

Sex Assaults, Harassment Are Top Campus Legal Liabilities

“Attorneys have recognized that they’re going to catch us with our pants down,” a risk management attorney told human resources managers at the CUPA-HR conference in Orlando in September. He cautioned that there has been an “amazing increase in litigation” over sexual assaults and harassment in the last 10 years because campuses have failed to protect themselves from liability claims and lawsuits.

Brett A. Solokow, a lawyer who created and heads the National Center for Higher Education Risk Management, said sexual assault and harassment claims have overtaken the traditional “slips and falls” as the biggest source of claims against colleges and universities. A decade ago, they ranked only fifth on the list of sources of claims, which he called an “incredible sea change.”



Brett A. Solokow

Why the increase?

Supreme Court cases in the 1990s and more recently have established precedents that encourage litigation, Sokolow said. Title IX of the Education Amendments of 1972 makes student-on-student sexual harassment a Civil Rights issue. But most schools have not taken steps to protect students and limit their liability, which encourages lawsuits.

While Title VII of the Civil Rights Act of 1964 covers harassment of one professor by another, many schools mistakenly apply the same standards to investigate complaints under Title IX. While Title VII makes employers responsible for protecting civil rights on the job, Title IX requires only that schools deal with potential violations that they know about, he said.

While “we’re not responsible for harassment,” he said of schools, “We’re responsible for our response to it.” The legal standard of “deliberate indifference” means that a school is legally liable if it fails to act after being given notice of sexual harassment or assault, or if the school’s actions were clearly unreasonable in light of known circumstances.

A recent Court decision also makes a school liable for retaliation against the filer of a complaint of harassment or assault, regardless of the validity of the original complaint. About a quarter of the claims he sees are for retaliation.

For example

He cited several cases as cautionary tales:

- An off-campus fraternity was known as the Train Station, where it was rumored to have been the scene of a type of gang rape. Although no complaint had been filed, he counseled the school to limit its liability by presenting an educational program to fraternity members on the school’s standards and expectations.

- A 15-year-old girl visiting her sister at college got drunk and was raped. Checking the student handbook, the girls found no info on how to report this kind of assault, so they didn’t report it. Later the girl’s parents sued and won, and the college revised its handbook to cover all members

of the campus community, including guests.

- “Schools adopting ‘no-contact orders’ against students who allegedly are stalking others “scare the heck out of me,” Sokolow said, because they are like restraining orders without teeth. If the college bars John Smith from entering a dorm housing Jane Doe, it better be sure the security guard has a photo of John Smith. Otherwise the school is admitting a potential problem exists, but it isn’t taking reasonable steps to prevent negative consequences from it.

- Changing an expulsion to a one-semester suspension is another red flag, he warned. When Georgetown University did that, it brought an investigation by the Education Department’s Office for Civil Rights. “If you want a Title IX case, reverse an expulsion and make it a one-semester suspension,” he said, which demonstrates a school is being “arbitrary and capricious.” He warned, “You’re just opening yourself up and saying, ‘Take my money.’”

- Retaliation can be dangerous. A male professor gave a female student a lower grade after she had filed a sexual harassment claim against another professor. After an investigation showed he had retaliated against her, the grade was changed and he was censured.

What schools can do

Sokolow advised schools to review their policies and procedures for responding to complaints of sexual assault and harassment, and to take proactive steps to protect students.

- *Be sure the student handbook is clear* on how to make and respond to sexual assault and harassment complaints.

- *Be sure all employees know* who is their Title IX coordinator. Most of those attending the CUPA-HR session admitted to not knowing who had that role on their campus.

- *Take pre-emptive steps* to show they care about complainants. One client rented an off-campus apartment for a woman who said another student was harassing her.

- *Show them the money.* He’s advised clients to cover the student’s tuition for a semester, because \$15,000 to \$20,000 was far less than the multi-million dollar damages a court could assess. “I do it a lot,” he said. “We hope that keeps them from running to an attorney.”

- *Be creative about ways to respect their privacy* after an assault. To avoid the social stigma and the adverse reaction of a student’s parents, one school created a special “scholarship” to show support for the student.

- *Solve the problem*, don’t avoid it. After a male student was accused of sexual assault, he was transferred to another dormitory, where he raped a different student. Since the school failed to take reasonable steps to prevent recurrence of the violation under Title IX, it was in jeopardy of further liability.

Learning how to respond to complaints can reduce the number and severity of claims and judgments, he said. ■

—MDW

Reach Sokolow at bsokolow@aol.com or 610.993.0229

Info is from the NCHERM Web site www.ncher.org and *The Chronicle of Higher Education* online for September 28, 2005.

‘While we’re not responsible for harassment, we’re responsible for our response to it.’