

## *The Growing Impact of Expert Witnesses in Title IX Cases*

By Brett A. Sokolow, Esq., TNG Consulting

A little more than ten years ago, I received what seemed like an odd request: would I be willing to serve as an expert witness in federal Title IX litigation? My perception had always been that most Title IX litigation focused on questions of law and therefore, was within the court's purview to decide. Although I had been working in the Title IX field for nearly a decade, it seemed that there was little room for an expert opinion that wouldn't encroach on the ultimate questions in the matter.

When I accepted that first expert role in [Doe v. Sewanee, The University of the South](#), I started to see how expert witnesses might become more commonplace in Title IX litigation. Sewanee included a negligence claim in addition to the Title IX causes of action, as many such cases now do. That allowed me to testify to the standard of care, laying the foundation for what is still the only federal jury verdict on such a case. I could not then foresee that I'd become involved in 35 more Title IX lawsuits over the years, including both defense and plaintiff opinions, and how an expert opinion can be essential to leverage in mediation, or for achieving or repelling that all-important motion to dismiss or summary judgment.

Another lesson has been about using an attorney as an expert. At first, trial lawyers seemed leery of considering the lawyer-as-expert retention, but then recognized that most of us who are deeply immersed in Title IX work are experts who happen to be lawyers, not experts because we are lawyers. And in court, we're not functioning as legal representatives, of course. The goal of the expert is to help the judge and jury understand what the standard of care is, what the industry customs are, and how the defendant has either upheld or deviated from those standards. This standard of care analysis has proven to be as salient to negligence claims as it is to Title IX-based causes of action.

It's not an expert's role to opine that a response was deliberately indifferent under Title IX (that is a question of law), but to help the court understand what responses are within the range of unreasonableness and which would satisfy the standard of care, and why. It's not an expert's role to opine that a decision was erroneous, but to explain procedures or training commonly used to minimize the risk of error. In some ways, having a law background makes lawyers-as-experts well-suited to the Title IX expert witness role but the most important quality is the ability to teach a judge or jury about complex processes in an approachable way, much like we do every day as consultants for schools and colleges across the country.

Another role is the Title IX expert as litigation consultants, working with clients to develop the case strategy. That challenge often includes identifying industry standard customs and practices in an industry in which a collected set of written standards does not exist..., thus the standards of acceptable practice must be extrapolated from multiple authoritative sources. Many Title IX experts seem to struggle with the "floor" of industry standards, and the "ceiling" of best practices, which are aspirational. The plaintiffs would like the court to believe the ceiling is required, and the defense argues that the floor is all that is necessary. The baseline of what is an accepted standard or not comes from a consensus of the field that can be complex to discern.

I was deposed recently in a state court negligence action, and the opposing counsel asked me if I thought something was an industry standard just because I said it was. I replied that my unique vantage

point on the field that allows me to understand industry customs and standards in a way that few can. I serve as general counsel to 70+ schools and colleges, I oversee a team of 40 professional investigators, I represent students in the disciplinary process, my firm serves over 1,200 education clients a year, and as President of ATIXA, the industry association with 5,500 members, I interact with dozens of Title IX administrators every day and have trained and certified 30,000 professionals in the field. So, when I recognize that something is a widely adopted industry standard or opine on whether something is consistent with the standard of care, it's because my sense of the pulse of the field is drawn from all of these disparate sources of industry customs and practices.

While a Title IX expert won't be essential in every case, they are becoming more common. When breach of contract claims are also pled, Title IX experts have to be cautious about staying in their lane, and won't often be qualified to opine on contract terms. The same is true for causation, as that is often a question for the court that is outside the scope of Title IX expertise. Where due process and/or negligence claims are often alleged side-by-side with Title IX claims, the right expert can make all the difference.