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Q&A

Dykema Title IX Senior Counsel on the #MeToo Movement and Higher Education

Interviewed by Ryan B. Whitacre, Managing Director, In-House-Practice Group—Major, Lindsey & Africa

The University of Southern California (USC) is the latest of many high-profile educational institutions to come under fire for failing to protect students and staff from sexual harassment and assault. Key to understanding these revelations and why they are appearing more frequently, from Penn State to Michigan State and now USC, is Title IX, the federal law that bans sex and gender discrimination in educational institutions.

I met Natalie Brouwer Potts on our first day at Cornell Law School. More than 20 years later, she is Senior Counsel at Dykema, where she represents educational institutions in civil rights and employment law matters. Natalie also represents employers in wage and hour litigation, discrimination and retaliation claims and matters involving various other state and local statutes. Formerly, she was the Title IX Officer at San Jose State University, an institution with more than 32,000 students and a large Division I athletics program, as well as the Title IX Officer at Northeastern Illinois University in Chicago. She recently returned to private practice, joining Dykema's Chicago office, where we reconnected.

Q: What is a Title IX Officer?

A: Title IX is a specialized practice area focusing exclusively on eliminating sex and gender-based discrimination. Title IX requires any educational institution that receives federal funding to appoint a Title IX Coordinator, and this individual is expected to lead substantial compliance efforts to prevent and immediately remedy sex discrimination against students, employees and even potentially third-parties. Since it became a federal law in 1972, Title IX has expanded to prohibit sexual harassment and sexual misconduct, including sexual assault, interpersonal violence and stalking. This is really a unique compliance area even within a higher education practice.

Q: So what you're saying is Title IX practice is a subset of higher ed law and a subset of traditional employment law, correct?

A: Exactly! You can't successfully "dabble" in Title IX practice, even if you're an experienced lawyer. You need to know the law, the regulations, the sub regulatory guidance and case law, but that's just for starters. It's also important to understand how colleges and universities operate, how to handle tough press inquiries, and above all how to react quickly and fairly in crisis situations. Title IX cases exist in a highly-charged environment inhabited by the Complainant, the Respondent, the Administration, the Board of Trustees, the student body, the faculty and staff and the media. There is no question that Title IX is a behemoth in terms of compliance and the stakes are high. Title IX expertise mitigates costly missteps in this difficult landscape.

Q: Recent events seem to have pushed Title IX to the front pages. From your perspective, how has the #MeToo Movement impacted colleges and universities?

A: Higher education has seen a steady rise in sexual harassment and sexual misconduct reports on campuses.

This has been happening for years, especially after the Obama Administration identified campus sexual assault as a serious problem in America and ramped up compliance requirements. The #MeToo movement has definitely increased students' and employees' awareness of Title IX's protections. Most colleges and universities have good Title IX programs in place, but only a small percentage of Title IX reports are usually investigated. You will see lots of situations where a Title IX Office has received a significant amount of Title IX reports in an academic year and only conducted a handful of investigations. It makes it look like the #MeToo Movement has had no impact and Title IX has no teeth, but that is not the case. You have to look closer to understand what's going on.

Q: Why aren't all Title IX reports investigated?

A: Title IX Complainants – the victim or survivor of sexual discrimination – generally get to decide whether an investigation goes forward, so if they don't want an investigation, the Title IX Office does not proceed. Educational institutions need to respect survivors' wishes. They also need to be mindful of important campus safety concerns. If you have a student who sexually assaulted another student at an off campus party in Fall Semester and Homecoming is next weekend, isn't there a chance another student might be assaulted? But what if the original Complainant does not want the Title IX Office to investigate and refuses to go to the police? It is tremendously complicated. Decisions about how to handle Title IX matters have to be made quickly and with your best information at the time.

Q: What is the most important step educational institutions need to take when they learn about Title IX violations?

Schools need to do about ten things at once, frankly, when they learn about a potential violation. Are interim remedies needed, such as issuing a No Contact Order or removing a

student from residential housing because he or she poses a threat? Does a warning alert need to be issued to the campus community? However, the most critical step is to make sure a person who has experienced sexual violence gets help. That is first and foremost. Whether it is a student, staff member or faculty member, the individual should be provided with resources to get immediate emotional, physical and mental help. Law enforcement sometimes needs to be notified, though the wishes of the Complainant should determine that. The important exception is if the Complainant is under 18 years, then the police need to be notified right away.

Q: How often are Complainants under 18? Doesn't Title IX only apply to colleges and universities?

A: That is what a lot of people think, but Title IX applies to a wide range of schools above and beyond college campuses. Every educational institution that receives federal dollars is covered by Title IX. That means K-12 schools are often required to comply with Title IX. This includes school districts, public schools, private schools and public charter schools. Unfortunately, sexual harassment and sexual assault reports have spiked in K-12 schools. It is hard to say if more incidents

are occurring or if increased awareness, especially due to the #MeToo movement, has contributed. But the bottom line is that there are Title IX incidents at schools across the country every day affecting people of all ages.

Q: What is the best way for a school attorney or General Counsel to advance Title IX compliance?

A: Make sure your Title IX Office is following the key requirements. Publish clear sexual harassment and sexual misconduct policies. Provide educational trainings on an annual basis to all employees, from senior leaders to the entire workforce of staff and faculty. Also provide age-appropriate annual trainings to students. Designate a Title IX Coordinator who will implement the investigation process promptly and fairly. Where a Title IX incident is reported, it is a school's obligation to take reasonable steps to eliminate the behavior, prevent its recurrence and address its effects. If you can do all of that, you're in great shape. Remember that Title IX cases that make the news – like Larry Nassar's unspeakable criminal sexual assaults at Michigan State – are outliers and the vast majority of educational institutions work really hard to maintain a healthy and safe environment.



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