



Sexual Violence Among our Students: The School Counselor's Legal Role

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Whitney, a 17-year-old student in your school, comes to your office distraught. Between tears, she tells you she went to a party last weekend with Derrick, another student her age, and ended up passed out in an upstairs bedroom. She was awakened by Derrick forcing himself on her. She protested loudly, but said that no one came to help her. Whitney says you are the only person she has told that she was raped. For the past five days, she has endured the snickering and sneering of Derrick and his friends in the hallways "as they smugly march around with their worlds intact" while she "dies a little more inside each day." She says she has been having trouble focusing on school, and she blames herself for the incident, saying she drank way too much even though she doesn't think she had very much to drink that night. She wonders aloud to you if she could have been drugged. She begs you not to tell anyone, especially her parents. We know our advocacy and ethical role but what is our legal role?

In the busy lives of school counselors there are those "drop-everything-and-attend" moments, and this is one of those times. You are required by law to act quickly to prevent possible future victims, to protect the school from legal liability and to provide support for Whitney. Our instincts are to concentrate on giving Whitney the time and guidance needed to come to terms with the fact that she was not responsible but a victim of a crime that needs to be reported. As school counselors we would rather focus on guiding her with the time, space, and autonomy needed to bring her to the point where she would choose to involve her parents, therefore, safeguarding the trusting relationship by breaching in the least intrusive way. However, federal law is breathing down our necks, and we must act swiftly to involve our administration and, for minors in secondary settings, her parents.

Sexual violence is a form of sexual harassment and discrimination under Title IX of the Education Amendments of 1972. Teen dating violence has long-term effects: teen victims are more likely to perform poorly in school, use drugs or alcohol, have eating disorders or be depressed or suicidal. They are also more likely to experience violence in future relationships. The CDC's 2009 Youth Risk Behavior Surveillance showed that 9.8 percent of ninth- to 12th-grade students reported being hit, slapped or physically hurt on purpose by their boyfriend or girlfriend in the 12 months before the survey. More than 10 percent of ninth- to 12th-grade females reported they had been forced to have sexual intercourse, as did 4.5 percent of males. As school counselors, we strive to support and advocate for all students and help them learn to build healthy relationships.

In April 2011, the Office of Civil Rights (OCR), an arm of the U.S. Department of Education, which governs Title IX, wrote specific requirements related to sexual violence. Sexual violence is the term used by OCR to refer to "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol . . . [or] due to an intellectual or other disability." Sexual violence does not necessarily mean rape but can also be sexual assault, sexual battery and/or sexual coercion.

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by: Carolyn Stone, Ed.D.

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According to OCR, a hostile school environment is created when “conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.” If the incident is severe, as in the case of rape, the conduct does not have to be repeated or occur over time to label the environment hostile. Derrick’s rape of Whitney was a one-time occurrence but sufficiently severe to create a hostile environment. Even when the assault occurs off campus the school should take the “sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.”

OCR states, “A school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. . . the school’s Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its obligation to investigate.

Even if Whitney had not come forward, if the school reasonably should know about possible harassment, e.g. the school counselor heard rumors, the school must take action. If Whitney had reported the incident to the police but not to the school, the fact that the police are investigating would not take the place of a school investigation necessary to comply with Title IX. The alleged victim’s parents must give consent for a school to conduct an investigation if the student is under 18.

The school’s inquiry must be prompt, thorough and impartial and “in states with mandatory reporting laws, schools may be required to report certain incidents to local law enforcement or child protection agencies.” For example, in California, non-mutual violence against a minor typically constitutes reportable child abuse, regardless of whether the offender is a minor.

If Whitney requests confidentiality or asks that Derrick not be pursued by school officials, the school should take all reasonable steps to investigate while maintaining Whitney’s confidentiality or respecting her request not to pursue an investigation. If Whitney insists that her name or other identifiable information not be disclosed, the school has the obligation to inform Whitney that its ability to respond may be limited.

Confidentiality presents a very difficult dilemma for us. Supporting Whitney will be an ongoing process made more complicated by the fact that, whether her name is used or not, Derrick will suspect she told. This is often the reason students do not confide in us. Even if we can protect them from taunts or physical abuse, students know we cannot protect them from social isolation and the other cruelties that follow when students make serious allegations against their peers. Despite the fact that the OCR states that, “the school also should tell any complainants that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs,” we know how important it is to many of our students that their confidentiality will not be breached, especially to the perpetrator.

As an advocate, we try to work with administration to minimize the additional trauma that an investigation could have on student victims. Our role is to encourage administration to act as the Federal law allows us to, evaluating Whitney’s request “in the context of [our] responsibility to provide a safe and nondiscriminatory environment for all students . . . and weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant’s age; whether there have been other harassment complaints about the same individual; and the alleged harasser’s rights to receive information about the allegations” if the documentation of the allegations are to become part of educational records. “Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence.”

Today’s schools are given enormous responsibility both to educate and to help students become productive members of society. States are beginning to interpret this to mean proactive/preventive measures have to be initiated and school policy established around sexual violence. States such as New Jersey and California are requiring that educators teach healthy relationships as part of curriculum. Not only do we owe Whitney support but if Derrick remains in our school we still owe him loyalty and support to teach him how to become a productive citizen and how to have healthy relationship skills.

All of the quotes in this article came from the OCR's Dear Colleague Letter available at: www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. This letter does not add requirements to applicable law but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. OCR offers assistance to help with compliance. Contact OCR at OCR@ed.gov or Office of Civil Rights, U.S. Department of Education, 400 Maryland Ave. SW, Washington, DC 20202, (800) 421-3481. Two resources to help Whitney are: National Teen Dating Violence Hotline, (866) 331-9474 or Love is Respect, www.loveisrespect.org.

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