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Title IX often used to force colleges to investigate sexual assaults

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When it was signed into law in 1972, Title IX aimed to give women the right to join sports teams and clubs that were long reserved for men. Because of its broad scope -- forbidding gender discrimination of any type in schools -- the law more recently has anchored a movement to prevent sexual harassment and assault on college campuses across the country.

The public feud between Ohio State University and its fired marching-band director goes back to one late-spring day this year and a mother's visit to campus.

In a meeting with the OSU Office of University Compliance and Integrity, the woman said she was concerned about what she called a "sexualized" culture in the marching band. She gave details about a midnight practice in which some students wore only underwear. She described oaths of secrecy.

She knew this because her daughter was in the band - and because her daughter was among three women since 2011 who had reported being sexually assaulted while in the band or a related pep band.

The meeting effectively pushed a big red button that awoke complex machinery involving school policies and federal rules that regulate how schools are required to respond to sexual misconduct. In legal parlance, she had filed a Title IX complaint.

That complaint ultimately led to the firing of band director Jonathan Waters. But the case also highlights how the rapid evolution of the federal Title IX law has made it both a boon and bane, depicted by some as a civil-rights shield and

by others as a scourge.

When it was signed into law in 1972, Title IX aimed to give women the right to join sports teams and clubs that were long reserved for men. Because of its broad scope -- forbidding gender discrimination of any type in schools -- the law more recently has anchored a movement to prevent sexual harassment and assault on college campuses across the country.

The U.S. Department of Education's directive to schools explains how they must respond to complaints of sexual misconduct under Title IX, and the rules also direct students who believe that their cases were mishandled to file complaints with the department, which can penalize schools.

Since 2012, complaints to the department have increased more than fivefold, reaching 96 during the past year amid heightened pressure from students, parents and government officials, including President Barack Obama. Students have been the driving force in a movement to quash tolerance for sexual violence on campuses.

Large groups of students at Harvard and Columbia universities filed Title IX complaints with the federal government this year. Students have organized groups to help others file complaints. The U.S. Department of Education is now investigating 91 colleges for potential violations of Title IX related to sexual violence, up from 55 when the department first released the list in May.

Colleges have hired extra workers to handle rising numbers of complaints on their own campuses. Denison University in Granville, which is under a federal Title IX investigation, recently moved its director of security and safety to a full-time job as Title IX investigator.

But critics say that Title IX rules are too rigid for cases in which the facts are gray at best.

Colleges are required to investigate any sexual complaint immediately, sometimes tripping over separate police investigations in the process. The rules recommend a 60-day deadline to finish school investigations, but there are no guidelines on when to make an exception. As a result, most schools see the recommendation as a requirement that spurs them to act fast.

“Where we begin to be prescriptive is in the guidance relative to the investigation of Title IX issues,” said Rick Amweg, the director of campus safety and security at the Ohio Board of Regents. “That’s very prescriptive - I think overly prescriptive in some cases.”

After the Waters firing, OSU President Michael V. Drake said the university had been under pressure to finish the investigation and resolve any problems within 60 days. In a statement released by the university last week, it also said the firing was simply the right thing to do.

“Mr. Waters himself has repeatedly admitted that the band’s culture was ‘in dire need of change,?’” OSU spokesman Chris Davey wrote in the statement. “We agree.”

But Waters and his backers have described the response in the same language that has been used across the country in other cases. They say it was a rush to judgment.

When an OSU administrator called Waters last spring and told him that someone had filed a Title IX complaint against him, he didn’t know what that meant for him, Waters said. Until then, he had seen the law used mostly to address discrimination against women in college sports.

During that phone conversation, he learned no other details about the complaint, he said. For weeks, no one followed up to explain. In two interviews with university officials, Waters said, he was told only about an investigation into his handling of one assault in the band, and he was later cleared of that complaint. He wasn’t told, though, about the broader investigation into the band’s culture.

“I didn’t know until after I was fired that I was being investigated,” Waters said. “I understand the pressure that universities are under. It just seems that Ohio State, this large institution, was advised by a few people who had an opinion, and it was a rush to judgment, I fear. And the damage was done.”

Waters and others across the country have complained that schools, in an effort to comply with Title IX, trampled their rights or falsely accused them of wrongdoing. In a federal lawsuit against Ohio State, Waters says that OSU stripped him of due-process rights required by Title IX rules.

“If the law is applied, then it needs to be applied fairly,” said David Axelrod, an attorney for Waters, adding that “this is not just an Ohio State problem.”

Other critics have said that colleges make the process confusing for students who are accused of wrongdoing, often giving little information about accusations against them. And once a case reaches a campus judicial board, accused students sometimes are forbidden to introduce new evidence, question witnesses and, until recently, bring an attorney to hearings.

Some contend that Title IX makes it too easy for innocent people to be found responsible for serious offenses, especially as schools face increasing pressure to take a stand against sexual assaults.

“A fair and transparent process is missing in these cases,” said Eric Rosenberg, a Granville lawyer who has represented accused students in a half-dozen cases. “And as a result, these male students are being hung out to dry.”

In one case that was settled with Denison University this year, a male student was expelled from the school for sexual assault despite passing a polygraph test. The student was accused of sexually assaulting a female student in a cemetery, but the lawsuit says the school conducted a faulty investigation, barred the man from questioning witnesses and ignored key evidence.

Denison officials declined to talk about how the 2,200-

student liberal-arts school in Licking County handles Title IX cases.

Colleges are raising the bar higher, Rosenberg said, by going after students even after they leave. He represents a male student who was suspended from a private college in Maryland for misconduct. After a failed attempt to appeal the punishment, the student left the college. But later, he received a letter saying he was being investigated for a sexual assault that happened two years earlier.

The lawsuit says the school opened the inquiry as retaliation for the male student’s previous appeal.

“These are traumatizing accusations that can stay with them the rest of their life,” said Rosenberg, who also has represented women who have been victims of sexual violence. “There are a lot of overlapping issues with these cases and Title

IX issues.”

Another source of controversy is the standard of evidence that schools must use under Title IX to decide whether a student is responsible. The guidelines tell schools to use a “preponderance of evidence” standard, meaning they must decide that a student “more likely than not” committed the offense rather than the court standard of “beyond a reasonable doubt.”

“It’s like one one-hundredth of a percentage on one side. It’s almost imperceptible,” Andrew Miltenberg said of the preponderance standard. He is a New York City-based lawyer who has represented several students across the country who say they were falsely accused of sexual assault.

“When you change the standard of proof, these cases become very hard to defend, very easy to find in favor of the complainant, and it’s very difficult to challenge the decision,” Miltenberg said.

As the U.S. Department of Education investigates more schools for possible violations related to sexual violence, students on the other side of those accusations have been filing more lawsuits saying their rights were violated.

“Schools seem to be almost terrified to do anything but find against a young man,” Miltenberg said. “Anything short of that, and they’re misogynists or they’re not sensitive to victims’ rights.”

The emphasis on Title IX as a means to address sexual violence on college campuses came into public focus with a 2011 letter from the Department of Education to schools.

The “Dear Colleague letter,” as it has come to be known, spelled out that the Title IX prohibition against sex-based discrimination also applies to sexual harassment and violence. Colleges, the Education Department said, must respond to sexual-violence allegations in a “prompt, fair and impartial” way. They also must take steps to prevent harassment and violence.

That makes Title IX a “powerful tool” to lobby for change, said Dana Bolger, a graduate of Amherst College in western Massachusetts, who co-founded Know Your IX, a Title IX literacy and advocacy organization.

As a student at Amherst in 2011, Bolger reported to college officials that she had been raped by another student. But no one told her that she could pursue disciplinary action separately from the police, Bolger said. Instead, a dean urged her to take some time off until her attacker graduated.

Then she found out about Title IX.

“I remember printing it out at the library and marching into the offices of administrators and pointing to specific passages that showed what my school was in violation of,” Bolger said. “It was validating for us as students and survivors to be able to point to something.”

One reason assault survivors have embraced Title IX as an important tool is because it gives them options that can be personalized to their own circumstances. Under Title IX, a student who is sexually assaulted by a classmate can request a class change or a housing move. The school can offer counseling or arrange for a student to withdraw from a class without penalty, among other accommodations for victims of sexual violence.

“Title IX provides civil protection in addition to the criminal-justice system, and sometimes those accommodations can be the support that a survivor on a campus is looking for,” said Katie Hanna, executive director of the Ohio Alliance to End Sexual Violence, based in Cleveland.

Bolger said enforcement of Title IX is improving, and the Department of Education is becoming more transparent. For the first time this year, for example, it revealed the complete list of schools that are under investigation.

But she’s also frustrated that investigations sometimes take years and that the government rarely punishes universities found in violation. The only punishment the Department of Education can levy for violating Title IX is a complete withdrawal of federal money; that penalty has never been used.

Fines based on the size of a college’s budget would punish schools without hurting students, too, Bolger said. There are proposals in Congress now for that type of punishment.

In Ohio, state leaders have realized that schools, especially smaller colleges, struggle to follow Title IX.

The chancellor of the Ohio Board of Regents convened the first statewide meeting of Title IX coordinators at public universities. Those are the people whose job is to broadcast students' rights on campus and handle complaints. But that often isn't their only job.

"Some of the folks in the room said, 'Hey, I'm the institution's Title IX coordinator; I'm also the director of human resources; I'm also the hearing officer,??'" said Amweg, of the Regents.

The group plans to meet regularly to discuss how larger schools can help smaller ones and how colleges can work better with police as they investigate the same offenses.

"We found a lot of common ground," Amweg said, "and a lot of common problem areas."

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