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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HALEY VIDECKIS AND LAYANA	)	Case No. CV 15-00298 DDP (JCx)
WHITE,	)	
	)	
Plaintiffs,	)	<b>ORDER GRANTING IN PART AND</b>
	)	<b>DENYING IN PART MOTION TO DISMISS</b>
v.	)	
	)	
PERPPERDINE UNIVERSITY, a	)	[Dkt. No. 13]
corporation doing business	)	
in California,	)	
	)	
Defendant.	)	
_____	)	

Presently before the Court is Defendant Pepperdine University ("Pepperdine")'s Motion to Dismiss the First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) (the "Motion"). (Dkt. No. 13.) Having considered the parties' submissions and heard oral argument, the Court GRANTS in part and DENIES in part the Motion and adopts the following order.

**I. BACKGROUND**

Plaintiffs in this case are Haley Videckis ("Videckis") and Layana White ("White"). Videckis is a former member of Pepperdine's women's basketball team who transferred to Pepperdine

1 from Arizona State University in July 2013. (First Amended  
2 Complaint ("FAC"), Dkt. No. 22, ¶¶ 1, 47.) White is also a former  
3 member of Pepperdine's women's basketball team who transferred to  
4 Pepperdine from Arizona State University in January 2014. (FAC ¶¶  
5 2, 47.) Defendant Pepperdine is a university located in  
6 California. (Id. ¶ 3.) Pepperdine receives funds from the federal  
7 government and from the state of California. (Id.) Ryan  
8 Weisenberg ("Coach Ryan") is the head coach of the Pepperdine  
9 women's basketball team. (Id. ¶ 5.) Adi (whose full name was not  
10 provided in the FAC) is an athletic academic coordinator of the  
11 Pepperdine women's basketball team. (Id. ¶ 11.)

12 Plaintiffs' suit arises out of allegedly intrusive and  
13 discriminatory actions that Pepperdine and its employees committed  
14 against Plaintiffs on account of Plaintiffs' dating relationship.  
15 Plaintiffs allege that, in the spring of 2014, Coach Ryan and  
16 others on the staff of the women's basketball team came to the  
17 conclusion that Plaintiffs were lesbians and were in a lesbian  
18 relationship. (Id. ¶ 16.) Plaintiffs further allege that Coach  
19 Ryan and the coaching staff were concerned about the possibility of  
20 the relationship causing turmoil within the team. (Id.)  
21 Plaintiffs allege that, due to their concerns, Coach Ryan and  
22 members of the coaching staff harassed and discriminated against  
23 Plaintiffs in an effort to force Plaintiffs to quit the team.  
24 (Id.)

25 Plaintiffs allege that, beginning in February 2014, Adi would  
26 hold individual meetings with each of the Plaintiffs in order to  
27 determine Plaintiffs' sexual orientation and their relationship  
28 status. (Id. ¶¶ 19-22.) The questions consisted of asking, among

1 other things, how close Plaintiffs were, whether they took  
2 vacations together, where they slept, whether they pushed their  
3 beds together, whether they went on dates, and whether they would  
4 live together. (Id.) The questioning lasted at least through June  
5 2014. (Id. ¶ 25.) At the end of April, White reported to Coach  
6 Ryan that Adi constantly was trying to retain information about  
7 White's personal life instead of focusing on White's academics.  
8 (Id. ¶ 23.) Coach Ryan assured White that he would soon have a  
9 coach monitor the players' meetings with Adi. (Id.)

10 On April 16, 2014, Coach Ryan held a team leadership meeting  
11 where he spoke on the topic of lesbianism. (Id. ¶ 23.) In the  
12 meeting, Coach Ryan stated that lesbianism was a big concern for  
13 him and for women's basketball, that it was a reason why teams  
14 lose, and that it would not be tolerated on the team. (Id.)

15 In May 2014, White met with Coach Ryan to discuss filing an  
16 appeal to the NCAA that would allow her to play basketball in her  
17 first year as a transfer student. (Id. ¶ 24.) Coach Ryan assured  
18 White that he would be starting the process right away. (Id.)  
19 Afterwards, however, White received no updates on the progress of  
20 the appeal. (Id.) Later, when White met with the athletic  
21 director at Pepperdine, she alleges that the director had not been  
22 informed of any appeal on her behalf. (Id. ¶ 25.)

23 On June 4, 2014, Videckis complained to the coaching staff  
24 that an athletic trainer had been asking Videckis inappropriate  
25 questions about dating women. (Id.) Videckis alleges that Coach  
26 Ryan accused her of lying when she complained about the  
27 inappropriate questions. (Id.)

28

1 Plaintiffs further allege that, in early July, Adi falsely  
2 accused Plaintiffs of academic cheating. (Id. ¶ 26.) The charges  
3 were later dropped. (Id.) Later in July, Coach Ryan reached out  
4 to two of Plaintiffs' teammates, recommended that the teammates not  
5 live with Plaintiffs, and stated that Plaintiffs were bad  
6 influences. (Id.)

7 On August 25, 2014, Coach Ryan and another member of the  
8 coaching staff asked two of Plaintiffs' teammates whether  
9 Plaintiffs were dating. (Id. ¶ 27.) When Plaintiffs found out  
10 that the coaches had been asking their teammates about Plaintiffs'  
11 relationship status, White confronted Coach Ryan about the  
12 questioning. (Id.) During this meeting, White was able to confirm  
13 that the coaching staff had been asking teammates whether  
14 Plaintiffs were dating. (Id.)

15 In early September 2014, Adi and the coaching staff accused  
16 White of being absent from a required study hall and punished  
17 White. (Id. ¶ 28.) After the meeting where Coach Ryan and Adi  
18 issued White's punishment, Adi walked up to White with a book white  
19 needed and slammed the book on the desk in front of White. (Id.)  
20 That night, White attempted to commit suicide. (Id.)

21 On September 9, 2014, Videckis informed Coach Ryan that she  
22 would miss practice on September 12 because she was getting tested  
23 for cervical cancer. (Id.) On September 16, 2014, Videckis met  
24 with Dr. Green at the Pepperdine Health Center, who told her that  
25 she was cleared for her condition. (Id.) After leaving her  
26 appointment that day, Videckis received an email from an assistant  
27 trainer on the team that stated Videckis would not be cleared for  
28 participation unless Videckis provided the athletic medicine center

1 with documentation from a spine specialist. (Id.) On September  
2 17, Videckis called the health center to request documentation.  
3 (Id.) That same day, Videckis brought her "MRI, diagnosis, and  
4 treatment of prescription" to the athletic training room. (Id.)  
5 Afterwards, Videckis received emails from the athletic trainers  
6 informing her that the documentation she provided was insufficient,  
7 and that she needed to provide them with a diagnosis and treatment  
8 plan. (Id.) Videckis spoke with Coach Ryan, telling him that she  
9 had given the trainers all of the documentation the doctor's office  
10 had on file for her. (Id.) Videckis requested Coach Ryan's  
11 assistance in speaking with the trainers to clear her for her  
12 tailbone injury, but Coach Ryan informed Videckis that he would not  
13 help her. (Id.) Videckis replied to the emails, informing the  
14 trainers that her diagnosis was in the documentation she had  
15 provided, but received no response. (Id.)

16 On September 19, 2014, Videckis met with Dr. Potts, the  
17 Pepperdine athletic director, and told him of her concerns  
18 regarding unfair treatment by the women's basketball staff. (Id.)  
19 Videckis told Dr. Potts that she felt that the coaching staff was  
20 trying to keep her and White from playing, and furthermore that  
21 they were trying to get Plaintiffs kicked out of the school. (Id.)  
22 Videckis alleges that Dr. Potts was very rude during the meeting  
23 and also that he yelled at her for bringing the issue to his  
24 attention. (Id.)

25 That same day, Videckis called Coach Ryan and told him that  
26 she was very unhappy with the way she had been treated. (Id.)  
27 Coach Ryan then told her that she would need to make a decision as  
28 to whether she wanted to remain on the team by Sunday. (Id.)

1 Videckis told him that she would need until Monday. (Id.) On  
2 Monday, Videckis called Coach Ryan and told him that she needed  
3 more time. (Id.) In response, Coach Ryan told her that he needed  
4 her decision by 5pm that day; otherwise, he would tell Dr. Potts  
5 that Videckis had quit voluntarily. (Id.)

6 Videckis sent Dr. Potts an email on September 24, stating that  
7 she had not made a decision to quit, and that she would like to  
8 speak with Dr. Potts later that week when she was back in town.  
9 (Id.) Dr. Potts replied, saying that due to Videckis' concerns,  
10 the school had begun an investigation, and that until then, as  
11 requested, Videckis would be relieved from activities having to do  
12 with the basketball team. (Id.)

13 On November 7, 2014, Videckis received a letter from the Title  
14 IX coordinator. (Id.) The letter stated that there was  
15 insufficient evidence to conclude that harassment or sexual  
16 orientation discrimination had occurred, and further that according  
17 to the team doctor, Dr. Green "has not received this documentation  
18 to medically assess your fitness to play." (Id.) On December 1,  
19 2014, Videckis sent the university a doctor's note stating that  
20 "[i]t is acceptable for [Videckis] to return to basketball without  
21 restriction." (Id. ¶ 29.)

22 As of the filing of the FAC, neither Videckis nor White had  
23 been cleared to play basketball. (Id.)

24 Plaintiffs' FAC alleges three causes of action: (1) violation  
25 of the right of privacy under the California constitution; (2)  
26 violation of California Educational Code §§ 220, 66251, and 66270;  
27 and (3) violation of Title IX. Pepperdine moves to dismiss on all  
28 claims.

1 **II. LEGAL STANDARD**

2 A 12(b)(6) motion to dismiss requires the court to determine  
3 the sufficiency of the plaintiff's complaint and whether or not it  
4 contains a "short and plain statement of the claim showing that the  
5 pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under  
6 Rule 12(b)(6), a court must (1) construe the complaint in the light  
7 most favorable to the plaintiff, and (2) accept all well-pleaded  
8 factual allegations as true, as well as all reasonable inferences  
9 to be drawn from them. See Sprewell v. Golden State Warriors, 266  
10 F.3d 979, 988 (9th Cir. 2001), amended on denial of reh'g, 275 F.3d  
11 1187 (9th Cir. 2001); Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th  
12 Cir. 1998).

13 In order to survive a 12(b)(6) motion to dismiss, the  
14 complaint must "contain sufficient factual matter, accepted as  
15 true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (quoting Bell Atl. Corp.  
16 v. Twombly, 550 U.S. 544, 570 (2007)). However, "[t]hreadbare  
17 recitals of the elements of a cause of action, supported by mere  
18 conclusory statements, do not suffice." Iqbal, 556 U.S. at 678.  
19 Dismissal is proper if the complaint "lacks a cognizable legal  
20 theory or sufficient facts to support a cognizable legal theory."  
21 Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th  
22 Cir. 2008); see also Twombly, 550 U.S. at 561-63 (dismissal for  
23 failure to state a claim does not require the appearance, beyond a  
24 doubt, that the plaintiff can prove "no set of facts" in support of  
25 its claim that would entitle it to relief). A complaint does not  
26 suffice "if it tenders 'naked assertion[s] devoid of 'further  
27 factual enhancement.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550  
28

1 U.S. at 556). "A claim has facial plausibility when the plaintiff  
2 pleads factual content that allows the court to draw the reasonable  
3 inference that the defendant is liable for the misconduct alleged."  
4 Id. The Court need not accept as true "legal conclusions merely  
5 because they are cast in the form of factual allegations." Warren  
6 v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

### 7 **III. DISCUSSION**

#### 8 **A. Plaintiffs' Right of Privacy Claim**

9 Pepperdine argues for dismissal of Plaintiffs' right of  
10 privacy claim because: (1) Plaintiffs had no reasonable expectation  
11 of privacy as to either their medical records or their sexual  
12 orientation; and (2) the alleged invasion of privacy was not  
13 sufficiently severe. A plaintiff alleging a claim for invasion of  
14 privacy under the California constitution must establish three  
15 elements: (1) a legally protected privacy interest; (2) a  
16 reasonable expectation of privacy in the circumstances; and (3)  
17 conduct by defendant constituting a serious invasion of privacy.  
18 Hill v. Nat'l Collegiate Athletic Assn., 7 Cal. 4th 1, 39-40  
19 (1994). Pepperdine argues that Plaintiffs have failed to establish  
20 the second two elements in their FAC. Pepperdine does not argue  
21 that Plaintiffs do not have a legally protected privacy interest  
22 with respect to their medical records or sexual orientation.

#### 23 **1. Reasonable Expectation of Privacy as to Medical** 24 **Records**

25 In Hill, the California Supreme Court held that the NCAA's  
26 drug testing policy for college athletes did not amount to a  
27 constitutional invasion of privacy because the athletes did not  
28 have a reasonable expectation of privacy given the circumstances.



1 Hill, 7 Cal. 4th at 41-42. Hill held that the athletes did have a  
2 legally protected privacy interest, but that it was diminished  
3 given that: (1) they were willing participants in NCAA sports, and  
4 (2) they knew that drug testing would be part of the requirements  
5 for playing at the NCAA level. Id.

6 Plaintiffs' alleged circumstances are different than those of  
7 the athletes in Hill. Although Plaintiffs, as they themselves  
8 acknowledge, give up some expectation of privacy as to their  
9 medical records due to their voluntary participation in college  
10 basketball, the right to privacy in their records remains insofar  
11 as those records are unrelated to their participation in athletics.  
12 Plaintiffs allege that the medical records requests were not  
13 related to the legitimate purpose of confirming Plaintiffs'  
14 physical fitness to play; instead, they allege that the requests  
15 were motivated by the desire to harass Plaintiffs in order to force  
16 them to quit the basketball team. See Hill, 7 Cal. 4th at 44  
17 (stating that the plaintiffs did not "attribute bad faith motives  
18 to the NCAA" in employing its drug testing policy).

19 Although it is possible Plaintiffs had a reasonable  
20 expectation to privacy with respect to their medical records,  
21 Plaintiffs have alleged insufficient facts in their FAC to support  
22 a reasonable expectation of privacy given the circumstances. The  
23 FAC is confusing and seemingly contradictory in its description of  
24 the circumstances surrounding the requests for Videckis' medical  
25 records. Although the FAC alleges that the coaching staff  
26 "demanded that Plaintiffs provide unlimited access to Plaintiffs'  
27 gynecology medical records," the FAC only alleges specific facts  
28 regarding the training staff's demands for records of Videckis'

1 tailbone injury, not her gynecological records. (See FAC ¶¶ 28,  
2 32.) Plaintiffs do state that Videckis had a doctor's appointment  
3 for a cervical cancer screening; however, the appointment with Dr.  
4 Green about which the training staff inquired appears to be an  
5 appointment regarding Videckis' tailbone pain. (Id. ¶ 28.) A  
6 tailbone injury would be relevant to Videckis' ability to play  
7 basketball, and Videckis would not have a reasonable expectation of  
8 privacy with respect to her tailbone injury. On the other hand,  
9 Videckis may have a reasonable expectation of privacy with respect  
10 to her gynecological records.

11 **2. Reasonable Expectation of Privacy as to Sexual**  
12 **Orientation**

13 Pepperdine argues that Plaintiffs had no reasonable  
14 expectation of privacy as to their sexual orientation. Pepperdine  
15 cites to Barbee v. Household Automotive Finance Corp. in support of  
16 its contention that team coaches and supervisors had a valid reason  
17 for questioning Plaintiffs' relationship - that of the concern for  
18 a cohesive and supporting team dynamic. Barbee, 113 Cal. App. 4th  
19 525. Barbee held that a sales manager had no reasonable  
20 expectation of privacy as to the manager's intimate relationship  
21 with a subordinate. Id. at 532-33.

22 Barbee can be distinguished from the present case in multiple  
23 ways. First, Barbee's holding was limited to the question of  
24 whether "customs, practices, and physical settings, weigh[ed]  
25 heavily against finding a broadly based and widely accepted  
26 community norm[] that supervisors have a privacy right to engage in  
27 intimate relationships with their subordinates." Id. at 533  
28 (internal quotations omitted). The present case involves a

1 relationship between fellow players on a basketball team, not  
2 between a supervisor and a subordinate, and further does not  
3 implicate an obvious potential conflict of interest. Second, in  
4 Barbee there was an express company policy that supervisors who  
5 wished to pursue an intimate relationship with a subordinate bring  
6 the matter to the attention of management. Id. Here, Pepperdine  
7 cites to a statement made by Coach Ryan that relationships between  
8 teammates are problematic for team cohesiveness; this does not  
9 constitute anything near an express policy. Third, the privacy  
10 right that was claimed in Barbee was one in "pursuing an intimate  
11 relationship." Id. at 531. Here, part of the privacy right  
12 alleged by Plaintiffs is to the fact of their sexual orientation as  
13 well as the right to be free from "questions relating to or to  
14 determine Plaintiffs' sexual orientation." FAC ¶¶ 31-32. Other  
15 California cases have held that there is a protectable right to be  
16 free from intrusive questioning related to one's sexual activities.  
17 See, e.g., Roman Catholic Bishop v. Superior Court, 42 Cal. App.  
18 4th 1556, 1567(1996) ("the employer who queries employees on sexual  
19 behavior is subject to claims for invasion of privacy and sexual  
20 harassment"); Botello v. Morgan Hill Unified Sch. Dist., No.  
21 C09-02121 HRL, 2009 WL 3918930, at \*5 (N.D. Cal. Nov. 18, 2009)  
22 (holding that student had a reasonable expectation of privacy as to  
23 school administrators' questioning of the student's sexual  
24 orientation).

25 The Court finds that Plaintiffs had a reasonable expectation  
26 of privacy as to their sexual orientation and their intimate  
27 activities.

28 ///

1                   **3. Severity of the Invasion of Privacy**

2           Pepperdine argues that the inquiries into Plaintiffs'  
3 interpersonal relationships and the requests for medical records  
4 fail to constitute a "serious invasion of privacy." The California  
5 Supreme Court has stated that "[a]ctionable invasions of privacy  
6 must be sufficiently serious in their nature, scope, and actual or  
7 potential impact to constitute an egregious breach of the social  
8 norms underlying the privacy right." Hill, 7 Cal. 4th at 37.

9           Plaintiffs allege that Coach Ryan and other supervisors and  
10 counselors for the basketball team essentially engaged in a  
11 campaign of asking Plaintiffs about the details of their sexual and  
12 personal lives for no legitimate reason other than to harrass  
13 Plaintiffs. These inquiries drove White to attempt suicide, and  
14 drove both Plaintiffs to leave Pepperdine and give up their  
15 basketball scholarships. The Court declines to find at the motion  
16 to dismiss stage that these types of actions do not constitute a  
17 serious invasion of privacy.

18                   **4. Conclusion**

19           The Court will deny the motion to dismiss the invasion of  
20 privacy claim as to Plaintiffs' sexual orientation. However, since  
21 the FAC only describes the circumstances surrounding the tailbone  
22 injury records and not the gynecological records, Plaintiffs have  
23 failed to state a claim for invasion of privacy insofar as the  
24 medical records are concerned. However, Plaintiffs may be able to  
25 plead a claim as to the medical records requests if they are  
26 allowed an opportunity to amend the FAC. Accordingly, the Court  
27 will grant the Motion without prejudice as to the portion of the  
28 privacy claim concerning Plaintiffs' medical records. See Martinez

1 v. Newport Beach, 125 F.3d 777, 785 (9th Cir. 1997) (leave to amend  
2 should be granted unless amendment "would cause prejudice to the  
3 opposing party, is sought in bad faith, is futile, or creates undue  
4 delay").

5 **B. Plaintiffs' Cause of Action under California Educational**  
6 **Code §§ 220, 66251, and 66270**

7 Pepperdine seeks dismissal of Plaintiffs' California  
8 Educational Code claim for failure to allege the necessary elements  
9 as well as for being impermissibly vague. Firstly, the Court does  
10 not find that the allegations are impermissibly vague. Plaintiffs  
11 cite to the specific portions of the Educational Code under which  
12 they are pursuing their action. Although Section 66251 is a  
13 general statement of policy, Sections 220 and 66270 have parallel  
14 language that prohibits "discrimination on the basis of disability,  
15 gender, gender identity, gender expression, nationality, race or  
16 ethnicity, religion, sexual orientation" by educational  
17 institutions that receive or benefit from state financial  
18 assistance. See Cal. Educ. Code §§ 220, 66270. Section 220  
19 applies to "educational institution[s]" in general while Section  
20 66270 applies to "postsecondary educational institution[s]." Cal.  
21 Educ. Code § 220. This puts Pepperdine fairly on notice of the  
22 nature of the claims that Plaintiffs are asserting against the  
23 school.

24 As to Pepperdine's argument that Plaintiffs fail to allege the  
25 necessary elements of the cause of action under Section 220 and  
26 Section 66270, the Court finds that Plaintiffs have sufficiently  
27 pled those claims. Plaintiffs' claims for sexual orientation  
28 harassment under the California Educational Code are governed by

1 the same elements as a federal cause of action under Title IX. See  
2 Donovan v. Poway Unified Sch. Dist., 167 Cal. App. 4th 567, 603  
3 (2008). To prevail, a plaintiff must prove the following elements:  
4 "(1) he or she suffered severe, pervasive and offensive harassment,  
5 that effectively deprived plaintiff of the right of equal access to  
6 educational benefits and opportunities; (2) the school district had  
7 actual knowledge of that harassment; and (3) the school district  
8 acted with deliberate indifference in the face of such knowledge."  
9 Donovan, 167 Cal. App. 4th at 579 (internal quotations omitted).  
10 The two primary elements that Pepperdine challenges are that  
11 Plaintiffs have not shown "severe, pervasive and offensive"  
12 harassment and that the school acted "with deliberate  
13 indifference." Plaintiffs have alleged that the questioning with  
14 regards to their relationship was persistent and aggressive, and  
15 that coaches and school officials failed to take concrete steps to  
16 address the issues. Pepperdine's arguments go to the ultimate  
17 strength of Plaintiffs' allegations rather than whether they  
18 support any plausible claim for harassment and deliberate  
19 indifference at all.

20 **C. Plaintiffs' Title IX Cause of Action**

21 Pepperdine argues that Plaintiffs have failed to state a cause  
22 of action under Title IX because Title IX only bans discrimination  
23 based on gender, and not discrimination based on sexual  
24 orientation. See 20 U.S.C. § 1681(a) ("[n]o person in the United  
25 States shall, on the basis of sex . . . be subjected to  
26 discrimination under any education program or activity receiving  
27 Federal financial assistance"); Hoffman v. Saginaw Public Schools,  
28 No. 12-10354, 2012 WL 2450805, at \*8 (E.D. Mich. June 27, 2012)

1 ("while discrimination based on noncompliance with sexual  
2 stereotypes may be actionable under federal law, discrimination  
3 based on sexual orientation is not") (citing cases).

4 Plaintiffs acknowledge that their Title IX claim, as currently  
5 pled, alleges a Title IX violation due to discrimination on the  
6 basis of sexual orientation. (Opp., Dkt. No. 6, at 6.) Plaintiffs  
7 request leave to amend their Title IX claim because they argue they  
8 can state a claim of discrimination on the basis of "stereotyped  
9 gender roles," which would fall within the bounds of Title IX.

10 (Id.) In support of their position, Plaintiffs cite to a Northern  
11 District of Illinois case that they argue supports their position.  
12 See Howell v. N. Cent. Coll., 320 F. Supp. 2d 717, 722 (N.D. Ill.  
13 2004). The court in Howell stated that "[h]arassment that relies  
14 upon stereotypical notions about how men and women should appear  
15 and behave, according to the court, reasonably suggests that it can  
16 be attributed to sex." Id. at 722 (internal quotations omitted).  
17 Pepperdine points out that in Howell, the Title IX claim was  
18 dismissed because the plaintiff, a player on a women's college  
19 basketball team, alleged she was discriminated against because of  
20 her views against homosexuality - something that the court in that  
21 case found alleged harassment based on sexual preference and not  
22 gender stereotyping.

23 As an initial matter, the Court notes that all of the cases  
24 referred to by the parties in support of the proposition that Title  
25 IX does not cover sexual orientation discrimination are out-of-  
26 circuit cases from the Seventh Circuit. Recent case law from the  
27 Supreme Court and from the Ninth Circuit indicates that the bounds  
28 of Title IX may not be so narrow. See, e.g., United States v.

1 Windsor, 133 S. Ct. 2675, 2696 (2013) (striking down the federal  
2 Defense of Marriage Act because "no legitimate purpose overcomes  
3 the purpose and effect to disparage and to injure those whom the  
4 State, by its marriage laws, sought to protect in personhood and  
5 dignity"); SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471,  
6 483 (9th Cir. 2014) (interpreting Windsor to apply heightened  
7 scrutiny to classifications based on sexual orientation  
8 discrimination); Latta v. Otter, 771 F.3d 456, 479-495 (9th Cir.  
9 2014) (reasoning that Idaho and Nevada's same-sex marriage  
10 proscriptions are unconstitutional not only because they  
11 discriminate on the basis of sexual orientation, but also because  
12 they discriminate on the basis of sex since: (1) they facially  
13 classify on the basis of gender, and (2) they are based in gender  
14 stereotypes) (Berzon, J., concurring). The law is rapidly  
15 developing and far from settled insofar as determining where sexual  
16 orientation discrimination lies within the framework of gender-  
17 based discrimination. Recent Ninth Circuit cases suggest that the  
18 distinction between sexual orientation discrimination and sexual  
19 discrimination is illusory. Furthermore, discrimination based on a  
20 same-sex relationship could fall under the umbrella of sexual  
21 discrimination even if such discrimination were not based  
22 explicitly on gender stereotypes. For example, a policy that  
23 female basketball players could only be in relationships with males  
24 inherently would seem to discriminate on the basis of gender. In  
25 this example, the gender discrimination would be that the female  
26 players would be prevented from entering into relationships with  
27 other females because their chosen partner was female. Even if a  
28 similar same-sex ban were imposed on the men's basketball team, the



1 unequal classification would still hold, as women seeking to be in  
2 relationships with men would not be treated equally as men seeking  
3 to be in relationships with me. For these reasons, the Court would  
4 be disinclined to give weight to older out-of-circuit cases that  
5 make a categorical distinction between gender-based discrimination  
6 and sexual orientation discrimination.

7       Because Plaintiffs have not contested Pepperdine's argument  
8 that Title IX does not cover sexual orientation discrimination, and  
9 because Plaintiffs contend that they can state a case based on  
10 gender discrimination, the Court will dismiss Plaintiffs' Title IX  
11 claim with leave to amend. However, the Court notes that the line  
12 between discrimination based on gender stereotyping and  
13 discrimination based on sexual orientation is blurry, at best, and  
14 thus a claim that Plaintiffs were discriminated against on the  
15 basis of their relationship and their sexual orientation may fall  
16 within the bounds of Title IX.

17       The Court acknowledges Pepperdine's protest that Plaintiffs  
18 have already had multiple chances to amend their complaint due to  
19 multiple meet-and-confer discussions. However, given that this is  
20 only the second iteration of their complaint Plaintiffs' have filed  
21 with the Court, Plaintiffs should be granted another opportunity to  
22 amend.

23       The Court further notes that Pepperdine has raised questions  
24 as to whether Plaintiffs have sufficiently pled the elements for a  
25 private right of action under Title IX. An implied private right  
26 of action does exist under Title IX. However, in order to have  
27 pled a cause of action under Title IX, a plaintiff must prove that  
28 the federal funding recipients were "deliberately indifferent to

1 sexual harassment, of which they have actual knowledge, that is so  
2 severe, pervasive, and objectively offensive that it can be said to  
3 deprive the victims of access to the educational opportunities or  
4 benefits provided by the school." Davis Next Friend LaShonda D. v.  
5 Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999). Because  
6 Plaintiffs do not oppose the motion to dismiss, because the Court  
7 Plaintiffs leave to amend, it would ask that Plaintiffs ensure  
8 their amended complaint fully addresses and satisfies the elements  
9 required to bring a Title IX claim.

10 **IV. CONCLUSION**

11 For the foregoing reasons, the Court DISMISSES Plaintiffs'  
12 invasion of privacy claim - insofar as it is based on the requests  
13 for Plaintiffs' medical records - with LEAVE TO AMEND. The Court  
14 further DISMISSES the Title IX claim with LEAVE TO AMEND. Any  
15 amended complaint should be filed within 20 days of the date of  
16 this order. Pepperdine's Motion is otherwise DENIED.

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19 IT IS SO ORDERED.

20  
21

22 Dated: April 16, 2015

  
DEAN D. PREGERSON  
United States District Judge

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