



Protecting Students From Peer-To-Peer Sexual Misconduct: The Struggle To Decide Higher Education's Proper Role

Insights

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Colleges and universities are squeezed between a rock and a hard place when it comes to complying with Title IX's requirements for responding to student-on-student allegations of harassment, discrimination, assault, and sexual violence. Last year, they experienced a record increase in complaints of sexual assault and related litigation. For example, in just the first six months of 2018, Yale University reported an 87.8 percent increase.

At the same time, they also experienced a sizable increase in litigation pursued by students accused of misconduct, typically alleging due process violations and discrimination claims. Mix in the flurry of media coverage, and colleges and universities have complex legal and public relations hazards to navigate. Given the oft-cited statistic that one in five female students will experience some form of sexual misconduct in her college years, the importance and seriousness of this legal turmoil is justified, and the stakes are very high.

How Did We Get Here?

The standards for managing student-on-student allegations of sexual misconduct flow from Title IX of the Education Amendments Act of 1972. Title IX generally prohibits discrimination on the basis of sex in any federally funded educational program or activity. In doing so, it contains one of the most succinct anti-discrimination laws on the books:

No person in the United States shall, on the **basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Based upon this single sentence, in 1999, the U.S. Supreme Court held that a school receiving federal funds that knows about possible harassment must promptly investigate, determine what occurred, and take appropriate steps to resolve the concern. The Court further held that federally funded schools can be liable for violating Title IX in connection with student-on-student sexual misconduct where all of the following requirements are met:

1. The school is able to "exercise substantial control over both the harasser and the context in which the known harassment occurs";

2. The student has suffered sexual misconduct “so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school”;
3. The school had “actual knowledge” of the sexual misconduct; and
4. The school acted with “deliberate indifference” to the known misconduct.

These requirements provided for liability in very limited circumstances, and only for the school’s conduct and not that of the offending student. Essentially, schools were shielded from liability unless their response to misconduct, or lack thereof, was clearly unreasonable in light of the known circumstances—in other words, “deliberately indifferent.”

Two years later, in 2001, the U.S. Department of Education’s Office of Civil Rights changed the “actual knowledge” requirement to include “constructive knowledge.” This new guidance provided that schools could be held liable if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual misconduct.

The requirements remained virtually unchanged for nearly a decade. Then, in 2011, the Obama administration issued the Dear Colleague Letter. It identified additional steps that federally funded schools must take to avoid liability, including:

- providing a grievance procedure for students to use to file a complaint;
- responding to off-campus incidents if the students would experience the continuing effects of the harassment in the educational setting;
- taking immediate and appropriate action to investigate what happened;
- implementing a procedure for both students to present witnesses and other evidence; and
- providing notice of the grievance outcome to both sides.

The letter also reaffirmed the move from the actual knowledge requirement to that of constructive knowledge.

The 2001 move to a constructive knowledge requirement, and its reaffirmation in 2011, left colleges and universities with an expanding exposure to potential litigation and liability. For example, they have confronted myriad constructive knowledge questions related to *off-campus* incidents. These situations often occur when schools learn of red flags in an accused student’s background prior to enrollment. Further, they have faced allegations of a past pattern of group behavior involving other students.

A very recent example of this expanded view of Title IX liability can be found in a lawsuit filed just recently by three female students against Yale University and over eight fraternities related to sexual harassment they encountered at parties. The students allege that Yale is liable under Title IX for allowing the fraternities to create a gender hostile environment for over a decade and should be

allowing the fraternities to create a gender-hostile environment for over a decade and should be held accountable for not ensuring an educational environment free of discrimination. All of this goes to show that long gone is the original guidance that federally funded schools will only be liable when they have actual knowledge of the sexual misconduct but fail to take any reasonable action.

Or So We Thought . . .

In a jarring effort to roll back the expanded view, President Trump's Secretary of Education, Betsy DeVos, rescinded the 2011 Dear Colleague Letter in 2017, and then, on November 16, 2018, issued proposed amended regulations to Title IX. As is required, the proposed rules underwent a 60-day public comment period, which just closed. There were almost 100,000 comments. The more controversial of Education Secretary DeVos's proposed rules include:

- narrowing the definition of sexual misconduct to include only “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity”;
- returning to the “actual knowledge” requirement;
- allowing schools to require formal complaints to specific employees (e.g., can require complaints be made only to a Title IX Coordinator, as opposed to a professor or coach);
- removing any obligation to address *off-campus* misconduct if it did not occur in an education program or activity, regardless of its continuing on-campus effects;
- eliminating the single-investigator model and requiring different staff members to act as the Title IX Coordinator, Investigator, and Decision Maker; and
- requiring schools to make a final determination on alleged misconduct after a live hearing where the parties, through advisors, have the option to cross-examine one another.

Where Might Things Go From Here?

Based on the sheer number of comments and strong reaction to a number of Education Secretary DeVos's proposed changes, most expect further modifications before the regulations become final. Once finalized, colleges and universities will have the option to either adopt the new rules or maintain those that provide greater protections for students than are what is required. However, if the modified rule requiring a live hearing and cross-examination is adopted in its current form, many schools will be required to modify their investigation policies to conform, as many schools do not use such an adversarial process.

In the meantime, schools should be on the lookout for the final rules and be prepared to make required changes. Further, despite the fact that most of the focus has been on what schools must do after the fact, you would do well to consider what steps you can take to help prevent sexual misconduct and reduce the growing number of complaints in the first place. Some first steps could include, but are not limited to, educating students on what “consent” looks like, and providing students bystander intervention training.

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