled in the complaint by the plaintiff as true, had to give them all the benefit of the doubt on that. And in the *Farmer* case with Kansas State, Judge Ebel of the Tenth Circuit took Justice O'Connor's language that I quoted earlier, interpreted its meaning differently than the *Kollaritsch* courts did. And in his view, to cause students to be vulnerable means to fear further harassment, not to actually suffer it — to hone in on the question that you posed, Heather.

**HEATHER:** Right, OK, so then, before we get to the fact that there's now a circuit split of the courts, what does this Michigan State holding mean for claimant suits but also for defendant institutions in this circuit?

**ROBB:** Well, I think it's important in that one of the most — and you focused on earlier — one of the most common allegations against campuses, against colleges and universities, is that either the failure of the no contact order or — as we know, on small campuses it's virtually impossible to keep people separate — that any further either fear of seeing their alleged harasser on campus or the harasser on campus or even actually seeing them across the room or in the cafeteria or something like that was, in itself, a re-traumatization and further sexual harassment, which made the college or university liable.

**HEATHER:** Right.

**ROBB:** So under the Tenth Circuit view, that potential liability continues. Under the Sixth Circuit's view, those very common types of allegations will not be actionable under Title IX.

**HEATHER:** Yes, OK. And so we understand that recent developments — the plaintiff has asked for a re-hearing by the entire court, Sixth Circuit Court of Appeals, and that is pending. Do you think that will be granted?

**ROBB:** They requested that right around Christmastime, so it is pending. It's hard to tell. It requires all of the active judges on the Sixth Circuit — and there are about 16 of them — a majority has to accept a re-argument; *en banc* is the legal Latin that's involved here. And it's hard to say. I mean, I long learned that I don't try to use the crystal ball because you could easily be wrong. But I think that certainly the plaintiff's lawyers here, and I think the community generally, realizes the stakes that are involved. And it's a necessary first step to trying to go to the next level, which would be the U.S. Supreme Court.

**HEATHER:** Right, and I know you don't to use your crystal ball but set that conviction aside for a moment; where do you think the case law generally is going on this? Eventually, perhaps, it will get to the Supreme Court unless there is just an almost permanent circuit split because no one really either feels they have the right case to take to the Supreme Court or the Supreme Court decides not to hear a particular case.

**ROBB:** Yeah, and, of course, it would be the choice of the Supreme Court — if the plaintiffs in *Kollaritsch* — if they weren't successful on the *en banc* petition. If they went for a *cert* petition to the U.S. Supreme Court, it would be the Supreme Court's choice whether it would accept that or not. So you're right, it could not be resolved any time soon. But it's a classic reason for the Supreme Court to accept a case when there is a clear circuit conflict. And here the *Farmer* case, KSU on one hand; *Kollaritsch*, MSU on the other, presents a clear circuit conflict.





This issue is probably important enough that it's going to get the attention of the justices and their law clerks if it's brought up there, so there's probably a decent chance if the plaintiffs decide to go to the Supreme Court. And then that becomes the question: Would they take their chances with a court that with the additions of Justices Kavanaugh and Gorsuch maybe has changed from the dates of *Gebser* and *Monroe* and may not look at the issue the same way as the court had look at it in the past.

**HEATHER:** So, Robb, let's turn to the second case, the ubiquitous *Doe vs. Michigan State University*. This was an opinion that was handed down out of the District Court of the Western District of Michigan, the Southern Division, by Judge Maloney. And this was a case that involved medical students who the plaintiff was accused of sexual assault following a number of accusations by a few different women, and he was found responsible. And then he appealed and —

**ROBB:** Well, and his expulsion was upheld.

**HEATHER:** — upheld, right. OK, so then he filed suit against Michigan State University. Can you talk a little bit about what the court decided then?

**ROBB:** Sure, and as factual situations become more increasingly common as respondents, usually males, in Title IX disciplinary proceedings on campus are increasingly challenging the discipline — and increasingly being successful. This was one of the rare cases, particularly in a motion to dismiss, where the university was successful. That's why it's notable for that reason. It's a less important case than the Sixth Circuit case, because it's only a district or trial court in the federal system, and it's a very fact-specific case, but it's worth commenting on, nonetheless.

Now, the decision also came down in December, and it continues what we've called reverse Title IX challenges by respondents. This one did not, although, it involved Title IX and there was a decision by the court, it's really notable for its Fifth Amendment due process outcome, which only applies technically to public universities. They're the only ones that have constitutional limitations under the federal Constitution. And it's also important because it is within the Sixth Circuit also — again, Michigan, Ohio, Tennessee, and Kentucky — and that's because the Sixth Circuit has become the Federal Court of Appeals most protective of respondent students in campus disciplinary cases. And it's also — the Sixth Circuit's law in this area has been the basis for proposed Title IX regulations and what they do in the whole cross examination area. That's important.

**HEATHER:** And that came from the *Baum* case?

**ROBB:** Correct. And let's talk a little bit about *Baum*, because I think that's the important backdrop to this. *Baum* was decided in late 2018 by the Sixth Circuit, and it basically held that the Fifth Amendment to the U.S. Constitution — that under the Fifth Amendment to the U.S. Constitution, when a university is faced with competing narratives about potential sexual misconduct on campus, the university must facilitate some sort, quote unquote, of cross examination in order to satisfy the constitution's due process requirement.

**HEATHER:** For public universities?

**ROBB:** For public universities. And the importance is, is that the proposed Title IX regulations would expand that holding of *Baum* and apply it to all public and all private universities under Title IX under the proposed regulations, so what will —

**HEATHER:** Which are still pending as of the date of this recording.

**ROBB:** At least as of the date of this recording. OK, so what was the point of arguing about the violations in this case? That's what we should home in. And, as you're right, it involved a medical student who was accused of sexual misconduct several years before the two women involved came forward. I think he was a third-year student by the time that the issue came. And the conduct had occurred during an alcohol-fueled party with these two other medical students a couple years before. Then he argued that even though he received a *Baum*-type hearing that involved some cross examination, that one of the two female medical students was permitted to refuse to answer two questions on cross examination by his lawyer. So that was the specific issue here. It's a fairly narrow issue, and so then you got to figure out, OK, so how did the court handle that particular issue?

**HEATHER:** Right, and the court said you don't have a right to every single question you want answered, correct?

**ROBB:** Right, so no absolute right to have all questions answered during cross examination as long as the fact finder allows enough cross examination to be able to allow the respondent to question the particular witness' credibility.

**HEATHER:** Yes, and so enough to then make that person who's serving as the, quote unquote, judge in — or the fact-finder in the hearing — allows them enough to be able to assess credibility.

**ROBB:** Right. And this was something that the public universities in the Sixth Circuit have done after *Baum*, and it was the way this particular case was handled. They appointed a hearing officer or administrative law judge who then made decisions on how much cross examination, which questions were permissible, and which were not. And that's become pretty much the standard of practice post-*Baum* in Sixth Circuit public universities.

Now, the fact that this particular district court in one of the follow-on cases said some sort is enough, we're not going to apply this standard rigidly and require every sort of question on cross examination, I think is important. It's important not only for Fifth Amendment due process purposes, but it's important when you look at the regs that may come down which took the *Baum* decision and basically extended it further, not just to apply it to Title IX and all recipients of federal funds, but also said beyond some sort of cross examination it became much more specific about what is required.

So, if you have the courts in the Sixth Circuit now saying it's a little more limited, you don't get all these kind of rights of cross examination, and you're having the regulations going even further than the constitution would require, I think that provides one more basis to question whether the proposed Title IX regulations may go too far in their requirement for cross examination.

**HEATHER:** OK, so back to this case then. What does this really mean for institutions? It's specific now to this court, correct, or this court jurisdiction?



**ROBB:** Yeah. First of all, let's start with the basics — UE, and smart institutions have always tried to give fair process to students on both sides of the issue. That's important. What does that mean when you get down to the nitty gritty details? It still means in some areas you have to give some cross examination. We're seeing that in the California courts. We're seeing that in some of the New York courts and certainly within the Sixth Circuit for publics. But still, fair process is important. But it gives, I think, an opportunity to — you don't need to have a perfect trial-type hearing when you have a disciplinary hearing. And I think this case establishes that as long as you go somewhere down the road to fair process, it doesn't have to be everything that a defendant would get in a criminal proceeding.

**HEATHER:** OK, thank you. And then I just want to ask you to wrap this up. Like we said, the Title IX regulations are pending. And they do differ from this case, in particular. But in other cases that might be coming down in the interim, how does that play out for institutions then, once you might have some case law in your jurisdiction and then regulations that are issued by the federal Department of Education?

**ROBB:** Well, institutions are bound by the legal rules that apply in their jurisdiction. There's no doubt about that. And the extent that the rules, the regulations that come down are stricter than those, then it'll be a question about whether the regulations are faithful to the role of the Department of Education Office for Civil Rights in fulfilling Title IX statutory mandate.

I mean, we know that the regs are due to come down imminently. We're not certain where they will come down on this cross-examination issue, because that was the focus of many, many adverse comments by the university and college communities. We don't know whether those comments — and there were hundreds of thousands of comments from all sides of the political spectrum — how much the proposed regs have been changed, to take those comments into account. We'll find out, obviously, imminently, I suppose. And at that point, my view is that either side's going to challenge them in court, so those regs may not go into effect for some time yet, even though they will come out of the government in final form.

In the meantime, whatever the governing law is in the jurisdiction is going to apply to colleges and universities, so there's not going to be much uniformity for some time yet, in my view.

**HEATHER:** OK, so it seems like institutions, our best word of advice is you really need to know your jurisdiction right now and consult with counsel when you have something you're unsure of.

**ROBB:** Exactly.

**HEATHER:** OK. Thank you, Robb, for taking the time to discuss these two important cases with us.

**CONCLUSION:** From United Educators Insurance, this is the *Prevention and Protection* podcast. For additional episodes and other UE risk management resources, please visit our website, [www.edurisksolutions.org](http://www.edurisksolutions.org).



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