2019 Title IX Compliance Conference

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New to Title IX
Title IX: The Basics

- 39 words
- Cannot discriminate on the basis of sex in education programs receiving federal funds
- Designate Title IX Coordinator
- Policies and Procedures
- Notice: Prompt, Equitable, Appropriate Response

45 Years of Title IX History In Under Five Minutes

- Modeled after Title VI. Original concern was employment and admissions practices of universities.
- Impact on athletics became apparent early on and proponents beat back repeated attempts to water down legislation.
- Historically, regulatory agencies (HEW and ED) have been lackluster in enforcement.
- Changed significantly with Obama Administration.
Obama Administration: OCR

- Issued 2011 Dear Colleague Letter
- Ramped up Title IX program compliance reviews
- Created "list of shame"
- Was not deferential
- As a result, schools for first time in Title IX's history took extraordinary steps to comply and ceased handling cases informally
- Disciplined students began aggressively challenging institutions
- VAWA is reauthorized with Clery amendments
Cannon v. University of Chicago (1979): Facts

- Geraldine Cannon was a nurse at Skokie Valley Hospital, the wife of a Chicago lawyer, and the mother of five children aged 12 to 21.
- Her lifelong dream was to become a doctor. It was a dream that was rekindled when her youngest child started elementary school and Cannon finally had the opportunity to return to school as a full-time student at Trinity College.
- Graduated with honors at age 39 and began applying to medical schools, including Univ. of Chicago’s Pritzker School of Medicine.
- Cannon was denied admission in 1975.
Cannon v. University of Chicago: Supreme Court

- “This case presents as a matter of first impression the issue of whether Title IX of the Education Amendments 1972 may be enforced in a federal civil action . . . .”
- Private cause of action was necessary to ensure that the “sweeping promise of Congress” to end sex discrimination in education was more than “merely an empty promise.”
- “Is [Title IX] an empty promise or will it be enforced and for the present, it simply must be enforced by the courts or it's not going to be enforced at all.”

Cannon v. University of Chicago: Supreme Court

- 6-3 opinion crafted by Justice John Paul Stevens & included Justices Brennan & Rehnquist
- **Holding:** There is an implied cause of action for individuals to sue under Title IX.
- Title IX was patterned after Title VI and that “when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy.”
- The Supreme Court also accepted the argument advocated by John Cannon and also HEW that private enforcement was necessary to effectuate the purposes of the law.
**Franklin v. Gwinnett County (1992): Facts**

- Christine Franklin was a student at North Gwinnett High School between September 1985 and August 1989. Franklin was subjected to continual sexual harassment beginning in the autumn of her tenth grade year (1986) from Andrew Hill, a coach and teacher employed by the district.
- The complaint further alleges that though they became aware of and investigated Hill’s sexual harassment of Franklin and other female students, teachers and administrators took no action to halt it and discouraged Franklin from pressing charges against Hill.
- Hill ultimately resigned on condition that all matters pending against him be dropped. The school thereupon closed its investigation.

**Franklin v. Gwinnett County: Issue & Holding**

- Issue: Does Title IX implied right of action support a claim for monetary damages?
- Unanimous holding: “[W]e conclude that a damages remedy is available for an action brought to enforce Title IX.”

- Gebser was assigned to classes taught by Waldrop. While visiting her home, Waldrop kissed and fondled Gebser. They had sexual intercourse on a number of occasions.
- In January 1993, police discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop. Lago Vista immediately terminated his employment.
- School district did not have an official grievance procedure for lodging sexual harassment complaints; nor had it issued a formal anti-harassment policy.
**Gebser: Plaintiff's Argument**

- Gebser and DOJ claimed that liability should be evaluated using the same standards plaintiffs use in employment sex harassment cases under Title VII.
- A “teacher is ‘aided in carrying out the sexual harassment of students by his or her position of authority with the institution,' irrespective of whether school district officials had any knowledge of the harassment and irrespective of their response upon becoming aware.”
- Alternatively, a school should be “liable for damages based on a theory of constructive notice, i.e., where the district knew or ‘should have known’ about harassment but failed to uncover and eliminate it.”

**Gebser: The Rule**

- An "appropriate person" . . . is, at a minimum, an official of the recipient entity with **authority to take corrective action** to end the discrimination.
- “Consequently, in cases like this one that do not involve official policy of the recipient entity, **we hold that 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.**”
- “[T]he response must amount to **deliberate indifference to discrimination.**”

- Roderick Jackson, a teacher in the Birmingham, Alabama, public schools, complained about sex discrimination in the high school’s athletic program and was retaliated against.
- Sued pursuant to Title IX
- Does Title IX prohibit retaliation? Yes.
Davis v. Monroe County Board of Education (1999): Holding

• "We consider here whether the misconduct identified in Gebser—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does."

• Recipients of federal funding may be liable "where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school’s disciplinary authority."

Davis: Majority Decision

• "School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed ‘deliberately indifferent’ to acts of student-on-student harassment only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."

• "The recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable. This is not a mere ‘reasonableness’ standard, as the dissent assumes. In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not ‘clearly unreasonable’ as a matter of law."
QUESTIONS?

POP QUIZ!
Title IX was patterned after:

- Title VII
- the Equal Protection Clause
- Title VI
- the Equal Rights Act Amendment

The sole remedy explicitly provided by the text of Title IX for violating the statute is:

- punitive damages
- statutory penalties prescribed by Congress and adjusted for inflation
- injunctive relief
- termination of federal funds
The Cannon v. University of Chicago case is significant because:

- it provides a private right of action to sue under Title IX
- it allows victims of discrimination to receive punitive damages if they can prove intentional discrimination
- it establishes a cause of action for disparate impact discrimination
- it recognizes that discrimination on the basis of sex is a crime

Title IX applies to:

- all educational programs
- all education programs or activities receiving Federal financial assistance
- only higher education programs or activities that receive Federal financial assistance
- education-related employers with more than 15 employees
There is a cap on damages in Title IX lawsuits.

True

False

In order for a school to be liable under Title IX for teacher-on-student assault:

- the assault must be severe and pervasive and commonly known to other students
- an appropriate person must have knowledge of the assault and respond in a deliberately indifferent fashion
- assault must be commonly known and not responded to appropriately
- the teacher must be tenured
In Davis v. Monroe County Board of Education, the court determined that school liability for peer-on-peer harassment is limited to:

- circumstances where the school exercises substantial control over both the harasser and the context in which the known harassment occurs
- circumstances where the school exercises absolute control over both the harasser and the context in which the known harassment occurs
- circumstances where the school exercises substantial control only over the harasser
- circumstances where the school should have known the harassment occurred

Overview of ED’s Proposed Regulations
“Era of Rule By Letter Is Over”

ED’s Enforcement Standard

- Adopts “deliberate indifference” standard from Supreme Court
- “Clearly unreasonable response”
- Substantially diminishes force of administrative enforcement
- Safe harbor
Title IX Jurisdiction

- Sexual misconduct occurring “under any education program or activity”
- Outside the USA is beyond jurisdiction
- Addressed under conduct code anyway?

- **Doe v. Brown University** (1st Cir. 2018): Title IX protections do not extend to student who is not enrolled at the defendant institution or otherwise taking part in its educational programs or activities.

- **Doe v. University of Kentucky** (E.D. Ky. 2019): Although plaintiff lived on defendant’s campus and utilized lab and library services and alleged rape occurred on UK campus, plaintiff could not establish Title IX claim because she was not a UK student or enrolled in a UK educational program or activity.

- **Farmer v. Kansas State Univ.** (D. Kan. Mar. 17, 2017): Alleged assault of KSU student occurring at an off-campus fraternity house occurred within “an education program or activity” based on allegations that fraternity had faculty advisor, is subject to KSU rules, and is overseen by KSU Office of Greek Affairs.
• **NPRM:** Although the regulations do not further define “in an education program or activity,” the preamble references following factors:
 ➢ Whether the conduct occurred in a location or in a context where the recipient owned the premises;
 ➢ Whether recipient exercised oversight, supervision, or discipline; or
 ➢ Whether recipient funded, sponsored, promoted, or endorsed the event or circumstance.

– **Existing OCR Guidance** (Sept 2017 Q&A): Based on recipient’s degree of control over the harasser and environment in which harassment occurs; schools responsible for redressing a hostile environment on campus even if relates to off-campus activities.

– **Prior OCR Guidance** (2011 DCL, now withdrawn): Schools must process complaints, regardless of where conduct occurred; for off-campus conduct, emphasis placed on whether resulted in continuing effects in the educational setting. Title IX also protects third parties from sexual harassment or violence in a school’s education programs and activities.

**Access to the Evidence**

• Parties have right to review investigation file upon request
• All evidence “directly related” to allegations, even if school does not intend to rely on it
• Must be made available electronically before report is final
Standard of Proof

- Permits clear and convincing standard for sexual harassment cases
- May use POTE only if school uses POTE for conduct code violations that do not involve sexual harassment, but carry the same maximum disciplinary sanction
- Same standard of evidence must apply for complaints made against students and employees (including faculty)

Records Retention

- Three year records retention requirement for case files
- Three year records retention requirement for training materials of involved employees
- Parties have right of access
Training Requirements

- Institutions must provide training on:
  - The definition of sexual harassment
  - How to conduct an investigation (including hearings, if applicable)
  - The school’s grievance process
- “[A]ny materials used to train coordinators, investigators, or decision-makers must not rely on sex stereotypes and instead promote impartial investigations and adjudications of sexual harassment.”

Live Hearings

- Colleges and universities must have live hearings for resolution of formal complaints
- Hearing officer/body cannot be the same as investigator
- Eliminates single-investigator model
Cross-Examination

- Party’s support person allowed to cross examine other party and witnesses
- Testimony of persons who refuse to submit to cross-examination is excluded
- Must provide support person for purposes of cross examination if party does not have one

What Is Next?
Lawmakers Examine Higher Ed’s Response to Sexual Assault

Efforts to reauthorize the Higher Education Act could derail the education secretary’s attempts to finalize rules regarding Title IX and campus sexual assault.

Sen. Lamar Alexander and Patty Murray questioned witnesses about campus sexual assault at a Senate hearing on Tuesday. (J. TOM WILLIAMS/CQ ROLL CALL)

Senators Seek to Break Sexual Assault Impasse on Education Bill

Posted June 27, 2019
By Emily Wilkins

- Bipartisan group looks to balance accuser, accused rights
- Congress, Education Department working separately

A group of eight senators is working to tackle one of the most contentious issues in higher education—when and how colleges need to respond to allegations of sexual assault.

Senate Health, Education, Labor, and Pensions Chairman Lamar Alexander (R-Tenn.) and ranking member Patty Murray (D-Wash.) brought the group together in a quest to resolve potentially the biggest remaining obstacle to a bipartisan reauthorization of federal higher education programs.

“We’re all looking for the same thing: an environment that encourages reporting when there is a problem and a process that gets at the truth and is fair to the person bringing a claim and fair to the person who is accused,” said Sen. Tim Kaine (D-Va.), a member of the working group.

Murray and Alexander are members of the group, as well as Republicans Tim Scott (S.C.), Susan Collins (Maine), and Richard Burr (N.C.), and Democrats Kaine, Maggie Hassan (N.H.), and Tammy Baldwin (Wis.).
When Finalized?

• Review of comments by ED
• Litigation?
• Will we get final regulations in advance of school year?

What Will Final Regulations Look Like?
QUESTIONS?

Title IX Case Law Update
Some Perspective on Sex Misconduct Litigation

- 12(b)(6) motions versus summary judgment
- It is imprecise to say “universities are losing tons of Title IX due process cases”
- Respondent litigation is like the bulk of litigation – the economics favor settlement (and even more so – damages are small)
- There is a lot of it
- Keeping apprised of circuit and state specific precedent

Respondent Litigation

- Due Process
- Title IX (“Erroneous Outcome”: Doubt + Gender Bias)
- Breach of Contract
- Other Tort Claims
Round 4

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• “Two members of the panel candidly stated that they had not read the investigative report. The one who apparently had read it asked John accusatory questions that assumed his guilt. Because John had not seen the evidence, he could not address it.”

• Title IX Coordinator “chose to credit Jane’s account without hearing directly from her” and Jane “did not even submit a statement in her own words”
(11th Cir. Sep. 13, 2018)  
Court backs suspension of Valencia College student in sexual harassment case

Doe v. Colgate Univ., et al.  
(2d Cir. Jan. 15, 2019)  
Judge Tosses Suit Against Colgate Univ. Over Expulsion for Sexual Misconduct

- Erroneous Outcome under Title IX
- References to “female complainants” and “male respondents” in Title IX training reflected a statistical reality as opposed to gender bias.
- Likewise, the trainer’s instruction to refer to “complainants” in the presence of respondents and “victims” or “survivors” in the presence of complainants reflected a “desire to be sensitive” as opposed to gender bias.
- Colgate’s procedures did not discriminate against Plaintiff, even though Plaintiff was not afforded an opportunity to cross examine his anonymous accusers, because his accusers were similarly denied the opportunity to cross-examine Plaintiff.
Due Process Cases

US Court of Appeals rules University must allow cross-examination in sexual assault cases

Friday, September 7, 2018 - 12:00pm

The Sixth Circuit Court of Appeals struck down the University of Michigan’s sexual assault investigation model Friday. Buy this photo

Doe v. Allee

• Due process requires live cross examination where severe discipline is possible and credibility matters
• Neutral arbiter required too
Maher v. Iowa State University
(8th Cir. Feb. 15, 2019)

• Female former student sued state university alleging it was deliberately indifferent under Title IX when it refused to force student accused of sexually assaulting her to move until completion of investigation of her charges against him.

Maher v. Iowa State University

• “A school is deliberately indifferent when its response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”
• “This clearly unreasonable standard is intended to afford flexibility to school administrators.”
• “[V]ictims of peer harassment do not "have a Title IX right to make particular remedial demands.”
• “And while Maher's preference was that ISU move Whetstone, it was not deliberately indifferent for ISU to wait to take such action until the hearing process concluded because ISU was respecting Whetstone's procedural due process rights.”
• “[D]issatisfaction with the school’s response does not mean the school's response can be characterized as deliberate indifference.”
The Supreme Court just took up a set of very big cases on LGBTQ rights

The Supreme Court will hear big cases on LGBTQ rights — after an LGBTQ ally left the Court.

by German Lopez | ggermanlopez | ggermanlopez@kox.com | Apr 22, 2019, 12:00pm EDT

~$500 Million Settlement

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (the “Agreement”) is made and entered into as of [Date], 2019 (the “Effective Date”) by and between Plaintiff and Derivative Plaintiffs (as defined below), on the one hand, and Michigan State University, the MSU Sports Medicine Clinic, the Board of Trustees of Michigan State University, Dr. David Dozier, Kathrin Kages, Dr. Jeffrey Kovan, Dr. Brooke Lennon, Kristine Moore, Lou Anna K. Simon, Dr. Gary Setlak, Dr. William Strampel, and Destiny Teaborn-Mack, on the other hand.

RECITALS

WHEREAS, Plaintiffs filed the Actions (as defined below) against some or all of the MSU Defendants (as defined below); and

WHEREAS, Plaintiffs allege that Lawrence Nassar, a former employee of Michigan State University, sexually assaulted and abused them at various times and in various locations; and

WHEREAS, the MSU Defendants acknowledge that Lawrence Nassar admitted to engaging in criminal conduct involving sexual abuse; and

WHEREAS, Plaintiffs further allege that the MSU Defendants, or some of them, are liable for Lawrence Nassar’s misconduct, abuse, and assault of Plaintiffs and any damages resulting therefrom; and

Larry Nassar and Why Your Institution Could Really Be Next

Published on January 30, 2019  |  Edit article  |  View state

Scott Schaefer
Labor & Employment Law Partner, Head of Higher Education...
“Skeleton” Claims

- Allegedly abused by Dr. Richard H. Strauss from 1979 to 1997 (Strauss dead since 2005)
- Independent investigation commissioned
- Investigators have interviewed more than 200 former students, 100 of whom accused Dr. Strauss of sexual misconduct, including former athletes from 14 different sports teams. Investigators expect to interview an additional 100 former students in the weeks to come

What happens next?

- Harvard University, Rutgers University, the University of Pennsylvania, the University of Washington and the University of Hawaii
QUESTIONS?

Thank you!

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