

Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights

Kathryn M. Reardon[†]

Copyright © 2005 Kathryn M. Reardon

Jane, an eighteen-year-old freshman, attends a party in her dorm. The party is small. She knows most of the people present. Over the course of the night she has four beers and two shots of tequila. She meets a boy that she recognizes from her economics class, but she has never spoken to him. They talk for about an hour. He invites her to his room to smoke a little pot.

They smoke a joint together. He is flirting with her. She is flirting a little back, but the pot is making her head spin and she is feeling a little confused. He says she needs something to drink. He gives her a beer. She is not sure she wants to drink it, but he convinces her that a cold drink will make her feel better. He tells her not to worry. She drinks about half the beer and begins to feel worse. When she closes her eyes the whole room spins, but she is so sleepy that it is hard to keep her eyes open. She feels limp all over when he begins to kiss her. She tries to push him away, but he is stronger than she is. She tells him to stop; she does not want to have sex. He tells her to be quiet and covers her mouth hard with his hand. With his other hand he pushes her skirt up and forces himself on her.

I. INTRODUCTION

Young women attending colleges and universities throughout the United States face a rate of sexual assault that is significantly higher than the general population. The United States Department of Justice (Department of Justice) found that for every one thousand female students, thirty-five sexual assaults

[†] Kathryn Reardon is a project attorney at the Victim Rights Law Center in Boston, Massachusetts. This Article was written based in large part on the Law Center's practice representing victims of sexual assault at colleges and universities. It is also based in part on the Law Center's Attorney Practice Guide entitled *Beyond the Criminal Justice System: Transforming Our Nation's Response to Rape* (2003), written by Susan Vickers, Gretchen Van Ness, Kathryn Reardon, A. Lehman, P. Mangum, and supported by grant number 2001-VF-GX-009 awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions expressed in that document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice. Ms. Reardon would like to thank the staff and interns at the Law Center, especially Susan Vickers, Susan Finegan, Kristy Nardone, Colby Bruno, Katherine Lawson, Jennifer Nash, Farrow Pan, Kit Maloney, and Mariela De Jesus for their tremendous assistance in writing this Article.

occur every year,¹ making it clear that rape is now an unfortunate yet prominent factor in the typical college experience. The widespread reluctance of academic institutions to deal with rape as a disciplinary and legal issue compounds the prevalence of sexual assault. The end result for victims is falling grades, prolonged school absence, and for many, eventual school drop out or failure. Simply put, sexual assault is a significant barrier to equal education for young women today.

Reports of rape on campus are met usually with controversy and skepticism. The cause of much of the controversy is the circumstances under which campus rape most often occurs. Studies show that approximately 90% of college sexual assault victims know their perpetrators.² Therefore, many victims willingly accompany their assailants and engage in some amount of consensual sexualized activity, such as flirting, kissing or petting. Adding that one or both parties used alcohol or other substances before the assault, many people doubt the veracity of the victim's story and/or the severity of the violation that occurred, choosing instead to see the alleged assault as an unfortunate, but benign, miscommunication between two sexual partners. A schools' hesitancy to deal with sexual assault is predicated on this deeply misguided understanding.

The reality, however, is that campus rape, no matter how vague the context, is a severe violation of a student's sexual autonomy. Its victims suffer incomparable physical, emotional and educational harms. Its perpetrators are criminal actors, who tend to fully understand their actions and are likely to commit multiple assaults. The fact is that a violent act, not a miscommunication, has occurred.

The first section of this Article discusses the realities of campus sexual assault: how often it occurs, what risks are unique to college campuses, and the ultimate effect rape has on student victims. The second section discusses what actions private colleges and universities must take in order to meet the needs of student victims and protect the student body as a whole. This section discusses safety and reporting procedures, specific accommodations to assist victims with maintaining their academic careers, and college disciplinary and grievance procedures. The third section will discuss instances when the rights of student victims intersect with the rights of others, specifically with those of students accused of sexual assault.

1. BONNIE S. FISHER, ET AL., U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 11 (2000).

2. *Id.* at 17.

II. THE REALITIES OF CAMPUS SEXUAL ASSAULT

A. Prevalence

In December 2000, the Department of Justice's National Institute released a report entitled *The Sexual Victimization of College Women*.³ The report documents that women attending the nation's colleges and universities face a higher rate of sexual violence than women in the general population. According to the study, for every one thousand women attending college, there may be thirty-five incidents of rape in a given academic year.⁴ Victims usually know their assailants: approximately nine out of ten offenders were boyfriends, ex-boyfriends, classmates, friends, acquaintances, or co-workers.⁵ Almost 60% of the rapes took place in the victims' residences, 31% occurred in off-campus living quarters, and a little over 10% happened in a fraternity.⁶ Despite the high occurrence of sexual assault among the student population, these victims are the least likely to formally seek help or participate in the criminal justice system. In fact, fewer than 5% of victims reported to police, although close to two-thirds of these victims confided in another person.⁷

The Department of Justice projects that over time, the percentage of rape among women at our colleges and universities could climb as high as 20% to 25%.⁸ The frequency of campus rape becomes an even more pressing concern when one projects these figures over a full year, a full college career, and the entire population of women attending colleges and universities across the nation.

B. Typical Assailants and the Risks They Present

Perpetrators of campus rape share common traits. Most plan their assault in some way, targeting specific women within their social group.⁹ Often, they target women who are intoxicated, or they use alcohol and other substances to facilitate the assault.¹⁰ Eighty percent of assailants describe using alcohol and drugs as a tool to overcome their victims.¹¹ Rather than brute violence, most perpetrators use *instrumental violence* such as intoxication, coercion, or just enough physical force to overwhelm a victim without causing substantial

3. *Id.* at iii.

4. *Id.* at 11.

5. FISHER, *supra* note 1, at 17.

6. FISHER, *supra* note 1, at 18.

7. FISHER, *supra* note 1, at 23.

8. FISHER, *supra* note 1, at 10.

9. David Lisak et al., *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 81 (2002).

10. *Id.* at 78.

11. *Id.*

physical injury.¹² Due to a lack of physical injury, the victim's drunkenness, and the close social relationship between assailants and victims most victims are unlikely to report the assault, those that do report are less likely to be believed.

Assailants pose a long term danger on campus because they often go undetected. A small minority of men commit the majority of violent crimes. Just about 7% of college men perpetrate these assaults.¹³ Approximately two-thirds of college acquaintance rapists are repeat offenders, averaging about four to six rapes apiece.¹⁴ They are also more likely to engage in other forms of interpersonal violence, such as battery and other forms of abuse.¹⁵ Given these statistics, schools that choose to overlook reports or fail to provide meaningful remedies and sanctions are susceptible to a hefty risk that these same offenders will victimize other students.

C. Educational Harm to Victims

Sexual assault has significant physical, psychological and social impacts on victims.¹⁶ Many victims are exposed to sexually transmitted diseases, including HIV. The trauma associated with short term care and follow-up testing and treatment is overwhelming. Some victims are prescribed HIV anti-retroviral prophylaxis treatment to prevent the contraction of HIV. The medication, which can last for up to six weeks, takes an enormous toll on victims. Side effects, including extreme nausea, chronic fatigue, and chronic headaches, can interfere with, and in many cases prohibit, daily function.¹⁷

Approximately one-third of all victims experience Post Traumatic Stress Disorder (PTSD) and many experience symptoms of depression.¹⁸ PTSD is characterized by persistent realistic flashbacks, an inability to concentrate, extreme sensitivity to stimuli (especially those that are related to or remind the victim of the assault), diminished responsiveness, heightened anxiety, and persistent sleeplessness.¹⁹ When perpetrators are classmates, thereby remaining

12. *Id.* at 81.

13. Lisak, *supra* note 9, at 78.

14. Lisak, *supra* note 9, at 78.

15. Lisak, *supra* note 9, at 78.

16. See Jacquelyn L. Resnick, *From Hate to Healing: Sexual Assault Recovery*, in CASE BOOK OF BRIEF PSYCHOTHERAPY WITH COLLEGE STUDENTS 43-63 (Stewart E. Cooper et al. eds., 2002). See generally JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* (1992); MARY P. KOSS & MARY R. HARVEY, *THE RAPE VICTIM: CLINICAL AND COMMUNITY APPROACHES TO TREATMENT* (1991).

17. See WORLD HEALTH ORGANIZATION & JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, *GUIDANCE MODULES ON ANTIRETROVIRAL TREATMENTS*, WHO/ASD/98.1, UNAIDS/98.7 (1998), available at <http://www.paho.org/english/hcp/hca/mod1.doc>.

18. See NATIONAL INSTITUTE OF MENTAL HEALTH, *RELIVING TRAUMA: POST-TRAUMATIC STRESS DISORDER* (2001), at <http://www.nimh.nih.gov/publicat/reliving.cfm>.

19. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 424 (4th ed. 1994).

a tangible part of the victim's social and academic life, the victim's symptoms become particularly acute.

Victims experiencing one, some or all of the above harms find it difficult to maintain their pre-existing academic status, as they miss classes, perform poorly in their coursework, and often decide to leave school to avoid failure and excess emotional trauma.

III. EDUCATIONAL INSTITUTIONS CAN ENSURE THAT THE NEEDS OF STUDENT VICTIMS ARE MET

For many victims of sexual assault the healing process is difficult and lengthy. While each individual victim deals with rape in her own personal way, there are certain needs that victims widely share. Incorporating these needs and concerns into the procedures used to address sexual assault on-campus is a giant step towards not only fulfilling the requirements mandated by law, but also serving the needs of students and community members.

A. The Legal Framework for Providing Remedies On-Campus

When responding to sexual assaults on campus, schools encounter a complex web of duties and liabilities. Many of the legal requirements that private colleges and universities schools must adhere to originate from federal laws, discussed below, including the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act),²⁰ The Family Educational Rights and Privacy Act (FERPA),²¹ and Title IX of the Educational Amendments to the Civil Rights Act and its regulations (Title IX).²² The nation's courts have established a host of other duties and liabilities. There are some conflicting rules and even more gray areas. As a result, schools are reticent to take swift and decisive remedial action.

1. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act

The Clery Act requires that colleges and universities are up front about the occurrence of violent crime on their campuses and how they prevent and respond to it. Among the Act's requirements, schools must:

- report and publish incidents of violent crimes on campus including rape and non-forcible sexual assault,²³
- post Campus Alerts to notify any group on campus that is in particular danger of being victimized,²⁴

20. 20 U.S.C. § 1092(f) (1998).

21. 20 U.S.C. § 1232g (2001).

22. 20 U.S.C. § 1681 (2004).

23. 20 U.S.C. § 1092(f)(1)(F)(i)(II).

24. *Id.* § 1092(f)(3).

- establish and publish reasonable reporting procedures;²⁵ and
- establish and publish the availability of resources to victims.²⁶

The Clery Act does not require that offending students be publicly identified.²⁷

Additionally, under the Clery Act, schools must establish clear procedures that *facilitate* reporting of violent crimes on campus.²⁸ Information required by the Clery Act must be available to current and prospective students and their parents.²⁹ While there is no private right of action available under the act, colleges and universities that fail to comply face significant government sanctions. The United States Department of Education (Department of Education) may impose fines of up to \$25,000 and violations also jeopardize an institutions' receipt of federal aid and funding.³⁰

2. *The Family Education Rights and Privacy Act*

FERPA both limits and enables disclosures of information. It ensures that students and their parents are not denied or prevented from accessing the information contained in the students' educational records.³¹ FERPA also prohibits schools from releasing information contained in educational records to persons other than the student or parent without express written consent.³²

Conditions for how and when schools should disclose information are an equally important element of FERPA. When handling sexual assaults and other violent crimes that occur on campus, schools must pay particular attention to this element. First, if a student poses a danger to any individual or group of students, faculty or community members, schools are free to issue warnings, as specific as necessary, to those affected individuals.³³ Furthermore, if a school considers a student to be dangerous, or has found a student culpable of a violent act on campus, it may disclose such information to any other academic institution or employment to which the dangerous student subsequently transfers.³⁴

A school's ability to disclose information to a victim regarding her assailants, and that victim's ability to re-disclose such information, is a grey area of FERPA.³⁵ Recently, however, the Department of Education has issued opinions lending clarity to the issue. According to the Department of Education, schools must inform complaining victims of the outcomes of their

25. *Id.* § 1092(f)(1)(A), (1)(G), (4).

26. *Id.* § 1092(f)(1)(D), (1)(E), (8)(B).

27. Clery Act, 20 U.S.C. § 1092(f)(1) (1998).

28. *Id.* § 1092(f)(1)(A).

29. *Id.* § 1092(f)(1).

30. *Id.* § 1092(f)(13).

31. FERPA, 20 U.S.C. § 1232g(a) (2001).

32. *Id.* § 1232g(b).

33. *Id.* § 1232g(h)(1).

34. *Id.* § 1232g(h)(1); 34 C.F.R. §§ 99.31(a)(2), 99.31(a)(10), 99.34, 99.36 (1996).

35. 20 U.S.C. § 1232g(b)(6)(A)-(B).

complaints, regardless of whether a school opts to take action against the assailant.³⁶ Under no circumstances can FERPA be used to prevent a victim from speaking about her experience.³⁷

3. Title IX of the Education Amendments to the Civil Rights Act

Title IX prohibits discrimination on the basis of sex, including sexual harassment at educational institutions. Throughout this Article, sexual assault will be discussed in a framework of gender discrimination and sexual harassment. Though this may not be an intuitive correlation for some, sexual assault must be understood as a severe act of sexual harassment. The aftermath of an assault, including ongoing threats, and the effects that the assault has on social and academic life, constitutes a hostile environment type of sexual harassment. Furthermore, in the Department of Education's regulations, it has recognized that sexual assault is a single act of harassment so severe so as to fit into the legal definition of sexual harassment at educational institutions.³⁸

Since 1975, Title IX has required colleges to "adopt and publish a policy against discrimination and grievance procedures providing for the *prompt and equitable* resolution of complaints of discrimination on the basis of sex."³⁹ The lack of response or an inadequate response to reports of sexual harassment is included in the concept of gender discrimination.⁴⁰

The Department of Education's Office for Civil Rights⁴¹ (OCR) has created regulations that require schools to provide a prompt and effective resolution of

36. Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office of the U.S. Dep't of Education to S. Daniel Carter (Mar. 10, 2003), at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/carter.html> (discussing disclosure of information to alleged victim of sexual offense).

37. 34 C.F.R. §§ 99.31, 99.33(a)(14).

38. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512-01, Part V.A (Jan. 19, 2001), *available in full* at <http://www.ed.gov/offices/OCR/archives/shguide/index.html> [hereinafter Revised Sexual Harassment Guidance]; *see also* Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 259 n.4 (6th Cir. 2000); Doe v. School Admin. Dist. No. 19, 66 F. Supp. 2d 57, 62 (D. Me. 1999); EEOC, Policy Guidance on Current Issues of Sexual Harassment, No. 915-050 (Mar. 19, 1990), *available at* <http://www.eeoc.gov/docs/currentissues.html> [hereinafter EEOC Policy]. The EEOC has stated in its guidelines that: "The Commission will presume that unwelcome, intentional touching of [any employee's] intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII." EEOC Policy, *supra*, Part C.2.

39. Revised Sexual Harassment Guidance, *supra* note 38, at 4.

40. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 642-43 (1999) (discussing liability for deliberate indifference or failure to act); *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290-91 (1998).

41. This Article focuses on the regulations enacted and enforced by the Department of Education's Office of Civil Rights as guidance for colleges and universities in handling on-campus sexual assault. Under these administrative rules, students can file complaints against schools, resulting in equitable relief and sanctions against schools. Though not discussed fully in this Article, schools should be aware that students also enjoy a private right of action under Title IX, through which monetary damages can be gained. The standard of review under this action is "deliberate indifference," meaning that given all facts and circumstances, the school's response to a report of sexual assault is not clearly unreasonable." *Davis*, 526 U.S. at 648, 651; *Gebser*, 524 U.S. at 290. This low, vague standard does not offer useful practical guidance for schools.

all complaints.⁴² If a university's procedure for addressing sexual harassment is not timely, does not provide an appropriate resolution, or further contributes to a hostile environment, that procedure is unacceptable. The OCR states that colleges must provide assurance that they will take steps to prevent the recurrence of *any* case of sexual harassment and to correct its discriminatory effects on the complainant.⁴³

B. The Framework for Colleges' and Universities' Response to Sexual Assault

The case of Jane Doe introducing this Article is consistent with the large majority of rapes that occur on campus.⁴⁴ Though the physical assault is over, Jane now faces an ordeal that can potentially be as traumatic as the initial physical violation. She now deals with whether she wants to tell anyone what has happened, who she can tell, and who she can look to for help.

In light of this, the response to campus sexual assault should be four-fold. First, information about and access to resources for victims in crisis should be made available to all students. Second, on a large scale, schools should adopt and publish clear, strong policies regarding sexual assault and sexual harassment that put students on notice that their school takes these issues seriously. Third, institutions should provide assistance and accommodations to help victims without any requirement that victims interact with the assailant or file a formal complaint. Finally, schools should provide accessible and usable mechanisms through which victims can file formal complaints against offending students and through which dangerous students will be removed from the campus environment.

It is critical that schools recognize that rape and recovery from rape is intensely personal. Victims' privacy must be the primary consideration in whatever procedures a school makes available. Schools should protect confidentiality starting from making a report, to investigation and disciplinary procedures, and through recovery and counseling.

1. Resources for Victims in Crisis

The immediate issues that most victims face include emotional trauma, fear, and the continuing harm and danger they face when forced to co-exist with their attackers on campus. It is important that institutions provide for the medical and emotional needs of rape victims. This includes creating on-campus resources as well as establishing relationships outside the campus to meet these needs. Appropriate resources include emergency medical care, forensic rape kit exams, STD and HIV testing, pregnancy prevention, and

42. Revised Sexual Harassment Guidance, *supra* note 38, at 4.

43. Revised Sexual Harassment Guidance, *supra* note 38, at 12 n.34, 20 (citing 34 C.F.R. § 106.31(b)).

44. See FISHER, *supra* note 1, at 17 (stating nine in ten victims assaulted by someone they know); see also Lisak, *supra* note 9, at 78, 81 (noting prevalence of intoxicants in rape victims).

counseling services specific to sexual assault victims.⁴⁵

In providing these referrals, schools should consider the likelihood that peer counseling and on campus sexual assault resources may frustrate a victim's sense of privacy and should therefore provide access to such resources outside of the school. The sooner referrals are made and victims receive care and support, the less likely it is that victims will suffer severe trauma symptoms and academic failure.⁴⁶ Providing access to these resources is an important first step in remedying a hostile education environment.

Though it is crucial that these services exist, they must at all times be within victims' control. This is an emotionally difficult time for victims. For many, medical examinations can be uncomfortable and unbearably intrusive. If at any time a victim chooses to stop, she must not be forced to continue.

Universities must also provide safety planning for victims. This may include stay away orders and necessary course and dormitory changes. Schools should also consider facilitating leaves of absence and tuition refunds for students who need time off to recover because the occurrence of a sexual assault invariably makes academics difficult. Immediate responses and quick resolutions will help victims regain some semblance of a normal life.

Finally, schools should assist victims in reporting their assaults to appropriate law enforcement.⁴⁷ Schools must establish, publish, and disseminate policies that facilitate the reporting of violent crimes on campus, including sexual assault.⁴⁸ When schools are aware that a student or group of students is at risk for victimization, they must issue warnings, to put students on notice of danger.⁴⁹

Reporting can be difficult for many victims. For those like Jane, who participate in underage drinking and substance use before or during an assault, reporting may subject them to disciplinary sanctions for violations of school alcohol and drug policies. The choice to sanction victims for their alcohol use poses serious issues given that the vast majority of campus sexual assaults involve alcohol and drugs.⁵⁰ Intoxication is very often used as a tool to coerce sex.⁵¹ The threat of sanctions for alcohol use all but renders reporting, at least candid reporting, impossible. Under this type of policy, a large majority of

45. Clery Act, 20 U.S.C. § 1092(f)(8)(B) (1998).

46. See R. Campbell et al., *Preventing the Second Rape: Rape Survivors' Experience with Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239, 1239-59 (2001) (associating mental health services with decreases in post-traumatic stress disorder symptoms in rape survivors).

47. See 20 U.S.C. § 1092(f) (requiring reporting procedures aid in facilitating reporting and encouraging candidness).

48. *Id.* § 1092(f).

49. *Id.* § 1092(f)(3).

50. VIOLENCE AGAINST WOMEN OFFICE, U.S. DEP'T OF EDUC., GRANTS TO COMBAT VIOLENCE AGAINST WOMEN ON CAMPUSES: APPLICATION KIT (1999).

51. Lisak, *supra* note 9, at 78 (noting 97 of 120 men interviewed reported committing rapes of women incapacitated by drugs or alcohol).

victims will be discouraged to come forward with reports of rape.⁵²

Sanctions against victims may be in violation of Title IX requirements to cease any ongoing harassment. Pursuing alcohol and drug charges against a victim promotes the notion that she somehow contributed to or was to blame for her rape, that she was able to control it, and that certain behaviors can nullify her non-consent. By punishing a complaining victim for admitting to substance use, school officials may be creating a hostile educational environment, despite their charge to end one.⁵³

2. Adopting and Publishing Clear Policies

For many victims, the days and weeks immediately following an assault are a true crisis. During this time symptoms of PTSD are acute, causing many victims to become withdrawn from social and academic life.⁵⁴ It is common for victims to closely guard their privacy at this stage. Many women are acutely aware of the social stigmas that attach to rape victims, and therefore carefully choose to whom they will disclose their experience. It is essential to providing an adequate response to campus sexual assault that schools encourage victims to come forward and seek help. To accomplish this, schools should provide information to all students, identifying resources and support available to victimized students as well as providing information regarding the filing of formal disciplinary complaints and reporting to law enforcement.

Schools must publish policies related to sexual harassment, including procedures for filing complaints against other students.⁵⁵ These policies must be clear and accessible so that students know what constitutes sexual harassment, how to file complaints, and how policies work.⁵⁶ The secondary goal of such policies is to put members of the campus community on notice that their school will not tolerate acts of sexual assault and sexual harassment, will take complaints seriously, and is capable of remedying harassment when it occurs.⁵⁷

Jane should be able to easily access information about seeking assistance and reporting. On an ideal campus, Jane would find detailed information in her student handbook or on her university's web page on who to report to, how to contact those individuals, and what kind of assistance she can expect. This

52. See Clery Act, 20 U.S.C. § 1092(f) (1998); see also VIOLENCE AGAINST WOMEN OFFICE, *supra* note 50. The United States Department of Education requires that schools receiving funding for maintaining an on-campus police force are prohibited from pursuing sanctions against students reporting substance use while reporting violent crimes such as sexual assault, dating violence, and domestic violence. VIOLENCE AGAINST WOMEN OFFICE, *supra* note 50.

53. 20 U.S.C. § 1681 (2004); see also Revised Sexual Harassment Guidance, *supra* note 38, at 32.

54. See generally HERMAN, *supra* note 16; KOSS & HARVEY, *supra* note 16; RESNICK, *supra* note 16, at 43-63.

55. Revised Sexual Harassment Guidance, *supra* note 38, at 14, 19.

56. Revised Sexual Harassment Guidance, *supra* note 38, at 20; see also 34 C.F.R. § 106.8 (2004).

57. Revised Sexual Harassment Guidance, *supra* note 38, at 19.

information should assure her that she can seek assistance privately and that her conversations with school representatives will be confidential. If Jane is unable to access this detailed information, she may refrain from seeking any help.

3. *Providing Assistance and Accommodations*

Schools can begin to provide effective assistance immediately after a victim discloses an assault. Indeed, in many cases the initial steps a school takes can shape its ultimate response, and will certainly affect the victim's overall experience. Without requiring her to make a formal complaint against another student or any report to law enforcement, schools should assist a victim in dealing with the aftermath of an assault.

In accordance with Title IX, once informed of an occurrence of a sexual assault, a school must take "prompt and effective" measures to relieve any ongoing hostile environment and prevent its recurrence.⁵⁸ Schools should ensure that staff and faculty members who are most likely to receive first reports of sexual assault are trained. These individuals, such as residential advisors, health care workers, security officers, and academic advisors, should be able to provide sensitive guidance to students who confide in them. At the least, these people should be able to refer complaining students to an employee who can provide assistance.⁵⁹ Title IX and its regulations require that schools designate one or more employees to act as a "Title IX Coordinator."⁶⁰ This employee is responsible for knowing and administering sexual harassment and sexual assault policies in accordance with legal regulations.⁶¹

Another simple step that schools can take toward eliminating a hostile academic environment is to provide accommodations in victims' coursework and schedule.⁶² Understanding victims' recovery needs means being flexible with course load requirements. Schools should provide victims with the opportunity to take optional leaves of absence and reduced course loads. This opportunity should be provided simultaneously with financial relief and tuition reimbursements for semesters when students are unable to attend classes. A student's traumatic experience of sexual assault should not become an academic and financial crisis as well. Victims should be allowed excused absences, extensions on projects and exams, and the option to withdraw from courses, even late in the semester.

Jane will likely need all of these accommodations. In addition, Jane faces added safety concerns. She shares a class with her assailant, and he lives in her dormitory. Ceasing a hostile environment means providing Jane with a safe

58. Revised Sexual Harassment Guidance, *supra* note 38, at 12 n.34, 20 (citing 34 C.F.R. § 106.31(b)).

59. Revised Sexual Harassment Guidance, *supra* note 38, at 21, 33 n.74; *see also* 34 C.F.R. § 106.8(a).

60. Revised Sexual Harassment Guidance, *supra* note 38, at 34 n.75 (citing 34 C.F.R. § 106.8(a)).

61. Revised Sexual Harassment Guidance, *supra* note 38, at 34 n.75.

62. Revised Sexual Harassment Guidance, *supra* note 38, at 16.

place to live and learn—a space where she does not feel physically threatened and she can live without daily reminders of her sexual assault compounding her initial trauma and jeopardizing her mental and physical health. Jane’s school must provide her with alternative housing and allow her to transfer out of the class she shares with the assailant. A victim may not want to move but often wants the assailant away from shared living spaces or classrooms. In many cases, it may be necessary to require assailants to vacate dormitories. Part III will address these issues, which require some engagement with an accused student.

4. Access to Grievance Procedures

Victims must have access to a fair and navigable formal complaint process.⁶³ The opportunity to participate in a campus based disciplinary or grievance procedure should be clearly explained to a reporting victim.⁶⁴ These procedures should ultimately provide a mechanism by which offending students can be removed from a victim’s environment and ultimately from campus.

The most useful legal guidance for meeting the needs of complaining students is Title IX and its regulations. According to the Department of Education’s Office for Civil Rights’ Revised Sexual Harassment Guidance, schools must take effective corrective action against sexual harassment and grievance procedures should be “prompt and equitable” in keeping with that goal.⁶⁵ Specifically, first, school procedures must provide for notice to students of how and where a complaint may be filed.⁶⁶ Second, an established procedure must actually be applied to a filed complaint.⁶⁷ Third, an “adequate, reliable, and impartial investigation” of a complaint must be provided.⁶⁸ Fourth, the process must follow designated and reasonable timeframes.⁶⁹ Finally, the school should provide assurances that discrimination will stop.⁷⁰

A school’s designated process must also meet a basic standard of fairness, separate from the above statutory and regulatory requirements.⁷¹ Courts around

63. Revised Sexual Harassment Guidance, *supra* note 38, at 4, 14, 19, 20; *see also* 34 C.F.R. § 106.8(a) (2004). *See generally* Meritor Savings Bank v. Vinson, 477 U.S. 57, 72-73 (1986).

64. *Id.*

65. Revised Sexual Harassment Guidance, *supra* note 38, Part IX.

66. Revised Sexual Harassment Guidance, *supra* note 38, Part IX.

67. Revised Sexual Harassment Guidance, *supra* note 38, Part IX.

68. Revised Sexual Harassment Guidance, *supra* note 38, Part IX.

69. Revised Sexual Harassment Guidance, *supra* note 38, Part IX.

70. Revised Sexual Harassment Guidance, *supra* note 38, at 12 n.34, 20 (citing 34 C.F.R. § 106.31(b)).

71. Schaefer v. Brandeis Univ., 432 Mass. 474, 481 (2000). *See generally* NCAA v. Tarkanian, 488 U.S. 179 (1988); Rendell-Baker v. Kohn, 457 U.S. 846 (1982); Runyon v. McCrary, 427 U.S. 160 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Mangla v. Brown Univ., 135 F.3d 80 (1st Cir. 1998); Doherty v. S. Coll. of Optometry, 862 F.2d 570 (6th Cir. 1988); Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984); Cloud v. Trs. of Boston Univ., 720 F.2d 721 (1st Cir. 1983); Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69 (4th Cir. 1983); Lyons v. Salve Regina Coll., 565 F.2d 200 (1st Cir. 1977); Mahavongsanan v. Hall, 529 F.2d 448

the nation have taken a relatively consistent stance on what type of process private colleges and universities owe to their students.⁷² The context of many of these decisions involve disciplinary processes where one student has accused another of a violent crime, typically a sexual assault, and one student claims that the school's process was "unfair." Courts have repeatedly dismissed the application of constitutional based due process rights in these cases.⁷³

The relationship between the private institution and the student is similar to a contractual one, in which schools and students have an agreed upon relationship.⁷⁴ The terms of the agreement are usually the rules and procedures established in the Student Handbook and Code of Conduct. Courts expect that schools will adhere to basic concepts of fairness in dealing with students in disciplinary matters.⁷⁵ Schools must employ the procedures set out in their own policies, and those policies must not be offensive to fundamental notions of fairness.⁷⁶ Though there has been little elaboration on the meaning of "fundamental fairness," it is widely thought to be a relatively low standard, as courts have favored affording private colleges and universities broad discretion in handling disciplinary matters on campus.

5. Adequate Investigations

Schools should provide for adequate and independent investigations of sexual assault complaints, as clearly defined in the Title IX regulations.⁷⁷ Processes that require student-run or open-ended investigations, however, face problems with Title IX's overall charge to stop and prevent the recurrence of a hostile campus environment related to the sexual assault.⁷⁸ Attorneys who regularly advise victims on disciplinary processes would point to investigations as one of the most problematic aspects of the process.

Many schools put the onus on the participating students to provide evidence

(5th Cir. 1976); *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10th Cir. 1975); *Dinu v. President & Fellows of Harvard Coll.*, 56 F. Supp. 2d 129 (D. Mass. 1999); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238 (D. Vt. 1994); *Holert v. Univ. of Chicago*, 751 F. Supp. 1294 (N.D. Ill. 1990); *Merrow v. Goldberg*, 672 F. Supp. 766 (D. Vt. 1987); *Jansen v. Emory Univ.*, 440 F. Supp. 1060 (N.D. Ga. 1977); *Giles v. Howard Univ.*, 428 F. Supp. 603 (D.D.C. 1977); *Life Chiropractic Coll., Inc. v. Fuchs*, 337 S.E.2d 45 (Ga. App. 1985); *Ahlum v. Adm'rs of Tulane Educ. Fund*, 617 So. 2d 96 (La. Ct. App. 1993); *Harwood v. Johns Hopkins Univ.*, 747 A.2d 205 (Md. Ct. Spec. App. 2000); *Coveney v. President & Trs. of the Coll. of the Holy Cross*, 445 N.E.2d 136 (Mass. 1983); *Anderson v. Mass. Inst. of Tech.*, 3 Mass. L. Rptr. 293 (Mass. Super. Ct. 1995); *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108 (Minn. 1977); *Univ. of Miss. Med. Cent. v. Hughes*, 765 So. 2d 528 (Miss. 2000); *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1303 (N.Y. 1980); *PSI Upsilon of Phila. v. Univ. of Pa.*, 598 A.2d 994 (Pa. 1991) (table decision).

72. See cases cited *supra* note 71.

73. See cases cited *supra* note 71.

74. See cases cited *supra* note 71.

75. See cases cited *supra* note 71.

76. See cases cited *supra* note 71.

77. Revised Sexual Harassment Guidance, *supra* note 38, at 15, 20.

78. Revised Sexual Harassment Guidance, *supra* note 38, at 12 n.34, 20 (citing 34 C.F.R. § 106.31(b)).

and witnesses to support their case and/or fail to provide set rules and timelines for investigations to happen. Students are required to be both detective and advocate, preparing and conducting their own investigation and presenting evidence to convince a disciplinary board that a rape occurred.

Imagine a situation where Jane, still reeling from the physical and emotional crisis of the sexual assault, must now identify potential witnesses and collect their statements, asking them “What do you remember from the night I was raped? Did you see anything unusual? Why didn’t you warn me?” Putting the burden on the victim to document her physical injuries, including bruises, scrapes, vaginal trauma and soreness, in the face of her highly personal emotional state would likely augment her fear, nightmares, and sense of isolation. Not only would this sort of investigation serve as a barrier to recovery, but it would also create a hostile environment or prolong an existing one.

Furthermore, loose rules regarding investigations often lead to investigations that spiral out of control. During investigations, private facts about the occurrence of the assault and the students involved are disclosed to outside parties. College campuses are sheltered, highly social environments. Through the spread of personal information and rumors, the hostile environment is not only prolonged, but becomes contagious. The list of witnesses grows beyond those individuals with first hand knowledge about the assault.

At the outset, only Jane and her assailant know about the rape; at some point, each passes the information on to one or two close friends. Eventually, those students who attended the party will know about the assault. Those party-goers then pass their knowledge on to a wider group of friends, and so on. Each outer layer of the social group gradually gets larger and more remote from Jane. Jane’s rape defines her life on campus; it is the context through which she is identified, and she is constantly re-encountering her trauma.

To prevent this perpetual hostile environment, investigations should follow clear, established rules.⁷⁹ For example, investigations can be conducted by an independent, impartial third party, such as a school official who has received adequate training and does not act as a decision-maker. Some schools have begun to use this model with success.⁸⁰ Investigators should verbally inform each witness interviewed about the expectation that information will be kept confidential. Schools should establish clear policies regarding what types of evidence and witness statements are appropriate, limiting witnesses to only those with actual first hand knowledge about the assault. Finally, deadlines for the completion of investigation should be set.

79. Revised Sexual Harassment Guidance, *supra* note 38, at 15, 20.

80. See FACULTY OF ARTS AND SCIENCE, HARVARD UNIVERSITY, STUDENT HANDBOOK ch. 4 (2002-03) (outlining Harvard University’s policy on sexual misconduct), available at <http://www.registrar.fas.harvard.edu/handbooks/student.2003-2004/chapter4/conduct.html>.

6. Sanctions

Students are better served by schools that set out clear sanctions in their written policy. Sanctions should be proportional to the severity of sexual assault, including suspension, expulsion, and removal from campus, sending a clear message to students that the offense is taken seriously. Providing disciplinary decision makers with options to remove dangerous students from campus enables them meet Title IX's directive to end a hostile environment and prevent future harm.

As discussed above, state and federal case law concerning the process owed students has consistently held that disciplinary proceedings must, at a minimum, provide for basic and fundamental fairness.⁸¹ Furthermore, Title IX requires that a college or university's response to reports of rape be immediate and reasonable.⁸² The best way for educational institutions to demonstrate that the proceedings in specific cases meet the requirements of fundamental fairness or that any particular response is reasonable is simply to show that they have adhered to their established and normal procedures.⁸³ Addressing the serious issue of sexual assault without specific reasonable procedures potentially subjects colleges and universities to liability repeatedly with each individual case.

Before opting to participate in a campus based disciplinary process, Jane is faced with an arduous decision-making process. She will weigh the potential benefits of the process against her own personal needs for physical and emotional safety and privacy. A necessary part of her decision making will be the sanctions that she can expect to be issued against her assailant. If those sanctions are not defined, or do not clearly provide for her assailants removal from campus, Jane may abandon the process. Her assailant will then remain a threat to her well-being, as well as a potential threat to others on campus.

IV. ENGAGING ACCUSED STUDENTS

Though many schools do have clear policies, the actual implementation of and adherence to established policy proves to be problematic. Once a complaint is made, experience shows that schools have a difficult time dealing with sexual assault perpetrated by acquaintances on campus. They struggle with understanding the extent of the violation that a victim feels and balancing that victim's needs against the rights of the accused student as a community member. The result is that school administrators often make difficult personal judgment calls, and established rules and procedures become fluid and malleable.

81. See cases cited *supra* note 71.

82. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999).

83. See cases cited *supra* note 71.

It is in handling complaints, when the rights of victims on campus are in direct contradiction with those of accused students, where schools are most cautious and hesitant to take conclusive action. It is in this context that private colleges and universities are most often threatened with liability by both complaining and accused students. Significant issues arise, including what interim precautions can be taken on behalf of victims, when legal counsel can act on students' behalf, and how formal proceedings should be conducted.

A. Interim Precautions

Interim sanctions and safety precautions should be available.⁸⁴ For most victims, sharing the same living and campus space with assailants compounds the initial trauma of a sexual assault. In attempts to avoid run-ins with their assailants, victims typically limit their exposure by missing classes, ceasing participation in social and extracurricular activities, and confining themselves to areas of campus where they feel safe. Run-ins are not just emotionally troubling, but are dangerous and are certain to create further harm and lend to hostile campus environment. Given Title IX's charge to schools to immediately stop any ongoing harassment and prevent its recurrence, providing for an "interim measure" to protect victims *during* an investigation and *before* a formal decision making process begins may be necessary.⁸⁵ Accordingly, schools should consider providing for stay away and no contact orders, including ones that may require accused students to transfer out of a dormitory or classroom shared with the victim.⁸⁶

This issue of "interim measures" raises several concerns. While victims and their advocates view them as necessary precautions, students accused of sexual assault often find them to be premature and unwarranted limitations on their rights. Schools are understandably wary of issuing such precautions.

When considering interim measures, schools must balance the accused student's right to basic fairness with the victim's rights under Title IX. Title IX requires schools to prevent the existence and continuation of hostile environments on campus.⁸⁷ Under this rubric, a school is required to provide interim precautions to victims once notified of a sexual assault.⁸⁸ Examples of interim precautions include issuing a stay away order to Jane's assailant ensuring that he not contact Jane or go within a certain distance of her; requiring Jane's assailant to move out of the dorm that he shares with her; and making arrangements that he not attend any classes that he shares with her. In this way, Jane is able to continue with her education with a modicum of

84. Revised Sexual Harassment Guidance, *supra* note 38, at 16-17.

85. Revised Sexual Harassment Guidance, *supra* note 38, at 16-17.

86. Revised Sexual Harassment Guidance, *supra* note 38, at 16-17.

87. Revised Sexual Harassment Guidance, *supra* note 38, at 12; *see also* 34 C.F.R. § 106.31(b) (2004).

88. Revised Sexual Harassment Guidance, *supra* note 38, at 16-17.

normalcy, that is, without constant and pervasive threats to her physical safety and emotional stability.

As mentioned, schools are often hesitant to provide such accommodations because of concerns surrounding their duty to provide accused students with basic fairness throughout the complaint and adjudication process. While such precautions can lead to accused students' complaints of not receiving due process, rarely are students successful in claiming that interim precautions fail to meet the standard of basic fairness.⁸⁹ To further decrease the number of successful lawsuits by accused students, schools should publish interim precautions and the procedures for obtaining them in their written policies and procedures. By doing so, schools can more easily strike a balance between providing victims with the protection they need (and comports with federal requirements under Title IX) while ensuring that accused students are afforded basic fairness.

B. Presence of Counsel

Where educational rights are at stake and there exists a likelihood of criminal proceedings, courts have held that an accused student should be allowed the assistance of independent legal counsel and noted that an accused student's interest in a college degree and reputation is equal to his interest in mounting a criminal defense and that therefore "only a lawyer is competent to cope with the[se] demands."⁹⁰ Some courts, however, have applied this rule narrowly, holding that an accused student need not be afforded counsel solely to affect the outcome of a disciplinary hearing.⁹¹

Of course, if a university advises Jane's assailant to obtain legal counsel and/or allows that counsel to be present for any disciplinary proceeding, it must also extend this accommodation to Jane. Because Title IX regulations require that any accommodation be applied equally, a university must allow Jane's counsel a part in the process or risk violating Title IX.⁹² Additionally, representation helps ensure a fair process, minimizes the possibility for further harassment, and helps academic institutions avoid liability for gender discrimination.

C. Adjudication Hearings and Confrontation

Those colleges and universities that do allow legal representation on behalf

89. See cases cited *supra* note 71.

90. *Gabrilowitz v. Newman*, 582 F.2d 100, 106 (1st Cir. 1978).

91. *Donahue v. Baker*, 976 F. Supp. 136, 146 (N.D.N.Y. 1997).

92. 34 C.F.R. § 106.31(b)(4) (stating schools prohibited from subjecting students to separate or different rules of behavior, sanctions, or treatment); see also Revised Sexual Harassment Guidance, *supra* note 38, § IX (evaluating school's grievance procedures including evaluating investigation of complaints, and opportunity to present witnesses and other evidence).

of either student during proceedings often will not allow counsel to speak or participate. Such a practice implicates both “basic fairness” concerns as well as Title IX gender discrimination ones. Without active counsel, a victim is often required to question her assailant as well as be questioned by her assailant. Not only does this practice result in broadly scoped and terrorizing questioning of victims, but it also requires a rape victim to question her alleged rapist, which is a problematic issue.⁹³

Requiring students to conduct direct and cross-examinations of each other does not rise to the level of basic fairness, to which disciplinary proceedings at private institutions are held.⁹⁴ Students accused of rape in disciplinary proceedings may broadly question victims with few, if any, boundaries. Proceedings are typically overseen by student judicial boards and faculty members, none of whom have an expertise in law or in dealing with victims of violent crimes. The absence of clear boundaries and formal rules of evidence renders harassment of the victim by the accused student not just a risk, but a certainty. Accordingly, the ability of a student accused of rape to question his victim freely is beyond any notion of “basic fairness.”⁹⁵

Moreover, allowing an alleged rapist to question the victim raises additional problems under Title IX. The student-on-student procedure puts the victim at risk for future harassment and effectively creates an ongoing hostile environment in which the accused may interrogate and harass the victim. Therefore, the reliance on this type of proceeding coupled with a lack of meaningful representation in disciplinary proceedings is in opposition to the Title IX guidelines.⁹⁶

V. CONCLUSION

Female students are at an exceedingly high risk of being sexually assaulted on college campuses and within student dormitories. These same students often consider their school to be their community and their home. They trust that their campus is a place where they can freely participate and exist within the community. When students are sexually assaulted, more often than not, victims become estranged from their community. Their assaults and the ensuing volatile campus environment becomes a barrier, sometimes insurmountable, to achieving their educational goals.

Schools can change this reality by conscientiously adhering to the laws governing campus safety, gender discrimination, and fairness in process.

93. While it is true that in the ordinary criminal context defendants representing themselves pro se do conduct cross examinations of victim-witnesses, state and federal criminal proceedings allow for substantially more protection of victims than is provided in a typical academic disciplinary proceeding.

94. See cases cited *supra* note 71.

95. Revised Sexual Harassment Guidance, *supra* note 38, at 12; see also 34 C.F.R. § 106.31(b) (2004); cases cited *supra* note 71.

96. See also cases cited *supra* note 71.

2005] *ACQUAINTANCE RAPE AT PRIVATE COLLEGES AND UNIVERSITIES* 413

Moreover, schools can change this reality by maintaining an awareness of the specific needs of victimized students and providing those students with resources, assistance and remedies. In doing so, schools remain on the right side of the law while treating student victims as respected members of the community.