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The Rise of "Reverse Title-IX" Lawsuits – Do Colleges and Universities have Anything to Fear?

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Recently, Judge Gregory Woods of the Southern District of New York dismissed a Title IX lawsuit against Columbia University, asserting "reverse Title-IX" lawsuits do not constitute sex-based discrimination.

In 2013, Paul Nungesser was accused of rape by fellow Columbia University ("Columbia") student, Emma Sulkowicz. Columbia ultimately found Nungesser "not responsible" for "non-consensual sexual intercourse." Notwithstanding Columbia's decision, however, Sulkowicz maintained that Nungesser raped her. In 2014, she undertook an art project, with the support and direction of faculty at Columbia, entitled *Mattress Performance (Carry That Weight)*. The project consisted of protest art where Sulkowicz carried her mattress in protest of Nungesser being on campus. The project received national media attention, inspiring the anti-assault movement Carry That Weight. Sulkowicz vowed to continue the project until Columbia expelled Nungesser or he left voluntarily.

Nungesser subsequently brought a Title IX suit against Columbia, arguing that, although Columbia found him "not responsible" for the alleged sexual misconduct, the school "looked the other way" while Nungesser was tried in the court of public opinion and subjected to harassment by his peers. He claimed that because of Columbia's indifference to Sulkowicz's actions, (i) his social and academic experience at Columbia suffered, (ii) he was precluded from attending on-campus career recruiting events, and (ii) consequently, was unable to obtain employment in the United States.

The Southern District of New York considered the issue on summary judgment and ultimately dismissed the claim. In its decision, the court wrote:

"Nungesser's argument rests on a logical fallacy. He assumes that because the allegations against him concerned a sexual act that everything that follows from it is "sex-based" within the meaning of Title IX. He is wrong. Taken to its logical extreme, Nungesser's position would lead to a conclusion that those who commit, or are accused of committing, sexual assault are a protected class under Title IX. The statute does not permit that result."

In other words, according to the Southern District of New York, referring to a person as a rapist, falsely or not, is not inherently gender-based; it is an allegation brought because of a person's conduct, not his or her gender status. Consequently, such harassment is outside the scope of Title IX. "To hold otherwise would, in essence, create a new right of action under which all students accused of sexual assault could bring a Title IX claim against their educational institutions – so long as they could plausibly plead that the accusations were known to the

institution and that the institution failed to silence their accusers – simply because the misconduct they were accused of has sexual elements."

Title IX states 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 education program or activity receiving Federal financial assistance." 20 U.S.C. 1681. To establish a discrimination claim under Title IX, a plaintiff must show that the defendant discriminated against him/her because of sex, that the discrimination was intentional, and that the discrimination was a substantial or motivating factor for the defendant's actions. Educational institutions can be held liable for "deliberate indifference" to known acts of student-on-student harassment, where the harassment was so severe, pervasive, and objectively offensive that it effectively deprived the victim of access to educational opportunities or benefits.

Traditionally, the alleged victim of campus sexual misconduct was the party who filed a Title IX claim against the educational institution. Accused parties typically only brought Title IX suits when they felt that the institution deprived them of due process or breached a contractual provision. Recently, however, accused parties have started bringing Title IX claims similar to those available to alleged victims, claiming that the institution unfairly punished the accused male students because of their gender status. Legal experts have started calling these claims "reverse Title IX" lawsuits.

Insider Higher Ed first reported on the existence of "reverse Title IX" suits in 2013. Since then, "at least 68 pending lawsuits alleging gender bias by accused students, many of them filed in the last two years." So far, however, "reverse Title IX" suits have not gained much traction, with male students failing to prove gender discrimination in cases against Vassar, St. Joseph's University, Miami University, and the University of South Florida. While this recent decision from the Southern District of New York supports the notion that being called a rapist due to one's alleged conduct, whether false or not, is not gender discrimination under Title IX, the court did provide Nungesser with thirty days to amend his complaint to explain why Title IX should apply. Should Nungesser fail to sufficiently allege a Title IX claim, the court suggested alternatives under state law – defamation and slander. However, if Nungesser convinces the court to consider his claim under Title IX, educational institutions should be ready to defend against increased "reverse Title IX" litigation.