

*Connecticut
Conference of
Independent Colleges –
Annual Member Forum*

**HOW LONG THE
ARM? LEGAL
RESPONSIBILITY FOR OFF-
CAMPUS CONDUCT**

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**PULLMAN
& COMLEY_{LLC}**
ATTORNEYS

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TITLE IX

- “Federal law provides that “[n]o 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.” **Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* [“Title IX”].**

TITLE IX

- a. Protects **both** male and female students;
- b. Prohibits sexually harassing conduct towards members of the opposite sex as well as members of the same sex;
- c. Title IX applies to sexual harassment directed **toward students** by professors, school employees, or third parties;
- d. Title IX also applies to sexual harassment **between students**, which is also known as peer sexual harassment.

TITLE IX

- Title IX does *not* provide a basis for claims of sexual harassment by a school employee against the school, against a supervisor or against another employee. Such claims fall within the ambit of Title VII.

TITLE IX

- Two Supreme Court established the appropriate standards of liability under Title IX for sexual harassment.
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- **Gebser v. Lago Vista Independent School District**, 118 S.Ct. 1989 (1998), established the standard of liability imposed on schools for claims brought by students sexually harassed by school employees.
- **Davis v. Monroe County Board of Education**, 119 S.Ct 1661 (1999), established the standard for school liability when a student is sexually harassed by another student.
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TITLE IX

- In Gebser, the Supreme Court held that a school will **not** be liable for sexual harassment of a student by a school employee unless:
 - An school official with **authority to take corrective action** had **actual knowledge** of discrimination, but failed to adequately respond; and
 - The **inadequate response** must amount to **deliberate indifference** to discrimination.

TITLE IX

- Similarly, in Davis, the Court held that liability is imputed to the school **only** where:
 -
 - a. The school has been “deliberately indifferent to sexual harassment, of which the [district had] actual knowledge”; and
 - b. The harassment is so “severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”
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TITLE IX

- The Court further held in Davis that a school should **not** be liable in every case where one student sexually harasses another student. Thus, a student must prove by a preponderance of the evidence that:
 -
 - a. The school had actual knowledge of the harassment; and
 - b. The school responded in a way that was clearly unreasonable under the circumstances.

DELIBERATE INDIFFERENCE

- In determining whether an educational institution has responded in a reasonable manner to claims of sexual harassment, courts will essentially take an ends-justifying-the-means approach. In other words, even if a complainant is not satisfied with the approach a school has chosen to take, if a school's actions end the harassment, courts will typically find it compliant with Title IX.

- The United States Department of Education's Office for Civil Rights ["OCR"] is charged with enforcing federal anti-discrimination laws that apply to educational institutions, including Title IX (as well as Title VI and Section 504).

▪ OCR ARRIVING AT UNIVERSITY



- OCR has held that Title IX applies to transgender students on the ground that gender, or gender stereotyping, is directly implicated.
- OCR has also determined that sexual orientation discrimination is covered under Title IX

DEAR COLLEAGUE LETTER

On April 2011, OCR issued one of its most important “Dear Colleague” letters, addressing the issue of sexual assaults at colleges, universities, and even K-12 school districts.

DEAR COLLEAGUE LETTER

- In its April 4, 2011 letter, OCR defined “sexual violence” as:
- “[P]hysical 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 also may be unable to give consent due to an intellectual or other disability.”

DEAR COLLEAGUE LETTER

- OCR has further advised:
- “A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.”

SCHOOL'S RESPONSIBILITY

- OCR requires schools to take the following proactive steps:
 - (A) Disseminate a notice of nondiscrimination;
 - (B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX; and
 - (C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.

SCHOOL'S RESPONSIBILITY

- **ADDITIONALLY**
- When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred.
- If an investigation reveals that sexual violence created a hostile environment, the school must take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

SCHOOL'S RESPONSIBILITY

- A school should notify a complainant of her right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school's internal Title IX investigation.
- Schools should **NOT** wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation. Thus, a school should not delay conducting its own investigation because it wants to see whether the alleged perpetrator will be found guilty of a crime

SCHOOL'S RESPONSIBILITY

- Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar access to any information that will be used at the hearing.

OFF-CAMPUS CONDUCT

- While OCR's April 4, 2011 Dear Colleague is, for the most part, straightforward, there is ambiguity as to the extent of a college or university's obligations for conduct that occurs off school grounds.

OFF-CAMPUS CONDUCT

- “Schools **may** have an obligation to respond to student-on-student sexual harassment that initially occurred **off** school grounds, **outside a school’s education program or activity**. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures.”
- (emphasis added)

OFF-CAMPUS CONDUCT

- “Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus.”

OFF-CAMPUS CONDUCT

- “For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator’s friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.”

OFF-CAMPUS CONDUCT

- OCR has held:
- “Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.”

OFF-CAMPUS CONDUCT

- OCR advises that school must initially determine whether the alleged off-campus sexual violence occurred in the context of an education program or activity of the school. If it did, then the school must treat the complaint in the same manner that it treats complaints regarding on-campus conduct.

OFF-CAMPUS CONDUCT

- Off-campus education programs and activities are deemed to include activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus. This is not, however, an exclusive list.

OFF-CAMPUS CONDUCT

- OCR warns:
- “Whether the alleged misconduct occurred in this context may not always be apparent from the complaint, so a school may need to gather additional information in order to make such a determination.”

OFF-CAMPUS CONDUCT

- In short, the mere fact that the locus of the alleged sexual harassment occurred off campus is **not** a sufficient basis for a college or university to decline to investigate.

OFF-CAMPUS CONDUCT

- As OCR notes, even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity.

OFF-CAMPUS CONDUCT

- “The school cannot address the continuing effects of the off-campus sexual violence at school or in an off-campus education program or activity unless it processes the complaint and gathers appropriate additional information in accordance with its established procedures.”

OFF-CAMPUS CONDUCT

- If an educational institution determines that the off-campus behavior has pernicious reverberations on campus, then it is required to address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct.

BUT SEE . . .

- In Yeasin v. University of Kansas, the Kansas Court of Appeals rejected the University's argument that it had the authority to expel a student for harassing conduct that occurred entirely off campus, holding that schools are not police forces, and it can only address what occurs on campus.

Yeasin v. University of Kansas

- The court held that the University's charge under Title IX is to "take steps to prevent or eliminate a sexually hostile environment," and that "the only environment the University can control is on campus or at a University sponsored or supervised events." In other words, in the context of interpreting the University's Student Code, the court essentially held that in order to implicate Title IX, the "sexually hostile" conduct *itself* – not just its consequences -- must take place on campus or at a school-sponsored or supervised event.

Yeasin v. University of Kansas

- It is highly doubtful that OCR would agree with the court's reasoning or its ultimate decision.

OFF-CAMPUS CONDUCT

- The bottom line is that educational institutions are required to investigate -- at least preliminarily -- complaints of sexual harassment involving their students, regardless of where the conduct took place.
- Ultimately, though, the determinative factors are the extent of the school's control over the alleged perpetrator and the extent to which it can take remedial action.

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