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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JANE DOE 1; JANE DOE 2; JANE DOE 3,

Plaintiffs - Appellants,

v.

EASTERN NEW MEXICO UNIVERSITY BOARD OF REGENTS,

Defendant - Appellee,

and

MEGHAN DE LOS REYES; PAUL WEIR; GLEN DE LOS REYES; GLEN'S FITNESS LAB LLC.,

Defendants.

No. 25-2044

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 2:23-CV-00362-GBW-JHR)

Jim Davy of All Rise Trial & Appellate, Philadelphia, Pennsylvania (Chelsea Stine of All Rise Trial & Appellate, Philadelphia, Pennsylvania; Katherine Ferlic and Benjamin Osborn of Egolf + Ferlic + Martinex, LLC, Santa Fe, New Mexico, with him on the briefs) for Plaintiffs-Appellants.

Alisha L. Walz of Walz and Associates, P.C., Albuquerque, New Mexico (Jerry A. Walz of Walz and Associates, P.C., Albuquerque, New Mexico with her on the brief) for Defendant-Appellee.

Before **BACHARACH**, **EBEL**, and **KELLY**, Circuit Judges.

EBEL, Circuit Judge.

In this civil appeal, Plaintiffs Jane Doe 1, 2, and 3 (the "Does") challenge the district court's summary judgment award in favor of Defendant Eastern New Mexico University ("ENMU") with respect to the Does' Title IX claims. The Does were all members of the ENMU women's basketball team, and their Title IX claims arose out of ENMU's alleged deliberate indifference to sexual abuse committed by Glen de los Reyes, whose wife Meghan was the coach of the team. The district court granted ENMU's motion for summary judgment on the basis that 1) ENMU did not have sufficient control over Glen for liability to attach, and 2) ENMU did not have an official policy of deliberate indifference towards sexual harassment. Reviewing de novo, we conclude that, although there is no evidence of an actual policy of deliberate indifference, ENMU did have sufficient control over Glen and the situation under which the harassment occurred for the claims to proceed. Having jurisdiction under 28 U.S.C. § 1291, we REVERSE the summary judgment award and REMAND for further proceedings consistent with this opinion.

I. BACKGROUND

A. De los Reyes' Role at ENMU

At all relevant times, Meghan de los Reyes was the head coach of the ENMU women's basketball team. Her husband, Glen de los Reyes, had no official role with ENMU. Glen did, however, offer his services as a "biomechanics specialist" to student

athletes, among others. J.A. 0428. Glen held multiple certifications relating to muscle recuperation, but the title of biomechanics specialist was his own invention. Up until January 2022, Glen performed treatments on student athletes on ENMU's campus, ranging from in the gym to coaches' offices to in the men's locker room. Coach Meghan asserts that she spoke with the Athletic Director, Paul Weir, before Glen began offering any services to student athletes, but AD Weir says he was unaware until January 2022 that Glen was treating student athletes.[1]

In January 2022, the head athletic trainer for ENMU, Daniella Torrosi, saw Glen doing a treatment on a male basketball player in the gym. Because she did not know who he was, Torrosi approached Glen, and he indicated that the coaches allowed him to give their players treatments. Torrosi later told the administration she was concerned about having a private actor working on their athletes, and that there could be questions of the university's liability if Glen injured someone via his treatments. At this time, AD Weir met with Coach Meghan, who then instructed Glen not to give his treatments on campus anymore. Neither Meghan nor Glen were under the impression that Glen was entirely prohibited from giving treatments, though. Additionally, Glen did still come onto

[1] Because this comes to us at the summary judgment stage, we view the facts contained in the record, construing all evidence in the light most favorable to the non-movant, the plaintiffs, female athletes. See Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1119 (10th Cir. 2008). The parties filed cross-motions for summary judgment, but because this appeal relates to the district court's order granting summary judgment to ENMU, we view the facts in the light most favorable to the Jane Does.

campus to lead self-defense classes (including to the women's basketball team) and to exercise.

B. Sexual Harassment Allegations

After January 2022, Glen continued to give ENMU student athletes treatments, but at the de los Reyes home. Many of the student athletes who Glen saw at his home were members of the women's basketball team; it is alleged that Coach Meghan required her players who complained of injuries to see Glen and that if they refused, she questioned the severity of their injuries.

As early as spring 2022, a student athlete—not one of the Plaintiffs—raised concerns with Torrosi that Glen was touching her inappropriately: when she had a shoulder injury, he was touching her in the pelvic region. Torrosi states that she reported this allegation to AD Weir both directly and through Assistant AD Liz Acosta, though it appears that Acosta never actually told AD Weir even though she found the report concerning. Acosta attributed her failure to report this information to her superior, AD Weir, due to her own lack of Title IX training. Nothing was done at this time with this report, as AD Weir apparently did not believe the allegation.[2]

In the fall of 2022, the Plaintiffs, Jane Does, joined the ENMU basketball team as freshmen. In late August 2022, Coach Meghan held a mandatory team dinner at the de los Reyes home. At this dinner, the players were introduced to Glen and informed about

[2] The record contains scattered references to another student athlete reporting in spring 2022 discomfort due to Glen touching her pelvic area, but there is no evidence in the record that AD Weir was aware of this second allegation.

his treatments. A volunteer 'team mom' told the players not to tell the athletic trainers that they were receiving treatments from Glen, and an unidentified individual stated, "Snitches get stitches." J.A. 0411. At this dinner, Doe 1 and Doe 3 received treatments from Glen, and Doe 3 alleges that Glen sexually assaulted her by touching her vagina. Doe 3 refused to get treatments from Glen after the August team dinner.

Does 1 and 2, however, continued to receive treatments in September and October, attending eight and four sessions respectively. During this time, Glen made a group message chat with the freshmen girls and himself to coordinate the 'required' treatments. Doe 1 alleged that during her second session, Glen touched her inner thigh and continued to do so even though she asked him to stop three to four times. In her third session, Glen touched the top of her vagina and around her breasts and refused to stop. In her fourth session, at the start of October, Glen touched her breasts and vagina. And after her seventh session, Doe 1 discussed the sessions with Doe 2, each stating that the sessions were "weird" and that the Does did not want to return. J.A. 0543, 0480. On that same day, Doe 2 had attended her third session, in which she alleged Glen touched her vagina and inner groin, supposedly to "activate[] [her] ankles and knees." J.A. 0812.

The final time Does 1 and 2 saw Glen was on October 30. The Does allege that Coach Meghan had Doe 2's car keys and would only give them back if they both got treatments from Glen. During their treatments on October 30, Glen climbed on top of them while they were on their backs. In so doing, Glen's genitals were on Doe 1's buttocks. Glen also touched Doe 1's vagina and breasts and Doe 2's groin during these

sessions. Other student athletes also allege that Glen touched their breasts under the guise of treatment for an unrelated body part.

C. Does' reports to ENMU

On October 2, 2022, Doe 3 reported the August assault to Torrosi. Having heard the prior report from another student athlete in the spring of 2022, Torrosi was concerned that nothing was being done to stop Glen from treating the student athletes. She reported again to AD Weir, saying that there could be a "Larry Nassar" situation at the school if he did not intervene.[3] J.A. 0502. Does 1 and 2 had not reported their own experiences at this time.

After several, weekly comments from Torrosi about the situation, AD Weir eventually scheduled a meeting with Glen, Coach Meghan, Torrosi, and other members of the athletics department and medical staff on November 2, 2022. At this meeting, AD Weir had two main objectives. First, AD Weir again pressed the concern of a non-affiliated person working with the student athletes. He offered to make Glen a formal ENMU volunteer to address this concern, but otherwise Glen should no longer see the student athletes. Glen declined the offer. After the meeting, AD Weir sent Glen a form to fill in that would cement the volunteer relationship, but Glen never signed it. Second,

[3] This was presumably in reference to the former university athletic trainer who was sentenced to sixty years imprisonment for child pornography and obstruction of justice charges, whose sentence was based in part on extensive testimony indicating he had molested dozens of minors under the guise of treatment in his role as an athletic trainer. See U.S. Att'y's Off., W. Dist. of Mich., Press Release: Lawrence Nassar Sentenced to 60 Years in Federal Prison, Dep't of Just. (Dec. 7, 2017).

Weir and one of the medical staff members asked about Glen's treatments, inquiring why he might touch a student athlete's pelvic area or breast area for a seemingly unrelated injury. Glen explained that it was part of his methodology of determining a person's "sensory imbalances." J.A. 0431. AD Weir was satisfied with this explanation. Glen also said that he recorded the sessions to avoid later claims of misconduct, though the student athletes did not know that and it does not appear anyone at ENMU reviewed this footage. No investigation was begun at this point nor were the allegations reported to the Title IX office. Later that same month, Doe 3 reported the misconduct to a counselor, who passed it on to Human Resources, who did initiate an investigation.

Glen continued to see student athletes at the request of ENMU coaches, but it is unclear who all knew this. Glen did, however, understand that he was violating the rules as explained to him. None of these post-meeting treatments involved the Does, though it appears that at least the last of Does 1 and 2's treatments came after AD Weir was aware of Doe 3's allegations. Coach Meghan also continued to hold mandatory team dinners involving the female athletes at the de los Reyes home, including for Thanksgiving and Christmas that year.

In January 2023, Doe 1 reported to an athletic trainer that Glen's treatments made her feel uncomfortable, and the trainer passed it on to Human Resources. Also in January 2023, Does 1 and 2 were overheard discussing their allegations of sexual misconduct by another member of the basketball team, who told her own mother. The mother, in turn, told Coach Meghan, who sat down with Does 1 and 2 to discuss the allegations. Both said they had nothing to report, though Doe 2 described the sessions as uncomfortable

and Doe 1 directed Coach Meghan to speak with her parents. At this time, as indicated above, Doe 1 had already reported the situation to an athletic trainer. And Doe 2 reported her allegations of assault to the Human Resources director the day after their meeting with Coach Meghan.

On February 6, 2023, ENMU filed a criminal trespass warning against Glen, banning him from coming to campus. Finally, on February 9, 2023, AD Weir sent an email to all ENMU coaches telling them that their players were not permitted to see Glen for treatments. It appears the assaults ended at this point.

II. PROCEDURE

The Does filed suit in the federal district court for the District of New Mexico, alleging state and federal law tort claims against Glen, Coach Meghan, AD Weir, and ENMU's Board of Regents. Relevant to this appeal, the Does alleged that ENMU violated Title IX by discriminating against them on the basis of sex, both via deliberate indifference to the risk of sexual harassment and by permitting retaliation against them for reporting that harassment.

The parties filed cross-motions for summary judgment on the Title IX claims. The district court granted summary judgment to ENMU and denied summary judgment to the Does. The district court determined that, though the Does had pled facts that could support some elements of their Title IX claims, they failed to demonstrate that ENMU had the requisite "control" over Glen to state a deliberate indifference claim. Separately, the district court determined that the Does had not demonstrated an official policy at ENMU of deliberate indifference to sexual harassment. The district court also rejected

the Does' Title IX retaliation claim, which stemmed from allegations that Coach Meghan suspended the Does due to their reports. The Does did not adequately preserve a challenge to this retaliation ruling on appeal, and thus this court will not review it.

III. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo, applying the same legal standard as the district court. Rost, 511 F.3d at 1118. Summary judgment is only appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Courts do not weigh the evidence nor witness credibility, Fogarty v. Gallegos, 523 F.3d 1147, 1165 (10th Cir. 2008), and instead must only determine whether there is evidence in the record from which a rational jury could find in the non-movant's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). Courts view the facts and make all reasonable inferences in favor of the non-movant, Harden v. Hedgecock, 181 F.4th 1094, 1101 (10th Cir. 2026), but the non-movant still must put forth "significant probative evidence," Anderson, 477 U.S at 249 (quoting First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 290 (1968)), not just "a scintilla of evidence," id. at 252.

IV. DISCUSSION

This case concerns the application of Title IX liability for a school's alleged deliberate indifference to sexual harassment carried out by a non-student, non-employee who has, nonetheless, a unique connection to the university. Applying the Supreme Court's parameters for liability - - that the university must have "control" over both the harasser and the context of harassment - - the district court concluded ENMU could not

be liable for Glen's harassment. The district court determined that, though there was some support for a finding that ENMU had the requisite control over the context of the harassment, ENMU could not have had control over Glen because he had no formal relationship with the university. The primary focus of the parties' dispute on appeal, then, is what constitutes control over the harasser. We write now to clarify the application of this test. And on the facts presented, we conclude at the summary judgment stage, there are sufficient allegations of AD Weir's control over the harasser—Glen—for the Does' claims to go forward.

A. Liability under Title IX

Under Title IX, a recipient of federal funding—such as a public university, like ENMU—cannot "on the basis of sex" subject any person "to discrimination under any education program" nor exclude them from participation in, nor deny the benefits of, said program. 20 U.S.C. § 1681(a). Schools cannot be held vicariously liable for the misconduct of their agents, but a school may be directly liable for its deliberate indifference to known misconduct. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 288 (1998); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644 (1999).[4]

[4] In their appellate briefs, the parties categorize this claim as a "pre-assault," as opposed to "post-assault," deliberate indifference claim. However, this categorization does not appear to have played a part in the litigation below. The alleged facts relate primarily to ENMU's deliberate indifference after Doe 3's report but before Doe 1 and 2's reports. Plaintiffs can state a claim of Title IX liability for a school's deliberate indifference either by demonstrating deliberate indifference to a reported instance of assault or by demonstrating that the school's deliberate indifference to a known risk of assault caused the Plaintiffs' subsequent assault. See Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019) (post-assault theory); Doe v. Sch. Bd. of Broward Cnty., 604 F.3d 1248, 1257–59 (11th Cir. 2010)

In the context of sexual harassment at a school, the Supreme Court has said a school "may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment." Davis, 526 U.S. at 644 (alteration in original). "That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." Id. at 645 (alterations in original). The Davis Court went on to provide parameters for "the set of parties whose known acts of sexual harassment can trigger some duty to respond on the part of funding recipients." Id. at 644. The Court said that a deliberate indifference finding is only appropriate "wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs" because "[a] recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action." Id. at 644–45. This two-part control requirement animates the Court's prior holding that Title IX liability exists when the harassment was ignored by "an official of the recipient entity with authority to take corrective action to end the discrimination." Gebser, 524 U.S. at 290. If an official has no such authority, there is nothing that the recipient failed to do.

1. Control is a case-specific, factual inquiry

In this case, the Does argue that AD Weir had sufficient control over Glen because, pragmatically, he could restrict Glen's access to student athletes. On the other hand, ENMU argues AD Weir did not have control over Glen because he could not fire, discipline, nor suspend Glen. The district court sided with ENMU stating that "the focus

(pre-assault theory). The proper categorization of this claim is outside the scope of the question presented on appeal and is best suited to the district court on remand.

is on whether the harasser is subject to the university's disciplinary authority or some other power which can be brought to bear against the harasser." Dist. Ct. Order at 14. It then said this authority was limited "almost always [to] students or employees." Id. at 15. The district court employed too formalistic an understanding of Davis.

Though different courts have followed different tacks in applying Davis, this court has recognized that the application of the control test is "necessarily a fact-based inquiry." Murrell v. School Dist. No. 1, 186 F.3d 1238, 1247 (10th Cir. 1999); Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 938 n.4 (10th Cir. 2003) (Tacha, C.J., concurring) ("A determination of whether particular conduct satisfies [the Title IX liability] factors 'depends on a constellation of surrounding circumstances, expectations, and relationships.'" (quoting Davis, 526 U.S. at 651)). It is not a rote exercise of asking merely whether the university can fire or expel the harasser. See Hall v. Millersville Univ., 22 F.4th 397, 408–09 (3d Cir. 2022) ("Whether Millersville had control over [the harasser] is not a limited inquiry into Millersville's formal disciplinary authority, but a broader examination of the degree of control Millersville had over him and its ability to 'take remedial action.'" (quoting Davis, 526 U.S. at 644) (emphasis added)). Contra Doe v. Edgewood Indep. Sch. Dist., 964 F.3d 351, 360 (5th Cir. 2020) ("[T]he power to institute corrective measures must include the power to terminate or discipline."). Liability is precluded only when "the school district could not have remedied the harassment because it . . . had no authority to respond to the harassment." Murrell, 186 F.3d at 1246. The focus of our inquiry, then, is functional: did ENMU have the ability to

protect its students from the threat of Glen's harassment? This is a pragmatic inquiry and is not limited to mere legal formalism.

There are undoubtedly ways to prevent sexual harassment other than simply terminating an employee or expelling a student. For example, in Murrell, this court said, "Davis makes clear . . . that a school official who has the authority to halt known abuse, perhaps by measures such as transferring the harassing student to a different class, suspending him, curtailing his privileges, or providing additional supervision" would have adequate control over the harasser to trigger liability. 186 F.3d at 1247. Each of these measures would serve the practical purpose of remedying the threat of assault, even if they fall short of expulsion. Additionally, not all are punitive in nature.

Here, AD Weir was pragmatically capable of "curtailing [Glen's] privileges" of access to its female athletes by instructing its coaches not to refer nor transport their players to Glen, by banning Glen from campus, which the university ultimately did months after the allegations first arose, or by instructing its female athletes (over whom it clearly had control) that they could not have contact with Glen nor go to his and Coach Meghan's home. Furthermore, AD Weir was capable of controlling Glen's improper conduct by indirect but effective control over the situation. AD Weir could have required Coach Meghan over whom he did have control, to instruct her student athletes that if they wanted to stay on the team they could not have any contact with her husband, Glen, nor could they go to her house or meet anywhere other than in school sponsored or public locations. AD Weir could also have ensured its women athletes that Coach Meghan could not take retaliatory action against them when the female athletes followed these

restrictions. These measures would indirectly have controlled Glen by controlling the environment in which Glen could operate.

This fact-intensive approach makes sense when considering the goal of the analysis set forth in Davis and Gebser. Courts are meant to ascertain whether the school was capable of protecting its students or employees and, through its indifference, chose not to do so. Here, if ENMU was aware that a third-party trainer was assaulting its students and yet it continued to allow its coach to require its students to see the harasser, even transporting them to the location of the assaults, it logically follows that the school would face liability for such deliberate behavior of indifference to the safety of its students. Further, given ENMU's ability to remedy the harm and, in fact, its role in actually fostering that harm, the school was obligated to take corrective action rather than simply washing its hands of responsibility for Glen's assaultive conduct toward its female basketball athletes.

The formalistic approach taken by the district court is not supported by Davis' language. In recognizing that Title IX liability is not limited to the misconduct of employees, the Davis Court importantly said schools can be liable "for their failure to protect students from the tortious acts of third parties." 526 U.S. at 644 (citing Restatement (Second) of Torts § 320, and cmt. a (1965) (listing examples of individuals liable for the misconduct of someone in their control)). To be sure, the harasser in Davis was another student, but if the Court meant to limit the term "third parties" strictly to students and to cabin Title IX liability just to harassment by employees and students, there would have been no reason to include this more generalized discussion of third

parties.[5] See id. (stating only that possibility of liability for failure to protect from third party misconduct "is not to say that the identity of the harasser is irrelevant"). Similarly, if the Court meant that a school is only directly liable when it can terminate, expel, or suspend the harasser, it would have said so. To evaluate a defendant's deliberate indifference, we necessarily must examine what the defendant could have done, not just a defendant's immediate legal authority over the third party offender.

Finally, the facts of this case demonstrate the fundamental flaw with applying a narrow, formalistic approach of considering only the direct legal power of the school to control the offender. Here, ENMU asserts it had no control over Glen because he was not a formal volunteer. Though AD Weir offered Glen the opportunity to become a formal volunteer, Glen declined this offer, and yet he continued to treat student athletes. ENMU conceded at oral argument that had Glen signed the form AD Weir sent him and became

[5] In guidance published shortly after the Davis opinion, the Department of Education discussed a school's liability for "sexually harassing conduct by third parties, who are not themselves employees or students at the school (e.g., a visiting speaker or members of a visiting athletic team)." Dep't of Educ., January 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at 12. Though agency interpretation is no longer given Chevron deference, we can still look to it for its persuasive value in applying a statute. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 402 (2024). And while this guidance document, along with several others, was replaced by updated guidance in 2020, the Department's new Title IX guidance specifically stated "[i]mportantly, the final regulations continue the 1997 Guidance and 2001 Guidance approach of including as sexual harassment unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature by an employee, by another student, or by a third party." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30036 (May 19, 2020) (codified at 34 C.F.R. pt. 106) (emphasis added).

a formal volunteer, then ENMU would have had the requisite control over him. See Oral Arg. at 15:45 – 16:40. But what additional "control" would this have given ENMU in practice? Seemingly, ENMU relies on the fact that AD Weir could have terminated the formal volunteer relationship at that point, essentially tearing up the paper Glen had just signed. And yet, to do so would simply have returned the situation to where it already was, with Glen treating students without a formal volunteer arrangement. This is a case of a distinction without a difference, and to assign liability based exclusively on such hollow grounds would be exceedingly odd as it adds nothing to ENMU's ability to protect its student athletes. We find the actual tools at ENMU's disposal that could have had a functional impact on curbing the abuse to be far more instructive than ending our inquiries at whether the funding recipient could fire or expel the harasser.

2. The record indicates that ENMU had effective control over Glen

Having concluded that Davis requires us to examine the specific facts of this case to determine whether ENMU had control over Glen—that is, whether ENMU could take action to remedy the risk of Glen's abuse to its student athletes—we next carry out that examination and clarify what is required to satisfy this test. We conclude that the record indicates ENMU had multiple mechanisms at its disposal to indirectly control Glen, both those it ultimately employed and others, sufficient to support the Does' Title IX claims at this preliminary stage of the case.

Though the district court recognized that "in rare circumstances," a third party could be under a school's control, Dist. Ct. Order at 16 (citing Hall, 22 F.4th 397; Feminist Majority Found. v. Hurley, 911 F.3d 674 (4th Cir. 2018)), it said this was not

one of those rare circumstances. In doing so, it specifically rejected the aforementioned measures AD Weir took against Glen as indicative of ENMU's control. First, it stated that banning Glen from campus could not have addressed the harassment because the alleged assaults all took place off campus. True enough, though it may be argued that Glen's ongoing presence on campus, including running self-defense classes for the women's basketball team added legitimacy to Glen and made the Does "'vulnerable' to" further harassment. See Davis, 526 U.S. at 645. Second, and more peculiarly, the district court stated that prohibiting coaches from referring their players to Glen and prohibiting players from seeing Glen "reflect[ed] the University's control over its employees and students – not over Defendant Glen himself." Dist. Ct. Order at 18. The district court considered it dispositive that ENMU was not acting directly upon Glen. This distinction is not supported by case law nor Title IX itself.

To start, it is worth reiterating the text of Davis, that a university's liability is limited "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs." 526 U.S. at 645. Nowhere does Davis say that the school must have "legal" or "direct" or "employment" control over the harasser. Instead, Davis is concerned with whether the school had sufficient "authority to take remedial action," that could effectively control the offender's illegal conduct so the school is not punished when there was nothing it could have done. Id. at 644. Further, the language of Davis, which mirrors Title IX itself, is focused on the victim, not the harasser: it asks whether the school's deliberate indifference "'subjects' its students to harassment," "'cause[s] students to undergo' harassment or 'make[s] them

liable or vulnerable' to it." Id. at 644–45 (cleaned up). It does not ask whether the school employed a harasser or formally admitted the harasser as a fellow student. See Cannon v. Univ. of Chicago, 441 U.S. 677, 691–92 (1979) (discussing Title IX's focus on the "benefited class" rather than acting "simply as a ban on discriminatory conduct by recipients of federal funds"), abrogation recognized on other grounds in Medina v. Planned Parenthood S. Atl., 606 U.S. 357, 369 n.1 (2025). Evidently, the purpose of the control prongs is to determine whether the school had the power to correct the situation, not to quarrel over how the precise measures at the school's disposal ultimately act on the harasser.

One's ability to harass can be controlled in many indirect ways. As discussed above, in addition to telling coaches not to require their players to get treatments from Glen nor to drive their players to the de los Reyes home, AD Weir also could have told Coach Meghan not to hold mandatory team dinners at the de los Reyes home anymore. And, of course, AD Weir had the power to discipline Coach Meghan. It is of no moment that these commands would have been directed at the coaches and student athletes.

To be sure, Davis requires examination of both control over the context of harassment and control over the harasser. But control over the harasser and control over the context, while distinct to a degree, can certainly inform one another. See Feminist Majority, 911 F.3d at 687–88 (determining school had control over context of harassment, an online app, in part because it had control over the students posting on that app). Unsurprisingly, when a school has the requisite control over the context of harassment, it will often have control over the harasser who has entered that context: the

two inquiries are undeniably intertwined. Here, the de los Reyes home was both the site of mandatory team events and the site of the alleged assaults. Knowing that Glen lived at the de los Reyes home and that he was carrying out his treatments there, AD Weir could have told Coach Meghan not to require her student athletes to come to her house. If Glen was banned from campus and the student athletes were not mandated to come to his home, Glen's ability to continue harassing the student athletes would have been drastically reduced. This is borne out by the fact that the assaults apparently stopped once ENMU took some of these exact measures.

That will not always be the case, however, and we still must premise liability on a school's power to control the specific harasser. For example, ENMU does not automatically have control over any harasser who enters the de los Reyes home simply because ENMU has control over that context. If instead of the repeated assaults being committed by Coach Meghan's husband during treatments that she required her student athletes to endure, someone broke into the de los Reyes home during a mandatory team dinner and committed an assault, this would clearly fall outside ENMU's ability to take corrective action. See Hall, 22 F.4th at 407 (finding funding recipient had control over non-student guest at a dormitory while stating "[w]e 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"). The purpose of the fact-driven analysis is simply to make a common sense appraisal of whether the school had the ability to control or correct the abuse and knowingly failed to do so. As such, we must take into account all facts that bear on this authority. In so doing, we recognize that facts relevant to the

context of harassment and to the harasser will at times have an effect on the other, but these facts must be weighed in each individual case.

The district court stated that the facts of this case demonstrate that ENMU did not have control over Glen because he continued to see student athletes after he was told that he could not without a formal volunteer relationship. But this hardly shows that the other mechanisms of control that ENMU had could not control Glen, and as stated above, some of those mechanisms deployed months after Doe 3's allegations did seem to control Glen's access to student athletes. Rather, the fact that Glen continued to see student athletes for so long is powerful evidence of the very deliberate indifference alleged by the Does: that ENMU was indifferent to the harassment because it was motivated by the opportunity to get free athletic training "to fill gaps in its sports medicine program" caused by "the University's perpetual shortfall of available athletic trainers." Aplt. Br. 6.

It is alleged that ENMU was more concerned with its liability for known unsanctioned training sessions, than for the misconduct occurring within those sessions. AD Weir was aware of Glen's treatments at least as early as January 2022. All discussions at that time, which led to the treatments moving off campus to Glen's home, revolved around ENMU's interest in avoiding liability in case these treatments medically went wrong. As the allegations turned to sexual harassment in the spring of 2022, AD Weir wrote them off as unfounded or unconnected to sexual harassment, perhaps unconcerned because the harassment was not taking place on campus**.** By this time, it was alleged that ENMU had informed some student athletes that if they went to outside providers for treatment, specifically Glen, the athletic training staff would not treat them

"for liability reasons," J.A. 0665, which put ENMU in a position not to learn about further misconduct from student athletes required to see Glen. Cf. C.S. v. Madison Metro. Sch. Dist., 34 F.4th 536, 545 (7th Cir. 2022) (discussing Title IX liability when "the school official buried his head in the sand to avoid acquiring knowledge of past or ongoing misconduct"). And when AD Weir held a meeting with Glen and relevant ENMU personnel after the sexual harassment allegations came to light, the self-proclaimed primary focus of the meeting again was ENMU's liability if Glen continued seeing athletes without a volunteer relationship with ENMU, not the allegations themselves. ENMU's indifference to the danger its student athletes were being exposed to does not demonstrate ENMU's lack of control over Glen. Instead, it is this very deliberate indifference that could itself subject ENMU to liability.

3. Conclusion

Properly applying Davis' factual inquiry, we conclude that the district court erred in granting summary judgment because a genuine dispute of fact exists as to ENMU's control over Glen in his ability to sexually assault members of the female ENMU basketball team. Glen's lack of a formal relationship with ENMU is not dispositive. The record contains adequate evidence, when viewed in the light most favorable to the Does at this preliminary stage of the proceedings, that ENMU had several tools at its disposal demonstrating its ability to control Glen, at least indirectly, and the situation to prevent the alleged harassment. As a result, the Does' Title IX claims are sufficient to go forward.

B. Official policy liability

Though we conclude that the district court erred on its deliberate indifference analysis under the Davis control test, we will also briefly address the Does' alternative argument that ENMU had an "official policy" of deliberate indifference towards the threat of sexual harassment via unsupervised training sessions with informal volunteers. See Gebser, 524 U.S. at 290 (recognizing subset of Title IX cases based on an "official policy of the recipient entity"). We agree with the district court that the record does not indicate ENMU had an official policy of deliberate indifference.

This court has found an official policy of deliberate indifference in limited circumstances. The leading case on this type of claim is Simpson v. University of Colorado Boulder. 500 F.3d 1170 (10th Cir. 2007). There, CU had a program to show athletic recruits around campus, led by "Ambassadors" who were typically female students. Id. at 1173. The purpose of these visits was to show the recruits a "good time," and there was some indication that the recruits were told they would get to have sex with the female students. Id. When multiple female students were sexually assaulted by recruits, this court found that "CU sanctioned, supported, even funded, a program (showing recruits a 'good time') that, without proper control, would encourage young men to engage in opprobrious acts." Id. at 1177. The Simpson court said that "an unsupervised player-host program," id. at 1184, posed an obvious need for training to prevent sexual harassment. Id. at 1173. And though there were reports about the threat of sexual assault by student athletes, including some specific to CU, id. at 1184, the court

acknowledged that "a need could be 'obvious' for reasons other than knowledge of previous incidents." Id. at 1178.

The same cannot be said of ENMU's conduct here. As described above, it appears that ENMU was made aware of the alleged sexual harassment and chose not to intervene. That differs from the type of affirmative promulgation of an environment rife with risk described in Simpson. And though athletic treatment sessions could be said to implicate a need for consent training, such as the training head athletic trainer Torrosi herself had, this is because "unfortunately, some flawed humans will engage in such misconduct when they are in the company of others," id. at 1177, not because ENMU was encouraging such misconduct. There have been few cases since Simpson that have found an official policy of deliberate indifference, and we do not think this case is one of those few.[6]

C. Alternative grounds for affirmance

Finally, given our conclusion as to the district court's deliberate indifference ruling, we address the alternative grounds for affirmance raised by ENMU. We conclude that neither merits affirmance.

First, ENMU suggests that summary judgment is warranted because the Does "failed to show substantial control over the context of the harassment" because the assaults occurred at the off-campus, private de los Reyes residence. Aple. Br. 28–29. We, like the district court, conclude that some of the Does' arguments could support

[6] See, e.g., Doe v. Univ. of Tenn., 186 F. Supp. 3d 788 (M.D. Tenn. 2016).

a finding that ENMU had control over the context of the harassment, such that summary judgment is inappropriate on that basis.

This court, when considering off-campus harassment, has looked for whether a sufficient "nexus" exists between the school and the location of the harassment. Rost, 511 F.3d at 1121 n.1 (citing Davis, 526 U.S. at 645). Such a nexus has been found when an assault happened in a fraternity that the school has some control over and the victims continued to see the fraternity members on campus, Farmer, 918 F.3d at 1097, 1101 (finding at pleading stage sufficient allegation of deliberate indifference when university refused to investigate off-campus rape), and when the harassment occurred at a location where the university was hosting or supervising an event. Oldham v. Penn. State Univ., 138 F.4th 731, 748 (3d Cir. 2025) (finding control over context of fencing invitational hosted by university). Here, the assaults themselves stemmed from the players' relationship to the basketball team, as Coach Meghan was referring, or even requiring, treatment with Glen. Additionally, Coach Meghan (who was an employee and representative of ENMU) held mandatory events at her home, making it a location of university-hosted events. Though ENMU disputes its knowledge of these events, summary judgment is not warranted on this ground.

Second, ENMU argues that we could affirm on the alternate ground that the Does failed "to show that ENMU ever acted with deliberate indifference to a known risk of harassment." Aple. Br. 30. Again, we agree with the district court that there

were sufficient facts to make this showing, such that summary judgment is inappropriate.

AD Weir was aware of reports of misconduct at the very latest by October 2022, and the record indicates he was aware of at least one report by the spring of 2022. He held a meeting in which the allegations were raised. He learned that Glen recorded the sessions without consent. And yet, AD Weir offered to formalize Glen's relationship with the university, so that Glen could continue treating student athletes. AD Weir also failed to report the allegations to the Title IX office, and he did not instruct coaches to stop referring players to Glen until months later. These allegations create a genuine issue of fact as to whether ENMU was deliberately indifferent.

V. CONCLUSION

Because the record indicates ENMU had the power to take corrective action to address the threat of sexual harassment Glen posed, we conclude ENMU had sufficient control over Glen and the context of the abuse described in the Does' Title IX claims to survive summary judgment. The court has determined to leave the Sealing Order dated September 11, 2025 in place.

We REVERSE the district court's summary judgment order and REMAND for further proceedings consistent with this opinion.