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# IWF Policy Brief

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## **When Policies Cry Wolf: A Look at Sexual Harassment Policies on Campus**

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### **Executive Summary**

According to Title IX of the Education Amendments of 1972 (Title IX), the U.S. Department of Education's Office of Civil Rights (OCR) requires that every college and university receiving public funding have a sexual-harassment policy. It also describes exactly what constitutes sexual harassment. However, a growing paternalistic trend among university administrators results in vague and overbroad policies that do more harm than good:

- They violate students' clearly defined First Amendment rights to freedom of expression.
- They induce a chilling effect on campus, inhibiting students' normal interaction.
- They foster a culture of dependency for women, as administrators begin to protect them from what they find distasteful.

A survey by the American Association of University Women indicates that many students are unaware of the true definition of sexual harassment. To solve the problem, colleges and universities need to get their policies in line with the OCR guidelines on sexual harassment in order to educate their students about the true nature of sexual harassment and what to do about it.

### **Introduction**

According to a 2006 study by the American Association of University Women, nearly two-thirds of American college students have been sexually harassed. This figure would be outrageous, were it true. However, this figure is based on a ridiculously broad definition of sexual harassment:

if students have ever been insulted, offended, or had sexual comments made in their presence, then they have been sexually harassed. True sexual harassment is serious; it causes students to feel threatened and hurts them in their quest for an education. It is no laughing matter, but many paternalistic administrators and their supporters are making it one.

### **Talking Points:**

- Sexual harassment policies on campus tend to be overbroad and limit students' clearly defined First Amendment rights to freedom of expression.
- College women deserve better policies so that they can be protected when they need it but also grow into strong, independent adults.
- Students need to be educated on what does and does not constitute sexual harassment so that truly harmful and serious cases can be dealt with effectively.

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## What is Sexual Harassment?

The Office of Civil Rights (OCR), part of the U.S. Department of Education, is responsible for determining the sexual-harassment policy at colleges and universities under Title IX regulations. According to the OCR, “Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.” This conduct is outlawed because it can limit the ability of students to take part in all aspects of the educational program, thereby constituting discrimination.<sup>1</sup>

There are two types of sexual harassment: quid pro quo and hostile environment. Quid pro quo sexual harassment occurs “if a teacher or other employee conditions an educational decision or benefit on the student’s submission to unwelcome sexual conduct.” Because students are rarely in positions of power over other students, this type of harassment is usually only committed by professors and other employees.<sup>2</sup> Hostile-environment sexual harassment, on the other hand, can be committed by anyone: male, female, fellow student, school employee, or even a third party such as a visiting speaker.<sup>3</sup> It is conduct that “is sufficiently serious that it denies or limits a student’s ability to participate in or benefit from the school’s program.”<sup>4</sup>

To determine whether or not conduct constitutes hostile-environment sexual harassment, many factors must be taken into account.<sup>5</sup> Most important is the degree to which the conduct affects the student’s education. If a student experiences such emotional distress because of the conduct that he or she is unable to attend school or the student’s grades suffer, the conduct would likely constitute hostile-environment sexual harassment. Only slightly less important is the type, frequency, and duration of the conduct. Unless the conduct is particularly severe, such as inappropriately touching a woman’s breasts, a single action typically will not constitute sexual harassment. If the conduct is less severe, generally it must be sustained, repeated, or perpetrated by a large number of offenders in order to constitute sexual harassment.

The relationship between the harasser and the harassed is also important.<sup>6</sup> Older students, professors, or others in positions of power are more likely to intimidate a student with sexual advances, so hostile-environment sexual harassment is more likely to occur in such a situation. Finally, context matters. For example, conduct that in a crowded hallway would seem harmless can be regarded as threatening or intimidating, and therefore sexual harassment, if it takes place in a secluded area or a dorm room.<sup>7</sup>

Lastly, harassment based on gender, even if not sexual, can constitute hostile-environment sexual harassment when combined with sexual-harassment acts. When one is judging whether or not hostile-environment sexual harassment has occurred, one must use common sense and reasonable judgment, as well as take the total situation into account.<sup>8</sup>

The OCR regulations on sexual harassment apply to all colleges and universities, both public and private, which receive federal funding.<sup>9</sup> If the harassment takes place on school property, the school has an obligation to stop it.<sup>10</sup> In the case of a student harassing another student, this means that if the school can be reasonably expected to know about it,<sup>11</sup> then stopping the harassment immediately is the school’s responsibility.<sup>12</sup> When professors or other employees are concerned, special circumstances can apply. If an employee sexually harasses a student in the context of his or her job, such as a professor harassing a student in class, then the school has a responsibility not only to stop the harassment but also to possibly remedy the effects on the student.<sup>13</sup> However, if an employee sexually harasses a student in a context where that employee has no authority over the student, then the school cannot be held liable for the harassment unless

the school fails to put a stop to it.<sup>14</sup> For example, a school cannot be held liable if a history professor inappropriately touches an engineering student at a bus stop.

When a student or employee is accused of sexual harassment, the school has an obligation to investigate and stop the harassment, but the accused is entitled to due process.<sup>15</sup>

### **What is Not Sexual Harassment?**

Sexual-harassment law and the First Amendment often run up against each other. In public schools, however, students' and employees' First Amendment rights to freedom of expression are guaranteed in activities as well as speech. "OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX." Although the school has the right to denounce opinions considered offensive or provide fora for competing views, it does not have the right to suppress the expression of its students or employees.<sup>16</sup> For example, if material in a class offends students, hostile-environment sexual harassment has not taken place and the professor should not be censored, but if a group of students repeatedly targets another student for sexual comments and attempts to follow the student home or distributes sexually explicit drawings of the student, then hostile-environment sexual harassment is a likely possibility.<sup>17</sup>

Although the federal government and therefore the Bill of Rights cannot fully protect individuals at private universities, those individuals are not completely at the mercy of their institutions.<sup>18</sup> Most states require even private colleges and universities to follow their own rules and treat students and employees fairly. Many states have also decided that student handbooks, catalogues, and other literature constitute a contract between a student and the university, so if a handbook promises freedom of expression to a student and then does not deliver, the student may have grounds to sue.<sup>19</sup> California goes even further, whereby the "Leonard Law" holds all colleges and universities, including private ones, to the same standard as public schools with regard to the Bill of Rights.<sup>20</sup>

Colleges and universities often have sexual-harassment policies that are too broad and violate the First Amendment. For example, at the University of Rochester, under circumstances "[c]omments about an individual's body, clothing or lifestyle which have sexual implications or which demean that individual's sexuality or gender" are outlawed.<sup>21</sup> Orange Coast College defines sexual harassment as "verbal harassment, e.g., epithets, derogatory comments or slurs, . . . visual forms of harassment, e.g., derogatory posters, cartoons, or drawings, . . . or . . . an intimidating, hostile, or offensive environment."<sup>22</sup>

At Occidental College in 2004, a student was subjected to considerable abuse based on an overbroad sexual-harassment policy. Jason Antebi ran a conservative-leaning, Howard Stern-style radio show on campus, and three of his political opponents in the student government brought him up on sexual-harassment charges because they claimed to be offended by his crude humor. Even though his speech was fully protected under the First Amendment, the school found him guilty. The Foundation for Individual Rights in Education (FIRE) intervened and Antebi was not expelled but he was not cleared of charges.<sup>23</sup> Antebi sued the school for violating his freedom of speech and due process rights and recently settled after a three-year dispute.<sup>24</sup>

Finally, speech is not the only commonly confused aspect of sexual-harassment law. The OCR does not consider nonsexual touching or conduct sexual harassment unless it becomes sexual, taking place repeatedly or under inappropriate circumstances.<sup>25</sup> It is also important to realize that heckling based on sexual orientation does not constitute sexual harassment unless it is serious enough that the same actions would constitute sexual harassment if they were directed at a heterosexual student.<sup>26</sup>

## When Sexual-Harassment Policies Hurt Women

Many schools have policies that push the bounds of sanity. Until recently Gettysburg College was a prime example. After more than a year of public pressure, Gettysburg finally revised its overbroad Sexual Misconduct Policy.<sup>27</sup> The policy formerly stated that

Each individual has a responsibility to obtain consent before engaging in sexual interaction. Consent is defined as the act of willingly and verbally agreeing (for example, by stating “yes”) to engage in specific sexual conduct. If either person at any point in a sexual encounter does not give continuing and active consent, all sexual contact must cease, even if consent was given earlier.

Sexual behavior included “physical contact of a lewd type such as brushing, touching, grabbing, pinching, patting, hugging, and kissing[.]”<sup>28</sup> This means that a student had to ask permission to comfort a crying friend, put his arm around a date at the movies, rest a head on a date’s shoulder, or even kiss a long-term girlfriend or boyfriend. Worse, students had to keep asking permission throughout the activity.

It is a positive development that Gettysburg finally amended its policy, but many similar policies still exist around the country. Davidson College’s policy is just as bad as Gettysburg’s was, and unfortunately, it is still on the books. Examples of “behavior and conduct that the college considers inappropriate” include, “Comments or inquiries about dating, marital status, sexual activities, or sexual orientation; . . . Abusive or hostile personal or gender related remarks; Patronizing remarks (i.e. little girl, boy, referring to an adult as ‘girl’, ‘boy’, ‘hunk’, ‘doll’, ‘honey’, ‘sweetie’, ‘women’s work’); Innuendoes, teasing, jokes, derogatory or dismissive comments[.]” and “Wearing inappropriate or sexually suggestive clothing.”<sup>29</sup> This means that asking someone out on a date is illegal at Davidson, which certainly puts a damper on the social scene. If a student manages to get into a relationship without breaking any rules and the relationship doesn’t work out, angry words about the lover after a breakup are out. So are tight jeans, high heels, and even pajamas.

By passing such policies, Davidson and, formerly, Gettysburg trivialize the very important issue of sexual harassment. Sexual harassment has become a joke rather than a frightening and potentially traumatic experience. Women who are legitimately harassed are less likely to be taken seriously. The point here is not that students need to be educated and protected against these innocent displays of affection or levity, but rather that students and administrators need to be aware of the serious actions that actually constitute sexual harassment.

These policies stem from a feminist initiative to protect women from sexual harassment. It’s a worthy goal, but in these cases it does more harm than good. Overbroad policies paint women as wilting flowers unable to take a joke, to extricate themselves from an innocent, if unwelcome, hug, and certainly to say “no” to a man if he misunderstands their limits or—God forbid—asks them out to dinner. If this is such a problem, perhaps Davidson and other schools should teach women to say “no” and defend themselves, and then help them when they are actually threatened, rather than build an overprotective bubble over them in an effort to protect them from occasional discomfort or offense.

## Enforcing Bad Policies

Perhaps even more chilling than the overbroad sexual-harassment policies is the selective way in which they are enforced or not enforced. For example, the Davidson College Women's Committee has performed Eve Ensler's controversial play *The Vagina Monologues* for several years in a row.<sup>30</sup> Although comments and inquiries on sexual activity, hostile gender-related remarks, jokes, patronizing remarks, and innuendo are outlawed under university policy, the play contains examples of all of them,<sup>31</sup> and the school not only allows but supports the production. This means that college administrators are put in the position of choosing which parties to prosecute for sexual harassment—hardly a fair policy.

This has actually happened at Roger Williams University. *The Vagina Monologues* and corresponding V-Day festivities were a regular event on campus. However, when the College Republicans satirized the event by “celebrating” P-Day and writing a similar play called *The Penis Monologues*, they were ordered to cease and desist immediately. When they refused, citing the double standard, two students were charged with disciplinary offenses.<sup>32</sup>

Overbroad and overprotective policies hurt women in the long run as well. If a woman is taught that when a man asks her out to dinner or tells her she looks lovely, he is harassing her, what kind of life will she lead? If women are trained in college that the administration will help them whenever something they don't like occurs, what happens after graduation? Workplaces have sexual-harassment policies but life doesn't. If they are stalked or attacked, the police can help, but what about whistles, catcalls, or being checked out on the street or in a bar? Women need to be able to take care of themselves, and policies like Davidson's don't help them do that.

A 2006 study by the American Association of University Women (AAUW) reveals quite a bit about students' thoughts on sexual harassment. When asked, “What is sexual harassment?” some students replied, “Any unwelcome comment or gesture pertaining to your body or gender,” “Molesting, joking etc. about someone's sex or body,” and “When someone oversteps your personal boundaries and refers to you in a derogatory manner.”<sup>33</sup> Understandably, 92 percent of students said they would be upset if someone forced sexual activity upon them,<sup>34</sup> but much fewer said they would be upset if someone made sexual comments, jokes, gestures or looks. Both of these behaviors, however, are defined by the AAUW as sexual harassment, whether or not they are repeated.<sup>35</sup> By this definition, the AAUW results state that nearly two-thirds of college students are sexually harassed, but that more than half do not report the incident because it “wasn't a big deal.”<sup>36</sup> Since hostile-environment sexual harassment, according to the OCR, must actually create a hostile environment for the student and hinder him or her in taking full advantage of educational opportunities, harassment that the student says isn't “a big deal” isn't harassment.<sup>37</sup> More examples of student-defined sexual harassment from the study include, “A girl kept trying to show off her breasts to get my attention,” and “Joking around with other guys calling each other gay.”<sup>38</sup>

## What Can Be Done?

A major part of preventing sexual harassment is merely educating students on what exactly constitutes sexual harassment. When asked what could be done about sexual harassment on campuses, 47 percent of students surveyed by the AAUW recommended that their schools have a sexual-harassment ombudsman or put the policy up on the website.<sup>39</sup> Generally, schools do both. Regardless, the first step is simply for schools to get their policies in line with the OCR guidance on sexual harassment. After that, if the policies were a little bit easier to find and read, perhaps students would better understand what is and is not sexual

harassment, and what the school can do to help those who feel they are being harassed. This is assuming, of course, that the school's policy is compliant with the OCR guidance, since propagating an overbroad or vague policy would hurt more students than it helps. It is important for students to learn what exactly is appropriate in a school environment and what is not.

Fifty-seven percent of students surveyed by AAUW responded that they would like their schools to have a confidential way to report sexual harassment on the Internet.<sup>40</sup> Confidential reporting can lead to many problems. Falsely accusing someone as a joke or because of a grudge suddenly has no consequences because the accuser cannot be identified. A sexual-harassment allegation, even if never proved, can have serious consequences for the accused. Sexual-harassment investigations are invasive and, if they become public, can leave the accused student exposed to vicious gossip and censure from other students. Although true sexual harassment is a serious problem for women and even occasionally for men and should not be dismissed lightly, those accused must have rights as well, and that means treating accusations as a more serious matter than filling out an anonymous form online.

## **Conclusion**

Students have the right to equal opportunity to participate in higher education and therefore to be free from sexual harassment. However, the current culture in university administration teaches women that they also have the right to be free from insult or offense. Some schools even go beyond this to say that any talk or suggestion of sex constitutes sexual harassment, resulting in a chilling effect on dating and humor. While it might be lovely if no one insulted or offended anyone else, the world simply does not work this way. College is supposed to prepare women for the real world and independence, and teaching them that they should run to an administrator the moment a man looks at them simply fails to do that. College women deserve better policies so that they can be protected when they need it but also grow into strong, independent adults. Students need to be educated on what does and does not constitute sexual harassment so that truly harmful and serious cases can be dealt with effectively.

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## Endnotes

- <sup>1</sup> Department of Education—Office of Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties—Title IX (January 2001). Available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf>, 2.
- <sup>2</sup> OCR Guidance 5.
- <sup>3</sup> OCR Guidance 3.
- <sup>4</sup> OCR Guidance 5.
- <sup>5</sup> OCR Guidance 5.
- <sup>6</sup> OCR Guidance 6.
- <sup>7</sup> OCR Guidance 7.
- <sup>8</sup> OCR Guidance 7.
- <sup>9</sup> OCR Guidance 2.
- <sup>10</sup> OCR Guidance 9.
- <sup>11</sup> OCR Guidance 14.
- <sup>12</sup> OCR Guidance 12.
- <sup>13</sup> OCR Guidance 10.
- <sup>14</sup> OCR Guidance 12.
- <sup>15</sup> OCR Guidance 22.
- <sup>16</sup> OCR Guidance 22.
- <sup>17</sup> OCR Guidance 23.
- <sup>18</sup> Harvey A. Silverglate, David French and Greg Lukianoff, *FIRE's Guide to Free Speech on Campus* (Philadelphia: The Foundation for Individual Rights in Education, 2005), 53. Available at <http://www.thefire.org/pdfs/free-speech.pdf?PHPSESSID=3e9f3b52c55305f451f27edfb44d8469>.
- <sup>19</sup> Silverglate et al., 54.
- <sup>20</sup> Silverglate et al., 55.
- <sup>21</sup> University of Rochester, University of Rochester Policy of Harrassment and Discrimination (2005). Available at <http://www.thefire.org/pdfs/f2c428e7bf567bb1025b3046a5a09154.pdf>.
- <sup>22</sup> Coast Community College District Student Code of Conduct (2006). Available at <http://www.thefire.org/pdfs/6accaf120852d56a223b84a786fa8284.pdf>.
- <sup>23</sup> FIRE Press Release, “Occidental College Ruthlessly Suppresses Free Speech—Censors Student Radio Host, Dissolves Student Government,” July 15, 2004. Available at <http://www.thefire.org/index.php/article/4982.html>.
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- <sup>25</sup> OCR Guidance 2.
- <sup>26</sup> OCR Guidance 3.
- <sup>27</sup> FIRE Press Release, “Victory for Fundamental Fairness at Gettysburg College,” August 22, 2007. Available at <http://thefire.org/index.php/article/8319.html>
- <sup>28</sup> Gettysburg College Code of Conduct (2006). Available at [http://www.gettysburg.edu/about/offices/college\\_life/srr/student\\_handbook/student\\_judicialsystem/code\\_ofconduct.dot](http://www.gettysburg.edu/about/offices/college_life/srr/student_handbook/student_judicialsystem/code_ofconduct.dot).
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- <sup>30</sup> Davidson College Gender Resource Center Website (2005). Available at [http://www2.davidson.edu/studentlife/stu\\_orgs/grc/index.html](http://www2.davidson.edu/studentlife/stu_orgs/grc/index.html).
- <sup>31</sup> Eve Ensler, *The Vagina Monologues* (New York: Villard, 1998).
- <sup>32</sup> Christina Hoff Sommers, “Why Can’t They ‘Just Get Along?’—V-Day meets P-Day on campus,” National Review Online, May 2, 2006. Available at <http://www.national>

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<sup>33</sup> Catherine Hill and Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, (Washington, DC: American Association of University Women Educational Foundation, 2005), 9.

<sup>34</sup> Hill and Silva, 9.

<sup>35</sup> Hill and Silva, 10.

<sup>36</sup> Hill and Silva, 28 and 33.

<sup>37</sup> Samantha Harris, "Shocking Study Finds College Students Joke About Sex!" *The Torch*, January 25, 2006. Available at <http://www.thefire.org/index.php/article/6726.html>.

<sup>38</sup> Hill and Silva, 20.

<sup>39</sup> Hill and Silva, 34.

<sup>40</sup> *Ibid.*