

Adele Kimmel¹
Public Justice, P.C.
1620 L Street, NW
Suite 630
Washington, DC 20036
202.797.8600
akimmel@publicjustice.net

Title IX Litigation and Enforcement for K-12 Sexual Assault Survivors

INTRODUCTION

Sexual violence against students has been receiving increasing national attention in the last few years. Although the issue is receiving the attention it desperately needs at the college level—including the creation of a White House Task Force to address campus sexual assaults²—this is not yet true for sexual violence occurring at primary and secondary (also known as “K-12”) schools. Unlike colleges, K-12 schools are not required to report sexual assault statistics,³ but available data show that sexual assault is a serious issue faced by middle and high school students. According to U.S. Department of Justice statistics, nearly 20% of girls ages 14 to 17 were sexually victimized.⁴ During the 2007-08 school year, there were 800 reported incidents of rape and attempted rape and 3,800 reported incidents of other sexual batteries at public high schools.⁵ In 2012, the Centers for Disease Control and Prevention (CDC) found that nearly 30 percent of female rape victims were first raped between the ages of 11 and 17.⁶ This year, the

¹ Adele Kimmel is a senior attorney at the DC Headquarters of Public Justice, a national public interest law firm that pursues high impact lawsuits to combat social and economic injustice, protect the Earth’s sustainability, and challenge predatory corporate conduct and government abuses. She is a widely quoted authority on school bullying and Title IX issues, and is the head of Public Justice’s Anti-Bullying Campaign. The Campaign seeks to hold school districts and officials accountable for failing to protect students from bullying, make systemic changes in the ways that schools respond to bullying incidents, and educate others about bullying and the law. Adele’s practice focuses on civil rights issues, including school bullying, Title IX sex discrimination, and prisoners’ rights.

² See “Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault,” Apr. 29, 2014, at 2, available at <https://www.notalone.gov/assets/report.pdf>.

³ Federally funded colleges—which includes most public and private colleges in the country—are required to report sexual violence statistics under the Clery Act, 20 U.S.C. §1092(f).

⁴ See U.S. News & World Report, “High Schools and Middle Schools Are Failing Victims of Sexual Assault,” Mar. 5, 2015 [hereinafter “U.S. News & World Report Article”], available at <http://www.usnews.com/news/articles/2015/03/05/high-schools-and-middle-schools-are-failing-victims-of-sexual-assault>.

⁵ SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY:2010 at 104 (U.S. Dep’t of Educ. & U.S. Dep’t of Justice, Dec. 2010), available at <http://nces.ed.gov/pubs2011/2011002.pdf>.

⁶ See “Sexual Violence,” Facts at a Glance, Centers for Disease Control and Prevention, 2012, available at <http://www.cdc.gov/violenceprevention/pdf/sv-datashet-a.pdf>.

CDC found that more than 20% of female and 10% of male high school students had experienced some form of dating violence in the past year.⁷

Despite these alarming statistics on sexual and dating violence experienced by middle and high school students, most K-12 schools fall down on the job when it comes to addressing campus sexual assault. According to Break the Cycle, an organization that addresses teen dating violence, more than 80 percent of high school guidance counselors say they feel ill-equipped to deal with reports of abuse on their campuses.⁸ This lack of preparedness by school officials often exacerbates the harm to sexual assault survivors. In addition, survivors sometimes face victim-blaming and harassment by their peers after they report being sexually assaulted, which some survivors say is even worse than the assault itself.⁹

Why do so many of our K-12 schools fail to take appropriate action in response to allegations of campus sexual assault? Besides a lack of training, a key piece of the problem is that many schools don't understand their obligations to address campus sexual violence under Title IX of the Education Amendments of 1972 (Title IX)—the federal civil rights law prohibiting sex discrimination in educational programs that receive federal funding.¹⁰ As explained below, Title IX requires all public schools and any private schools receiving federal funds to combat sexual violence and harassment, and accommodate survivors' needs to ensure that they have equal access to educational opportunities.

Title IX litigation and enforcement are critical tools for forcing K-12 schools to do a better job of addressing campus sexual assault. A civil lawsuit can obtain justice and compensation for survivors. Lawsuits and/or complaints filed with the U.S. Department of Education's Office for Civil Rights (OCR) can also lead to systemic changes in the ways that K-12 schools prevent and respond to campus sexual violence. This paper provides an overview of the Title IX claims and remedies available to K-12 sexual assault survivors.

TITLE IX IN K-12 SCHOOLS: THE BASICS

If you are representing a primary or secondary school student who was sexually assaulted by another student or a school employee, you should consider filing a claim under Title IX. Title IX's prohibition against sex discrimination in education is broad: "No 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."¹¹ Title IX covers a host of conduct that creates a hostile educational environment based on sex, including sexual harassment, gender-based harassment, and sexual

⁷ See Medical News Today, "1 in 5 high school girls 'experience teen dating violence,'" Mar. 3, 2015, available at <http://www.medicalnewstoday.com/articles/290188.php>.

⁸ See U.S. News & World Report Article, *supra* note 4.

⁹ See *id.*

¹⁰ 20 U.S.C. § 1681 *et seq.*

¹¹ 20 U.S.C. § 1681(a).

violence (which is a form of sexual harassment that includes rape, sexual assault, sexual battery and sexual coercion).¹²

Title IX applies to all schools that receive any federal funds. This includes all public elementary and secondary schools, private and parochial schools that participate in the federal free lunch program or receive other federal funding, and schools that are formally affiliated with another school (such as a diocese) that receives federal money.¹³ If your client has a potential Title IX claim, she or he may only assert the claim against the recipient of the federal funding—*i.e.*, the school district or school board of education—not against individual school officials.¹⁴

Title IX protects *all* students from sexual violence at federally funded schools: male and female students; straight, gay, lesbian, bisexual, and transgender students; students with and without disabilities; and students of different races and ethnicities.¹⁵ In addition, Title IX requires schools to address sexual violence regardless of the sex of the complainant or alleged perpetrator, including when they are members of the same sex.¹⁶ Similarly, the actual or perceived sexual orientation or gender identity of the involved parties does not change a school's obligations under Title IX.¹⁷ Schools must investigate and resolve sexual violence complaints by lesbian, gay, bisexual, and transgender (LGBT) students using the same procedures and standards they use in all complaints of sexual violence.¹⁸

Finally, Title IX protects students from sexual violence in connection with all the academic, educational, extracurricular, athletic, and other programs of a school, whether the programs occur on school grounds, on a school bus, during a field trip, or during any other school-sponsored events.¹⁹ In some circumstances, schools may be obligated to respond to sexual violence that initially occurred off school grounds, outside a school's education program or

¹² See, e.g., Letter from Russlynn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Oct. 26, 2010) [hereinafter "Bullying DCL"], at 6-8, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (discussing how sexual harassment and gender-based harassment are forms of sex discrimination prohibited by Title IX); Letter from Russlynn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Apr. 4, 2011) [hereinafter "Sexual Violence DCL"], at 1-2, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (discussing how sexual violence is a form of sex discrimination prohibited by Title IX).

¹³ See "Title IX in High School: FAQs," Know Your IX, available at <http://knowyourix.org/title-ix-in-high-school-in-detail/>. If you are unsure whether your client's school is subject to Title IX, you may be able to obtain this information from OCR.

¹⁴ *Smith v. Metro. Sch. Dist. of Perry Twp.*, 128 F.3d 1014, 1019-21 (7th Cir. 1997) (no individual liability under Title IX). If you file an equal protection claim under § 1983, then you can sue individual school employees in addition to the school district.

¹⁵ See U.S. Department of Education Office for Civil Rights, Questions & Answers on Title IX and Sexual Violence (Apr. 29, 2014) [hereinafter "OCR Sexual Violence Q&A"], at 5, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ OCR Sexual Violence Q&A, *supra* note 15, at 5-6.

¹⁹ Sexual Violence DCL, *supra* note 12, at 3-4.

activity. For example, when a student reports that she was sexually assaulted by another student off campus, and that she was harassed when she returned to school by other students who are the perpetrator's friends, a school should consider the off-campus sexual assault when determining whether there is a sexually hostile environment, and should take steps to protect the student assaulted off campus from further sexual harassment or retaliation by the perpetrator and his associates.²⁰

TITLE IX LITIGATION AND ENFORCEMENT

Damages Liability Standard

The seminal case on student-on-student or “peer” sexual harassment is the Supreme Court’s decision in *Davis v. Monroe County Board of Education*.²¹ The plaintiff in *Davis* was a fifth-grade student in Georgia who filed a Title IX suit based on school officials’ failure to take action in response to complaints about a male classmate who was sexually harassing her. LaShonda Davis was harassed by her male classmate for five months, until he was charged with, and pled guilty to, sexual battery. The harassment included inappropriate touching of Davis, rubbing his body against hers in a sexually suggestive manner, and making vulgar statements to her. Davis and her mother complained to the school’s teachers and principal on numerous occasions, but nothing was done to stop the harassment. The school never disciplined the harasser in any way, nor did it make any effort to separate the harasser from Davis.

In *Davis*, the Court held that students subjected to peer sexual harassment may sue their school districts for damages under Title IX when the districts “are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is 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.”²² The Court also limited a school district’s damages liability under Title IX to circumstances where it exercises “substantial control” over the harasser and the context in which the harassment occurs.²³

Title IX does not make a school district liable for the conduct of students who sexually harassed their peers. Rather, a district is liable only for its own misconduct in responding to *known* harassment. If the harassment is not reported to or observed by school employees or administrators with authority to take corrective action, then a district will not be liable.²⁴

²⁰ *Id.* at 4. Apart from schools’ obligations under Title IX, most K-12 schools are subject to mandatory reporting requirements under state and/or local laws. See OCR Sexual Violence Q&A, *supra* note 15, at 4. Typically, mandatory reporters (such as teachers, principals, and other school staff) must report suspected sexual abuse to a government agency, such as law enforcement or child protective services.

²¹ 526 U.S. 629 (1999).

²² *Id.* at 650.

²³ *Id.* at 646-47.

²⁴ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) (allowing damages action under Title IX for teacher-on-student sexual harassment).

The more severe the sexual harassment, the less need there is for the plaintiff to show a repetitive series of incidents to prove a hostile educational environment under Title IX. For example, a single instance of rape may be sufficiently severe to create a hostile environment.²⁵

For a district to avoid liability for “deliberate indifference,” it need not expel the harassers, engage in any particular disciplinary action, or remedy the peer harassment.²⁶ The district need only respond to known peer harassment in a manner that is not “clearly unreasonable in light of the known circumstances.”²⁷ “This is not a mere ‘reasonableness’ standard,” and lower courts may conclude as a matter of law that a school district’s response was not “clearly unreasonable.”²⁸ Indeed, *Davis* emphasizes that “courts should refrain from second-guessing the disciplinary decisions made by school administrators.”²⁹

Nonetheless, where schools take little or ineffective action to stop sexual harassment, plaintiffs frequently defeat schools’ efforts to dismiss their Title IX claims.³⁰ Similarly, where schools have policies or take action that makes students more vulnerable to sexual violence—such as only punishing sexual harassment when students are “caught in the act”—they may also be liable for deliberate indifference to peer harassment.³¹ For example, in *Hill v. Cundiff*,³² known as the “rape-bait” case, a middle school student in Alabama was repeatedly harassed by an older student who kept asking her to have sex with him in a school bathroom. When she complained to school officials about this, their response was to try to “catch him in the act”—in accordance with school policy—by using her as bait in a bathroom sting operation. Before any staff arrived in the bathroom, the boy had raped her. The Eleventh Circuit recently allowed this case to proceed under Title IX, holding that a jury could conclude that the school’s policies and conduct amounted to deliberate indifference.³³

Although *Davis* involved male-on-female sexual harassment, the Court did not limit its holding to these circumstances. *Davis* opened the door for LGBT students to file Title IX suits when schools fail to respond appropriately to peer harassment based on gender stereotypes and actual or perceived LGBT status.³⁴ LGBT students experience higher rates of sexual harassment and

²⁵ See, e.g., *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 n.4 (6th Cir. 2000) (“[w]ithin the context of Title IX, a student’s claim of hostile environment can arise from a single incident” (quoting *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999))).

²⁶ *Davis*, 526 U.S. at 648.

²⁷ *Id.* at 648-49.

²⁸ *Id.* at 649.

²⁹ *Id.* at 648.

³⁰ See, e.g., *Patterson v. Hudson Area Sch.*, 551 F.3d 438 (6th Cir. 2009); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952 (D. Kan. 2005); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000); see also *Doe v. School Bd. of Broward Cnty.*, 604 F.3d 1248, 1261 (11th Cir. 2010) (teacher-on-student sexual harassment case).

³¹ *Hill v. Cundiff*, 797 F.3d 948, 973 (11th Cir. 2015).

³² See *supra* note 31.

³³ *Id.* at 973-74.

³⁴ See *Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties*, U.S. Dep’t of Educ., Office for Civil Rights v (Jan. 19, 2001) [hereinafter “2001 Guidance”], at i-ii, v, 2, 3,

violence than other students,³⁵ and Title IX is a tool in the arsenal that is being used with increasing success to address this problem.³⁶ A good example of this is a case filed by the mother of Seth Walsh, a boy who was relentlessly bullied and sexually harassed by his peers after he “came out” as gay in sixth grade.³⁷ What started as vicious verbal taunting with anti-gay epithets turned to physical and sexual violence. Some of the most hostile incidents occurred in the boys’ locker room, where classmates pulled down Walsh’s pants and a male peer threatened to rape him. Walsh and his mother repeatedly reported the bullying to school officials, to no avail. Walsh’s peers were permitted to bully him with impunity, and some teachers joined in the disparagement. Walsh committed suicide shortly after being taunted and physically assaulted at a local park by four students. He was thirteen when he died. Walsh’s mother filed a Title IX lawsuit against her son’s school district and obtained a settlement of \$750,000.³⁸ She also filed a complaint with OCR that resulted in findings that the school district had violated Title IX, as well as sweeping reforms within the school district.³⁹

OCR Enforcement Standard

The liability standard established in *Davis* applies to private actions for money damages, not to administrative enforcement proceedings or, arguably, suits limited to injunctive relief.⁴⁰ Before filing a lawsuit, you should think about filing a complaint with OCR both to exert additional pressure on the district and to obtain significant reforms under an easier-to-satisfy standard. Under OCR’s enforcement standards, a school is responsible for addressing peer harassment “about which it knows or reasonably should have known.”⁴¹ In addition, if the harassment is

5-7, available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>; Bullying DCL, *supra* note 12, at 7-8 (discrimination based on gender stereotyping includes harassment “for failing to conform to stereotypical notions of masculinity and femininity” and covers “all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.”); Sexual Violence DCL, *supra* note 12, at 1-3.

³⁵ See Human Rights Campaign, *Growing Up LGBT in America* (2012) at 16, available at http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf; Gay, Lesbian, and Straight Education Network, *The 2013 National School Climate Survey* (2014) at xvi, available at http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf.

³⁶ See, e.g., *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151-52 (N.D.N.Y. 2011); *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006); *Theno*, *supra* note 30, 377 F. Supp. 2d 952, 964-65; *Montgomery v. Indep. Sch. Dist. No. 709*, *supra* note 30, 109 F. Supp. 2d 1081, 1090-93.

³⁷ *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107 (E.D. Cal. 2011).

³⁸ Lauren Foreman, *The Bakersfield Californian*, “Seth Walsh case settled for \$750,000,” (June 3, 2014), <http://www.bakersfield.com/news/2014/06/04/seth-walsh-case-settled-for-750-000.html>.

³⁹ Letter from Zachary Pelchat, Supervisory Attorney, Office for Civil Rights, U.S. Dep’t of Education, and Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep’t of Just., to Richard L. Swanson, Superintendent, Tehachapi Unified Sch. Dist. (June 29, 2011), available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/09111031-a.pdf>; Resolution Agreement Between the Tehachapi Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division (June 30, 2011), available at <http://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/tehachapiagreement.pdf>.

⁴⁰ See 2001 Guidance, *supra* note 34, at iii-iv.

⁴¹ Bullying DCL, *supra* note 12, at 2.

“sufficiently severe, pervasive, *or* persistent” that it limits or interferes with a student’s educational opportunities, then “a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.”⁴² If OCR decides to investigate a complaint you file, this may also give you leverage in reaching a separate settlement with the school district on money damages. In fact, the damages action filed by Seth Walsh’s mother settled approximately one year after OCR and the U.S. Department of Justice concluded that the school district had violated Title IX.⁴³

Remedies

There are a variety of remedies available to bullying victims whose Title IX rights have been violated. Students may seek compensatory, but not punitive, damages.⁴⁴ In addition, if the student prevails, she may seek to recover attorneys’ fees under 42 U.S.C. § 1988.

To help attorneys assess the financial value of their K-12 sexual assault and bullying cases, Public Justice tracks verdicts and settlements across the country and updates this information three to four times per year. This information is available on Public Justice’s website at <http://www.publicjustice.net/what-we-do/anti-bullying-campaign>. Our research shows that verdicts and settlements in these cases generally range from 5 to 7 figures. The highest reported settlement we know of in a peer sexual violence case brought under Title IX was \$5.75 million.⁴⁵ The case was filed in Hawaii and involved a gang at a public school for the deaf and blind that sexually assaulted and terrorized their classmates for more than a decade.⁴⁶

Apart from damages, plaintiffs who are still in the school district may generally seek declaratory and injunctive relief for Title IX violations. For example, they may ask school districts to implement anti-bullying training and education programs for school personnel and students alike. This is the best way to force schools to make systemic changes that will reduce bullying. In addition, if the plaintiff no longer attends a school within the district, an alternative way to try to obtain systemic reforms within a district is through an OCR complaint.

CONCLUSION

We cannot eliminate sexual violence among school children, but we can make schools respond appropriately to it—and help stop and deter a great deal of it—through effective Title IX litigation and enforcement. Litigation and enforcement are critical tools in our arsenal. In

⁴² *Id.* at 2-3 (emphasis added).

⁴³ *See supra* notes 38, 39.

⁴⁴ *See Barnes v. Gorman*, 536 U.S. 181, 185-89 (2002) (punitive damages not available under federal statutes prohibiting disability discrimination); *Mercer v. Duke Univ.*, 50 F. App’x. 643, 644 (4th Cir. 2002) (holding that Supreme Court’s conclusion in *Barnes* compels conclusion that punitive damages are not available for Title IX claims).

⁴⁵ Malia Zimmerman, “\$5.75 Million Settlement Awarded to Deaf and Blind Students Sexually Assaulted by Gang at Hawaii Public School,” *Hawaii Reporter*, Feb. 24, 2013, available at <http://www.hawaiireporter.com/5-75-million-settlement-awarded-to-deaf-and-blind-students-sexually-assaulted-by-gang-at-hawaii-public-school/123>.

⁴⁶ *Doe v. State of Hawaii*, No. 11-cv-0550-KSC (D. Haw. 2011).

combination, they can help compensate bullying victims for the injuries they have suffered and help change the culture of schools and districts, so they take appropriate steps to prevent and respond to sexual violence.