

# EDUCATION RIGHTS OF SEXUAL ASSAULT VICTIMS

Number 6

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Washington Coalition of Sexual Assault Programs*

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Every day, students are sexually assaulted in high school, junior high and elementary schools. This newsletter focuses on the legal recourses available to victims of sexual assault - often captured under the heading of "sexual harassment" in the educational setting. **Sexual assault is a severe form of sexual harassment.** Schools that receive federal funds are required to prevent and appropriately respond to incidents of sexual violence, per Title IX of the 1964 Civil Rights Act.

Sexual assault victims also have other legal rights in the education setting - such as privacy protections and access to their school records under the Family Education Rights and Privacy Act (FERPA) - which are not addressed in this newsletter. College and university students also have institution-specific processes and remedies available through student codes of conduct, disciplinary proceedings and other campus-based remedies which are beyond the scope of this publication.

This newsletter is focused on minors in our public school settings who have experienced sexual violence. It is important that victims understand that when sexual violence occurs at school, the school has ethical and legal responsibilities to protect both the victim and the alleged perpetrator. This sometimes may impact how the school responds or fails to respond appropriately to a victim of sexual violence, thus perhaps increasing the need for victim advocacy in the education arena. Having a foundation of knowledge about this topic will enable advocates to provide more informed support to victims and assist them in making informed decisions about their education rights and available legal remedies.

If you or your clients have any questions about the legal rights of sexual assault victims in schools, please do not hesitate to contact the Sexual Violence Law Center.

“The fact that a student may accept the conduct does not mean that he or she welcomed it.”

#### **DISCLAIMER:**

*The legal information provided in this newsletter should not be considered legal advice. Whether a particular factual situation is contrary to federal or state law will depend on a number of circumstances specific to the victim. If you or your client needs legal advice, you should consult an attorney. Laws change both as the result of legislative and court decisions. The information here is current as of October 2007.*

## **SEXUAL ASSAULT IN SCHOOLS: Q&A**

### **1. What is sexual assault/harassment in schools?**

Sexual violence takes many different forms - from unwanted sexual touching such as rape, to invasions of space such as sexual jokes and cat calls, to attitudes and beliefs such as “victims are to blame” or the “normalizing” of violence, particularly against women, because of their sex.

Sexual harassment/assault in schools is unwanted and unwelcome behavior of a sexual nature that interferes with a student’s right to receive equal educational opportunities. It can include **unwelcome sexual advances, requests for sexual favors, and other verbal (insulting remarks and jokes and verbal abuse), nonverbal (such as leering and physical gestures conveying a visual meaning) or physical conduct of a sexual nature** (from pinching and fondling to rape).

All the examples referred to above are forms of sex discrimination that are against the law. Federal law protects people’s civil rights in the education setting and addresses sex discrimination and, by judicial precedent, sexual harassment. As previously mentioned, **sexual assault is a severe form of sexual harassment**, which is prohibited under federal law.

The courts and the Office for Civil Rights (OCR) have recognized two forms of sexual harassment claims: the *quid pro quo* (this for that) claim and the hostile environment claim.

A *quid pro quo claim* is where a teacher (or responsible employee) conditions an educational decision(s) or benefit(s) upon the student’s submission to unwelcome sexual conduct. *Quid pro quo* sexual assault/harassment is unlawful whether the student resists and suffers the threatened harm or submits and thus avoids the threatened harm.

The second form of sexual assault recognized under the law is called a *hostile environment claim*. This type of sexual assault/harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal or physical conduct of a sexual nature by an employee, another student, or a third party. A hostile environment claim

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*“The critical issue is whether the school recognized the sexual assault occurred, and took effective and prompt action calculated to end any harassment, and prevent its reoccurrence and as appropriate, remedy the effect of the assault on the student.”*

requires that the harassing behavior be serious enough to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex.

**What constitutes “unwelcome conduct”?**

- Conduct is unwelcome if the student did not request or invite it and “regarded the conduct as undesirable or offensive.”
- The fact that a student may accept the conduct does not mean that he or she welcomed it.
- Alleged “consensual” sexual relationships between an adult school employee and an elementary student will never be viewed by OCR as consensual.

**2. How do I know if the behavior the victim has been experiencing or has experienced at school rises to the level of “hostile environment sexual harassment” prohibited by federal law?**

Ask the victim to determine whether or not the sexual violence or ongoing sexual harassment she has experienced at school, has denied or limited her ability to participate in or benefit from the educational program? If the answer is yes, than ask how. She will need to identify specific things such as missing class, missing school all together, not being able to concentrate, failing grades, etc...

What the law considers as contributing factors to the creation of a hostile environment in the school setting based upon sex discrimination are the following:

- The degree to which the conduct affected one or more students’ education
- The types, frequency and duration of the conduct
- The identity of and relationship between the alleged harasser and the victim(s)
- The number of individuals involved
- The age and sex of the alleged harasser and the victim(s)
- The size of the school, location of the incidents, and context in which they occurred
- Other incidents at the school

- Incidents of gender-based, but nonsexual harassment

### 3. What responsibility do schools have to end and/or prevent sexual assault at school or school sponsored events?

Under state and federal law, school districts are required to address the issue of sexual assault in their policies. However, it may be referred to as sex discrimination, sexual harassment, harassment, bullying or intimidation, rather than sexual violence.

RCW §28A.300.285 requires all schools in Washington State to adopt model prevention policies and training materials that prohibit harassment, intimidation and bullying. It is the responsibility of each school district to share this policy with parents or guardians, students, volunteers and school employees. There may also be provisions in these policies specific to providing resources to victims of bullying, harassment and intimidation. Ask your local school for a copy of their policies and training materials.

Under Title IX, schools must adopt and publish a policy against sex discrimination and grievance procedures. Grievance procedures must apply to complaints of sex discrimination filed by students. Title IX does not require specific policies or procedures, only that they must be an effective means for preventing and responding to sexual harassment. Depending on the district's policies under Title IX, they may or may not include specific responsibilities regarding the provision of resources to victimized students.

Under Title IX, the critical issue is whether the school recognized that sexual harassment (sexual assault) occurred, and took effective and prompt action calculated to end the harassment, prevent its reoccurrence and as appropriate, remedy the effect of the assault on the student.

Victims also have a right to information regarding the complaint against the other student, including information about sanctions imposed on a student who is determined to be responsible for the offensive behavior.

Because there are many different ways a school may appropriately respond to allegations of sexual assault, the federal law does not provide specific duties to schools because it encourages schools and educators to take a reasonable common sense approach to addressing issues of serious misconduct. However of special note, is that if *students are not aware of what kind of conduct constitutes sexual assault/harassment AND that such conduct is against the law, a school's general policy and procedures relating to sex discrimination complaints are not going to be effective.*

*"It is the parent's or legal guardian's responsibility, including costs associated with transport, to transport the offending juvenile to another school."*

## STUDENT TO STUDENT SEXUAL ASSAULT

When sexual assault is perpetrated by other students or third parties (student to student sexual assault/harassment), the school is responsible under federal law, for taking immediate effective action to eliminate the hostile environment AND prevent its recurrence if the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program. This means that the school **MUST** know or reasonably should have known about the conduct (this is why it is important to notify school officials in writing).

*“A school has a duty to respond to sexual harassment about which it reasonably should have known; i.e., if it would have learned of the harassment if it had exercised reasonable care or made a ‘reasonable diligent inquiry.’”*

The first question to ask when evaluating what options student victims of sexual harassment have when the perpetrator is a fellow student is whether the offender has been convicted of a sex crime. Under Washington law, if the juvenile offender has been adjudicated for a sex crime, schools have a direct responsibility to protect victims of sexual assault and prevent any contact with the offender. If a juvenile offender has not been adjudicated, the responsibilities of the school are less specific and protections for victims may be obtained through a sexual assault protection order or anti-harassment order, or more generally by accessing the school's Title IX policies and grievance procedures (see discussion above).

### Convicted Juvenile Offender:

RCW 13.40.125 provides that within 30 days of the release of a juvenile offender the public and/or private school the offender will be attending must be notified and provided with the criminal background history of the offender. Additionally, the law states that a convicted juvenile sex offender **shall not** attend a public or private school of a victim or sibling of a victim of the sex offender.

It is the responsibility of the parent or legal guardian of the offender, including costs associated with transport, to transport the offending juvenile to another school. It is not the school's responsibility to determine where the offender will attend school.

### Convicted or Investigated Juvenile Offender:

RCW 10.14.040(7) allows for parents or guardians to petition for a protective order (called an anti-harassment order) on behalf of their child. If the offender has been adjudicated of an offense against the child or has been investigated for such an offense, the court may order the person restrained not to attend the same school the victim attends and order a transfer to another school. If the judge makes such an order, the parents or legal guardian's of the offender are responsible for the costs associated with such a transfer.

*“Advocacy and developing positive collaborative working relationships with your local school and administrators is the best way to support and protect sexual assault victims in school settings.”*

Parents or guardians (or victims 16 years and older) may also petition for a sexual assault protection order under RCW 7.90 on behalf of their child and request that the offender transfer to another school. A sexual assault protection order can be obtained regardless of whether the offender is investigated or charged criminally or whether the victim even reported to law enforcement. Just as with an anti-harassment order, if the judge issues the sexual assault protection order requiring a school transfer of the offender, the parents’ or legal guardian’s of the offender are responsible for the costs associated with such a transfer.

Juvenile Offenders who have not been Convicted by a Criminal Court:

As explained in the first section of this newsletter, school districts are required by law to address the issue of sexual assault in their policies. If the perpetrator has not been convicted, or investigated criminally, of a sex crime against the victim, the school’s Title IX policies may be applicable if the sexual assault occurred at school or at a school sponsored activity.

Regardless of whether the juvenile offender has been investigated or convicted in the criminal system, the parents or guardians of a minor victim may petition for a sexual assault protection order to require that the offender transfer to another school (see discussion above).

## **SEXUAL ASSAULT BY A TEACHER OR SCHOOL EMPLOYEE**

Under federal law, a school’s responsibility to address sexual assault perpetrated by teachers and other employees is determined by evaluating a number of factors:

- What level of responsibility the employee has with respect to having control over the student(s)
- What degree of influence the person has over the student(s)
- When and where the assault(s) occurred
- Age & education level of student(s) involved

Additionally a school has a duty to respond to sexual assault if it knows about the assault or if it reasonably should have known; *i.e.*, if it would have learned of the assault if it had exercised reasonable care or made a “reasonable diligent inquiry.”

A school has notice if a responsible employee “knew, or in the exercise of reasonable care should have known” about the assault. In this way schools need to ensure their employees are trained adequately so those with authority to address sexual assault know how to respond appropriately.

If a school responds improperly to sexual assault, when they have been given proper legal notice, the victim has two options: 1) to file a complaint with the Office of Civil Rights for violating Title IX - which could result in loss of federal funding to the school; (See below for further discussion on filing a complaint with OCR) or 2) may seek civil legal remedies for money damages under Title IX. In cases where the perpetrator was a teacher or school employee, knowledge can be imputed to the school administration - meaning that the school may be liable if it knew *or should have known* about the assault. A finding of “deliberate indifference” makes the school liable for future harm under Title IX. A school that does not immediately respond in a clearly reasonable way may be found liable for injuries suffered as a result of any continued harassment or retaliation.

## **ADVOCACY STRATEGIES**

### **Knowing & Understanding Local Policies & Procedures**

Advocates should be familiar with the local school’s policies and grievance procedures regarding sexual harassment, bullying and violence. Developing effective working relationships with school personnel is critical in helping schools respond effectively and sensitively to student victims of sexual assault. Understanding Title IX obligations of school and knowing who the Title IX Compliance Officer is for your school district will be effective advocacy tools to help prevent sexual assault and improve the response to sexual assault in schools.

The school’s obligations are generally not changed because of a criminal investigation. Under Title IX they are still required to conduct their own investigation. However, depending on the facts of the case, due process rights of the accused may impact how a school conducts its investigation.

If sexual assault occurs in the educational setting, teachers and administrators also have a duty as mandated reporters to report the suspected abuse to Child Protective Services and/or law enforcement.

Advocacy and developing positive collaborative working relationships with your local schools and administrators is the best way to support and protect sexual assault victims in school settings.

If you would like additional information about Title IX, or a copy of the regulations which detail the requirements of Title IX, write or phone the OCR enforcement office which serves your state or territory, or you may call 1-800-421-3481. If you need help with a Title IX case:

<http://bailiwick.lib.uiowa.edu/ge/helpRE.html>

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**Consider the Following Issues to help Clarify the Schools Legal Obligations:**

- Is the perpetrator convicted of a sex offense? If so, look to the applicable state laws to help advocate for the victim's safety.
- If not, what are the school's policies under Title IX regarding the prohibition of sex discrimination and under our state law RCW 28A.300.285 regarding harassment, intimidation and bullying.
- Is the sexual assault experienced by the student sufficiently severe, persistent or pervasive?
- Has the sexual assault limited the student's/victim's ability to participate in or benefit from the education program? If so, how?
- Has the assault created a hostile or abusive educational environment?
- Does the school know about it? Have they been given notice of the offensive behavior? If not - notify them. If yes, what was the response? The key is understanding that the school cannot adequately address anything unless it knows of the sexual assault.
- What is the school's Title IX grievance procedure? How can a victim access it? How do students know about it?

## **RESOURCES**

**Title IX U.S. Dept. of Education Office for Civil Rights**

- *1997 Guidance on Sexual Harassment*  
<http://www.ed.gov/about/offices/list/ocr/docs/sexhar01.html>
- *2001 Revised Sexual Harassment Guidance* (not adopted)  
<http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf>

**American Association of University Women (AAUW)**

**Legal Advocacy Fund:**

<http://www.aauw.org/laf/library/assault.cfm>

**Legal Momentum, Publications & Resources**

<http://www.legalmomentum.org/pub/index.shtml#vaw>