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How Teachers and Coaches Can Defend Against Sexual Harassment

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Over forty years ago, Congress enacted Title IX of the Education Amendments of 1972 (Title IX) to eliminate sex discrimination in educational institutions. Though much progress has been made since Title IX's enactment, gender equity issues continue to plague colleges and universities. While responsibility for ensuring full and effective compliance with Title IX requires institutional support and engagement at all levels, teachers and coaches play a particularly important role in ensuring effective enforcement of Title IX, as they are often in the best position to identify discrimination and bring it to the attention of administrators.

Unfortunately, however, it is not uncommon for teachers or coaches to face pushback from their educational institutions if and when they complain about sex discrimination. While such retaliatory acts can be intimidating, teachers and coaches should not be deterred from making Title IX complaints because of fear of retaliation. Indeed, because reporting incidents of discrimination is so vital to Title IX enforcement, the Supreme Court has held that Title IX's private right action encompasses suits for retaliation – see *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005). That means that institutions covered under Title IX are prohibited from terminating or otherwise discriminating against a teacher or coach because he or she opposed or protested sex discrimination.

Though the statute of limitations within which you must bring a Title IX retaliation claim varies by state, all Title IX retaliation complaints require proof of three elements that teachers or coaches considering filing a complaint should be aware of. Stated simply, these elements are:

1. Protected activity
2. Adverse action
3. Causation

Protected Activity

To make a Title IX retaliation claim, a plaintiff must first show that she engaged in "protected activity." Protected activity refers to opposition or protests to statutorily prohibited conduct. Because Title IX prohibits sex discrimination, a plaintiff engages in protected activity under Title IX when she protests or opposes sex discrimination.

"Sex discrimination" under Title IX has been interpreted broadly to include a wide range of unequal treatment of an individual because of his or her sex. Though Title IX does not delineate any specific type of protestation or opposition required to constitute protected activity, the plaintiff's complaint must, at a minimum, be clear enough to put the covered institution on notice that he or she is complaining about sex discrimination against herself or her students.

While not exhaustive, common examples of sex discrimination that teachers or coaches often encounter are (i) sexual harassment, of both students and teachers, (ii) unequal treatment of faculty

members in the terms, conditions or privileges of employment because of her sex, and (iii) unequal treatment of student athletes or coaches because of sex, to name a few.

When a teacher or coach seeks to protest or oppose sex discrimination, the clearest form of protected activity is a formal written complaint alleging sex discrimination lodged with the covered institution's human resources department or administration. While such a complaint is probably the most effective way to communicate concerns regarding sex discrimination to the covered institution, such a formal complaint is not required. Other acts that courts have found to constitute protected activity under Title IX include:

- Participation in the report and/or investigation of an allegation of sexual assault or sexual harassment by a student or faculty member
- Oral and/or written complaints to human resources, supervisors or other officials with authority to act alleging differential treatment in employment – such as disparate allocation of resources, teaching assignments, funding and compensation – based on sex
- Oral and/or written complaints to human resources, supervisors or other officials with authority to act alleging differential treatment of male or female sports teams – such as disparate treatment in resources, funding, coaching, scheduling and publicity – because of sex
- Oral and/or written complaints to human resources, supervisors or other officials with authority to act alleging retaliation against another student or faculty member because the student or faculty member opposed or protested gender discrimination.

Adverse Action

To make a Title IX retaliation claim, a plaintiff must next show that she suffered an "adverse action." To satisfy this element, a plaintiff must identify a materially adverse action, which courts define as one that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination" – see *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53, 68 (2006).

As a general rule, a material adverse action produces injury or harm. Typically, therefore, tangible employment actions – such as a termination or demotion – will almost always constitute actionable adverse action. Other less tangible adverse actions that may (but not always) be actionable include transfers to an objectively worse position, decreased pay and poor performance ratings. Vague criticisms, stray remarks and petty slights are generally not considered sufficient to constitute a materially adverse action.

Causation

Finally, to make a Title IX retaliation claim, a plaintiff must show "causation." Until recently, most courts applied the "motivating factor" causation standard from Title VII retaliation cases to Title IX retaliation cases. This standard only required a plaintiff to show that her protected activity was a motivating factor in the adverse actions against her. In 2013, however, the U.S. Supreme Court dispensed with the "motivating factor" standard for Title VII retaliation cases and held that Title VII retaliation claims should be governed by a "but for" causation standard – see *Univ. of Tex. Southwestern Med. Ctr. v. Nassar,* 133 S. Ct. 2517 (2013). The "but for" standard is more demanding than the "motivating factor" standard and requires a plaintiff to show that the employer would not have taken the adverse actions against her but for her protected activity.

Though courts continue to agree that the Title VII analytical framework for retaliation claims applies to Title IX retaliation claims, there is disagreement over whether the Title VII "but for" standard applies in the Title IX context. Some courts have concluded that *Nassar* does not extend to Title IX claims and held that a Title IX plaintiff must merely show that the covered institution took the adverse action "because of" the plaintiff's protected activity. A subset of these courts have concluded that the "because of" standard simply requires the plaintiff to show that the protected activity and adverse actions are "not completely unrelated." Other courts have acknowledged the disagreement over the

appropriate causation standard but have declined to rule on the issue one way or the other. And at least one district court in the 6th Circuit has held that the "but for" standard applies to Title IX retaliation cases.

Regardless of what causation standard applies to Title IX retaliation cases, however, there are several pieces of evidence that are generally helpful to prove a causal link in retaliation cases. This evidence includes direct or circumstantial evidence of a retaliatory motive, such as emails or witness testimony memorializing the university's intent to fire you because of your complaints about sex discrimination; short temporal proximity between the protected activity and adverse action; and other pieces of circumstantial evidence suggesting an improper motive, such as deviations from internal disciplinary processes or increased scrutiny or hostility following the protected activity.

Continuing to Rely on Title IX

In sum, teachers and coaches play an integral role in Title IX's enforcement scheme as their position in the classroom affords them a unique position to identify discrimination and bring it to the attention of appropriate administrators. Indeed, the Supreme Court has stated that "sometimes adult employees are 'the only effective adversar[ies]' of discrimination in schools" – see *Jackson,* 544 U.S. at 181.

While allegations that an educational institution is engaged in some form of sex discrimination against its students or faculty is inherently provocative, Title IX's enforcement scheme depends on individual reporting from individuals like teachers and coaches. Fortunately, the law acknowledges the important role that individual reporting in this context plays and provides critical protections against retaliation for teachers and coaches who choose to speak out about sex discrimination at the educational institution where they work.