

Title IX Requires Colleges & Universities To Eliminate The Hostile Environment Caused By Campus Sexual Assault

A Guide To Understanding What Is Expected Of Colleges & Universities Under Federal Gender Equity Requirements When A Sexual Assault Is Reported

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Introduction-Sexual Assault Is a Form of Sexual Harassment

Sexual harassment is “unwelcome conduct of a sexual nature...[and]... can include unwelcome sexual advances, request for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”¹ Federal law prohibits sexual harassment of college and university students whether the harasser is an employee or another student. Sexual assault, a term which includes rape and other forms of sexual abuse like forcible fondling, is an extreme form of sexual harassment. It is “unwelcome conduct of a sexual nature,” and more specifically, “unwelcome sexual advances” and “unwelcome physical conduct of a sexual nature.”

Sexual assault, like the other forms of sexual harassment “can deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in the college or university’s program.”² Sexual assault survivors often experience physical injuries, emotional distress, and mental distress, all of which can stand in the way of the survivor’s educational opportunities. For example, when a survivor withdraws from a class because the attacker is in the same class or continues to attend that class with great emotional and mental difficulty, the sexual assault has impacted the survivor’s education. Sexual assault can affect the educational opportunities of the survivor and other students. When it affects the survivor’s and/or other students’ educational opportunities, the sexual assault creates what the legal system identifies as a hostile environment. Note that sexual harassment includes opposite gender and same gender sexual harassment.

Title IX of the Education Amendments of 1972 (Title IX), a federal law, requires that once a college or university (“college”) knows or reasonably should know of possible sexual harassment of students, it must take “immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again” regardless of whether the student who has been harassed complains of the harassment or asks the college to act.³ When a college fails to do so, it becomes subject to legal action, either through a private civil lawsuit brought by the survivor or an administrative proceeding through the U.S. Department of Education’s Office for Civil Rights.

What Should a Student Expect from His or Her College or University?

To meet its obligations required by law under Title IX, a college must take a variety of actions:

Harassment Grievance Procedures

A college must create a sexual harassment policy that explains how a student can file a complaint and what will happen after he or she makes that complaint, commonly referred to as grievance procedures. The grievance procedures must provide for “prompt and equitable resolution of complaints.”⁴ That means that the procedures must be set up so that the college handles complaints in a prompt, fair and impartial manner. Each college must designate a coordinator for sexual harassment complaints who has training on sexual harassment matters. The policy and coordinator’s contact information must be advertised to students. To find these grievance procedures, a student should look in the college’s student handbook, student judicial codes, and/or Jeanne Clery Act annual campus security report (Each student should receive a copy of the Clery report or notice of it by October 1st of each year and it should be available on the school’s website or from a student affairs, campus police/security, or admissions office). Colleges have been found to violate Title IX when their procedures included several complaint processes (through housing, the disciplinary board, and campus police) with no coordination among them⁵ and when their policies do not contain time frames for the resolution of complaints.⁶

Responsive Action After Knowledge of Harassment

Once a student who has been harassed reports the sexual harassment, the college must discuss with the student the options for informal and formal action, including an explanation of the grievance procedure.⁷ A college is not required to establish a procedure for informal complaints but must address them.⁸ If the college learns about harassment in other ways, such as a report from a student other than the harassed student, the college must consider a variety of factors to determine the reasonable response.⁹ If it is reasonable for the college to investigate and it can confirm the allegations, the college must follow the same responsive action as if the college learned of harassment from a report by the harassed student.¹⁰ Whether or not the harassed student requests action, the college must promptly investigate and take steps to resolve the harassment. The type of investigation varies by situation but in all cases must be prompt, thorough, and impartial.¹¹ While investigating, it is good practice for colleges to periodically inform the harassed student about the investigation.¹²

The college should make every effort to keep the names of those involved confidential, including the complainant (the harassed student), witnesses, and the accused (the harasser), unless necessary to investigate and only to the extent necessary to do so.¹³ If the complainant wants to keep his or her name confidential from the accused student, the college should inform the complainant that such a request could limit an investigation and explain the college’s retaliation prevention. If the complainant still desires to keep his or her name confidential then the “college should take all reasonable steps to investigate and respond...consistent with the student’s request as long as doing so does not prevent the college from responding effectively...and preventing harassment.”¹⁴

Colleges have been found in violation of Title IX for investigatory practices such as allowing the accused to respond to allegations before being questioned;¹⁵ giving the accused student the opportunity to rebut the complainant’s allegations without giving the complainant the same

opportunity;¹⁶ failing to interview a witness who heard the complainant telling the accused to stop;¹⁷ pursuing a non-disciplinary hearing process without consulting complainants about whether or not they wanted the hearing option;¹⁸ and completing campus police investigatory reports that show clear bias against the complainants.¹⁹

Disciplinary hearings have violated Title IX by requiring the complainant to prove that she had been sexually harassed rather than requiring the college to fully investigate the charge and issue a report to a hearing committee;²⁰ using a higher standard than preponderance of the evidence (more likely than not that sexual harassment occurred);²¹ and inadequately informing the disciplinary committee about the investigation.²²

It may be appropriate for the college to adopt interim measures while investigating the complaint. The Jeanne Clery Act requires the school to change the complainant's living and academic arrangements if the complainant requests the change and arrangements are reasonably available.²³ This may happen before the school takes any other action, and should be as immediate as possible. Since the complainant is being moved, not the accused student, there are no due process issues, and hence should be no delay. Under Title IX, a school could impose an interim suspension of the harasser from housing, or school altogether, or other arrangement, and do so even without a specific request from the complainant. If potential criminal conduct is involved the college should determine whether to notify law enforcement.²⁴ However, schools have violated Title IX when the school stopped its investigation after a complaint was filed with the police or decided to wait until the end of a police investigation to conduct a school investigation.²⁵ Such action is a violation in part because a law enforcement investigation may take a very long time, and a school cannot allow a hostile environment to persist for that long, as well as because law enforcement investigations and sexual harassment investigations use different standards (i.e. a criminal conviction requires proof beyond a reasonable doubt and a finding of sexual harassment requires a lower standard of proof).

If a college determines that the complainant was harassed, "it should take reasonable, timely, age-appropriate, and effective corrective action."²⁶ A college may counsel, warn or discipline the harassing student in accordance with the severity of harassment, prior incidents, or both.²⁷ Possible corrective actions include permanently changing housing arrangements; directing the harassing student to no longer contact the survivor; special training and workshops to repair the educational environment; assisting the survivor in making program or schedule changes that do not adversely affect the survivor's academic record; preventing further harassment; preventing retaliation; suspension; and/or expulsion.²⁸ Colleges have been found to violate Title IX by not following up on complaints that the harassing student was not in compliance with his terms of discipline.²⁹ Furthermore, the Office for Civil Rights has implied that affording the complainant "an opportunity to appeal the findings or remedy, or both" is something that it will consider "in evaluating whether a school's grievance procedures are prompt and equitable."³⁰

The Family Educational Rights and Privacy Act does not prevent a college from notifying a sexual assault complainant about the outcome of the complaint. Under Title IX a school can release information regarding disciplinary action imposed on a student found guilty of sexual harassment if a) the information directly relates to the complainant in non-sexual assault harassment and sexual assault harassment; or b) if the harassment involves a crime of violence or

sex offense in a post secondary institution (i.e. sexual assault).³¹ Additionally, the Jeanne Clery Act requires the college to inform the complainant and the accused of the final results in a sexual assault case, including the original findings and any appeals, in an equal, unconditional, and affirmative way.³²

What Can A Student Do If His or Her College Has Violated Title IX?

There are two avenues in the legal system to remedy violations of Title IX, an administrative complaint via the Department of Education's Office for Civil Rights and a private lawsuit filed by the harassed student:

Department of Education, Office for Civil Rights (OCR) Complaints

Usually, OCR only takes complaints filed within 180 days from the last act the student believes was discriminatory or if there is a continuing discriminatory practice or pattern. OCR will investigate a complaint, issue findings against a college or university, and require the college to take corrective action. OCR also has an early complaint resolution process whereby the college can take corrective action before an investigation begins. OCR's process allows colleges to voluntarily correct their practices prior to losing federal funding and does not issue monetary damages to the complainant. For more information on the OCR process, please visit <http://www.ed.gov/about/offices/list/ocr/complaints-how.html>.

Civil Lawsuit

A civil lawsuit is harder to prove than an OCR complaint because it requires that a school has actual knowledge of the harassment; but, that heightened requirement is necessary because via a civil lawsuit a student may receive money damages.³³ A student may also request or exclusively request what is called equitable relief – non-monetary damages like reforming the college's policy. If a student only requests non-monetary damages, a school's actual knowledge is not required.³⁴ The time in which a student must file a lawsuit from the last date of discrimination, the statute of limitations, is usually at least a year, so a student has more time to file a lawsuit than an OCR complaint.³⁵ The process of a civil lawsuit is longer than the OCR process as it usually takes several years. A student will need to locate an attorney to represent him or her. Security On Campus, Inc. can help students locate an attorney. Although some attorneys may require payment, others take cases on a contingency, meaning that they receive a portion of the money damages only if the student prevails in court, or a combination of both payment methods.

For more information, please visit the documents listed in the footnotes, many of which are located on the Security On Campus, Inc. website <http://www.securityoncampus.org/>. We recommend that you begin by reading the *OCR Revised Sexual Harassment Guidelines*.

¹United States Department of Education, Office for Civil Rights. [Revised Sexual Harassment Guidance: Harassment of Student by School Employees, Other Students, or Third Parties](#). January 2001, at 2.

² *Id.*

³ *Id.* at 15.

⁴ *Id.* at 4.

⁵ Sonoma State University, OCR Case No. 09-93-2131

⁶ Erskine College, OCR Case No. 04-04-2016

⁷ Revised Sexual Harassment Guidance, *supra*, *Id.* at 15.

⁸ University of Maine at Machias, OCR Case No. 01-94-6001; Sonoma State University, OCR Case No. 09-93-2131

⁹ Revised Sexual Harassment Guidance, *supra*, at 18. Please see these guidelines for a listing of the factors.

¹⁰ *Id.*

¹¹ *Id.* at 15.

¹² *Id.* at 20.

¹³ *Id.*

¹⁴ *Id.* at 17; Erskine College, OCR Case No. 04-04-2016

¹⁵ Sonoma State University, OCR Case No. 09-93-2131

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* The investigating officer wrote in his report that the complainants engaged in consensual kissing with the accused student even though the complainants' allegations do not include consensual kissing and also described the complainants' use of alcohol as an admission, making the complainants appear to be under investigation, and using terms throughout the report that reference consensual sex.

²⁰ Erskine College, OCR Case No. 04-04-2016

²¹ Georgetown University, OCR Case No. 11-03-2017

²² Christian Brothers University, OCR Case No. 04-03-2043

²³ 20 U.S.C. 1092(f)

²⁴ Revised Sexual Harassment Guidance, *supra*, at 16.

²⁵ Academy School Dist. No 20, OCR Case No. 08-93-1023; Mills Public School Dist., OCR Case No. 01-03-1123.

²⁶ Revised Sexual Harassment Guidance, *supra*, at 16.

²⁷ *Id.*

²⁸ *Id.* at 16-17

²⁹ Sonoma State University, OCR Case No. 09-93-2131

³⁰ Revised Sexual Harassment Guidance, *supra*, at 20.

³¹ *Id.* at 37. See Footnote 102.

³² 20 U.S.C. §1092(f)

³³ Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998).

³⁴ Revised Sexual Harassment Guidance, *supra*, at iv.

³⁵ Davis v. Monroe County Board of Education, 526 U.S. 629, 650 (1999).

While this article contains a discussion of general legal principles and specific laws, it is neither intended to be given as legal advice nor as the practice of law, and should not be relied upon by readers as such. Before taking any action, always check with a licensed attorney in your jurisdiction to ensure compliance with the law.