Title IX sexual assault cases not conducive to summary judgment

By Carla DiMare

Title IX of the Education Amendments of 1972 began as a law to help equalize women's rights in college sports. This federal civil rights law says that any school or university that receives federal funds cannot discriminate based on gender. With regard to sports, that means that if half the student body is female, then half the athletes should be female. In response to the law, schools had to shift their athletic programs, and big money decisions were made.

But the law goes beyond providing females with athletic opportunities; it touches every aspect of the education system, including how a school responds to claims of sex discrimination, harassment and assault.

Title IX provides that "[n]o person ... shall, on the basis of sex, be excluded from participating 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. Section 1681(a). In *Gebser*, a case involving teacher-on-student harassment, and *Davis*, regarding student-on-student harassment, "the Supreme Court began to define the parameters of a school's liability for harassment under Title IX." *Davis v. Monroe County Board of Educ.*, 526 U.S. 629, 641 (1999); *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 290-91(1998).

To succeed on a Title IX claim, the Supreme Court has held that a claim for money damages based on sexual harassment may arise under Title IX only if (1), "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [funding] recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond," and (2) the inadequate response, "amount[s] to deliberate indifference to discrimination."

Schools cannot be held vicariously liable for acts of sexual harassment committed on campus. Instead, schools are liable under Title IX for their own misconduct, and not just any type of misconduct. The school must be found to have acted with "deliberate indifference." *See Reese v. Jefferson Sch. Dist.*, 208 F.3d 736, 739 (9th Cir. 2000); *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1131-32 (D.Kan. 2017).

Because the standard is deliberate indifference (the same standard used in 42 U.S.C. Section 1983 and Title VI discrimination cases), Title IX sexual harassment, discrimination and abuse charges are often not conducive to summary judgment. In a Title IX sexual assault case, one court pointed out that "the Ninth Circuit has a history of leaving the question of deliberate indifference to the jury." *See Doe v. Green*, 298 F. Supp.2d 1025, 1036 (D. Nev. 2004), citing *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470, 1478 (9th Cir. 1992) ("Whether a local government entity has displayed a policy of deliberate indifference is generally a question for the jury."); *see also Davis v. Mason County*, 927 F.2d 1473, 1482 (9th Cir. 1991); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994); *Blair v. City of Pomona*, 206 F.3d 938 (9th Cir. 2000); *Lee v. Los Angeles*, 250 F.3d 668, 681 (9th Cir. 2001).

Similarly, in *Hart v. Paint Valley Local Sch. Dist.*, 2002 WL 31951264 (S.D. Ohio 2002), the court found that whether a response to harassment was clearly unreasonable in light of the known circumstances "does not lend itself well to a determination by the Court on summary judgment."

A Title IX complaint will often say that the school violated Title IX by depriving the victim of an equal opportunity to finish their education due to the school's deliberate indifference, or clearly unreasonable response, to the claim of discrimination or harassment. In one case, after 27 depositions, including five expert depositions, the evidence showed that the school did not act to help the female victim — rather, the school worked against her. The victim immediately reported the rape. Yet, the school did not call the police for her at that time, and it attempted to dissuade her from involving the police. The claims were also that the school failed to investigate, which corrupted the crime scenes, and tipped off the suspect. Also,

See Page 8 — EVEN

Even with good facts, Title IX cases are tough

Continued from page 7

the school drove the suspect home where he could wash his clothes and body of evidence, and think up a good story.

In a different Title IX case, the school took the opposite approach and immediately investigated and cuffed the suspect until the Los Angeles Police Department arrived and interrogated him. However, the school's Title IX investigation was slanted. The school let the suspect off without any punishment, even though his story did not add up and it was contrary to the forensic evidence.

The tough spot that schools face is that all schools that receive federal funding must publicly report their crime statistics. No school wants high rape statistics. The lower the crime rate, the more applications and more money for the school. If a school clears a suspect, arguably, the sexual assault or rape never occurred. Therefore, whether you are a victim or a suspect, you should remember that schools are a business, so hire a lawyer as soon as possible.

If you are a lawyer taking a Title IX case, even if the facts are clearly in favor of the victim or the suspect, it may be a long and expensive haul to trial, with heavy events beyond your control, so be fully prepared to take on these worthy cases.

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