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Legal Issues in Nursing Education

Understanding title IX: Implications for higher education

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According to the Office on Women's Health (U.S. Department of Health & Human Services, 2018), sexual assault on college campuses is most common among females age 18–24 with 1 in 5 women experiencing some type of unwanted sexual activity. Title IX was intended to hold federally funded education entities accountable to prevent discrimination on the basis of sex, interpreted to also include sexual harassment, rape and sexual assault. Colleges and universities across the United States should be familiar with Title IX rules as they should have been complying for quite some time. This federal civil rights law was enacted under the Education Amendments of 1972 and states:

No 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 (American Civil Liberties Union, 2020a).

Accountability for compliance with Title IX encompasses all programs or activities of the federally funded college or program. The U.S. Department of Education, Office for Civil Rights, 2015 noted key areas of accountability, including but not limited to:

- recruitment, admissions and counseling
- financial assistance
- sex-based harassment
- treatment of pregnant and parenting students
- employment
- retaliation against complaint participants.

Many advocates felt that legal decisions surrounding the 1972 amendment evolved to better support women's rights, providing recourse for sexual harassment and assault on college campuses.

A sample of cases that proceeded to the courts are reviewed here. The American Civil Liberties Union (2020) notes 2 cases of interest, citing *J.K. v. Arizona Board of Regents* (2008). Arizona State University had previously expelled a football player for severe sexual harassment of multiple other women on campus but had allowed his readmission without supervision. The athlete then raped another student in her dormitory room. The court held that the University was responsible due to their knowledge of the perpetrator's history. The university settled the case. In *Simpson v. University of Colorado*

(2006), 2 students who were sexually assaulted by university football players and recruits filed a lawsuit against the university but lost at the trial court. The case was appealed to the U.S. Court of Appeals 10th Circuit who reversed the trial court's findings, noting that the evidence showed the university acted with deliberate indifference to an apparent hostile environment. The university settled the case.

In *Farmer v. Kansas State University* (2019), a student alleged the university was deliberately indifferent to their allegations of sexual harassment – in this case rape – allowing the alleged assailants to remain at the university unrestricted and without the school investigating. The court denied the university's motions to dismiss. The court concluded the plaintiff had shown the relationship between the university's indifference and her fear of encountering the alleged assailants on campus which impeded her access to educational opportunities.

Note that each of the above cases cite the university's liability as it relates to their specific actions or inactions in response to allegations of sexual harassment or assault. Fast forward to 2020: the legal landscape has shifted somewhat with the recent revisions to Title IX. The federal government released new Title IX regulations on May 6th, with an effective date of August 14, 2020. The U.S. Department of Education (2020) notes key provisions of the revised regulations including but not limited to:

- Defines sexual harassment to include sexual assault, dating violence, domestic violence, and stalking, as unlawful discrimination on the basis of sex.
- Requires schools to offer clear, accessible options for any person to report sexual harassment.
- Requires the school to offer survivors supportive measures, such as class or dorm reassignments or no-contact orders.
- Holds colleges responsible for off-campus sexual harassment at houses owned or under the control of school-sanctioned fraternities and sororities.
- Restores fairness on college and university campuses by upholding all students' right to written notice of allegations, the right to an advisor, and the right to submit, cross-examine, and challenge evidence at a live hearing.
- Shields survivors from having to come face-to-face with the accused during a hearing and from answering questions posed personally by the accused.
- Requires schools to select one of two standards of evidence, the preponderance of the evidence standard or the clear and convincing

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evidence standard – and to apply the selected standard evenly to proceedings for all students and employees, including faculty.

- Requires schools to offer an equal right of appeal for both parties to a Title IX proceeding.

Protects students and faculty by prohibiting schools from using Title IX in a manner that deprives students and faculty of rights guaranteed by the First Amendment.

The new regulations redefine sexual harassment, resulting in a more inclusive definition but believed by some to be narrower in scope. Gedeus and Shapiro (“Key Provisions”, 2020) note that the elements of sexual harassment require the conduct of the perpetrator be so “severe, pervasive, and objectively offensive” that the victim is denied access to a school’s education program or activity. All three elements must be met. In addition, schools are only required to investigate **formal complaints** [emphasis added] filed with the college’s Title IX coordinator or through official mechanisms defined by the school. The investigative process has been expanded to include due process protections for the accuser and the accused that require a live hearing and an opportunity for cross-examination. However, the individual parties are not permitted to cross-examine anyone – this can only be done by their advisor. If one of the parties does not have an advisor, the school must provide one. Finally, either party has the right to remain silent without fear that their silence will affect the outcome (Gedeus & Shapiro, 2020).

Although the U.S. Department of Education (2020) touts the Title IX revisions as “historic action to strengthen Title IX protections” (para. 1), not everyone agrees. Critics of the new rules include educational institutions, advocacy groups, civil rights groups, and survivors who are concerned that the changes will reverse progress that has been made to prevent campus sexual misconduct (Churches, 2020). According to Anderson (2020) there is concern that the rules make it more difficult for survivors to report sexual harassment or sexual violence. In addition, the new rules have been released at a time when colleges across the country are closed due to the coronavirus pandemic and facing heavy budget impact, creating additional challenges for implementation by the August deadline. Legal objections are likely, and at the time of this writing the ACLU has filed suit (American Civil Liberties Union, 2020, May 14).

Ultimately, what does this all mean for you: the nurse educator? In an era where incivility and inappropriate social discourse are all too common, the potential for faculty or students to engage in or become victims of sexual harassment creates risk. First and foremost, no educator should become involved with a student in a nonprofessional relationship. Botelho (2019) notes that college employees and

faculty are more frequently being accused of inappropriate behavior or sexual harassment. Coupled with the concerns about student to student misconduct, college administrations are faced with developing complex procedural changes that require levels of understanding that may necessitate engagement of legal counsel. Faculty should assure first that professional boundaries are rigorously maintained, and second that they remain fully aware of the college’s policies regarding reporting requirements for sexual harassment claims. Regardless of the pathway to filing formal complaints, if the nurse educator is made aware of a student concern the right next step is to link the student to the Title IX coordinator for the college. The goal is to provide a safe and supportive educational environment for all concerned.

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