

WHAT TO DO WHEN A STUDENT REPORTS A SEXUAL ASSAULT BUT THEN ASKS THAT NO ACTION BE TAKEN?

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This is a complex issue that is informed by two federal laws, student affairs best practices, good victim services, the Department of Education, and negligence law. While no one perspective dictates how we address reluctant victim situations, taken together, a cohesive approach can be created.

Clery First

Let's start with the Clery Act, and its role in this issue. The Clery Act is an absurd law, in its execution. It tells colleges to collect crime reports from campus security authorities, which it defines as any institutional official who has significant responsibility for student and campus activities. It then splits hairs to tell us this will include some faculty but not others. It includes student services personnel, but not the support staff talking with the student in the waiting room while they wait to see the Dean. It does not include counselors, but may include a non-counselor administrator who runs the counseling center. These are not reasonable hairs to split on a college campus if you are interested in accurate compliance. Responsibilities of college employees are constantly changing. A faculty member who assumes a role as a student organization advisor mid-year may not receive training on reporting until the following year, depending on your training schedule. Who is on the list and who is not on the list of mandated reporters for Clery is a moving target that is not easy to hit. It is just easier (and very reasonable) to tell ALL institutional employees that it is part of their job to report all crimes about which they become aware within 24 hours of becoming aware. That way, nothing slips through the cracks. This includes reports of sexual assault made in confidence, because nothing in the Clery Act requires the revelation of personally identifiable information. Counselors, clergy and medical services personnel can complete a report without violating their professional ethics.

Once you have created an all-employee reporting requirement, employees can be trained that when a student reports sexual assault, they cannot promise confidentiality, and need to make that clear to the student who comes to them (unless of course, you are among the limited number of university employees who can actually promise statutorily or ethically-conferred confidentiality).

Best Practices Tip—Explain This to a Victim as the Difference Between Confidentiality and Privacy:

“Thank you for coming to talk to me about such a serious issue. I want you to know that we are going to do all we can to help you. I need to make clear that I am not someone who is able to maintain the confidentiality of what you share with me. I can and will protect your privacy, and will only share your information on a need-to-know basis with a small group of key administrators. We will make every effort to respect your wishes as

far as how we respond to your report. If you desire a confidential conversation, I can take you to the counseling center, or help you to set up a meeting with one of our campus staff members who is a confidential resource.”

Acting on the Reports You Receive

A predicate to liability under Title IX is notice to campus official(s) who have remedial authority to address gender-based discrimination (in any of its forms, including sexual violence). Let's assume for purposes of this article that you are such an official. Once you have established a campus-wide crime reporting network as discussed above, you will hear more often about campus crime generally, and you probably will receive more sexual assault reports, specifically. Not all of these reports will include personally identifiable information, but some will. Once you receive a report, various laws govern your response and you MAY have to provide some or all of the following.

After each item listed below, the law that mandates or influences it is identified:

- Crime statistic (Clery)
- Interim suspension (tort law – negligence)
- Timely warning (Clery)
- No contact order (student affairs best practice)
- Investigation (Title IX)
- A prompt and equitable resolution (Title IX)
- A hearing (state/federal due process or contract law)
- Sanctions (Title IX, tort law – negligence, due process)
 - To bring an end to the discriminatory conduct; and
 - To take steps reasonably calculated to prevent the reoccurrence of the discriminatory conduct
- Remedies (Title IX)
 - To restore the victim, as much as possible, to his/her pre-deprivation status and/or undo the effects on the victim of the gender-based discrimination they have experienced.
- Notice of outcome (Clery Act)
- Appeals (contract law and Title IX)
- Post-sanction enforcement (Title IX, tort law – negligence)
- Follow-up to determine if remedies are effective (Title IX)

Upon receiving a report, whether anonymous or not, you will need to determine if the alleged victim wishes to make a complaint. If so, you will follow the proper procedures on your campus for making a complaint and begin the investigation process. If not, you will need to find out why not. Perhaps the assault occurred long ago, or off-campus. Perhaps the victim is going to the police to pursue criminal prosecution. While you may be able to determine directly why no formal action is requested by the victim, you may have to go through the employee who initially received the report before it was passed along to you. They may be able to dialogue with the victim to find out reasons why the

victim wants no action taken. I think you or the employee who is in contact with the victim should try to problem-solve with him/her any impediments to filing a complaint.

Best Practices Tip: Convincing a Reluctant Victim

I think we should make a good faith effort to persuade (not pressure) a victim to make a formal complaint. Often, victims are reticent to pursue a campus hearing because they fear for their privacy, they blame themselves, and they don't want to subject themselves to a process they fear will be a secondary victimization. I think we can overcome some of these reasons for hesitation. We can make sure that the victim understands how well-suited the campus conduct process is to meeting the needs of many victims. I think we should explain that the campus process is private, that resolution is quick (can we shoot for 30 days?), that we use a standard of proof (more likely than not) that makes it twice as easy to prevail in a campus hearing than in a criminal trial, that we provide victim-friendly accommodations, such as the right to an advisor, to testify from behind a screen or by closed-circuit, and that we actively prohibit evidence of a student's irrelevant sexual history or character. I also think we need to be clear that we are not going to throw the book at a victim for his/her own policy violations, if they decide to make a complaint. It is also worth it to explain to a victim that perpetrators recidivate, and if left unchecked, they may assault again and are likely to make someone else feel the way they now feel. Their action in filing a complaint can help to prevent future victimization, and I think we should at least get them thinking about their duty to other potential victims and members of their community. Once we have said our piece, though, I think we need to back off and let them choose for themselves what is in their best interests.

The Requirements of Title IX

If you are not successful in encouraging the victim, directly or indirectly, to file a formal complaint, your legal duties are not over. In fact, they may just be starting. Once you have actual notice under Title IX, your duty to investigate the report is absolute. There are no exceptions. Yet, investigation is a very broad term, and may indicate merely a preliminary inquiry, or it may include a much more elaborate inquisition into the facts. With an anonymous report, your ability to investigate is more limited. You would satisfy your legal duties of due diligence by checking the report against other recent anonymous and formal reports, to determine if a trend or pattern may be apparent. If so, you might decide to take some action based on the composition of assaults, rather than on just the one anonymous report you have received. You may even gain information on repeat perpetrations in a single location, and this may allow you to target a high-risk population or location with enhanced enforcement, patrols, lighting, cameras, timely warnings, etc.

In addition to the duty to investigate, you may have a duty to attempt some form of remedial response, even to an anonymous report. For example, if you learn of multiple perpetrations by the same individual (anonymous reports sometimes include the name of an alleged perpetrator or enough detail for you to figure out who the alleged perpetrator is), or multiple perpetrations at the same event, you may decide to alert the alleged victim to this information to see if this makes him/her more willing to file a formal complaint, or

you may decide to launch an investigation into the campus event that produced multiple reports (such as a party at which multiple drinks were laced with GHB).

Where a victim comes to you to make the report directly, your duty to investigate is the same, but is enhanced by the additional information you may have by receiving the report directly rather than through a third-party. Assume that the alleged victim, as with the anonymous victim, asks that you take no action. At this point, one of the purposes of the investigation is to allow you to determine whether you can honor the victim's wishes. OCR tells us that we should make every effort to do so, but not at the expense of compromising our duty to provide a prompt and equitable remedy under Title IX.

Negligence

Tort law plays a role here too, as we must make a determination whether the report gives us notice of foreseeable future harm. If so, our legal duty is to act to warn (and perhaps protect) foreseeable victims from that known potential for harm. If, as a result of our investigation, we reasonably believe that there is no continuing threat of harm to the alleged victim, or to any member of our community, we have no legal obligation to pursue the allegation through a hearing. We may, however, have other equitable duties of remedy, such as a need to provide an education program to the community, or to a target population, to post prominent bulletin board information about the issue, or to give a clear warning without singling out any particular individual by enlisting a coach, RA, greek advisor or student organization advisor to raise the issue indirectly at an appropriate meeting.

If you decide not to have a hearing, it would be wise at such a point to have the alleged victim sign a statement making it clear that s/he has requested that you take no action, and that they understand they are preventing you from taking future action by failing to cooperate in the investigation. If they ever make a Title IX claim against the institution, your attorneys can use this waiver to help them to claim an estoppel defense (it is unfair for a victim to sue you for not taking action when you decided not to take action at his/her request and instigation). Of course, any waiver should make clear that if the alleged victim ever changes his/her mind, you stand ready to re-open the investigation, to the extent practical and possible.

Where the results of the investigation do not give you reasonable assurance as to the safety of your community, you have a duty to act irrespective of the victim's wishes. You cannot force them to participate in a hearing, but you should initiate one with the institution as complainant, and you may use written statements of the victim, statements by the victim to witnesses, police and medical records as needed in lieu of participation by the alleged victim as complainant. No need to worry about FERPA. You have a right to use this information even without the alleged victim's consent, under the health and safety exception.

Each complaint is governed by the principle that you take it as far as you need to. If you commence a preliminary inquiry, and that inquiry leads to further suspicion, you will

broaden the inquiry to a full-fledged investigation. An investigation itself, even one that clears an accused student, is a response under Title IX. It may be all that is required, depending on the findings. If you are challenged under Title IX by a lawsuit or OCR investigation, you may be accused of deliberate indifference. One of the best ways to prove that you were not deliberately indifferent is to show that a comprehensive civil rights investigation was completed and documented.

All information offered in this publication is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.

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