Education Law/Constitutional Law

Stronger Laws Against Sexual Harassment: How Higher Education May Avoid the Learning Curve

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Emergence of the #MeToo Movement

In 2007, Tarana Burke created a non-profit organization to help victims of sexual assault and sexual harassment (collectively, "sexual misconduct") in underprivileged communities. She referred to her undertaking as the "Me Too" movement[1] with the idea that there is strength in numbers. By commonly utilizing this phrase, the movement has allowed individuals to come forward with their stories and stand in solidarity.

Nearly ten years later, on October 15, 2017, after allegations of sexual misconduct were asserted against high profile Hollywood media mogul Harvey Weinstein, Alyssa Milano posted a tweet that stated: "If you've been sexually harassed or assaulted write 'me too' as a way to reply to this tweet." [2] In response to her tweet, social media became flooded with stories of harassment and assault, igniting a nationwide conversation.

Since then, more than 80 women have come forward against Harvey Weinstein[3] and claims of workplace harassment have also been brought against television host Charlie Rose, U.S. Senator Al Franken, comedian Bill Cosby and comedian Louis C.K., just to name a few.[4] There has been a sharp increase in reporting of claims across many U.S. industries.[5] Time Magazine named "the silence breakers" as its person of the year for 2017, referring to those women (and some men) who came forward with stories of sexual misconduct to help launch a nationwide reckoning.[6]

Governor Cuomo's New Sexual Harassment Laws

The increase in public awareness also resulted in the New York State Legislature implementing stronger protections against workplace harassment.[7]

As many are aware, Title VII of the Civil Rights Act of 1964,[8] the New York State Human Rights Law,[9] and the New York City Human Rights Law[10] prohibit discrimination and retaliation based on sex, which includes sexual harassment.[11] Specifically, these laws prohibit unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.[12]

Seeking to strengthen those existing protections, on April 12, 2018, New York Governor Andrew Cuomo, signed the 2018-2019 Executive Budget into law, which includes several additional measures aimed at tackling workplace claims. He refers to these changes as "the most aggressive sexual harassment legislation in the country." Significant highlights include:

- Effective July 11, 2018, employers are prohibited from including mandatory arbitration clauses in employment agreements.[13]
- Effective July 11, 2018, non-disclosure provisions in settlement agreements are prohibited unless the complainant prefers confidentiality and is provided 21 days to consider the terms and conditions of the agreement and a seven day revocation period.[14]
- The New York State Department of Labor must consult with the New York State Division of Human Rights to create a model sexual harassment prevention policy and training program for use by employers.[15] All employers are required to implement or create their own written policies and training programs that meet or exceed these minimum standards by October 9, 2018.
- All employers are required to conduct annual interactive sexual harassment training for all employees.[16]
- Effective immediately, employers may be held liable for sexual harassment of a non-employee such as a "contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace" if they "knew or should have known" that the non-employee was being sexually harassed "in the employer's workplace" and failed to take "immediate and appropriate corrective action."[17]
- Public employers are now prevented from using taxpayer funds to settle claims. A public employee who has been found liable for intentional wrongdoing related to a claim of sexual harassment must reimburse the State.[18]

It is unsurprising that New York is leading the way in providing additional protections in this regard, as the new sexual harassment protections for employees are reminiscent of the protections that were passed by Governor Cuomo in 2015 to protect students in New York.

The Campus Sexual Assault Movement Predates the #MeToo Movement

Before the #MeToo movement, and long before the media coverage on Harvey Weinstein, colleges and universities were already grappling with the issue of campus sexual misconduct. In fact, the recent movement exemplifies what many higher education institutions have known, and been dealing with, for years. For many colleges and universities, the #MeToo movement actually happened a few years ago, and it is only now that the workforce is coming up to speed.

During President Obama's administration, the federal government placed an inordinate amount of attention on the issue of sexual misconduct on college campuses. As a result, institutions were inundated with an overwhelming amount of federal guidance on how to properly recognize, prevent and address campus sexual assault and harassment. For example, in 2011, the U.S. Department of Education's Office of Civil Rights ("OCR") issued the Dear Colleague Letter, which expanded institutional oversight.[19]

Additional guidance was released by OCR in 2014 and 2015.[20] As a result, colleges and universities expanded Title IX offices, created intensive trainings, and revised policies. While some of this federal guidance was recently rescinded by Education Secretary DeVos,[21] many state legislatures nonetheless codified many of the provisions outlined in the Obama-era guidance.

Furthermore, over the past few years, students have also become more vocal about how their campuses are handling allegations of campus sexual misconduct, as evidenced by the exceptional number of colleges and universities that have been accused, by both complainants and respondents, of mishandling complaints of sexual misconduct in violation of Title IX and state law.[22]

In 2015, the growing awareness of sexual misconduct on college campuses led Governor Cuomo to sign Article 129-B of the New York Education Law (the "Enough is Enough" law) to ensure the safety of all students attending college in New York State.[23] Article 129-B protects students from sexual assault, dating violence, domestic violence and stalking. While many provisions of Article 129-B reinforce or expand on existing obligations imposed on higher education institutions by federal law,[24] Article 129-B also imposes a number of requirements that impact how institutions respond to and investigate claims of campus sexual misconduct that go beyond the federal requirements.

While the changes to New York's sexual harassment laws in the employment area may seem daunting at first glance, most, if not all higher education institutions in New York have been addressing these issues, at least in some context, over the last few years.

For example, Article 129-B requires higher education institutions to adopt a uniform definition of "affirmative consent"[25] and a statewide uniform alcohol and/or drug use amnesty policy as part of their codes of conduct.[26] Article 129-B further requires institutions to include in their codes of conduct, and distribute annually, a prescribed statewide uniform Students' Bill of Rights[27] and mandates that institutions conduct biennial anonymous campus climate assessments.[28]

Pursuant to Article 129-B, every institution must implement a student onboarding and ongoing education plan to educate the campus community about sexual misconduct. Institutions must provide training to all students, including but not limited to first-year, transfer, international, online and distance education students, leaders and officers of student organizations and student athletes.[29] All those involved in the investigation and adjudication of claims must also receive training.[30] Article 129-B also sets forth a number of reporting requirements to New York State.[31]

In May 2017, Governor Cuomo ordered a comprehensive statewide review of compliance with Article 129-B which found: 95 institutions (38.9 %) were compliant, 29 institutions (11.9%) were non-compliant and 120 institutions (49.2%) were found to be significantly compliant.[32]

Lessons Learned

While the changes to New York's sexual harassment laws in the employment area may seem daunting at first glance, most, if not all higher education institutions in New York have been addressing these issues, at least in some context, over the last few years. Most institutions in New York faced a learning curve when adopting the new rigorous standards set forth in the federal guidance and Article 129-B; however, this experience can be used in implementing and addressing New York's new anti-harassment laws. While all employers throughout the State are now required to revise policies and conduct training, colleges and universities, to a large extent, have already done so for at least a subset of the population and can modify these already existing documents and programs.

Moreover, Article 129-B details specific protections for complainants and respondents insofar as both parties must be afforded equal opportunities to present evidence and have witnesses speak on their behalf.[33] Additionally, the respondent must be provided with adequate notice of the allegations and both parties may appeal the determination.[34] At this point, the new workplace legislation is distinguished from Article 129-B because it does not address respondent rights. Here, once again, experience may serve as a blueprint. Even with these express provisions in Article 129-B, there has been a recent increase in respondent lawsuits. Employers should also anticipate a rise in respondent claims and, with this in mind, draft their new policies and conduct investigations accordingly.

As the new sexual harassment laws come into effect quickly over the next

See HARASSMENT, Page 12

LIMIT ...

Continued From Page 5

light of the special characteristics of the school environment." A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school."

Speech Promoting Illegal Drug Use

School administrators may restrict student speech that promotes illegal drug use.[10] In *Morse v. Fredrick*, the district was permitted to discipline students who displayed a banner that read "Bong Hits 4 Jesus" across the street from an event that was sanctioned and supervised by the school. The U.S. Supreme Court held that schools may limit such speech due to the special characteristics of the school environment and the compelling government interest in stopping drug abuse.

State Laws

On the State level, the New York State Dignity for All Students Act ("DASA") prohibits harassment and bullying in the school context.[11] DASA defines such terms as "the creation of a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying, that:

(a) Has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being; or
(b) Reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; or
(c) Reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or
(d) Occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property."[12]

As mentioned above, even *off-campus* speech can be limited when it is "reasonably foreseeable" that the misconduct will "create a risk of a material and substantial disruption" in the school setting.[13]

Local Regulation

Various school district policies also regulate speech-related activities in public schools. Student protest activities that violate a school district's code of conduct are not protected and, as such, carry disciplinary consequences.

For example, the New York State Commissioner of Education (Commissioner) has upheld the five-day suspension of a student who admittedly left the classroom, joined students in a walkout, and failed to return to the classroom.[14] In *Appeal of Durkee*, the Commissioner explained that "faculty and staff had been advised in advance of the walkout and the consequences of student participation," and explained that the student "could have avoided suspension had he returned to his classroom instead of leaving school grounds."[15] That case highlights the school district's authority to implement its code of conduct regardless of whether the violation relates to a speech-related activity.[16]

Finally, when dealing with speech-related activities, districts should apply their codes, policies and regulations in a neutral manner, and may not engage in viewpoint discrimination.[17] Any actions taken with regard to student speech must be viewpoint neutral. Districts should not take any action that appears to either endorse or oppose a particular viewpoint, no matter how popular – or unpopular – it may appear to be at the time.

Student "Walkouts" and Other Mass Protests

Generally, school districts may discipline students for planning, participating in or encouraging other students to plan or participate in "en masse" protests as long as the *Tinker* standard is met (i.e., the district reasonably believes that the protest-related activity is likely to result in substantial disruption). A student walkout that involves a large number of students who are planning to walk out of a school building, or even just their class, would likely constitute a material and substantial disruption to the extent that the educational process is being disrupted.

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Notwithstanding this clear right to regulate student protests, the issue is almost never that simple. The message behind student protests can often seem so universally laudable that the school community wishes to support the protest in good faith. In fact, it is fairly common for teachers, principal and school employees to sympathize with students and their desire to protest.

Nonetheless, school employees should think twice before taking any active role in any student protest. While it is true that public employees do maintain the right to engage in speech on matters of public concern, those rights do not apply in the same manner when they are acting in the scope of their employment.

For example, the Commissioner has held that one teacher's conduct in "absenting himself from his assigned duties and leading students away from their classes" in a mass walkout protesting alleged police brutality was not protected by the First Amendment.[18] The Commissioner explained that the content of the teacher's expressions about the particular student protest was not in issue; rather, it was "his action in leading the walkout which clearly disrupted the educational process at Morris High School."[19]

There is no question that a walkout during school hours would clearly undermine a teacher's ability to complete his or her regularly scheduled lesson plan or assignment. In addition, encouraging such a disruption would clearly undermine the educational process. Moreover, districts should avoid setting a precedent that could compromise the district's position in future protests that the school board or administration may find itself unable to support.

Finally, it has been argued that students who leave their classrooms to participate in a mass protest are learning another – and perhaps equally important – lesson regarding civil disobedience. Most school districts and school attorneys alike acknowledge that there is real value in the exercise and the firsthand civics lesson. Of course, it makes sense that a full lesson in civil disobedience would require the implementation of civil consequences that would naturally flow from such "disobedience."

No matter where a school board member, teacher or parent falls on the political spectrum, it is almost universally accepted that schools should be safe places for children to learn, play and speak. *Would it were so for all places everywhere…*

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1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503(1969).
2. *Id.*
3. 101 A.D.3d 73 (2012); *appeal dismissed by* 20 N.Y.3d 1032 (2013).
4. *Id.*, (quoting *Tinker, supra).*
5. *Id.*
6. *See Watts v. United States*, 394 U.S. 705 (1969).
7. *Bethel School District v. Fraser*, 478 U.S. 675 (1986).
8. *Id.*
9. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).
10. *Morse v. Frederick*, 551 U.S. 393 (2007).
11. N.Y. Educ. Law, Art. 2.
12. N.Y. Educ. Law §11 (7).
13. *See Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008).
14. *See Appeal of Wolfe,* 39 Ed. Dept. Rep. 653 (2000).
15. *Id.*
16. *See also, Appeal of Durkee*, 20 Ed. Dept. Rep. 94 (1980)(Commissioner upheld five-day suspension resulting from a mass walkout by approximately 125 students).
17. *See Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005).
18. *See Appeal of Dick*, 24 Ed. Dept. Rep. __, Dec. No. 11,331 (1984).
19. *Id.*

HARASSMENT ...

Continued From Page 7

few months, it behooves institutions to, once again, review their existing policies and procedures in order to confirm that they are in compliance with the current law and guidance and/or make any necessary changes as soon as practical. Institutions should also provide training to students, employees, and all members of the community as to how to properly recognize, prevent, and respond to allegations of sexual misconduct. Institutions are advised to pay close attention to this area of the law, as it has the potential to have significant practical as well as legal implications.

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2. *Id.*
3. Sarah Almukhtar, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, NY Times (Feb. 8, 2018), www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html.
4. *Id.*
5. Stephanie Zacharek, Eliana Dockterman and Haley Sweetland Edwards, *The Silence Breakers*, Time Magazine (last visited May 23, 2018), www.time.com/time-person-of-the-year-2017-silence-breakers/.
6. *Id.*
7. New York City employers may be subject to additional laws.
8. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*
9. N.Y. Exec. L. §§ 290 *et seq.*
10. N.Y. City Admin Code §§ 8-101 *et seq.*
11. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986); *Anderson v. Davis Polk & Wardwell, LLP*, 850 F. Supp. 2d 392. 404-405 (S.D.N.Y. 2012).
12. *Meritor*, 477 U.S. at 64-65.
13. CPLR 7515.
14. CPLR 5003(b) and Gen Oblig. L. § 5-336.
15. Lab. L. § 201-g.
16. *Id.*
17. Exec. L. § 296-d.
18. Pub. Off. L. § 17-a.
19. *Dear Colleague Letter*, U.S. Dep't of Educ. Office for Civil Rights, www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (last visited May 24, 2018).
20. *Dear Colleague Letter*, U.S. Dep't. of Educ. Office for Civil Rights , https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (last visited May 29, 2018); *see also Dear Colleague Letter,* U.S. Dep't. of Educ. Office for Civil Rights, ,https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf (last visited May 29, 2018).
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22. Roberta Smith, *In a Mattress, a Lever for Art and Political Protest*, N.Y. Times (Sept. 21, 2014), www.nytimes.com/2014/09/22/arts/design/in-a-mattress-a-fulcrum-of-art-and-political-protest.html; *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356 (S.D.N.Y. 2015).
23. Educ. L. §§ 6439-6449.
24. Violence Against Women Reauthorization Act of 2013, 113 P.L. 4, 127 Stat. 54 (2013); The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, 20 U.S.C. § 1092(f), 34 C.F.R. 668.46 (1990); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*.
25. Educ. Law § 6441.
26. *Id.* at § 6442.
27. *Id.* at § 6443.
28. *Id.* at § 6445.
29. *Id.* at § 6447.
30. *Id.* at § 6444 (5)(c)(ii).
31. *Id.* at § 6449.
32. N.Y.S. Office of Campus Safety, *Preliminary Report: A statewide Review of Compliance with Education Law Article 129-B* (Sept. 19, 2017), https://www.ny.gov/sites/ny.gov/files/atoms/files/EnoughisEnoughPreliminaryReport_September192017.pdf (last visited May 29, 2018).
33. Educ. Law § 6444.
34. Id.