

CYBER ABUSE AND TITLE IX: A RESOURCE FOR CAMPUS SAFETY OFFICIALS

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Produced by:

Break the Cycle

Because Everyone Deserves a
Healthy Relationship



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Title IX prohibits academic institutions receiving federal funding from discriminating on the basis of sex. It requires schools to adequately respond when the school has actual knowledge of sexual harassment or other sex-based discrimination.

Since its enactment in 1972, most Title IX matters have involved in-person student to student discrimination and harassment or claims that school policies discriminated on the basis of sex. But in recent years, a new form of sex-based harassment has emerged-- gender-based cyber abuse. With innovative forms of technology, teens and college students have unprecedented access to current and former dating partners and other peers. Technology allows information to travel faster than ever before. The flow of information can infiltrate school communities and interfere with a secondary school or college student's access to education. Therefore, cyber abuse, like other forms of harassment, may have Title IX implications, triggering an institution's obligation to respond. This Q & A addresses when and how a school must respond to cyber abuse.

Q: What is cyber abuse?

A: Cyber abuse is the misuse of technology to bully, stalk, threaten, intimidate or otherwise victimize another person.

Cyber abuse is an emerging form of abuse that includes online harassment, online bullying, non-consensual sharing of intimate images online (often called “revenge porn”), sexual extortion, and cyberstalking. As with other forms of abuse, survivors of cyber abuse often experience devastating psychological consequences, including anxiety, PTSD, depression, or suicidal ideation.

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Because online interaction is ubiquitous in young people’s lives-- 92% of teens and nearly 100% of college students use the internet daily-- young people experience cyber abuse at higher rates than older individuals, and young survivors are more likely to experience negative mental health symptoms. These symptoms can have serious implications for a young person’s academic functioning and ability to succeed long after the abuse has ended. High school and college students who experience cyber abuse may begin doing poorly in school, have difficulty participating in extracurricular activities, or feel they are unable to attend classes altogether.

¹ Anderson, M. & Jiang, J. (2018). *Teens, Social Media & Technology 2018*. Pew Research Center. *Internet and Technology*, 7.

² Ranine, L., Smith, A., & Zickuhr, K. (2011, July 19). *College Students and Technology*. Pew Research Center. *Internet and Technology*.

³ Anderson, M. & Jiang, J. (2018). *Teens, Social Media & Technology 2018*. Pew Research Center. *Internet and Technology*, 7.

Q: When is a school obligated to respond to cyber abuse?

A: If cyber abuse is severe enough that a student is unable to participate in school activities or if their education otherwise is compromised, the school may have obligations under Title IX.

Title IX states, in relevant part, that institutions receiving federal funding may not discriminate against any student on the basis of sex or deny any student the benefit of educational programs or activities. If an institution is made aware of harmful conduct, such as cyber abuse or other sex-based discrimination, the school has a responsibility to respond in a manner that stops the abuse and ensures the victim is not deprived equal⁴access to education.

If ALL of the following elements are present, a school must respond to cyber abuse experienced by a student:

- 1. The institution is aware of the cyber abuse.** Where the school knows or reasonably should know of an incident of sexual misconduct, whether or not a student files a complaint or otherwise asks the school to take action, the school must take steps to understand what occurred and respond appropriately.⁵ An institution knows or should reasonably know when sexual misconduct occurred, including peer-to-peer cyber abuse, when a responsible school employee has been notified of the abuse.⁶ A responsible employee includes any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual misconduct by students or employees, or who a student could reasonably believe has this authority or responsibility.⁷

⁴ Hensler-McGinnis, N.F. (2008). *Cyberstalking Victimization: Impact and Coping Responses in a National University Sample*, 145.

⁵ Office for Civil Rights, *Revised Sexual Harassment Guidance* (66 Fed. Reg. 5512, Jan. 19, 2001) available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (hereinafter 2001 Guidance).

⁶ 2001 Guidance at (V)(C).

⁷ 2001 Guidance at (V)(C).

2. **The cyber abuse is severe, pervasive, and objectively offensive.** An evaluation of the circumstances surrounding online conduct determines whether the conduct is severe, pervasive, and objectively offensive.⁸ While there is no clear formula, courts have looked at.

- The content and frequency of the online messaging
- The number of individuals involved
- The relationship between the victim(s) and abuser(s)
- Any in-person verbal, sexual, or physical abuse accompanying the online conduct
- The impact the conduct has on the victim.

Simple acts of teasing or name-calling, even if targeting gender differences, are not enough to render the school liable for failing to respond.⁹

3. **The cyber abuse deprives the victim of access to education benefits or opportunities.** While students often present evidence that they are unable to attend class or participate in extracurricular activities, a victim does not have to have been physically excluded from participating in school activities to demonstrate he or she was deprived access to educational benefits or opportunities. Rather, the cyber abuse must have undermined and detracted from the victim's educational experience such that the victim was effectively denied¹⁰ equal access to the school's resources and opportunities-- academic or otherwise. For example, where students repeatedly missed class or dropped out of extracurricular programs, courts have held that the students were deprived of educational benefits.

⁸ *Davis*, 526 U.S. at 631.

⁹ *Davis*, 526 U.S. at 652.

¹⁰ *Davis*, 526 U.S. at 649.

Q: What are the school's obligations under Title IX if these elements are present?

A: The school must actively takes steps to prevent the hostile environment from continuing and notify the victim of the steps taken.

The institution cannot act indifferent to the allegations. Once a school official is notified of online harassment or other cyber abuse that creates a hostile environment at school, the school must actively take steps to prevent the hostile environment from continuing; any action taken by the school must be proportional to the abuse.¹¹ The school is not required to “remedy” the situation or completely end the abuse, nor is it required to take disciplinary action. However, it must respond in a reasonable and timely manner in light of the known circumstances.¹² This might include investigating the allegation of abuse, disciplining the perpetrating student, instituting a no-contact order, or notifying proper law enforcement personnel. At a minimum, a school acts deliberately indifferent if its action or inaction causes a student to undergo further abuse or makes a student vulnerable to it.¹³ Once the school takes action, the school must inform the complainant of the action(s) taken.

¹¹ *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000).

¹² *Davis*, 526 U.S. at 629.

¹³ *Davis*, 526 U.S. at 652.

Q: Do schools still have an obligation to respond when the abuse happens online rather than in the classroom?

A: Yes. Even if the abuse happens exclusively online, a school may still have an obligation to respond.

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According to recent studies, 95% of teens have access to a smartphone; 90% of teens and 86% of college students use social media and messaging platforms;¹⁶ and 88% of college women and 83.4% of college men send text messages daily.¹⁷ Most of this online interaction between students happens before or after school hours and often while students are off campus. Yet, because young people have near-constant access to the internet, any cyber abuse that occurs online is almost always accessible at school, even if the messages were sent or posted away from school property.

Responding to the emergence of online communication among peer groups, courts have determined that even if abuse occurs off campus, a school has an obligation to respond to peer-to-peer cyber abuse if the school has substantial control over both the abuser and the context in which the cyber abuse occurs.¹⁸

A school has substantial control over an abuser if the abuser is a student at the school, is a school official, or is someone who otherwise participates in school activities and the school has the ability to take remedial or disciplinary action against them.¹⁹ The school has substantial control over the context of the abuse if the abuse is sufficiently related to the school or school activities or if it is reasonably foreseeable that the abuse will cause a considerable disruption to school activities, compromising the victim's equal access to education.

¹⁴ Anderson, M. & Jiang, J. (2018). *Teens, Social Media & Technology 2018*. Pew Research Center. *Internet and Technology*, 7

¹⁵ Lenhart, A. (2015). *Teens, Social Media & Technology Overview 2015: Smartphones Facilitate Shifts in Communication Landscape for Teens*. Pew Research Center. *Internet and Technology*, 3.

¹⁶ Ranine, L., Smith, A., & Zickuhr, K. (2011, July 19). *College Students and Technology*. Pew Research Center. *Internet and Technology*.

¹⁷ Bennett, D. et. al. (2011). *College Students Electronic Victimization in Friendships and Dating Relationships: Anticipated Distress and Associations with Risky Behaviors*. *Violence and Victims*, 26, 410-429.

¹⁸ *Davis*, 526 U.S. at 645.

¹⁹ *Davis*, 526 U.S. at 645.

²⁰ For the abuse to cause a considerable disruption to school activities, the conduct must do more than merely upset a student or lead to a student missing a single class session.

Q: Does a school risk interfering with the offending student's right to free speech by responding to cyber abuse?

A: Harmful speech that interferes with someone else's rights is not protected by the U.S. Constitution.

Young people have the constitutional right to express themselves, and it is important for adults to respect and encourage that right. However, the Constitutional rights of students, especially in public schools, are not coextensive with the rights of adults in other settings. Student speech that rises to the level of harassment or abuse or speech that otherwise collides with the rights of other students is not protected by the U.S. Constitution because it may substantially disrupt the work of the school. Therefore, when a school regulates online conduct that interferes with another student's access to equal educational opportunity, a school does not violate the abuser's First Amendment rights.

Q: What can schools do to improve their response to cyber abuse?

A: Schools can review current Title IX policies, work with their IT departments, and develop trainings to foster a safe community and ensure they appropriately respond to any allegations of cyber abuse.

With new and innovative forms of technology being introduced every day, it can be challenging to predict all the ways abuse may emerge.

- Schools should ensure their current Title IX policies adequately respond to developing forms of sex-based discrimination and online harassment that may occur on or off campus.
- Schools should familiarize themselves with the disparate forms of cyber abuse, including sexual extortion, non-consensual sharing of intimate photos, and cyberstalking so that their policies meet the needs of survivors and respond appropriately and objectively to the complex nature of cyber abuse reports.
- Schools can also work with their technology departments to gain an understanding of what information can and cannot be preserved on school servers in the event that such preservation becomes necessary in a school investigation or possible disciplinary proceeding.
- Additionally, schools should develop trainings for faculty and students that discuss healthy ways to interact online. Students, faculty, and--in the case of young students--parents or other guardians should be made aware of their school's specific Title IX policies and the reporting process for students who face online abuse or other sex-based harassment.

21 *Bethel School Dist. v. Fraser*, 478 U.S. 675, 682 (1986)

22 *Tinker v. Des Moines Independent Cmty. School Dist.*, 393 U.S. 503, 513 (1969).

23 *Wlerson, Gajda & Suryanarayan. (2011). The New Frontiers of Peer-Peer Sexual Harassment: Sexting, Cyberbullying, and Electronic Harassment. The National Association of College and University Attorneys, Session 05B, 15.*

Q: Does a school have to take action when a student harasses another student through electronic means (texting, email, social media, etc...)?

A: It's complicated. Use this flowchart to help determine whether your school has a responsibility to respond to abuse.

