



Handling Student Sexual Assault In K-12 Schools

Insights

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In March, *U.S. News & World Report* featured a lengthy story provocatively titled, “High Schools and Middle Schools Are Failing Victims of Sexual Assault.” In addition to documenting situations where schools allegedly mishandled allegations of sexual assault, the article cites Justice Department statistics indicating that nearly 20% of girls between the ages of 14 and 17 have been victims of sexual assault or attempted assault.

Over the last several years, colleges and universities have been in the regulatory and media crosshairs regarding their handling of campus sex assault. The bulk of legal claims have focused on violations of Title IX or the Clery Act. This law requires colleges and universities that receive federal financial aid to keep and disclose information about crimes on and near their campus.

While K-12 schools are not covered by the Clery Act, Title IX applies to all schools which receive federal funding. Notably, there has been an uptick in Title IX regulatory reviews (currently 24 schools are under federal investigation by the Department of Education) and there have been several court determinations against K-12 institutions for failing to adequately address sexual misconduct in school. A recent decision out of Tennessee is illustrative of the latter.

In that case brought against the Robertson County school district by the parents of two children who claim they were sexually abused by peers (*Belcher v. Robertson County, Tennessee*), Judge Todd Campbell found that the school district’s deliberate indifference to peer-on-peer sexual abuse rendered it liable under Title IX.

The facts of the case focus on the actions of two students (identified in court pleadings as ML and WJ) who at all relevant times were under ten years old. They were accused of:

- Hitting female classmates in the private areas multiple times;
- Showing pornographic images to other students on a school bus;
- Touching, rubbing, and simulating a sex act on fellow students; and
- Trying to perform oral sex on a female student.

The court noted that to be liable under Title IX, “a school must have possessed enough knowledge of the [sexual] harassment that it reasonably could have responded with remedial measures to address that harassment.” The court determined that the parents had presented sufficient evidence

that the school district had actual knowledge of the harassment by ML and WJ from as far back as their time in kindergarten. The court strongly criticized the district for “siloeing” that information and not sharing it with people who had a need to know.

For instance, a “safety plan” was developed for ML whereby he was supposed to be monitored at all times by his teacher; but the teacher was not advised why such monitoring was even necessary. The school district rationalized its failure to share specifics by citing privacy concerns and the Family Educational Rights and Privacy Act (FERPA), a position the court strongly and correctly criticized.

The court is accepting briefs on what the damages in the case will be but has already indicated that those damages will include therapy costs for the abused students, compensation for emotional distress, and attorneys’ fees.

In addition to civil liability, three Robertson County educators have been charged criminally for failing to appropriately report student-on-student sexual assaults in violation of mandatory reporting obligations applicable to educators in Tennessee.

For years, the focus of K-12 administrators in this area was on sexual abuse of students by adults. Media attention (exemplified by the *U.S. News* article) coupled with decisions like the case above and criminal prosecutions, scream for that focus to include the appropriate handling of student-on-student sexual abuse. Simply put, this is an emerging and complicated legal and compliance issue for K-12 schools.

Our Advice

Here are some guidelines we believe will help:

- Seek guidance from counsel on state-law mandatory reporting requirements and determine how those requirements apply to student-on-student misconduct cases. In many instances, the definition of sex abuse is far broader than most school employees suspect and the consequences of getting this wrong can be significant;
- Ensure that all teachers and staff are provided with training on what their responsibilities are in this area. That training should also provide guidance on how FERPA applies (and doesn’t apply) in these situations;
- Assess whether they are covered by Title IX and, if so, review their policies and practices to ensure that they are Title IX compliant. As indicated above, only public schools and private schools which receive federal funding are covered. Even if Title IX does not apply, a review of policies and practices in this area is advisable to insulate schools from negligence claims;
- Find a resource which can help investigate student-on-student cases when they arise and can provide counsel on appropriate responses;
- Provide annual training to all students on what conduct is prohibited by school policy and who they should report to if they are victimized or learn that a classmate has been victimized.

If you need help with any or all of these suggestions, let us know.

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