

Sexual Violence and Public Schools—Liability Implications for School Leaders

Nathan L. Essex, PhD
Professor of Educational Law
The University of Memphis
President
Southwest Tennessee Community College

Abstract

Sexual violence is increasingly present in public schools across the nation. It is a crime that also violates federal law namely, Title IX, which prohibits sexual discrimination at any institution receiving federal funds. Sexual violence can have a devastating impact on victims both physically and emotionally. It can result in anxiety, depression and deep scars. School leaders and school personnel have an obligation based on their legal duty to ensure to the greatest extent possible that students are protected from sexual violence. Public schools are viewed as “safe places” by the courts based on the view that mature, responsible and professionally trained school personnel are creating and maintaining a safe environment for students under their supervision. Failure to exercise the proper standard of care may prove costly to school districts when students are harmed based on sexual violence involving negligence by school personnel.

Keywords: sexual violence, student safety, liability challenges, duty of care, sexual discrimination

Sexual violence may affect victims emotionally, psychologically and physically. It leaves scars that last for a lifetime. Sexual violence acts may be committed by school personnel and students alike in public schools. Sexual violence is a crime that violates the personal rights of students and may affect their ability to receive an equal educational opportunity.

Sexual violence involves a sexual activity in which consent is not obtained or freely given. It occurs when a person is forced, coerced or manipulated into an unwanted sexual activity and may manifest itself in many forms including but not limited to the following:

- Rape,
- Sexual Assault,
- Incest,
- Sexual Exploitation,
- Unwanted or Inappropriate Sexual Contact,
- Sexual Harassment,
- Exposure,

- Threat,
- Stalking/Cyberstalking, and
- Peeping (Opposing Abuse with Service, Information and Shelter (OASIS), (2015, para. 2).

Perpetrators of sexual violence tend to be motivated by a need to control, humiliate or harm victims. Most survivors of sexual violence knew their perpetrators before the assault occurred. Unfortunately, many incidents are not reported by victims based on fear or a view that their disclosure will not be accepted as truthful. Other victims are embarrassed and fearful of retaliation based on threats by the abuser. Still, other victims believe that the responsibility lies in part with them based on failure to protest or say no.

Based on data generated by the Rape, Abuse and Incest National Network (RAINN), a person is assaulted every 107 seconds in the United States (2015, para. 2). To seek justice, the first step for victims of sexual assault is to make the decision to report the incident to law enforcement officials.

According to the National Center for Injury Prevention and Control—Division of Victim's Prevention, a representative national survey revealed the following statistics. For children and youth,

- 42.2% of female rape victims were first raped before age 18.
- 29.9% of female rape victims were first raped between the ages of 11-17.
- 12.3% of female rape victims and 27.8% of male rape victims were first raped when they were age 10 or younger.
- A 2011 survey of high school students revealed that 11.8% of girls and 4.5% of boys from grades 9-12 reported that they were forced to have sexual intercourse at some time in their lives (2012, para. 3).

For perpetrators,

- Among female rape victims, perpetrators were reported to be intimate partners (51.1%).
- 12.5% acquaintances and 13.8% strangers
- Male rape victims 52.4% were acquaintances and 15.1% were strangers (2012, para. 4).

Sexual violence has become so prevalent that it has resulted in the release of new guidelines describing the responsibilities of educational institutions in addressing sexual violence and other forms of sexual discrimination under Title IX of the Educational Amendments Act of 1972. These guidelines, developed by the White House Task Force to Protect Students from Sexual Assault (2014), provide greater clarity regarding the requirements of Title IX surrounding this critical issue. Under Title IX, a school must conduct a prompt investigation into any report of sexual assault and determine whether it is more likely than not that sexual violence occurred. This requirement is a totally separate process from a criminal investigation. School leaders may, based on facts and circumstances, assume a degree of liability if they knew or more importantly should have known that sexual violence is occurring or has occurred in the school or at school-

sponsored activities and fail to respond swiftly. School leaders and school personnel are expected to foresee that sexual violence is harmful to students. Once foreseeability is established, appropriate steps based on school and district policy must be taken to prevent and/or minimize harm to potential victims of sexual violence. Failure to act promptly and responsibly may result in liability charges for school leaders based on specific facts surrounding each incident.

In fact, the U.S. Supreme Court ruled in a related sexual harassment case that lawsuits are valid when an harassing student's behavior is so severe, pervasive and objectionably offensive that it denies the victim equal access to an education guaranteed by federal law. The court held further that harassment claims are only valid when school leaders are clearly unreasonable and deliberately indifferent toward the alleged harassing conduct, which obviously means that they must have been aware of such conduct and did nothing to address it.

It is difficult to refute the fact that sexual violence occurring in public schools is objectively offensive and denies the victim equal access and equal opportunity to an education guaranteed by federal law. Furthermore, school leaders are vulnerable and open to lawsuits when they are clearly unreasonable and deliberately indifferent toward sexual violence and do not act to address this highly offensive behavior.

Summary of Incidents Involving Sexual Violence That Have or May Result in Lawsuits and Criminal Charges for Educators

The following incidents highlight the prevalence of sexual violence in public schools:

- A Minneapolis public school teacher is accused of stalking a female student and trying to get her to have a sexual relationship with him. He has been charged with attempted third degree criminal sexual conduct and stalking a victim under 18. He admitted to asking the student for a phone number and texting her over a dozen times. (MPR News, 2014)
- A North Branch Area Public School is facing a \$500,000 lawsuit filed by the lawyers of a woman who said a middle school student on a district school bus sexually assaulted her 6-year-old son (Knutson, 2014).
- An 18-year-old student in Salisbury, Maryland was found guilty of five counts of rape of a fellow student at Parkside High School. He was also found guilty of second-degree assault, reckless endangerment and disturbing or threatening a student. (Junkin, 2014)
- A Grosse pointe Deputy Superintendent in Michigan was accused of stalking children to ensure that non-resident children did not attend the district's school. His acts included peering through the children's window, sitting in his car on dark early mornings to see whether a student came out of the front door. (Spalding, 2013)
- An elementary school janitor in Brentwood, Tennessee was arrested for peeping on students by hiding in the ceiling and peeping on young girls in the bathroom (Ramdass, 2014).

- An elementary school teacher in Philadelphia, Pennsylvania was charged with statutory sexual assault and involuntary deviate sexual intercourse for having sex with a 14-year-old student receiving special education services (Jimenez & Quinones, 2014).
- A sexual harassment scandal in the football locker room in New Jersey resulted in the suspension of the team's head football coach and four assistants. Seven student athletes have been charged for allegedly flipping on the lights and filling the room with jeers as they sexually accosted four of the younger players in separate dressing rooms. The younger players were held against their will while being sexually touched in an inappropriate manner. At least one of the victims was penetrated. Three players are charged with aggravated sexual assault, aggravated criminal sexual contact, criminal restraining and hazing. These incidents point to the gravity of sexual violence in public schools and the potential liability that districts may face if they breach their duty to protect students in their schools. (Brumfield, 2014)

Sexual Violence and School Liability

School personnel have a duty to ensure that proper health and safety measures are taken to protect students who are under the supervision and care of the school in all activities, including extracurricular since they are considered to be an extension of normal school activities. These activities most commonly include clubs, athletic teams, pep squads, school bands and other student organizations. In fact, the courts view extracurricular activities as a natural extension of the school's curriculum.

School officials and teachers must be proactive in addressing potential threats to students' safety based on reported or suspected incidents of sexual violence in their schools. They must take necessary steps to change the school's culture so as to minimize and eliminate sexual violence in their schools. Under the concept of liability, school personnel must be able to foresee that students' safety will be threatened if they are victims of sexual violence. Foreseeability, in this instance, is defined as school personnel's ability to predict or anticipate that an act of sexual violence will be harmful to victims either physically and/or emotionally. Once a violent sexual act becomes foreseeable, prudent steps must be taken to prevent harm to students by promptly eliminating the threat. There are instances in which the courts expect school officials and school personnel to be aware of harmful activities in their schools. For example, if it is common knowledge among students that sexual assaults are occurring in the school, professional educators are expected to be aware of such activity and take prudent steps to address it. Failure to do so can result in lawsuits for negligence.

Standard of Care and Liability

Standard of care is an important liability concept in cases involving sexual violence. It requires school personnel to conform to certain standards of conduct that other professional educators occupying similar positions would exercise under the same or similar conditions. A teacher or school leader is under an obligation to exercise reasonable care (Alexander &

Alexander, 2009). Essex (2012) stated that the degree of care provided students may change based on their age, maturity, school environment, as well as the nature of the activities in which they are involved. Obviously, this standard of care is higher if there are reported instances of sexually violent incidents in the school.

Based on the gravity of sexual violence in schools and the potential for inviting lawsuits, prudence suggests that school or governing boards develop and adopt anti-sexual violence policies through a well-defined process involving broad-based input from parents, teachers, students (when appropriate), law enforcement officials, healthcare professionals and community leaders. Once approved, Sexual violence and related policies should be discussed with all students and parents prior to their implementation so that everyone affected is aware of the policies and, specifically, what is expected of students and school personnel involved in school organizations. Consequences for violating anti-sexual violence policies should be clearly defined with great clarity and implemented consistently in conjunction with due process requirements.

Negligence Standards and Liability

Negligence, as a component of school or district liability, is generally viewed as the failure to exercise a reasonable standard of care that results in harm or injury to another person. It represents a breach of one's legal duty to protect others from unreasonable risk of harm (McCartney, Cambron-McCabe, & Eckes, 2013). Most negligence cases involve civil wrongs, although there may be instances in which the accused faces both civil and criminal charges (Essex, 2012). When school personnel foresee or should have foreseen that a particular activity or practice may result in harm or injury to a student and fail to act to protect the student, a charge of negligence may be brought against school personnel by the victim who sustains an injury.

For example, when charges of negligence are sought by an injured student resulting from sexual violence, certain requirements must be met. The student bringing charges must be able to demonstrate that four elements were present. The student's failure to establish each of the following elements invalidates charges of liability. According to Alexander and Alexander (2009), the following components are necessary to establish charges of negligence:

Standard of care: Professional educators (based on *in loco parentis*) owed a legal duty to protect the student by conforming to certain standards. This duty has been clearly established by the courts (p. 647).

Breach of duty: The student must demonstrate that professional educators failed to meet standards associated with their assigned duty (p. 647).

Proximity or legal cause: The student must be able to demonstrate proximate cause (i.e., that a causal relationship existed between school personnel breach of duty and the actual harm sustained by the student) based on sexual violence (p. 648).

Injury: The student must prove actual injury or harm based on a breach of duty by school personnel (p. 649).

If a student is injured or harmed based on a sexually violent incident that was known or should have been known by school personnel and all the elements cited earlier are present, liability charges may surface.

Sexual Violence: A Team Approach

To control sexual violence it must be viewed as a school/community effort with active engagement of school officials, teachers, parents, and community leaders. For example, school officials and teachers, especially coaches and club advisors, should receive training in sexual violence intervention strategies. They should discuss with students specifically what actions constitute sexual violence and the dangers associated with it as well as the consequences based on school or district policy that will follow if they are found guilty of initiating or participating in sexual violence activities. They should also convey to students that sexual violence activities must be reported promptly through a well-defined reporting process without fear of reprisal or retaliation based on school or district policy. Students should understand that there is zero tolerance regarding sexual violence in the school and that they have a responsibility to report any incidents involving sexual violence through appropriate channels. Teachers and students alike must embrace the view that they have a responsibility to adhere to school or district reporting procedures when they become aware of potential sexual violence incidents.

Parents and community leaders should work closely with school leaders and teachers to reinforce the school's position on sexual violence. Parents should discuss the inappropriateness of such behavior and the sanctions their children will receive at home as well as at the school if they are involved in initiating or participating in sexual violence activities associated with school activities, athletics or social clubs. Parents also have a responsibility to report any known or alleged incidents of sexual violence to school officials so that a prompt and thorough investigation may be conducted. Parents should also be aware that sexual violence is a covert form of violence that poses serious problems for their children and their school. Community supporters should promptly report any information to school personnel regarding planned or past sexual violence activities when they gain awareness of these activities. Incidents involving sexual violence may be greatly reduced through a collective effort involving students, parents, school officials, teachers, and community supporters.

Guidelines

The following guidelines may assist school leaders in addressing sexual violence incidents in their schools. They may also minimize harm to students and the potential for liability suits.

1. Sexual violence should be clearly defined so that students, faculty, club advisors, coaches, and parents are aware of specific acts that constitute undesirable behavior by students involved in school organizations and activities.
2. The school board or governing body should adopt a policy that clearly establishes that sexual violence by students, teachers or staff either on or off school property is strictly prohibited.

3. All policies and procedures regarding sexual violence should be distributed to students and parents prior to their implementation.
4. Penalties should be clearly established for violations of sexual violence policies including denial of permission for student organizations to operate on school property and civil penalties and/or criminal penalties as appropriate.
5. School leaders should create an environment that focuses on the worth and dignity of each individual and mutual respect for others.
6. Teachers, students, and parents should be informed of proper procedures for reporting incidents of sexual violence on and off school premises and be assured that there will be no retaliation or reprisals brought against them for reporting these incidents.
7. School leaders should promptly and thoroughly investigate reported incidents of sexual violence in school and initiate the appropriate actions based on school or district policy.
8. Training workshops should be held each year, at a minimum, for new and existing faculty/staff to ensure that they are knowledgeable of sexual violence policies, procedures for reporting, and their responsibilities in handling suspected cases involving sexual violence.
9. Parent and teacher organization meetings should include a training module regarding sexual violence policies as well as expectations that the school or district has established regarding these incidents in the school.
10. Prohibitions regarding sexual violence should be included in the overall plan for establishing and maintaining a safe school environment.

Summary

Sexual violence in public institutions is a serious issue that creates potential liability for school leaders if they are aware or should have been aware of a sexually violent incident. Sexual violence has resulted deep physical and emotional scars to victims who survived. These are incredible prices to pay for victims and their families. Everyone associated with schools—school officials, teachers, students, parents, and community leaders—have a responsibility to take necessary steps to eliminate sexual violence in schools. Failure to do so may prove costly for both the victim's and the school district.

References

- Alexander, K., & Alexander, M. (2009). *American public school law* (7th ed.). Belmont, CA: Wadsworth Cengage Learning.
- Brumfield, B. (2014, October 22). Coaches sidelined over New Jersey locker room sex abuse scandal. *CNN U.S.* Retrieved from <http://www.cnn.com/2014/10/21/us/new-jersey-football-abuse-scandal/>
- Essex, N. (2012). *School law and the public schools* (5th ed.). Upper Saddle River, NJ: Pearson.

- Jimenez, T., & Quinones, T. (2014, June 4). Special education teacher accused of having sex with student. *CBS Philly*. Retrieved from <http://philadelphia.cbslocal.com/2014/06/04/mayfair-teacher-accused-of-having-sex-with-student/>
- Junkin, V. (2014, October 21). Teen convicted of rape in high school hallway. *USA Today/The (Salisbury, MD) Daily Times*. Retrieved from <http://www.usatoday.com/story/news/nation/2014/10/21/teen-convicted-of-rape-in-high-school-hallway/17699211/>
- Knutson, D. (2014, April 9). NBAPS facing lawsuit in relation to sexual assault on bus. *The Post Review*. Retrieved from <http://ecmpostreview.com/2014/04/09/nbaps-facing-lawsuit-in-relation-to-sexual-assault-on-bus/>
- McCartney, M., Cambron-McCabe, N., & Eckes, S. (2013). *Public school law: Teachers' and students' rights* (7th ed.). Upper Saddle River, NJ: Allyn and Bacon.
- MPR News. (2014, July 2). Minneapolis teacher accused of stalking student. *The Associated Press*. Retrieved from <http://www.mprnews.org/story/2014/07/02/minneapolis-teacher-accused-of-stalking-student->
- National Center for Injury Prevention and Control—Division of Victim's Prevention. (2012). *Sexual violence*. Retrieved from <http://www.cdc.gov/ViolencePrevention/pdf/sv-datasheet-a.pdf>
- Opposing Abuse with Service, Information and Shelter (OASIS). (2015). *What is sexual violence?* Retrieved from <http://oasisinc.org/what-is-sexual-violence/>
- Ramdass, N. (2014, January 14). Elementary school janitor arrested for peeping on students. *News 2, WKRN TV, Nashville*. Retrieved from <http://www.wkrn.com/story/24422896/elementary-school-janitor-arrested-for-peeping-on-students>
- Rape, Abuse and Incest National Network (RAINN). (2015). *Statistics*. Retrieved from <https://www.rainn.org/statistics>
- Spalding, A. (2013, June 19). *Stalking students in Grosse Point. Evidence of a broken education system*. Retrieved from the Mackinac Center for Public Policy website: <http://www.mackinac.org/18768>
- White House Task Force to Protect Students from Sexual Assault. (2014, April). *Not alone. The first report of the White House Task Force to Protect Students from Sexual Assault*. Retrieved from http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf