Student Sexual Harassment in Independent Schools: Is Title IX the Standard for Responding?

The media has focused recently on sexual violence on college campuses and, increasingly, at public K-12 schools. But the subject cannot be ignored by independent schools. This publication will address how emerging standards for handling peer-to-peer sexual violence under Title IX are affecting independent schools.

Why Should My School Care About Title IX?

Title IX, a portion of the Education Amendments Act of 1972, prohibits sex discrimination in any federally funded educational program. This prohibition applies to all institutions receiving federal financial assistance and includes all educational experiences—academics, athletics, and extracurricular activities. The U.S. Department of Education’s Office for Civil Rights (OCR) has a long history of issuing guidance and enforcing the law with regard to sex discrimination, which includes sexual harassment and sexual violence, but has recently expanded Title IX compliance requirements and stepped up efforts to enforce them.

If your school does not receive federal financial assistance and Title IX does not apply, the evolving standard of care for sexual harassment or misconduct complaints requires you to re-evaluate your related policies and procedures.
What Is Sexual Harassment?

Sexual harassment is unwelcome conduct of a sexual nature that creates an intimidating, hostile, or abusive environment that is so severe or pervasive it prevents a student from fully participating in an educational program or activity. Harassment includes unwanted verbal or written sexual statements, sexual advances, name-calling, and graffiti. The conduct may occur in person or via cellphones or the Internet. OCR guidance stresses that there does not need to be intent to harm nor does the activity need to be directed at a specific person to be considered harassment. OCR states that “the more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical.” Male and female students may be subject to sexual harassment. In addition, harassment based on gender stereotypes is sexual harassment.

What Is Sexual Violence?

OCR defines sexual violence as “physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual may also be unable to consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts are forms of sexual harassment covered under Title IX.”

Is Your School a Recipient of Federal Financial Assistance?

To know whether your school must follow the requirements of Title IX, you must first determine whether it receives federal financial assistance (FFA), which may come in the form of:

1. Grants or loans of funds, including funds for the acquisition, construction, renovation, restoration, or repair of a building or facility, and scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity
2. Grants, donations, or transfers of federal real or personal property or interest in the property
3. Services of federal employees detailed to the recipient
4. Sale, lease, or use of federal property or interest therein at nominal or reduced cost
5. Contracts intended to provide assistance to any education program or activity

Determining whether your institution qualifies as an FFA recipient is complex. If you have not made this determination, have the school's attorney review all potential sources of federal funding it receives and all federal programs in which it participates.

If your school is an FFA recipient, Title IX applies to its entire operations, not just the program or activity that receives the funds. Because Title IX governs your institution's obligations to address sexual harassment, UE recommends that you consult our recent Public School News “Title IX and Sexual Harassment in K-12 Public Schools: Key Steps to Compliance.”
The National Association of Independent Schools (NAIS) has identified six federal programs that independent schools commonly participate in:

- Safe and Drug-Free Schools and Communities—State Grants
- Title I of the Elementary and Secondary Education Act—Grants to Local Educational Agencies
- Title II of the Elementary and Secondary Education Act—Improving Teacher Quality Standards
- National School Lunch Program
- Enhancing Education Through Technology
- Special Milk Program for Children

For a detailed analysis of whether participation in these programs qualifies the school as an FFA recipient, see the NAIS publication *Are You a Recipient of Federal Financial Assistance?: A Look at Select Federal Programs*, January 2011.

If your school is not an FFA recipient and Title IX does not apply, the evolving standard of care for complaints of sexual harassment or misconduct requires you to re-evaluate your sexual misconduct policies and procedures.

**What Must Schools Do?**

When an FFA recipient or public school district knows or reasonably should have known about sexual harassment or sexual violence that creates a hostile environment, it must take immediate action to end the harassment, prevent its recurrence, and remediate its effects. Similarly, if an independent school that is not an FFA recipient knows of or learns about sexual harassment, it should take steps to end the harassment, remediate the situation, and take steps to prevent the harassment from recurring.

Individual students may bring private lawsuits against a school district under Title IX and, at independent schools, students may sue for breach of contract or negligence. United Educators has received a number of claims from independent school *students* based on the harassing conduct of their fellow students. Therefore, regardless of whether Title IX applies, independent schools should take steps to identify, prevent, and remedy peer-on-peer harassment.

**Creating a Harassment-Free Environment**

The following actions can have the biggest impact on combating sexual harassment and sexual violence in a school community and create a positive learning environment. Although not identical, these steps are similar to what public schools must do under the standards imposed by Title IX.

**Revise and Publicize Your Anti-Discrimination Policy and Grievance Procedure**

Review your sexual harassment policy to ensure that it conforms to best practices. Make sure the policy states clearly that your school does not tolerate sex discrimination or sexual harassment in any form by anyone in your community. Prominently publish and disseminate the school’s nondiscrimination policy to everyone in the school community.

Your policy should include definitions of sexual harassment and sexual violence and examples of prohibited conduct that your students can easily understand. Define “consent” to engage in any sexual activity. Encourage reporting of all incidents. Explain how and where students, parents, and employees can make complaints about discrimination or harassment.
Your institution’s policy should also outline the procedure for investigating and resolving discrimination or harassment complaints, including a general time frame to complete the investigation. Distribute the grievance procedure to employees, students, and parents.

Make sure your policy includes:

- Procedures for reporting an incident, problem or concern
- A statement that the policy and procedures apply to complaints alleging harassment by employees, other students, or third parties
- Definitions of sex discrimination, sexual harassment, other prohibited conduct, and consent;
- A promise to impartially investigate complaints within a reasonable time frame
- An anti-retaliation provision (i.e., intimidation, threats, coercion, or discrimination in any form and through any medium) including how to report retaliation and the school’s response procedures for retaliation allegations
- The standard used to determine if harassment has occurred
- The right of any party to appeal the determination following an investigation
- How the school will handle requests for confidentiality

The anti-harassment policy may intersect with other school policies, so be sure your language and definitions are consistent across all policies.

**Conduct Training**

Train employees annually on how to identify, stop, and prevent peer sexual harassment, including sexual violence, and, additionally, how to maintain appropriate professional boundaries with students. Include in employee training an overview of the school’s anti-discrimination policy and grievance procedures and how to report a complaint or concerns that may implicate the school’s sexual harassment policy.

Educate students about sexual harassment in an age-appropriate way, including how to identify harassment. Be clear on how students can report harassment they experience or witness. Explain the school’s anti-harassment policy and grievance procedure. Talk to students in language they will understand and provide specific examples of prohibited conduct.

Offer training to parents about how the school works to prevent, identify, and take action to stop sexual harassment. Educate them on how to recognize the effects of harassment in their own children. Include an overview of the school’s sexual harassment policy and grievance procedure along with how to report harassment.

Identify other constituents in your school, such as bus drivers, dining workers, volunteers, coaches, and outside contractors, who can play a role in preventing harassment. Train them on how to identify and report harassment.
Appoint an Administrator to Oversee Harassment Prevention

To provide a holistic application of your school's harassment policies and related prevention efforts, multiple administrators should review this issue regularly. Ideally, your school should have a committee to review policies, conduct trainings, and prevent harassment on your campus. Involvement of multiple people and departments will demonstrate that the school does not tolerate harassment on your campus. Because of staff demands, that may not be realistic for your institution. At a minimum, your school should give ownership of sexual harassment prevention to one administrator who can involve others as needed.

The administrator should:

- Know and understand your schools' current anti-harassment policy
- Confirm that the school's anti-harassment policy contains the elements listed above
- Review the policy with other administrators and revise it based on legislative, legal, or school policy changes
- Lead training initiatives for students, employees, and parents
- Champion a healthy school culture by spreading awareness and prevention messages

The primary administrator should receive reports of harassment and have the authority to initiate an investigation. Prominently publish his or her contact information throughout your campus and in your anti-harassment policy. Identify others in your school who can receive reports when the administrator is not available and in case someone wishes to lodge a complaint against this person. Give the administrator authority to identify and address discrimination issues to prevent systemic problems.

Create a recordkeeping system for reports of sexual harassment and steps taken to address them, investigation outcomes to demonstrate consistent investigations, and policy enforcement and harassment prevention efforts. Accurate recordkeeping allows the administrator to identify and address patterns of harassment, repeat offenders, or constituencies that require additional training.

Select a Qualified Investigator

Conducting a systematic, professional investigation of all reports is paramount. Your school’s investigative procedures may vary, but they should be prompt, thorough, and impartial. Don’t wait for law enforcement to complete an investigation, as the harassing conduct could continue in the meantime. Instead conduct your investigation and reach a conclusion under your school’s anti-harassment policy. Impose any appropriate disciplinary sanctions regardless of the status of any criminal investigation.
Be sure your institution has access to and uses a qualified investigator. This may be someone on your campus trained to conduct investigations, or it may be an outsider, such as your school’s attorney. Qualifications should include knowing how to recognize trauma and question sexual assault victims. Consider national organizations and local resources that could properly train your internal investigator. Vet your outside investigator in advance to be sure he or she has an appropriate temperament, will be nonjudgmental, and can connect with witnesses. Investigators must recognize the importance of confidentiality and know your institution’s anti-discrimination policy to make appropriate determinations. Request examples of similar completed investigations to evaluate the quality of his or her work. When appointing an investigator to handle a specific complaint, make sure he or she will have time to conduct a prompt and thorough investigation.

Remember State Law

Some states are codifying OCR’s Title IX guidance and may extend the law to cover private schools. These efforts have primarily targeted higher education institutions, but it is important to know what your state requires of its schools, including any mandatory reporting or disclosure laws. Allegations of criminal misconduct should be reported to the appropriate law enforcement agency, and suspected child abuse should be reported to child protective services or another appropriate agency.

Conclusion

Preventing sexual harassment and sexual violence in independent schools enhances the learning environment for all students. Implementing our recommended steps will advance that goal and move your institution toward a harassment-free environment.
A review of UE claims revealed that student-on-student sexual harassment or sexual violence is a concern for independent schools, as noted below.

**UE Claims Data**

Over the past five years (2010-2015), independent schools reported to United Educators a number of claims of student-on-student sexual harassment or sexual violence.

- **Of those:**
  - 100% of alleged perpetrators were male
  - 88% of the alleged victims were female

Most (86%) of the claims involved single perpetrators, with 14% involving multiple perpetrators against one victim. Under a quarter (18%) of the claims involved multiple incidents of sexual harassment or sexual violence, with 72% of claims involving only one incident.

Of the claims in which a location was identified, 33% stemmed from incidents occurring in school residence halls, and 14% occurred in a bathroom or locker room.

- 31% took place in other campus locations, ranging from classrooms to libraries to stairwells
- 14% of the claims stemmed from activity occurring off campus or on a school bus
Acknowledgment

This Risk Research Bulletin was written by Heather A. Salko, senior risk management counsel at United Educators. United Educators would like to thank Debra Wilson at the National Association of Independent Schools for her contribution to this publication.

Resources

1 is 2 Many
White House Campaign

Crossing the Line: Sexual Harassment at School
American Association of University Women

National Association of School Psychologists

Legal and Legislative Resources
National Association of Independent Schools

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