Look, it's a bird; it's a plane,
NO,
It's a new standard

By
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The DAY and Back on TRAC programs that Lisa discussed are very successful in assisting students to recover from their drug and alcohol abuse problems and set them on their way to personal responsibility and good decision making. I have witnessed both programs in action and can attest to their value. They are the only drug or alcohol programs that I know of that really work. They are both based on sound developmental theory and I believe that's why they work. However, both programs are responses to students who are abusers and in the future simply responding may not be enough in certain situations. The purpose of this paper is to alert you to the need, in some situations, to provide adequate training for certain types of risks.

Last fall the 10th Circuit Court of Appeals applied a totally new standard in analyzing Title IX cases. The court's reasoning leaves open the very real possibility that this new standard may be applied to various programs and policies at our institutions. The case was Simpson v. University of Colorado, 500 F.3d 1170 (10th Cir. 2007). The case involved the alleged rape of Ms Simpson and several other female students at the University by football players and recruits. The district court [372 F. Supp.2d 1229 (D. Co. 2005)] using traditional Title IX analysis set down by the Supreme Court in Davis ex rel. LaShonda D. v. Monroe County Board of Education, 526 U.S. 629 (1999) and Gebser v. Lago Vista Independent School District, 524 U.S.247 (1998) granted the University's motion for a summary judgment.

On appeal the 10th Circuit reversed the district court and remanded the case. The University then settled with the women for several million dollars.

In reversing the district court the 10th Circuit found the traditional Title IX standard lacking. Both in Davis and Gebser "…there was no element of encouragement of the misconduct by the school district." The court focused in Gebser on wording that restricted "actual knowledge" of, and an inadequate response to, the sexual harassment to "…cases like this one that do not involve official policy of the [school district]" at 290. Although individuals perpetrated the sexual assaults, the plaintiffs in Simpson alleged that the University supported and funded a program to show recruits "a good time." The court observed, "…that without proper control, [the program of showing recruits a "good time"] would encourage young men to engage in opprobrious acts", and thus it did not believe the "actual notice" standard would apply in this case.

The court also took note of the fact that the Supreme Court in Gebser referred to City of Canton v. Harris, 489 U.S. 378 (1989) in establishing the deliberate indifference standard for Title IX cases. In City of Canton a municipality was held liable under section 1983 for a police officer's constitutional violation when the violation was the result of inadequate training and the municipality's deliberate indifference to the rights of those "with whom the police come into contact"(City of Canton, at 388). Quoting the Supreme Court in City of Canton, the court noted that:

> It may happen that in light of duties assigned to specific officers or employees the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably have been deliberately indifferent to the need. (p.390)

Applying that standard to the facts in the Simpson case the 10th Circuit said:

> A funding recipient can be said to have intentionally acted in clear violation of Title IX when the violation is caused by official policy of deliberate indifference to provide adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient. (p. 1178)

The program or policy at the University of Colorado consisted of visits to the campus by football recruits who were hosted for the weekend by football players who were told by coaches to show the recruits "a good time". During a recruiting weekend in December 1997 a high school girl was alleged (the DA dropped the case) to have been sexually assaulted by recruits in a hotel of campus.

The court found that, based on various articles in newspapers and magazines, football Coach Barnett had general knowledge of the risks of sexual assaults during recruiting efforts, that he had knowledge that sexual assaults had occurred during recruiting visits, that he maintained an unsupervised player-host program to "show recruits a good time", and because of his "unsupportive attitude" there had been no change in the atmosphere. The court based this final piece of evidence on Coach Barnett's failure to retain a female place kicker after she complained of verbal sexual harassment by other football players. Actually she never filed a complaint with the University as per University policy and according to the Coach, she was released from the team because she could not put the ball through the uprights. However when she complained to the coach that she was being stalked he provided her with an escort.

The court also cited as Coach Barnett's unsupportive attitude the hiring of an assistant coach who had been accused of assaulting a

female parking lot attendant when he was a student and banned from the campus. The court noted that this incident took place "a few years earlier". The fact is, it occurred 11 years prior to his being hired and the coach had checked his references and found him to be a "completely different person". The assistant coach was now married and had a special needs child.

Finally the court cited a conversation the coach had with a female trainer who alleged a football player had sexually assaulted her, but told him she did not want anyone to know nor to have the player punished. Barnett told her if she pressed charges her "life would change". She did not press charges and Barnett had a conversation with the player to help him understand how the woman felt. The player also wrote her a letter of apology and the coach imposed punishment on him. The coach also transferred the trainer, at her request, to a facility where the football player would not be in attendance.

The court found that "A jury could infer that 'the need for more or different training [of player hosts was] so obvious and the inadequacy so likely to result in [Title IX violations], that [Coach Barnett could] reasonably be said to have been deliberately indifferent to the need." This in spite of the fact that coach Barnett had a player's Handbook with a section on date rape --"no means no" and an intoxicated woman can not give consent. This information was reviewed with the players as well as bringing in a local police officer to talk about date rape and campus judicial affairs officers to do the same. Hosts were specifically instructed that it was against the law to consume alcohol if you were less than 21 years of age. They were also told to "act like adults" with recruits, "make the right decisions" and "don't get into trouble". Coach Barnett had a "Mother Board" where he posted newspaper clippings about athletes who had gotten into trouble. The saying on the board was "Would you want your mother to read this about you?" Behavioral expectations (which included a prohibition

against unwanted sexual contact) were covered with each player at least three times their first two years -- once at University orientation, again at football orientation by the office of campus judicial affairs, and yet again at their residence halls (every player was required to live on campus for two years). Hosts were also required to sign a statement that they would obey the laws of the State of Colorado which were explained to them every year by the local police and there was a ban on alcohol and tobacco for recruits.

The points above have been made not to argue with the 10th Circuit, but only to highlight how low the threshold is to be found deliberately indifferent in providing adequate training.

The question becomes "Which of your programs or policies create an obvious need for training, the inadequacy of which is likely to result in the violation of a constitutional or statutory right?"

Let's start with your athletic program. Have we learned from the University of Colorado or are we doing things the same old way? That's the first area to review.

Taking the elements the 10th Circuit used: Do you have a general knowledge of the risk of sexual assaults in your residence halls? Could we find newspaper and magazine articles or even scholarly journals that speak to this? The Supreme Court of Maine has said that a sexual assault in a college residence hall is foreseeable! [See Stanton v. University of Maine (Cum-00-513, 2001)]. Have you had any sexual assaults in your halls? Do you have visitation policies or coed halls? Is the risk higher in those halls? Are you providing adequate training to prevent sexual assaults in the halls or during visitation?

Do you have a program of fraternities and sororities? Could we find newspaper or magazine articles or journals that provide even

more than "general knowledge", but specific information on the risk of underage consumption of alcohol, alcohol poisoning and deaths, hazing and sexual assault in fraternities and sororities? Have any of these occurred on your campus in the past? Are you providing adequate training that is obviously necessary for your program?

You can probably come up with other areas on campus where there is a need for training. Your medical staff has probably been trained in AIDS, but have your hall staff and your intramural personnel? I suggest that Doe v. Borough of Barrington, 729 F.Supp. 367 (D. New Jersey 1990) be reviewed.

What I think the 10th Circuit seems to be telling us is that it is not enough to simply [delete this “to”] respond to students who violate our rules, but we must be proactive and provide adequate training where there is a risk of a constitutional or statutory violation absent that training. I think they are also saying the actual notice standard may not apply to situations where the violation occurs because of an official policy and the threshold for finding you deliberately indifferent is pretty low.