Administration & Supervision Program
Department of Education
University of New Hampshire

Policy Brief #11-03
December 2011

Title IX's Deliberate Indifference Standard and the Sexual Abuse of Students: A Trust Betrayed

Todd A. DeMitchell
Professor, Department of Education
Lamberton Professor, Justice Studies Program
University of New Hampshire

Title IX's Deliberate Indifference Standard and the Sexual Abuse of Students: A Trust Betrayed[1]

The worst sin towards our fellow creatures is not to hate them, but to be indifferent to them; that is the essence of inhumanity.

George Bernard Shaw, *The Devil's Disciple*

Our discussion is set against a backdrop of the Penn State scandal involving the sexual abuse of children by those to whom they have given their trust only to be violated.[2] While what happened at Penn State is probably not a Title IX case, the ethics of Title IX are brought to mind. Did the Penn State coaches and administrators act with deliberate indifference to the abuse of a child, or to phrase it differently, did they act vigorously to make a difference? This Policy Brief explores the standard of protection afforded to students under Title IX for their sexual abuse perpetrated by an educator and offers a few suggestions for what educators can to protect the trust that has been given to them. We will begin by putting a human face on the issue.

THE ABUSE OF A STUDENT BY A TRUSTED TEACHER

Jane Doe was 14 years old. She had a reputation as a good student. Jane Doe also played soccer for her high school where Jeremy Green was an assistant coach. A couple

---

[1] The term " A Trust of Betrayed" is borrowed from the title of a three-part Series Special Report published by EDUCATION WEEK (Dec. 2, 1998, Dec. 9, 1998, Dec. 16, 1998) that explores when educators cross the line of professionalism and sexual abuse their students.

[2] *See, e.g.*, Bill Chappell, *Penn State Abuse Scandal: A Guide and Timeline*, NPR (Nov. 17, 2011) available at http://www.npr.org/2011/11/08/142111804/penn-state-abuse-scandal-a-guide-and-timeline; Huffington Post, *Penn State Scandal* (Nov. 19, 2011) available at http://www.huffingtonpost.com/news/penn-state-scandal.

of months into the school year Jane told her health teacher that Green made her feel uncomfortable because of the way he looked at her and his question about whether she had a boy friend who could be his competition. In addition, Green called her at home.[3]

The teacher reported the conversation to the principal who called Jane Doe into his office to discuss the concern. Jane admitted that Green had called her at home and had paged the numbers "69" into her beeper. In addition, Green told Jane that he had had a relationship with a former student. She further told the principal that Green had proposed a bet, which would require her to kiss him if she lost the bet.

At a meeting with Green, the principal and the assistant principal, Green admitted to behaving inappropriately. Green was told to remain professional with Jane Doe and the other students and to not talk about his private life. Green acknowledged the directive.

Soon after, Jane Doe's parents complained to the principal following an incident in which Green invited Jane Doe to get a soft drink. Once in his car he brushed his hand against her bare knee and thigh. A memo was developed defining the appropriate boundaries for relationships with students. No reprimand was given, no attempts to monitor Green's behavior toward Doe on campus were formulated, and no follow-up was initiated with Jane Doe. Neither the principal nor the assistant principal "referred the matter to officials, child and family services, or any police or sheriff's department."[4] Up to this point Jane Doe, confiding to her head soccer coach that she still considered Green to be a friend even though she acknowledged that she felt that Green was pursing her

[3] *Jane Doe A. v. Green*, 298 F.Supp. 2d 1025 (D. Nev. 2004).
[4] *Id.* at 1029.

sexually and that she was afraid that Green would "make her do something that she did not want to do."[5]

In December, at a potluck held off campus at the head soccer coach's home Green and Doe kissed for the first time. They started meeting before school, after school, between classes, and Green would have the campus monitor pull Doe out of class where they would meet behind Green's closed and locked classroom door. Once behind the locked door, Green and Doe would kiss and fondle.[6] Doe also started sneaking out of her house at night to meet Green. Soon their relationship turned from kissing and fondling to a sexual relationship.

In February, the campus monitor reported to the school authorities that Green and Doe were having sex. The police were called. In May, Green pled guilty to sexual seduction and to open and gross lewdness. Green was order by the court to have no contact with Jane Doe. However, Doe and Green continued their relationship for two months until the police caught them together in Green's car. Green was sent to jail[7] and Jane Doe brought suit against the school district under Title IX.

The federal District Court of Nevada on the defendants' Motion for Summary Judgment found that a reasonable jury could conclude that Doe's teachers and her father's reports are "sufficient to establish acts of harassment of which school officials had actual notice."[8] Similarly, Judge Hicks held that the reasonable jury could find that the school officials acted with deliberate indifference to the notice of harassment/abuse.[9]

---

[5] *Id*. at 1028-9.
[6] *Id*. at 1030.
[7] Green was sentenced to a maximum of sixty months to a minimum of 24 months. *Id.*
[8] *Id.* at 1034.
[9] *Id.* at 1036.

Consequently, the defendants' Motion for Summary Judgment dismissing the Title IX claim was denied. Jane Doe would have her day in court.

Jane Doe's experience is not the norm for student-teacher relations. The great majority of our educators keep their trust with their students. Education is one of the great helping professions. "It is founded on a trust given by society and parents that the well being of children will be primary and the best interests of students shall be served by the actions of those in the profession."[10] However, that trust is too often broken and we cannot allow that to stand.

PROTECTING THE TRUST OF STUDENTS

Reform efforts that target student test scores, value-added modeling for teacher effectiveness and provide for merit pay but do not make the classroom a more secure place for children make a false promise of improvement. Efforts that focus on improving the workplace for adults but neglect student safety and well-being offer a vain hope of improving our schools in any meaningful way.[11] A safe school for children is not a desired goal it is a mandatory condition for learning.[12]

---

[10] Todd A. DeMitchell, *The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students,* 2002 B.Y.U. EDUC. AND L. J. 17, 49 (2002).

[11] TODD A. DEMITCHELL & RICHARD FOSSEY, THE LIMITS OF LAW-BASED SCHOOL REFORM: VAIN HOPES AND FALSE PROMISES 100-104 (1997). *See, also* Todd A. DeMitchell, *Student to Student Sexual Harassment and Title IX: A Conflict in the Federal Courts*, 5 INT'L. J. OF EDUC. REFORM 496, 504 (1996) ("No student should have to run a gauntlet of abuse in order to attend school. . . . If we do not value our students and their well-being at school, nothing else is of sustainable value in our schools.").

[12] *See* Cary Silverman, *School Violence: Is It Time to Hold School Districts Liable for Inadequate Safety Measures?* 145 Ed. Law Rep. 535, 553 (2000) ("The public expects schools to provide a safe haven that takes the place of parents during school hours, protect their children, and provide their children with a proper learning environment.").

In 2007, the Associate Press conducted a seven-month investigation into allegations of sexual abuse of students perpetrated by educators.[13] Over a five-year period (2001-2005) across the fifty states, they found 1,440 cases in which students suffered abuse at the hands of educators.[14] The report found that the abusers were "often popular and recognized for their excellence and, in nearly nine of 10 cases, they're male."[15] The report summed their findings writing, "[s]tudents in America's schools are groped. They're raped. They're pursued, seduced, and they think they're in love."[16]

TITLE IX AND SEXUAL ABUSE

Congress passed Title IX as part of the Education Amendments of 1972. It was enacted after extensive hearings by the House Special Subcommittee on Education in 1970 revealed pervasive discrimination against women with respect to educational

---

[13] Martha Irvine & Robert Tanner, *Sex Abuse a Shadow Over U.S. Schools*, EDUC. WEEK (Oct. 21, 2007) http://www.edweek.org/ew/articles/2007/10/24/09ap-abuse.h27.htm. For other studies of the sexual abuse of students, *see* U.S. Department of Education, Office of the Under Secretary (prepared by Charol Shakeshaft), EDUCATOR SEXUAL MISCONDUCT: A SYNTHESIS OF EXISTING LITERATURE (2004); American Association of University Women, HOSTILE HALLWAYS (2001).

[14] *Id.*

[15] *Id.* However, the sexual abuse of students is not just perpetrated by male teachers. A number of high profile female teacher sexual abuse cases were reported on early in the last decade. For example, the following are high profile cases involving female teachers, sexually abusing their students: Stacy Shuler (Kevin Dolak, *Ohio Gym Teacher Jailed for Sex With Students*, GOOD MORNING AMERICA (Oct. 28, 2011) http://www.gvglass.info/papers/tcheval.html; Pamela Turner (Colin Fly, *Teacher's Image Shattered by Teen Sex Allegations*, HERALD SUNDAY (Portsmouth, NH) C2 (Feb, 13, 2005); Debra Lafave (Mitch Stacy, *Teacher Pleads Guilty in Student Sex Case*, THE BOSTON GLOBE A19 (Nov. 23. 2005); and Mary Kay Letourneau (Erin Van Bronkhorst, *Teacher: Baby Born of Love for Pupil, 13,* THE BOSTON GLOBE A12 (Aug. 15, 1997));. *See, also* Joe Stennis, Jr., *Equal Protection Dilemma: Why Male Adolescent Students Need Federal Protection from Adult Female Teachers who Prey on Them*, 35 J. L. & EDUC. 395 (2006).

[16] *Id.*

opportunities.[17] Title IX seeks to avoid the use of federal funds to support discriminatory practices; it seeks to "rid educational institutions of sex discrimination."[18] Second, "it wanted to provide individual citizens effective protection against those [discriminatory] practices."[19] The Supreme Court held that Title IX contains an implied, enforceable private right of action.[20] The law provides that "[n]o 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 educational program or activities receiving Federal financial assistance."[21] Thus, the law applies to virtually every school district and college in the United States because of the pervasiveness of federal support.

Prior to 1992, there had been few court cases involving sexual harassment of students under Title IX. However, the landscape of Title IX changed in 1992. In the seminal Title IX case, *Franklin v. Gwinnett County Public Schools*, the Supreme Court clarified the range of damages available under Title IX. In this case a female student sued a Georgia school district for sexual harassment. According to the student, the teacher had;

> engaged her in sexually-oriented conversation. . . forcibly kissed her on the mouth in the school parking lot . . . telephoned at home and asked if she would meet him

---

[17] 118 CONG. REC. 5804 (1972) (remarks by Sen. Bayh). According to Senator Bayh, Title IX's sponsor, the statute was intended to:

> provide for the women of America something that is rightfully theirs--an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work

[18] KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC LAW 368 (5TH ed. 2001).

[19] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

[20] *Id.* at 709.

[21] 20 U.S.C. §1681(a) (2000).

> socially . . . and . . . on three occasions . . . interrupted a class, requested that the teacher excuse [her] and took her to a private office where he subjected her to coercive intercourse.[22]

The Supreme Court argued that Title IX placed on the Gwinnett County Schools a duty not to discriminate on the basis of sex and "when a supervisor sexually harasses a subordinate because of the subordinate's sex that supervisor discriminates on the basis of sex."[23] Following this line of reasoning, in a strongly worded statement about the protection of Title IX in our schools, the Justices, in which there was no dissenting opinions, stated: "We believe the same rule should apply when a teacher sexually harasses and abuses a student."[24] A federal district court in Texas captured this position writing, "Without question, one of the core objectives of Title IX is to provide relief to young girls sexually abused by their male teachers receiving federal funds."[25] While the authorizing language of the Title IX statute did not specifically grant that money damages were an available remedy, the High Court concluded that a monetary damage award was possible under Title IX.[26]

The *Gwinnett* case was followed six years later when the Supreme Court handed down the ruling in *Gebser v. Lago Vista Independent School District* on June 22, 1998.[27] The facts of *Gebser* are surprisingly close to the facts discussed above in *Jane*

---

[22] *Franklin v. Gwinnett Cnty. Pub. Sch*., 503 U.S. 60, 63 (1992).
[23] *Id.* at 75.
[24] *Id.*
[25] *Leija v. Canutillo Indep. Sch. Dist*., 887 F.Supp. 947, 951-52 (W.D. Tex. 1995).
[26] This holding was consistent with a prior decision in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) which upheld the theory that Title IX, in addition to being enforceable through administrative regulations, is also enforceable through an implied private right of action.
[27] 524 U.S. 274(1998).

Doe; a female student was pursued by an educator who had groomed her for seduction and abuse. The educator used the power of his position to gain and then betray the trust of the student. The Court in a five to four decision held: "damages may not be recovered for teacher-student sexual harassment in an implied private action under Title IX unless a school district official who, at a minimum, has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct".[28]

The Court concluded that the express remedial scheme under Title IX is predicated upon notice to an "appropriate person." An appropriate person, the Court defined, was one who "has authority to address the alleged discrimination and to institute corrective action on the recipient's behalf."[29] In addition, after an appropriate school official has received actual knowledge of the sexual abuse, the response to the complaint must amount to deliberate indifference in order for the plaintiff student to prevail. In other words, the school official after receiving notice of the abuse "refuses to take action to bring the recipient into compliance" is, therefore, deliberately indifferent.[30]

The twin triggers of protection of actual knowledge and deliberate indifference are high standards to meet as the dissent noted writing, "the Court ranks protection of the school district's purse above the protection of immature high school students."[31] Similarly, the Eighth Circuit Court of Appeals in *Schrum v. Kluck* characterized deliberate indifference as a "stringent standard of fault."[32]

---

[28] *Id*. at 277.
[29] *Id*. at 290.
[30] *Id.*
[31] *Gebser*, 524 U.S. at 306 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting).
[32] 249 F.3d 773, 780 (8th Cir. 2001).

THE APPLICATION OF DELIBERATE INDIFFERENCE AND THE SCHOOL ADMINISTRATOR

In a study of federal court of appeals decisions related to the sexual abuse of student perpetrated by educators, the authors found that school districts won the cases at an overwhelming level.[33] Of the 28 reported cases, school districts won 24 of the cases. The stereotypical case from this research of sexual abuse by a school employee generally involves a male high-school teacher or coach who has an exploitive sexual relationship with a female high school student. However, of the 28 cases reviewed, only 14 involved male educators and female students. Ten involved allegations of sexual misconduct by a male teacher against male students.[34] In three cases, plaintiffs alleged that a female educator sexually harassed or abused a female student, and one case involved a male student and a female teacher. In other words, 13 cases involved allegations of same-sex abuse, while 15 cases dealt with allegations of heterosexual abuse. Three of the four cases in which the student prevailed the sex of the student was female and her perpetrator was male. The one same sex case was male and male.

Most cases concerned allegations of abuse in a high school (17), while seven cases were set in elementary schools, and three cases involved charges of sexual misconduct in a middle school or junior high school. Of the four cases in which the student plaintiff prevailed, three occurred in high schools and one occurred in an elementary school.

---

[33] Richard Fossey & Todd A. DeMitchell, *Title IX's 'Deliberate Indifference' Standard for Determining School Liability Under Title IX When Students Are Sexually Abused by School Employees: How Effective Is it in Encouraging Vigilance by School Officials?* Education Law Association, Chicago, Illinois November 2011.

[34] The Supreme Court has found same-sex harassment claims actionable under Title VII. *Oncale v. Sundowner Offshore Servs*., 523 U.S. 75, 79 (1998).

Research literature has determined that teachers in coaching positions, band directors, and other teachers in extracurricular activities figure prominently in sexual abuse cases against students. Their findings are in harmony with the literature. Nine of the cases involved educators in coaching, band director, music teacher, or other extracurricular job. Nevertheless, a majority of the cases dealt with sexual abuse allegations by classroom teachers.

The cases reflect the challenge that administrators face when investigating allegations of sexual abuse. Generally both the perpetrator and the victim conspire separately to keep the truth out of the investigation. For example, in *Sauls v. Pierce County School District* the administration interviewed both the teacher and the student several times, discussed the allegations of potential sexual abuse with the police, continually monitored the teacher, contacted the parents of the alleged victim, and warned the teacher about appropriate behavior with her students.[35] Even after a substitute teacher found a note from the male student admitting the relationship and extorting $100, the return of his cell phone, and sex at a specific time, the teacher continued to deny the sexual abuse.[36] The court found that the appropriate officials did not act with deliberate indifference once receiving actual notice of the abuse.

What can we do so as to act deliberately to make a difference?

1. Abusive educators often 'groom" their students by treating them in a special manner: starting slowly and building their trust and increasing their attachment and vulnerability. Signs of grooming may include inordinate amounts of attention being paid to a student, sexual comments and innuendos directed at students, pulling the student

[35] 399 F.3d 1279, 1282-83.
[36] *Id.* at 1284.

from classes for private meetings, giving gifts, inappropriate touching (sitting on the teacher's lap, hugging, stroking, etc.). Not all individual acts that may constitute grooming in the aggregate are grooming acts. However,

- We must look for the pattern of behavior and be willing to ask the educator about his/her behavior.[37]
- We must engage our faculty about defining, establishing, and enforcing professional boundaries.
- Consider adding a professional relations with students section to your faculty handbook.

2. Both the student and the educator are motivated by a desire to keep their sexual relationship a secret. Therefore, they are often not honest or forthcoming in interviews. For example in *Baynard v. Malone*[38] the abused student did not finally come forward until the student had graduated and gone on to college that he brought a Title IX suit.

School officials cannot just rely on the bald statement that nothing is going on. As seen in the *Sauls* case above the school authorities did not just wrap up their investigation at the first insistence that nothing was going on. They kept monitoring the situation. This did not happen in the *Jane Doe* case. However, the school administration in *Frye v, Board of Education of County of Ohio* responded appropriately once officials received notice of abuse.[39] The school district investigated the allegations, met with the district's counsel, removed the student from the classroom, and placed the teacher on a behavior

---

[37] In *J.M. v Hilldale Indep. Sch. Dist. No 1-29*, 397 Fed. Appx. 445 (10th Cir. 2010) the Tenth Circuit Court of Appeals upheld the judgment for a student stating, evidence showed that student reported to assistant principal that instructor was in hotel room with student behind a closed door and that assistant principal reported this to principal. No investigation was undertaken. Such a lack of response, a reasonable jury could conclude, "was not reasonable." At 24-5.

[38] 268 F.3d 228 (4th Cir. 2001).

[39] 1999 U.S. App. LEXIS 759 (4th Cir. 1999)

modification program.[40] A thorough investigation protects the student from further abuse and it protects the educator from wrongful accusations.

3. Too often a school is more concerned with the reputation of the school than the abuse of a student. The "blind eye" approach to reports of suspected sexual abuse by educators is sometimes the first response. These schools fail the question of "whom do we protect, the student or the school?" For example in *Gonzalez v. Yselta Independent School District*[41] a school district instead of reporting a teacher's suspected child abuse merely moved the teacher to another school or in *Daly v. Derrick*[42] in which the faculty of an alternative school negotiated with three female students who were sexually abused by one of their teachers at the school to move the teacher in exchange for the students' silence on the sexual abuse. The educators considered the school more important than their students. In the long run, as the Penn State scandal is demonstrating, the institution is best protected by a thorough and prompt investigation. It is hard to reclaim a damaged reputation.

It bears stating that even when a school official has acted appropriately in response to notice of alleged abuse, the standard is not that the abuse has been stopped; as with negligence, we do not insure the safety of students.[43] For example the Fifth Circuit Court of Appeals held that a principal investigated and erroneously concluded that the student was lying about the abuse.[44] The principal did not respond with deliberate indifference to the notice "Officials may avoid liability under a deliberate indifference

---

[40] *Id*. at *5
[41] 996 F.2d 745 (5th Cir. 1993).
[42] 230 Cal. App. 3d 1349 (1991).
[43] *See* TODD A. DEMITCHELL, NEGLIGENCE: WHAT PRINCIPALS NEED TO KNOW ABOUT AVOIDING LIABILITY 98 (2007).
[44] *Doe v. Dallas Indep. Sch. Dist.* 220 F.3d 380 (5th Cir. 2000).

standard by responding reasonably to a risk of harm, 'even if the harm ultimately was not averted.'"[45]

CONCLUSION

Children must not be treated with indifference by the adults in their lives. This should be an uncontested truth. There is an "immense trust placed in school employees to keep students safe and to maintain an environment and relationship conducive to learning."[46] A loathsome of act of an educator is to act with indifference to the welfare of a student when harm is deliberately visited upon the student through sexual abuse—the educator could have acted but chose not to. Laws, rules, and regulations are necessary but they are not sufficient. Creating a school culture that protects students first is critical. Communicating and enforcing clear, unambiguous statements about maintaining a professional relationship with students is necessary. Preventing harm and responding to early signs such as grooming is a challenge we must meet. Our goal must be zero indifference to our students, and zero tolerance for the sexual abuse of our students.

[45] *Id.* at 384.
[46] *Jane Doe A. v. Green*, 298 F.Supp. 2d at 1038 (asserting that engaging in sexual relations with students is an "extreme" violation of this trust.). *Id.*