



The National Women's Law Center's Legal Network for Gender Equity presents

Title IX & Sexual Harassment: School Complaints, OCR Complaints, and Litigation

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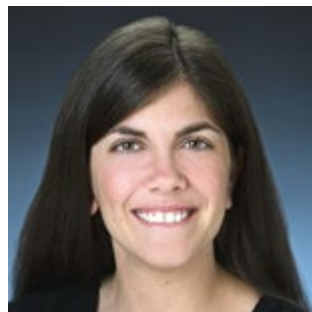
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Legal Network for Gender Equity

- The [Legal Network for Gender Equity](https://www.nwlc.org/legal-network) connects people who have experienced sex discrimination as a ***student, worker, or patient*** with attorneys like you. Thank you!
- For technical assistance, please contact legalnetwork@nwlc.org



Sexual Harassment in Schools

Sexual harassment affects too many students.

- **Sexual harassment affects too many students.**
 - K12:
 - 56% of girls and 40% of boys in grades 7-12 are sexually harassed each year
 - 1 in 5 girls ages 14-18 (21%) are kissed or touched without their consent
 - College:
 - 1 in 4 women, 1 in 5 trans and gender-nonconforming students, and 1 in 15 men are sexually assaulted in college
 - 1 in 3 women & 1 in 6 men are survivors of dating / domestic violence
 - 1 in 6 women & 1 in 19 men have experienced stalking
 - Statistics are often higher for Black and Brown women, LGBTQ students, and disabled students
- **Sexual harassment occurs both in and outside of school.**
 - In school: in class, on Zoom, on campus, during away games, in dorms, etc.
 - Outside of school: in private homes, Greek housing, on social media, etc.

Most students don't report sexual harassment.

- Only 2% of girls ages 14-18 who are kissed or touched without consent tell their schools
- Only 1 in 10 college survivors report sexual assault to their schools
- **Reasons for underreporting to school**
 - Shame or embarrassment
 - Fear of retaliation
 - Fear of school discipline, police, or immigration officials
 - Concern the harasser will get in trouble
 - Belief the harassment was not “serious enough” (e.g., because it began consensually or involved alcohol or drugs)
- **Many students don't report to police**
 - Students who are of color, undocumented, LGBTQ, and/or disabled are afraid of criminal legal system
 - Survivors who are of color and/or LGBTQ often do not want to report assailants who are of color and/or LGBTQ

Students who report are often ignored or punished.

- **Schools often punish sexual harassment victims for:**
 - Consensual sexual activity or premarital sex
 - Reasonable self-defense
 - Expressing trauma symptoms (“acting out”)
 - Missing school to avoid their harasser
 - Telling other students they were sexually harassed
 - Filing a “false complaint”
 - Being the subject of a retaliatory cross-complaint by their harasser
- **Some students are more likely to be ignored or punished:**
 - Black and Brown women, LGBTQ students, pregnant and parenting students, and disabled students
 - Stereotypes label them as “promiscuous,” “aggressive,” less credible, and/or less deserving of protection
- **Students who don’t get help lose access to education:**
 - Lower grades, withdrawal from classes / activities / school

The Trump Title IX rule harms all students.

1. **Schools can—and, in many cases, must—ignore many reports of sexual harassment if:**
 - It doesn't fit a narrow definition
 - It takes place in private off-campus or online locations
 - One of the people don't go to the school anymore
 - In colleges/universities, it is not reported to a high-ranking employee.
2. **Schools can mistreat/further harm survivors:**
 - Schools can treat students “unreasonably”
 - Schools cannot provide a full range of supportive measures
 - Schools can use mediation to resolve student-on-student sexual assault
1. **Schools can—and, in many cases, must—use uniquely unfair investigation procedures for sexual harassment:**
 - Schools must presume there was no sexual harassment

NWLC Litigation Update

- A federal judge held unlawful the “exclusionary rule,” which required postsecondary schools to exclude all oral or written statements made by any party or witness who did not submit to cross-examination at a live hearing.
 - College and graduate school survivors were required to submit to cross-examination by their harasser or abuser’s advisor for the statements in their formal complaint or Title IX interview to be considered as evidence
 - Respondents could exclude a confession or apology from the evidence by simply refusing to be cross-examined
 - Schools could not consider statements in a text message, email, rape kit, police report, etc. if the person who wrote the statements was not available or was too afraid to appear for cross-examination
- The Department of Education has announced that it will no longer enforce that provision.
 - Effectively, survivors should no longer have to be cross-examined by the respondent’s advisor under the Title IX rule

School-Based Title IX Complaints

Cari Simon's Practice Representing Survivors

- ❑ Campus Disciplinary Process
- ❑ Accommodations
- ❑ Federal Investigations
- ❑ Civil Lawsuits
- ❑ Defamation

Effective Advocacy



Policy



Tik Tok

Investigation and Report



Collect
Evidence



Timeline



Interview



Report
Response

Title IX Disciplinary Procedures



Live hearing



Cross-examination by the advisor of choice: Parent or fraternity brother



If you don't submit to cross, statements cannot be considered.



Schools must assign an advisor to conduct cross



Only limits on cross are relevance and sexual history.



Informal Resolutions

Hearing and Cross-Examination in Practice



Pre-Hearing
Conference



Witnesses



Safeguards &
Decorum



Prevent
encounters



Opening
Direct
Cross
Closing



Waiver



Decision-
maker pools



Non IX
Hodge
Podge

Accommodations, Remedies & Supportive Measures

- ❑ Definition:
 - ❑ Designed to restore or preserve equal access to the recipient's education program or activity
 - ❑ Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge
- ❑ No formal report required
- ❑ Examples
 - ❑ "Course-related adjustments" include opportunities to retake classes or exams or adjusting an academic transcript
 - ❑ Counseling
 - ❑ Extensions of deadlines
 - ❑ Modifications of work or class schedules
 - ❑ Changes in work or housing locations

Academic Impact

- ❑ Why grades matter - Micro and Macro
- ❑ What a school can and should do
 - ❑ Extensions and Location: *Rape is extraordinary*
 - ❑ Remedy academic record: *Ws meaning; Retroactive Withdrawals*
 - ❑ Address GPA requirements: *i.e. scholarships*
- ❑ Pop Quiz



Clery Act



“prompt, fair and impartial process”



Officials annually
trained on:

- 1) issues related to VAWA crimes
- 2) how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability



Schools *must* provide
accommodations or
protective measures

If requested and
reasonably available

Department of Education's Office for Civil Rights (OCR) Complaints

Department of Education's Office for Civil Rights

OCR is responsible for enforcing federal civil rights laws in programs and activities that receive financial assistance from the Department of Education.

These may include:

- state education agencies
- elementary and secondary school systems (LEAs or school districts)
- colleges and universities (including private colleges or universities)
- adult education and career and technical education (CTE) institutions
- state vocational rehabilitation agencies

OCR Regional Enforcement Offices

- **Boston** (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont)
- **Chicago** (Illinois, Indiana, Iowa, Minnesota, North Dakota, Wisconsin)
- **New York** (New Jersey, New York, Puerto Rico, Virgin Islands)
- **Cleveland** (Michigan, Ohio)
- **Philadelphia** (Delaware, Maryland, Kentucky, Pennsylvania, West Virginia)
- **Kansas City** (Arkansas, Kansas, Missouri, Nebraska, Oklahoma, South Dakota)
- **Denver** (Arizona, Colorado, New Mexico, Utah, Wyoming)
- **San Francisco** (California)
- **D.C.** (North Carolina, South Carolina, Virginia, D.C.)
- **Atlanta** (Alabama, Florida, Georgia, Tennessee)
- **Dallas** (Louisiana, Mississippi, Texas)
- **Seattle** (Alaska, American Samoa, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and the Northern Mariana Islands)

<https://ocrcas.ed.gov/contact-ocr>

OCR Enforcement

- **Processing complaints**

- OCR evaluates, investigates, resolves, and monitors complaints - process is governed by the Case Processing Manual (<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>)
- Complaints must be written and can be filed online:
<https://www2.ed.gov/about/offices/list/ocr/complaintintro.html>
 - Must allege discrimination under one of the laws OCR enforces and involve an institution over which OCR has jurisdiction
 - Must be timely (generally, within 180 days of date of alleged discrimination unless granted waiver)
 - Must include consent, when filing on behalf of or pertaining to another person

- **Conducting compliance reviews**

- Allow OCR to target classwide issues; agency directed

- **Providing technical assistance**

- TA is available for institutions as well as students and families
- TA may include responding to phone or written inquiries
- Doing presentations, workshops, and consultations

Title IX Litigation

Basics of Gebser/Davis

- Unfriendly liability standard set in two key cases:
 - Gebser v. Lago Vista Ind. Sch. Distr., 524 U.S. 274 (1998)
 - Davis v. Monroe County Bd. Of Ed., 526 U.S. 629 (1999)
- Elements of a standard Title IX sexual harassment claim for plaintiff seeking money damages:
 - Defendant had actual knowledge of
 - And was deliberately indifferent to
 - Sex-based harassment so severe, pervasive, and objectively offensive
 - That the victim was effectively denied access to education

Exploring Alternatives to Gebser/Davis

- “Official policy” claims
 - Karasek v. Regents of Univ. of Cal., 956 F.3d 1093 (9th Cir. 2020)
 - Simpson v. Univ. of Colorado Boulder, 500 F.3d 1170 (10th Cir. 2007)
- “Straight” sex discrimination
- Sex stereotyping
 - Prompt complaint
 - Utmost resistance
 - “Sexual purity”

Emerging Issues

- “Further harassment” split
- Single incident
- Off-campus harassment
- Relationship to Title VII
- Narrowing of “person[s]” and “program or activity”

No person in the United States shall, based on 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.

Questions?