Applying Title IX to Sexual Assaults and Harassment in Schools

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While still vastly unreported, sexual assaults and harassment on campuses are receiving a lot of attention from the federal government and the media. Not only have more individuals come forward with reports, but there has also been an increase in legal actions against schools.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§1681 et seq., and its implementing regulation, 34 C.F.R. Part 106, is most commonly known because of its application in the area of athletics. However, it is increasingly being used in investigating schools in connection with their handling of claims of sexual assaults and harassment, as the basis of federal lawsuits.

In 2011, an Ivy League school that received $510.4 million in federal funding that year came under investigation when 16 women filed a claim that the school had a sexually hostile environment. If the school did not act properly, its federal funding could be lost.

Many schools have joined the ranks of those who could lose their federal funding. As of October 2014, the U.S. Department of Education reported that 85 colleges were under investigation for violations of Title IX in connection with reports of sexual assaults.

Lawsuits are on the rise as well. Victims, perpetrators and alleged perpetrators have filed federal actions against schools for the handling of the investigation and the penalties imposed. Schools are paying millions of dollars in settlements and jury verdicts.

Brett Sokolow, managing partner of the National Center for Higher Education Risk Management, has been quoted as stating that Title IX cases represent "the most expensive lawsuits in history" against colleges.

Title IX—Not Just About Sports

Title IX is a federal civil rights law that prohibits discrimination on the basis of sex in education programs and activities. All public and private elementary and secondary schools, school districts, colleges and universities receiving any federal funds must comply with Title IX or risk losing federal funding.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. §1681(a).

Under Title IX, discrimination on the basis of sex can include sexual harassment or sexual violence, such as rape, sexual assault, sexual battery and sexual coercion. A student is entitled to be free of harassing conduct that creates a hostile environment that interferes with or limits a student's ability to participate in or benefit from the school's program. Title IX

also prohibits gender-based harassment, which may include hostility even if those acts do not involve conduct of a sexual nature.

Schools that receive federal financial assistance must comply with the procedural requirements outlined in Title IX, which include: (1) disseminating a notice of nondiscrimination; (2) designating at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX; and (3) adopting and publishing grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.

On April 4, 2011, the Department of Education issued a "Dear Colleague" letter to colleges and universities across the country. The letter (and subsequent ones) represented a "significant guidance document." The document provided that sexual violence is a form of sexual harassment under Title IX. The letter also provided suggestions as to what would be involved in the prompt and equitable resolution of a sexual harassment complaint. The letter also provided that a preponderance of the evidence standard should be used rather than clear and convincing or beyond a reasonable doubt when conducting its proceeding.

A school's responsibility for complying with Title IX is enforced by the U.S. Department of Education's Office for Civil Rights (OCR). A complaint can be filed with the OCR, anonymously (Jane or John Doe) via facsimile, email or online at: www.ed.gov/about/offices/list/ocr/complaintintro.html.

An action can also be filed under Title IX in federal court with or without having first filed an action with the OCR. In a federal court action, a litigant may be awarded injunctive relief, monetary damages and attorney fees.

Reporting to Appropriate Persons

A plaintiff asserting a claim under Title IX in federal court must show that a person with the authority to take corrective action had actual knowledge of harassment and acted deliberately indifferent in response thereto. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). The express remedial scheme under Title IX is predicated upon notice to an "appropriate person" and an opportunity to rectify any violation, 20 U.S.C. §1682. Therefore, an "appropriate person" under §1682 is, at a minimum, an official with authority to take corrective action to end the discrimination, i.e., sexual harassment/assault.

Consequently, a damages remedy will not lie under Title IX unless an official who, at a minimum, has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf, has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.

Given the hesitancy in reporting such claims, one can see how the proper official may not have been notified. Recently in Pennsylvania, a jury verdict under a Title IX claim was vacated because the "appropriate person" was not notified. *Harden v. Albert Gallatin Sch. Dist.*, 2014 Pa. Commw. LEXIS 444 (Sept. 11, 2014). This case involved sexual relations between a 16-year-old high school student and a teacher. While the mother reported this to teachers and guidance counselors, the court found that for the purposes of Title IX, this was not enough because the teachers and guidance counselors to whom this was reported did not have the power to take corrective action, but could only report the incident to the police. Therefore, even though a jury found that the school had violated Title IX, the jury's award was set aside because the plaintiff failed to meet her burden of proof that the matter was reported to the appropriate person.

This is an important decision for the defense bar. If the claims are asserted under Title IX, then attention needs to be paid regarding to whom the claims were actually reported. While under other legal theories there may be liability, whether the person to whom the event was reported had the ability to effectuate changes can be fatal to plaintiffs' claims.

Deliberate Indifference

A plaintiff in a federal action must also demonstrate that the institution acted with deliberate indifference when it responded to the complaint. The implied private right of action available to parties who would challenge an institution's response to sexual harassment or sexual violence only provides for damages where the institution's response evinces "deliberate indifference." See *Gebser*, 524 U.S. at 290.

The Supreme Court has stated that the "deliberate indifference" theory of liability under Title IX applies only where the defendant organization has some control over the alleged harassment. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999). Once again, the issue of to whom the incident was reported will come under close scrutiny, as well as what was done in response to the complaint. Were there efforts made to "sweep it under the rug?"

The test for deliberate indifference is whether a reasonable fact-finder could conclude that the official's response was clearly unreasonable in light of the known circumstances. *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir.2006). This is an issue that can be determined as a matter of law. Summary judgment may be properly entered when a school's response to the harassment was clearly reasonable as a matter of law. *Davis*, 526 U.S. at 649.

For those schools that do not act swiftly and properly, deliberate indifference can lead to huge financial implications. The University of Colorado at Boulder had two Title IX lawsuits filed against it, alleging rapes at football recruiting parties. Originally, the lawsuits were dismissed. Subsequently, the 10th Circuit ruled, unanimously, that the university "had an official policy of showing high-school football recruits a 'good time' on their visits to the CU campus," and that the alleged assaults were caused by the university's lack of supervision over the players who served as hosts. This lack of supervision, the court determined, was the result of "deliberate indifference." *Simpson v. Univ. of Col., Boulder*, 500 F. 3d (10th Cir. 2007). The cases settled for $2.5 million to one plaintiff and $300,000 to the other.

While the bar for establishing "deliberate indifference" seems high, there are instances when it will be clear. Developing facts as to the school's policies is critical, as is investigating the school's history in responding to such claims and the atmosphere on campus. Both an effective defense and prosecution of the case will depend on it.

Title IX Actions by Alleged Perpetrators

Many schools have tried to promptly investigate and equitably resolve claims of sexual assault and harassment. However, some schools were not equipped to handle the investigations or prosecutions. The lower standard of care of preponderance of the evidence has also led many to argue that their due process rights were being violated. This has also resulted in lawsuits against the schools by alleged perpetrators, and even those having been found to have committed the acts. As of March 2015, it is reported that there are 60 lawsuits pending nationwide, brought by males who are also alleging violations of Title IX and their due process rights (www.avoiceformalestudents.com).

A college in New Jersey is presently facing a lawsuit for its handling of the alleged perpetrator. *Parisi v. Drew Univ.*, 2:14-CV-02263

(DNJ). In that Title IX action, the male student, who was cleared by the school of charges, argues that the pre-investigation disciplinary action in the form of removal from campus was discriminatory. The plaintiff seeks damages, claiming his academic career was ruined and that without a college education, his economic future is compromised.

Two students who were accused of participating in an on-campus gang rape at William Paterson University, but were cleared of the charges, have filed a tort claim notice that they intend to sue the school, its director of public safety, its president and others. The notice asserts that the university failed to provide them with due process and that the university lacked the training and experience to handle a sexual assault case.

The lawsuits are not just coming from those cleared of any wrongdoing by the schools. See *Schaer v. Brandeis Univ.*, 432 Mass. 474 (2000). Besides Title IX, students are bringing causes of actions for breach of contract (student handbook), defamation and negligence. *Harris v. St. Joseph's Univ.*, 13-CV-03937 (E.D. Pa. 2013). The arguments continue to be that the process was faulty. See also*, Boston Globe*, "BC Graduate Says School Mishandled Sex Assault Case*,"* March 13, 2015 ($3 million in damages sought).

These lawsuits will continue to arise given that the standard of proof in the investigation is preponderance of the evidence and not beyond a reasonable doubt. Schools certainly want to and must act promptly, but those who are accused argue that schools are acting in haste and in violation of their rights.

Conclusion

Title IX actions will continue to increase. Claims of sexual assault and harassment can no longer be resolved behind closed doors or by persuading the victim that he/she is wrong in coming forward. Schools must act promptly and equitably—a balance which many have not yet been able to strike in such cases. Clearly, that is a learning process for the schools and, for some, a lesson which could prove very costly.■

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