

Dealing with Sexual Assault Allegations

Inside Higher Ed

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Agenda

- ▶ Title IX and the “Dear Colleague” Letter from the Office of Civil Rights (OCR)
- ▶ Institutional Mistakes that Lead to Sexual Assaults on Campus
- ▶ OCR’s Requirements and Recommendations for Policies and Procedures for addressing Sexual Violence
- ▶ Coordinating Investigations with Police
- ▶ The Grievance Process – from Complaint, to Investigation, to Decision

Title IX – Scope and Applicability

- ▶ Title IX of Educational Amendments of 1972 prohibits discrimination on the basis of sex
- ▶ All post secondary institutions that receive federal funding must comply with Title IX
- ▶ Sexual harassment of students, **which includes acts of sexual violence**, is a form of sex discrimination prohibited by Title IX

Sexual Harassment

OCR's General Definition

Sexual harassment is conduct or expression that:

- ▶ Is *Sexual* in nature
- ▶ Is *Unwelcome* (meaning that the student did not request or invite the conduct)
- ▶ Is *Impactful* (meaning that it denies or limits a student's ability to participate in or benefit from a school's education program)

Two Categories of Sexual Harassment

- ▶ *Quid Pro Quo* – a person in authority conditions an academic decision on the student's submission to or rejection of sexual favors, advances or behavior ("Not everyone gets extra points, Kim. They must be earned, if you know what I mean.")
- ▶ *Hostile Environment* – sexual behavior is severe and pervasive enough to interfere with learning environment (can be based on a single, extreme incident, e.g., rape)

Title IX Applies to...

- ▶ All aspects of a school's education program and activities
 - Academic
 - Extracurricular
 - Athletic
 - Other programs, on or off-campus
- ▶ Third parties participating in a school's education programs and activities
- ▶ Off campus conduct that may lead to a hostile environment on campus



“Dear Colleague” Letter

- ▶ Issued by OCR
- ▶ Spells out OCR’s expectations on how schools will **address and respond** to sexual violence
 - Explains school’s responsibility “to **take immediate and effective steps to end sexual harassment and sexual violence**”
 - Provides guidance for **preventing** conduct, **ending** conduct, and **remediating** its effects

New Area of OCR Concern: Sexual Violence = Sexual Harassment

- ▶ 1 out of 5 undergraduate women experience an attempted or completed sexual assault
- ▶ 1 in 16 men experience an attempted or completed sexual assault
- ▶ 2009 – 3,300 forcible sex offenses reported on college campuses in 2009
- ▶ “The Department is deeply concerned about this problem and is committed to ensuring that all Students feel safe in their school, so that they have the opportunity to benefit fully from the school’s programs and activities.”

**SOMEONE IN AMERICA IS
SEXUALLY ASSAULTED
2 EVERY
MINUTES**



University of Montana

- ▶ Justice Department, in coordination with OCR, is investigating the manner in which campus authorities and local law enforcement have responded to allegations of over a dozen sexual assaults
- ▶ University's process alleged to be unclear and unresponsive
- ▶ University's VP urged campus officials to refer to an alleged assault by four football players as "date rape" and not "gang rape" and then questioned whether a victim had violated code of conduct by discussing her case
- ▶ The University's President expressed surprise that investigators "felt the need to come in"

Mistakes that Can Lead to Sexual Assault on Campus

- ▶ Failing to help students understand what is consensual sexual activity, and what is not
- ▶ Allowing an insular and untouchable culture to develop, especially around sports teams (allowing *revenue* to become more important than education and safety)
- ▶ Perpetuating stereotypes related to drinking, behavior, or manner of dress
- ▶ Attacking or blaming the victim, which tacitly approves future assaults
- ▶ Having a grievance process that is not publicized or welcoming, or not having any grievance process

Sexual Violence: Definition

- ▶ Physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to (1) victim's use of drugs or alcohol or (2) victim's intellectual or other disability. Includes:
 - Rape
 - Sexual assault
 - Sexual battery
 - Sexual coercion

April 4, 2011 "Dear Colleague" Letter

Duty to Respond to Sexual Harassment

“If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”

April 4, 2011 “Dear Colleague” Letter



Requirements of Title IX: Three Things You Must Do

- ▶ Disseminate a Notice of Non-Discrimination
- ▶ Designate a Title IX Coordinator to oversee College's compliance with Title IX
- ▶ Adopt and publish Grievance Procedures for the prompt & equitable resolution of harassment and discrimination complaints

Procedural Requirement 1

Notice of Nondiscrimination: Content

Required:

- ▶ College does not discriminate on basis of sex
- ▶ Title IX requires no discrimination
- ▶ Title IX complaints may be referred to OCR or Title IX Coordinator (provide address, phone number, email)

Recommended:

- ▶ "OCR recommends that a [college's] nondiscrimination policy state that that **prohibited sexual discrimination covers sexual harassment, including sexual violence**, and that the policy include examples of the types of conduct that it covers."

Procedural Requirement 1

Notice of Nondiscrimination: *Distribution*

Required:

- ▶ **Widely distributed** to all students, employees, applicants for admission and employment, and “other relevant persons”

Recommended:

- ▶ **Post prominently** on school web site and various locations throughout the school
- ▶ **Publish and generally distribute** in electronic and print publications

Procedural Requirement 2

Title IX Coordinator: Duties

- ▶ **Oversee** all Title IX complaints
- ▶ **Identify and address any patterns or systemic problems** that arise during investigations – avoid the “silo” effect
- ▶ Meet with Students, as needed
- ▶ Cannot hold conflicting role (e.g., member of disciplinary board)

Introduce the Campus Community to the Title IX Coordinator

- ▶ Identify the Title IX coordinator as the “point person” for complaints
- ▶ Explain that sexual harassment and sexual violence can create hostile environment
- ▶ Emphasize that the school will respond to *all* complaints in a manner that is efficient, effective and fair
- ▶ Highlight the goals of the school’s Sexual Misconduct Policy:
 - Stopping sexual harassment and misconduct
 - Remedying effects of that behavior
 - Taking reasonable steps to prevent behavior

Procedural Requirement 2

Title IX Coordinator: Qualifications

Must :

- ▶ Be **trained** on what constitutes sexual harassment, including sexual violence, and handling complaints
- ▶ **Understand school's grievance procedures;** ensure they provide for prompt & equitable resolution of complaints

Should:

- ▶ Be available to provide assistance to school law enforcement

If Police Are Involved, Should We Wait Until They Finish Their Investigation?

- ▶ NO
- ▶ School may *temporarily* delay fact-finding while police are actually gathering evidence -- after that, must have "dual processing"
- ▶ A parallel criminal investigation does not relieve the school of its independent obligation to investigate and resolve complaints
- ▶ Police investigation may be useful for fact-gathering, but because standards for criminal investigation are different, police reports are not determinative whether conduct violates Title IX
- ▶ MOUs with local police must allow school to meet Title IX obligations

Coordination with Law Enforcement

- ▶ School should notify student of right to file criminal complaint and not dissuade her from doing so
- ▶ Title IX coordinator should have access to law enforcement investigation notes, if it does not compromise criminal investigation
- ▶ Law enforcement should receive training on grievance procedures
- ▶ Law enforcement should notify complainant of right to file Title IX complaint
- ▶ Law enforcement should report violence to Title IX coordinator, if complainant consents

The School

Law Enforcement

Procedural Requirement 3

Grievance Procedures

- ▶ College must adopt procedures that provide for “**prompt & equitable resolution**” of sexual discrimination complaints
- ▶ The procedures must apply to complaints filed by students against school employees, other students, or third parties
- ▶ Don't have to have separate procedures for sexual harassment and sexual violence
- ▶ **NO SEPARATE POLICIES FOR ATHLETES**

Grievance Procedures: Six “Critical” Elements for Compliance

- ▶ Notice of procedures, including where and how complaints may be filed -- plain language, easily located, widely distributed
- ▶ Application of the procedures to complaints
- ▶ Adequate, reliable, and impartial investigation; parity for both sides
- ▶ Designated and reasonably prompt time frames for investigation’s major stages
- ▶ Written notice to parties of the outcome
- ▶ Assurance that the school will take steps to prevent recurrence and correct any discriminatory effects

Useful Points in a Sexual Misconduct Procedure

Provide Clear examples of **Sexual Misconduct** and **Consent**:

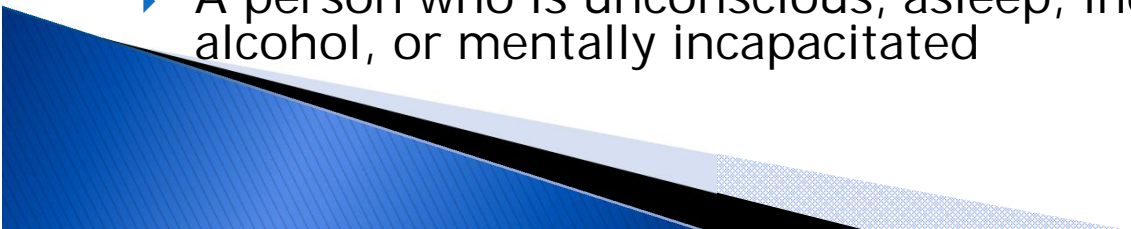
Consent IS:

- ▶ An agreement to a request for sexual activity established by words or actions that are clear, freely given and mutually understandable

Consent IS NOT:

- ▶ Silence, or Failure to resist
- ▶ Inferred by consent to prior or different activity

Consent CANNOT BE GIVEN BY:

- ▶ A person who is person legally capable (e.g., under age 16)
 - ▶ A person who is unconscious, asleep, incapacitated by drugs or alcohol, or mentally incapacitated
- 

Useful Points in a Sexual Misconduct Procedure

- ▶ Emphasize response and concern for campus
 - Any report of sexual misconduct will be investigated and action will be taken to eliminate any ongoing threat
- ▶ Offer assistance in making changes to classes and housing, providing safety measures
- ▶ Assure all involved that they will receive a fair process and be treated with care and respect
 - No penalizing of the complaining party – will be viewed as separate and serious policy violation
 - Harassment of accused will not be tolerated
- ▶ Highlight trained staff and ability to investigate

Training: *Who* Should Be Trained?

- ▶ Training on identifying, reporting, and addressing allegations of sexual violence should broadly be provided to:
 - Teachers
 - Law enforcement unit employees
 - Administrators
 - Counselors
 - General counsels
 - Health personnel
 - Resident advisors
 - Coaches
 - All involved in investigation of complaints (investigators, fact-finders, and decision-makers)

Training: *What* Should Training Cover?

- ▶ Title IX requirements
- ▶ Campus policies
- ▶ Confidentiality
- ▶ No Retaliation
- ▶ Sources of Evidence
- ▶ Examination Technique
- ▶ Addressing admissibility of evidence (prior sexual history or pattern evidence)
- ▶ Preponderance of the Evidence Standard
- ▶ Deliberation Technique
- ▶ Available Sanctions
- ▶ Recusal/Need for Impartiality
- ▶ Sexual assault dynamics
- ▶ Counter-intuitive victim behavior
- ▶ Disclosure/Recantation
- ▶ Evaluating Consent
- ▶ Avoiding stereotypes
- ▶ Role of Alcohol: intoxication, impairment, incapacitation
- ▶ Evaluating credibility: demeanor, interest, detail, corroboration, common sense

Basics

High Level

Can't We Just Work this Out?

- ▶ Mediation **MUST NOT** be used for complaints of sexual assault, even if parties volunteer (grievance procedures should make this clear)
- ▶ Mediation **MAY BE** used for some types of sexual harassment, but the complaining student...
 - Cannot be required to work out the problem directly with the alleged perpetrator
 - Must be notified of the right to end the informal process and commence a formal process

What Should I Do When I Meet With the Complainant?

- ▶ Seek to obtain consent before beginning investigation
- ▶ If a possible crime, notify of right to file a criminal complaint
- ▶ If complainant refuses to have his/her name disclosed to alleged perpetrator, explain that school's ability to respond may be limited
- ▶ No retaliation: School must take steps to prevent, ensure that complainant knows how to report problems, and respond strongly if retaliation occurs

What If the Complainant Wants Confidentiality, or Doesn't Want to Pursue the Complaint?

- ▶ Inform student that school cannot ensure confidentiality (e.g., mandatory reporting)
- ▶ Explain that school has obligation to provide safe, non-discriminatory environment for all students in the campus community
- ▶ OCR still says that “school should take all reasonable steps to investigate and respond to the complaint”
 - Training
 - Education programs

What Interim Measures Should I Take To Protect Complainant?

- ▶ Must have procedures in place and take steps to protect against retaliation; ability to report
- ▶ Notify the complainant of options to avoid contact (e.g., no contact order)
- ▶ Advise complainant of counseling, medical and mental health services
- ▶ Allow students to change classroom or living situations (minimize burden on the complainant)

Other Potential Remedies for Complainant

- ▶ Provide an escort
- ▶ Provide academic support services
- ▶ Arrange for Complainant to re-take a course or withdraw without penalty
- ▶ Review any disciplinary action taken against the Complainant to see if there is a causal connection with the harassment

Grievance Procedures

Establish Time Frames For:

- ▶ Full investigation (OCR says 60 days for a “typical” investigation; parties should receive periodic status reports)
- ▶ Providing written response regarding the outcome of the complaint
- ▶ Filing an Appeal, if applicable

The Investigation and Hearing: Equality and Parity

- ▶ Both parties must have equal opportunity to present relevant witnesses and evidence
- ▶ Both parties must have similar and timely access to information to be used at the hearing (consistent with FERPA)
- ▶ If the accused is given the opportunity to tell his side of the story before the hearing, review the complainant's statement, and present character evidence, *the Complainant should be given the same*

Can We Keep Out the Lawyers?

- ▶ Yes
- ▶ But, if the school allows lawyers to participate in the process, it must do equally for both sides
- ▶ OCR "strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing"

Standard of Proof at the Hearing

- ▶ Must be preponderance of the evidence (i.e., more likely than not that sexual harassment or violence occurred)
- ▶ Cannot be “clear and convincing”
- ▶ When the fact-finder is presented with two different but plausible versions of an incident, credibility determinations may tip the scale on way or the other

Written Notice of Outcome

- ▶ Both parties must be notified in writing of the outcome of both the complaint and any appeal (OCR recommends concurrent notice)
- ▶ The Institution may disclose to the alleged victim the final results of a disciplinary proceeding against the alleged perpetrator, regardless of whether the institution concludes that a violation was committed
- ▶ If the institution determines that the alleged perpetrator has committed a crime of violence or a non-forcible sex offense (e.g., statutory rape), the institution may disclose the results to anyone

Questions?

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