THE LEAD | HOSTILE ENVIRONMENTS

Play referee in the Title IX, 1st Amendment boxing match

By Michael Henry, J.D., Contributing Editor

Colleges and universities have historically taken pride in being bastions of free expression, cultivating free-flowing dialogue and the uninhibited exchange of ideas. However, with the increased prominence of Title IX and expectations regarding institutional responsibility for creating environments that are free from sex-based discrimination and harassment, campuses have found themselves wedged between that un-moving rock and proverbial hard place, trying to avoid the seemingly unsympathetic protections of the First Amendment while addressing allegations of sexual harassment and offensive speech. This is the first of two articles addressing the interplay between Title IX and the First Amendment.

Law sets the line

The First Amendment protects speech no matter how offensive. It’s the rule, not the exception. The U.S. Supreme Court addressed the importance of free speech on campuses as far back as 1969 in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, asserting that students “do not shed their constitutional rights to freedom of speech and expression at the schoolhouse gate.” The court further held that a school cannot prohibit speech unless the speech will “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” So where is the line? Is there even a line clearly separating verbal sexual harassment from simply offensive speech? Despite many administrators’ feeling that the line is a blurry, purgatorial grey area where institutions are damned if they do and damned if they don’t, there is an established standard and a defined threshold. The difficulty lies in the application of that standard and the analysis therein.

The framework for assessing whether behavior constitutes gender-based discrimination under Title IX has been shaped by civil litigation in much the same way as workplace harassment under Title VII. In 1986, the U.S. Supreme Court case, Meritor Savings Bank, FSB v. Vinson, 477 U.S. 5, established that sexual harassment is a form of gender discrimination under Title IX. In 1992, the court recognized the same application under Title IX in Franklin v. Gwinnet County Public Schools, 503 U.S., 60.

Title IX, as interpreted by the U.S. Department of Education’s Office for Civil Rights, prohibits sex discrimination that manifests in the form of “hostile environment harassment.” In its “Questions and Answers on Title IX and Sexual Violence,” OCR states that: “hostile environment harassment

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Free speech case may hold some Title IX implications

By Cynthia Gomez, Editor

Things can get muddy when the First Amendment intersects with gender equity issues, as in the case of Milward et al. v. District Board of Trustees of Valencia College illustrates. The case involves former students of Valencia’s sonography program, who spoke out against the program’s practice of having students perform transvaginal ultrasounds on each other in a lab setting as part of the learning process. In addition to the college, named in the suit are the program chair, the clinical and laboratory coordinator, a lab technician, and a lab and physics instructor.

The plaintiffs claimed the college violated their First and Fourth Amendment rights. The chair reportedly told them they could go to another institution if they did not want to be probed. One plaintiff, Melissa Milward, expressed concern over the painful nature of the probing and embarrassment over being probed by the sole male student. Milward and the second plaintiff, Elyse Ugalde, agreed to be probed due to the pressure from employees. The third, Ashley Rose, refused and was banned from observing. Further, throughout all three plaintiffs’ time in the program, the defendants allegedly threatened to lower the students’ grades and block future employment opportunities if they did not submit to being probed. Rose claimed that she was subjected to harsher grading and that the lab and physics instructor yelled at her for nearly an hour. The students ultimately left the program.

The defendants asked the court to dismiss the complaint. The court complied, using the Hazelwood standard as a rationale. Established by a 1988 Supreme Court case, this ruling made it easier for K–12 schools to censor student speech when the speech is made as part of some curricular activity (e.g., a student newspaper produced or a presentation given as part of a course). The case is now before an appeals court. This February, a coalition of free speech groups filed a brief calling on the appeals court to reverse the lower court’s ruling.

Given that only female students are able to have transvaginal exams due to their anatomy, and that because there was a male student in the class at least some of the female students would have been subjected to penetration by a male, one must wonder why Title IX was left out of the complaint. Regardless, this is a case that should be monitored, given its possible gender-equity implications. ♦
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occurs when unwelcome conduct of a sexual nature is so severe, persistent, or pervasive that it affects a student's ability to participate in or benefit from an education program or activity, or creates an intimidating, threatening or abusive educational environment.” That definition borrows heavily from the language in the landmark case, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), in which the Supreme Court established that to be actionable under Title IX, alleged conduct or expression must be “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”

The *Davis* case and subsequent OCR guidance prescribe what I call a “sufficiency standard,” effectively establishing the threshold that behavior must meet to be considered hostile environment harassment and addressed as student misconduct. In *DeJohn v. Temple University*, 537 F. 3d 301 (3d Cir. 2008), an appeals court held that Temple’s use of overly broad terms like “hostile” and “offensive” without any qualifying language rendered its sexual harassment policy unlawfully overbroad.

Colleges must include some semblance of this standard in their sexual harassment policies to avoid First Amendment challenges. The sufficiency standard requires first establishing that the behavior is objectively offensive, then identifying the existence of at least one of three aggravating elements — unreasonable severity, pervasiveness, or persistence — to remove the speech from First Amendment protection.

Generally, the more severe the harassment is, the less likely the victim will need to show a repetitive series of incidents. With pervasiveness or persistence, the behavior must permeate a student’s educational setting to such a degree that it creates a hostile or abusive educational environment. Sporadic, occasional, isolated, or trivial incidents will likely fall short of this standard and thus, despite their relative offensiveness, be subject to First Amendment protection. Pervasive harassment is typically difficult to escape and manifests in multiple, often unrelated, aspects of the campus environment (e.g., classroom, dormitory, rec center), and reporting parties may describe the behavior as “constant,” “unavoidable,” and “happening everywhere.”

In assessing any one of the aggravating elements, perhaps the most important consideration is context, as these situations do not occur within a vacuum. Analyze and understand the totality of the circumstances. A student’s use of erotic terminology and graphic descriptions of sexual anatomy looks significantly different in the context of a Human Sexuality discussion group than after weekly Student Government Association meetings. While offensive, many incidents of harassing conduct will not meet the sufficiency standard and will not be actionable.

Institutions get it wrong when they overreact, often the result of feeling obligated to materially respond to every allegation. They should instead commit entirely to their policies, assessing allegations under the sufficiency standard. While offensive, many allegations will not sufficiently rise to the level of hostile environment harassment, which means that they are not incidents of sex discrimination under Title IX, and perhaps most importantly, amount to constitutionally protected speech.
Pair broad mandated reporting, numerous confidential reporting options

By Brett A. Sokolow, J.D., Publisher, Title IX Today; Executive Director, ATIXA

ATIXA has been at the forefront of pushing institutions to move from the “responsible employee” and “campus security authority” constructs to the idea of “mandated reporters.” We've encouraged campuses to broadly cover employees with this mandate, not just for Title IX, but for child abuse and student-of-concern issues, such as disruption and behavioral intervention referrals. The symmetry of broad reporting mandates to empower the “engaged university” ensures that all concerns get to the right officials. This approach is reflective of the Office for Civil Rights' expectations, simplifies the training process, and avoids confusion from having subject-specific reporting obligations that impact employees differently.

But, ATIXA has insisted that if colleges impose blanket reporting mandates, they also carve out significant safe spaces for confidential reporting. On this front, we have largely been ignored. We're baffled by this. We thought colleges would welcome the guidance provided in OCR’s 2014 “Questions and Answers on Title IX and Sexual Violence” and immediately designate large numbers of confidential resources. That hasn't happened, and we are concerned that failing to designate sufficient safe spaces is driving reporting underground, causing backlash among victims/survivors who feel administrators are overzealous, and fueling discomfort amongst faculty members who want to be able to help victims/survivors without feeling obligated to violate their trust.

Climate survey data is revealing this trend on many campuses. Administrators, it is again time to recalibrate and provide a course correction. The intensity with which the notice topic is addressed on many campuses is misplaced. It's easy to be too hot or too cold on this subject, and again we are offering our guidance to help colleges get it just right. One of the goals of this article is to push hard for your campus to designate more confidential resources, even as you continue to train everyone else to report what they know.

Too many administrators and attorneys are literalists and see OCR's statements on this as prescriptive, rather than as merely representative. OCR has acknowledged that its guidance does not have the force of law, though violations can result in OCR-based administrative enforcement. Such paralysis can occur in heavily regulated environments where one is afraid to put a foot out of line. We've written before on how early responses to the 2011 “Dear Colleague Letter” from OCR caused administrators to act like “notice hunters,” tracking down every whiff of discrimination as if their federal funding depended on it. Luckily, OCR signaled in April of 2014 that this rigidity was misplaced, but its discourse in the Title IX Q&A document is incomplete, and administrative over-reaction lingers due to bureaucratic preference for bright-line rules and blanket pronouncements.

We'll continue insisting that OCR is more victim-driven in its approach to notice than its written treatment of this issue makes it seem. This quote from the 2014 Q&A should be heeded: “OCR strongly supports a student's interest in confidentiality in cases involving sexual violence... A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students...
from reporting sexual violence.” OCR has supplemented this with collateral statements that must also be considered as policy is formulated, but OCR has not widely disseminated them.

We are attempting to do so here, and we must also recognize that OCR is not the only source of obligations related to mandated reporting, which spring from Title VII and the Clery Act as well. Perhaps the lack of cogent and consistent policy across campuses on responding to notice is a result of the multiplicity of sources for these obligations, none of which align with the others. Supervisory reporting obligations under Title VII do not match the list of who is considered a Campus Security Authority under the Clery Act, and neither of those matches OCR’s broadly interpreted, three-part definition of “responsible employee” under Title IX.

Much of our critique of responses to mandated reporting focuses on overzealousness and using blunt approaches that treat all notice as equal. OCR would expect a college to respond to a known atmosphere of sexual abuse within an athletics program without a formal report. But, OCR would not expect a college to act formally — including conducting a comprehensive investigation and resolution that could lead to discipline — on a casual mention of potential sexual violence made to an instructor by a reluctant victim who had asked the instructor not to share it. That’s not the same kind of notice, but these reports do not create notice; they are not intended as notice; they are not required. Policy should clarify whether this kind of information should be forwarded to the Coordinator, or can be screened at the level of the person to whom it was initially reported. The first and last bullets include information that must be addressed by the Coordinator, but the middle three may not.

Disclosures like these pose challenges when victims/survivors don’t have enough safe spaces to disclose, seek resources, and begin the healing process. On campuses where confidential resources are plentiful and well-identified, mandated reporters are less likely to be put in positions where they can’t assure confidentiality to someone requesting it, because victims/survivors know they have a myriad of other points of entry that can offer confidentiality.

OCR has carved out mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, and any other person with a professional license requiring confidentiality, or who is supervised by such a person, as being exempt from reporting unless victims/survivors wish to them to report. But, in this exception to mandated reporting, OCR sets the floor, not the ceiling.

The 2014 Q&A allows colleges to designate additional first responders as confidential resources. A few counselors in the counseling center aren’t enough. Climate surveys will show you where students need more safe spaces, such as in women’s centers, campus crisis centers, peer advocate and peer counselor programs, campus victim advocacy programs, and ombuds offices (if they have no resolution authority). There is no need for state-level privilege or confidentiality to apply to designate a person or group as exempt from mandated reporting. This group can also include front desk staff, students, and volunteers who support these programs.

OCR has stated that designated confidential resources still have an obligation to report incidents in aggregate, without personal identifiers, but these reports do not create notice for the institution. So, start designating. There should be at least 20–30 people on most campuses who fit this category. Small institutions will have fewer, but should still designate as many as possible. On other campuses, it should be far more. “OCR wants students to feel free to seek their assistance … and OCR strongly encourages schools to designate these individuals as confidential sources” notes the Q&A. Don’t pick and choose which OCR guidance to heed or ignore. If you’re going to broadly designate mandated reporters because OCR says so, also broadly designate confidential resources, because OCR says so.
Improve prevention, response efforts through outside collaborations

By Amy Murphy, Ph.D., Contributing Editor

Annie Kerrick is the Director of Title IX, Americans with Disabilities Act, and Section 504 Compliance at Boise State University and a fellow Contributing Editor of Title IX Today. As a former staff attorney at the Idaho Coalition Against Sexual & Domestic Violence, she has designed prevention initiatives for middle and high school students and provided legal assistance to victims of sexual assault. She spoke to us about the importance of collaboration.

Q You mentioned primary prevention efforts. What are some next steps for prevention?
A Holding people accountable can help. There is promising work occurring with bystander intervention, and we are finally getting funding to show the impact of the work with actual reductions in incidents. Comprehensive programming that touches people at all levels — at the individual level, social group level, and across the broader community — is critical. It is important for students to hear the same messages regarding sexual violence across campus, when they talk to a faculty member, student organization advisor, counselor, and members of their social groups. Effective prevention methods need to reach throughout an individual’s experience on campus and reinforce messaging through various initiatives. Public health models, with this as the foundation, are how we can achieve broader change.

Q From your experience with K–12 schools, what strategies do school administrators need to be considering?
A The problems associated with dating and sexual violence are often not recognized as an issue for schools. However, the problems of perpetration, entitlement, not respecting people’s wishes, and not understanding boundaries are learned at a young age. K–12 administrators need greater awareness of what problematic behaviors occur in their schools and how to respond to them. Many districts
are not well versed in responding to these kinds of complaints, or teachers and parents may not know that the district has a Title IX Coordinator and how to locate that individual. Some reports may go to a Vice Principal, who deals with student conduct, but may not have an understanding of trauma and victimization.

Q What can you share about what middle school and high school students are experiencing before arriving at college?

A We know that victimization can often happen really early, and many students have histories of trauma. This impacts how they develop survival skills and how they react in different settings. Growing up in a family with really unhealthy relationships or rape at a young age will impact how students perceive trauma. I have seen students from foster care systems with extremely traumatic lives react to trauma by laughing. Laughter is a coping mechanism, but without training, an investigator or panel can read the laughter as a credibility concern.

Some students arrive on campus having been victims of dating violence or in unhealthy relationships for many years. They may be at the same institution as the abusive partner, in some cases having been coerced to come to the college as part of the relationship. The student may not recognize behaviors that are not OK, or may not realize that the university can provide assistance and support. Additionally, some students have not had many dating relationships and may not understand what healthy relationships or healthy break ups look like.

Q How can K–12 and higher education partner to combat dating and sexual violence?

A More work between universities and school districts can help. Many colleges recruit students locally. In those cases, the school can share what teachers and staff may be seeing from students, in terms of areas of concern, since colleges and universities often have more resources dedicated to Title IX efforts and staff. Joint training efforts could also help administrators in K–12 schools and districts to better understand victimization and how to treat victims in Title IX complaints. I worked with a high school freshman who reported an incident of sexual violence. The school district had good intentions, but it treated her in an almost paternalistic manner. In trying to protect her, it pulled her out of her classes and had her complete her assignments in the counselor’s office.

Q As the Title IX Coordinator at Boise State since 2013, could you share some of the challenges of moving into this role?

A In many ways, the entire job has been a challenge. New Title IX Coordinators need to know that the job is going to be highly political. One of the challenges is gaining recognition and campus support to do the work that needs to be done and hold people accountable. Your decisions and recommendations will be challenged, people will struggle to trust you, or they may believe you have a greater interest in one party or another. Prepare for these times by building transparency in your processes, developing relationships across campus, cultivating trust, and using solid judgment.

In addition, I think we have to find ways to help each other and our institutions take care of ourselves. If we cannot ensure the support and resources to help each of us maintain some sense of well-being in our jobs, we are going to constantly be retraining, filling positions, and unable to work in a sustained and proactive manner.

About the Author

Amy Murphy is an Assistant Professor at Angelo State University, an Affiliated Consultant with The NCHERM Group, and the former Dean of Students at Texas Tech University.
Anna Bartkowski, the University of San Francisco’s Title IX Coordinator, explains her role and the purview of her office to her campus community as being five-fold:

1. **Providing legal and administrative structure for Title IX processes.** This involves ensuring Title IX compliance through the institution’s policies and procedures for complaints and resolution processes focusing on accountability and due process. It also involves continually monitoring and incorporating updates on federal and state law and best practices.

2. **Offering campus training on the Title IX nuts and bolts.** This requires educating targeted populations on the definitions of sexual misconduct, the school’s policies and disciplinary procedures, and the consequences of violating USF’s policies.

3. **Conducting education and outreach with a goal of prevention and risk reduction.** This calls for collaboration with different campus groups to align priorities and mobilize efforts in the development and implementation of educational outreach efforts to increase awareness, reduce risk, raise awareness, and share prevention strategies.

4. **Providing advocacy via remedies, resources, and support.** The Title IX office advocates for gender equity campuswide, but unlike a survivor advocate, its advocacy is meant to provide adequate support for both reporting and responding parties, through the provision of vital information, resources, and support with neutrality and outspoken advocacy for the process.

5. **Assessing Title IX efforts through the use of metrics, data collection, analysis, and feedback.** In maintaining records of caselogs, it’s important to account for growth in reporting rates, resolutions, and adjudications. Analyze data of populations using reporting and support resources. And ask for and maintain feedback from Title IX “clients” on satisfaction and conduct climate surveys to assess impact on the community.