



Rape Culture on Campus and the Demise of Title IX

By Kathleen Balthrop Havener

Seventy-eight women are raped every hour in the United States. A woman is beaten every 11 seconds. “Domestic violence is the most common cause of nonfatal injury to [American] women,” according to the *New England Journal of Medicine* (<https://tinyurl.com/rdloxn2>). Partners and ex-partners commit approximately one-third of all murders of women in this country. Experts estimate that hundreds of thousands of rapes occur every year, and statistics prepared by the Rape, Abuse, and Incest National Network (<https://www.rainn.org>)

suggest that about 300 out of every 1,000 sexual assaults are reported to authorities. Of those 300, only 11 are referred for prosecution, and seven result in felony convictions.

On college and university campuses, reports of sexual crimes against women fall to about 10 percent. Meanwhile, studies indicate that one in five women will be attacked or abused on campus during her college years (<https://tinyurl.com/smsp7ma>).

This is the milieu in which we live. It’s how we live. For women, this is also what we live with. All. The. Time.

SEXUAL ASSAULT SCANDALS AND STUDENT ATHLETES

The first known disclosure by a young girl that Larry Nassar had sexually abused her occurred in 1988. The victim was only eight years old, and Nassar had not yet attended medical school. Over the next three decades, as a trainer, physician, and eventually team doctor for Michigan State University and USA Gymnastics, he committed thousands of acts of sexual assault against as many as 500 girls and young women, including Olympic champions and members of a succession of U.S. national gymnastics teams.

Despite numerous—even

jorgantomo/Getty Images plus via Getty Images

hundreds—of reports of Nassar’s abuse to representatives of Michigan State University, the U.S. National Olympic Committee, and USA Gymnastics, Nassar’s career not only survived but thrived while he went on committing criminal assaults against children and young women in his medical care.

When he realized that police were close to arresting him, Nassar took at least one of his computers to be sanitized and tried to dispose of other hard drives. Police learned nevertheless that he was also an avid collector of child pornography. Investigators discovered more than 37,000 images and videos. Nassar even filmed and photographed some of his own acts of sexual abuse and sexual assaults of young women and girls.

Nassar’s career as the physician to elite athletes and Olympic champions did not hit a bump—despite hundreds of reports against him—until the late summer and early fall of 2016 when the *Indianapolis Star* published a series of articles on sexual abuse in gymnastics. The *Star*’s reporting spurred first one athlete, then another and another, to come forward to report Nassar’s abuse. Notably, the *Star*’s investigation was directed not specifically at Nassar but at USA Gymnastics’ failure to report allegations of sexual misconduct by its coaches against athletes.

Throughout the time he was committing his crimes, Nassar repeatedly justified his abuse and assault to colleagues and other medical professionals at conferences, claiming that he was manipulating young gymnasts’ “pelvic floor” to alleviate pain, stretch their hamstrings, and treat various sports injuries.

Astonishingly, he conducted *all* these thousands of “procedures” without gloves. When he spoke before groups, he gave a Power-Point presentation that contained a video with scrolling text that read:

These are the voyages of the “Sports Pelvic Floor” specialist / Whose life-time mission . . . to boldly go where no man has gone before (in most of our young gymnasts—hopefully).

It is impossible to imagine a physician or sports trainer seeing such a video and not at least wondering whether something is wrong about the presenter’s relationships with the athletes.

Nassar is now in a federal penitentiary—sentenced to between 40 and 175 years by several courts—and will almost certainly die in prison. That Nassar was able to act with impunity for decades, however, until the *Star* publicly exposed his conduct, is worse than tragic. Countless adults who should have been protecting Nassar’s victims must have ignored multiple red flags—indeed, flashing red warning lights—for Nassar to have harmed so many young women and girls.

As a result of the revelations about Nassar’s ongoing abuse, numerous officials of Michigan State, USA Gymnastics, and even the U.S. National Olympic Committee were either terminated or forced to resign. In May 2018, Michigan State agreed to pay a \$500 million settlement to settle numerous lawsuits by survivors of Nassar’s abuse. The U.S. Department of Education (DOE) levied a record fine of \$4.5 million against Michigan State in September 2019. (For more on the

case, see <https://tinyurl.com/yxxtq2aa> and <https://www.nassarinvestigation.com/en>).

TITLE IX

On June 23, 1972, President Richard Nixon signed into law Title IX of the Education Amendments of 1972, codified at 20 U.S.C. §1681 et seq. The law was an expansion of the Civil Rights Act of 1964. While the 1964 Act ended discrimination in various fields based on race, color, religion, sex, or national origin in the areas of employment and public accommodation, it failed to address sex discrimination in education. (The 1964 Act prohibited discrimination in federally funded private and public entities including educational institutions, but—although it established protected classes for race, color, and national origin—Title IV did not include gender.) Along with its implementing regulations, 34 C.F.R. Part 106, et seq., Title IX intentionally filled that gap and prohibited discrimination in all federally funded educational programs.

Although Congress rejected the Tower Amendment, proposed by Congressman John Tower of Texas—which would have exempted collegiate athletics from Title IX—the publicity surrounding Tower’s proposal led to a misunderstanding that Title IX primarily or only addresses equity in education-associated sports. This widespread notion is mistaken. Although known for its impact on high school and collegiate athletics, the original statute did not even mention sports. Title IX provides:

No 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 education program or activity receiving federal financial assistance.

The law is meant to eliminate the infiltration of federal money in support of sex discrimination in education programs and to provide individuals effective protection against the harms such conduct causes.

“START BY BELIEVING”

For decades, the courts have identified sexual abuse and assault as forms of sex discrimination. In 2011, under President Barack Obama, the DOE’s Office for Civil Rights (OCR) issued policy guidance—known as a “Dear Colleague” letter—reminding schools of their obligation to redress sexual assaults as civil rights matters under Title IX, on pain of losing their federal funding (<https://tinyurl.com/w488y9g>). “Do not think it’s an empty threat,” Assistant Secretary of Education Catherine Lhamon warned a group of college administrators in August 2014.

The 2011 policy guidance also mandated a “preponderance of the evidence” standard and declared:

The “clear and convincing” standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for

violations of the civil rights laws, and are thus not equitable under Title IX. (*Id.*)

The 2011 policy guidance mandated a “preponderance of the evidence” standard.

The Obama administration took a further step in April 2015 when OCR, via another “Dear Colleague” letter, instructed each educational institution that received federal funding to designate a Title IX coordinator. That appointee was tasked with ensuring that everyone impacted by the operations of the institution—including students, parents, employees, and applicants—was aware of the rights that Title IX affords and that the institution and its officials comply with their legal obligations. “To be effective,” the letter declared, “a Title IX coordinator must have the full support of [the] institution. It is therefore critical that all institutions provide their Title IX coordinators with the appropriate authority and support necessary for them to carry out their duties and use their expertise to help their institutions comply with Title IX” (<https://tinyurl.com/revht4k>).

The University of Pennsylvania, among other schools, began training investigators and adjudicators of sexual misconduct complaints to “start by believing” complainants rather than to begin their efforts from a neutral position. It became commonplace to deny alleged

perpetrators access to the complaint, the identities of witnesses, and other evidence. Some commentators called the Obama administration’s policy guidance and its impact on educational institutions “overreacting.”

Whether instructing school officials to “start by believing” was an “overreaction” or misguided is, of course, open to question—in light of statistics and then-ongoing events.

MEANWHILE BACK AT MICHIGAN STATE

On March 24, 2014, during a medical appointment with 24-year-old former cheerleader Amanda Thomashow, under the guise of therapeutic treatment, Larry Nassar massaged his patient’s breasts and repeatedly touched her vagina. Despite Thomashow’s protests, he continued for an hour before she “had to literally stand up and push him off.” Distraught, Thomashow reported the incident to another university physician, who elevated her complaint to Michigan State’s Office for Inclusion. Michigan State opened a Title IX investigation, and—two months later—on May 29, 2014, Michigan State’s assistant director of its Office for Institutional Equity Kristine Moore, along with a university detective, interviewed Thomashow in what she describes as an interrogation. Thomashow said later to reporters, however, that she “thought she had gotten through to them.”

When Detective Valerie O’Brien interviewed Nassar, he vociferously defended his procedures and offered to perform the procedure on a volunteer officer.

[Nassar] touted his credentials in treating the pelvic

floor, which he described as an overlooked area by most physicians. He said that he has been called “the body whisperer” for his expertise and [explained his] Star Trek-themed slide in a PowerPoint presentation titled, “Pelvic Floor: Where no man has gone before.” (<https://tinyurl.com/trrm58o>)

Michigan State issued *separate* reports to Nassar and Thomashow. The report to Thomashow concluded:

We cannot find that the conduct was of a sexual nature. Thus, it did not violate the sexual harassment policy. However, we find the claim helpful in that it allows us to examine certain practices at the MSU Sports Medicine Clinic. (*Id.*)

The version communicated to Nassar stated:

We find that whether medically sound or not, the failure to adequately explain procedures such as these invasive, sensitive procedures, is opening the practice up to liability and is exposing patients to unnecessary trauma based on the possibility of perceived inappropriate sexual misconduct. In addition, we find that the failure to obtain consent from patients prior to the procedure is likewise exposing the practice to liability. (*Id.*)

Nassar’s version of the report suggested that his procedures be performed over clothes and

that patients be asked to provide consent. (Recall that Nassar did not even don medical gloves for his “treatments.”) Michigan State apparently overlooked that Nassar frequently performed his procedures on young girls who

Since 2017, DOE has rescinded more than 20 anti-discrimination policy guidelines.

could not legally consent to his treatment, regardless of its nature.

Most importantly, the university’s 2014 investigation into Larry Nassar’s conduct concluded with no action whatsoever against Nassar. He continued “to boldly go where no man has gone before” in the bodies of young women and girls until he was “outed” by the *Indianapolis Star* in 2016. Even as late as February 2018, precisely when a third criminal court was sentencing Nassar, Michigan State continued to maintain that no university official in the summer of 2016 believed the news reports that Nassar had committed sexual abuse. That Michigan State had covered up Nassar’s conduct, the university said, was “simply false.”

Given such results of a supposedly fair investigation, especially viewed against the backdrop of thousands of incidents of sexual misconduct by a single physician against hundreds of victims over three decades *after* the first disclosure by a child about Nassar’s assaults, to “start by believing” does not seem misguided.

A WRECKING BALL

In July 2015, well before the 2016 presidential election, South Carolina Senator Lindsey Graham was the first (to this author’s knowledge) to refer to Donald Trump as a “wrecking ball.” Senator Graham called Trump a wrecking ball to the Republican Party. In the same interview, Graham said, “If we do not reject this way of thinking clearly, without any ambiguity, we will have lost our way. If we don’t reject it, we’ve lost the moral authority . . . to govern this country” (<https://tinyurl.com/u292uzj>).

When Trump had been in office less than a year, *Time* magazine’s November 6, 2017, cover depicted Trump’s head as a cartoon wrecking ball, with the cover line “The Wrecking Crew” and the subheading “How Trump’s Cabinet Is Dismantling Government As We Know It.”

Without a doubt, President Trump’s DOE wasted little time in taking a wrecking ball to the Obama-era policy guidance on sexual assault at educational institutions. DOE’s September 22, 2017, “Dear Colleague” letter formally withdrew the “Dear Colleague” letter of April 4, 2011, and the April 29, 2014, “Questions and Answers on Title IX and Sexual Violence” previously issued by OCR. Indeed, since Trump took office, DOE has rescinded more than 20 policy guidelines on anti-discrimination laws put in place under the previous administration.

On November 29, 2018, by a Notice of Proposed Rulemaking (NPRM) published in the Federal Register, Secretary of Education Betsy DeVos officially unveiled DOE’s proposed

new regulations on sexual harassment at colleges and universities (<https://tinyurl.com/ycqo7boj>). As of this writing, the final rules are expected to be issued in the immediate future; they possibly will have been issued by the time this article is published.

Among other changes, the proposed rules would permit an institution to dispense with the “preponderance of the evidence” standard and apply a “clear and convincing evidence” standard—thus raising the bar for complainants to obtain relief after sexual abuse or assault.

Reactions to the NPRM have been pointed and critical. Brett A. Sokolow, the president of the Association of Title IX Administrators (ATIXA), predicts that the final rules will “rock our worlds”—referring to educational institutions. Sokolow anticipates court challenges and even possible intervention by Congress (<https://tinyurl.com/teo86tw>). Indeed, congressional intervention is more than a possibility. In December 2019, four Representatives introduced a bill in Congress that would bar the DOE from implementing the regulations on the grounds that they would have a chilling effect on survivors’ efforts to report sexual assaults and would provide inordinate protections to accused perpetrators.

In a January 30, 2019, letter to Assistant Secretary for Civil Rights Ken Marcus, the Leadership Conference on Civil and Human Rights and more than 40 civil rights organizations as co-signatories describe the proposed rules as “a cruel attempt to silence sexual assault survivors and deny them educational opportunities” (<https://tinyurl.com/vs86t44>). The Leadership

Conference warns that the proposed rules could lead schools to do even less to prevent and respond to instances of sexual violence. Critics say the proposed rules do, and the final rules likely will, disregard the broad harms caused by the prevalence of sexual violence in schools. To the extent that the proposed rules remain in the final regulations, they will make it more difficult for students to report abuse. The rules will permit, or even require in some cases, schools to ignore disclosures of sexual harassment or sexual assault. Others point out that the proposed rules would unfairly and purposely place a thumb on the scale of the investigation in favor of accused perpetrators and against survivors, resulting in harm to women and girls in educational institutions.

WHAT’S WRONG WITH THIS PICTURE?

It is impossible to reconcile the simultaneous narratives of Larry Nassar’s crimes against young women, facilitated by his position as a sports medicine specialist at a respected institution of higher learning, with DOE’s purposeful effort to render it substantially more difficult to prove that one has been the victim of sexual violence in an educational institution. While some commentators, including Sokolow, recommend that institutions continue to honor best

practices that were adopted as a result of—or even prior to—the Obama-era policy guidance, such practices will certainly not be required by the federal regulations.

At least one thing is certain. Under the new regulations, educational institutions will no longer “start by believing” the disclosures of victims of sexual violence. Unfathomable is that the new regulations were promulgated, and will likely be adopted, with conscious awareness of the countless victim impact statements provided in open court in the Nassar case, and a year after the #MeToo movement became mainstream.

When James Baldwin wrote, “It is the innocence which constitutes the crime,” he was referencing whites during the Civil Rights era who chose not to see, much less bear witness to, the violence and existential harm of racism. At this moment in our national history, it is no longer only the individuals turning a blind eye to the fundamental misogyny that permeates our culture who feel like the enemy. Now it’s the United States of America that is perpetuating rape culture.

Somehow, someday, we need to get back to a place where we can and will consciously “start by believing.” Indeed, to start by believing may be the most advisable position from the standpoint of real equity and justice. ■



Kathleen Balthrop Havener (kbh@cullenlaw.com) is an attorney at The Cullen Law Firm, PLLC, in Washington, D.C., focusing on complex commercial matters in state and federal trial and appellate courts, mediation, arbitration, and administrative proceedings. Kathleen particularly focuses on constitutional law issues, largely in the context of class actions. She is a frequent writer and public speaker on inclusion in the legal profession and how diversity improves decision making at all levels.