

The Rights of the Person Impacted by Discrimination Under Title IX

This *Compliance Corner* addresses the question of what we call a person bringing forward an allegation under Title IX on a college campus, what rights attach to that person, and what rights attach to the person accused?

The Reporting Party

Over the last 16-18 months, my partners and I have had the opportunity to conduct Title IX-related focus groups on dozens of campuses. One of the recurring findings of the focus groups has been that students do not like the terms that campuses use to describe their role in the resolution process. They do not like being labeled “the victim.” They despise “alleged victim” even more. They feel that “complainant” suggests complaining, with implications of making a big deal about something that is minor.

Based on this feedback, ATIXA has started to use the term “reporting party” to refer to the person impacted by discrimination under Title IX. Reporting party is not a perfect term, because there are some instances where the impacted person and the person reporting the discrimination are in fact different people, but those instances are fairly rare. Most campuses have no need to formally label the person who reports an incident or offense, so there is no harm in using the term “reporting party” to refer to the person impacted by discrimination, as long as policy clearly defines that usage. We favor it because of its neutrality, and because it focus groups better than other terms commonly in use. It also works well with the ATIXA-preferred term for the person accused, whom we call the “responding party.” Now, let’s discuss the rights that attach to each party in their respective roles.

Rights of the Reporting Party

Reporting parties have federally-conveyed rights under Title IX and VAWA Section 304 (amending the Clery Act). The key to understanding these rights is that they adhere regardless of what role the reporting party plays in the resolution process. They can be fully participant or completely unwilling, but their rights attach to their status as a person impacted by discrimination, not to their chosen role in the campus resolution process. Here is a list of those rights:

- The right to a prompt and effective remedy (including initial actions)
- The right to a thorough, reliable and impartial investigation
- A prompt, fair, and impartial proceeding that is:
 - Completed within reasonably prompt timeframes designated by an institution’s policy,
 - Allows for the extension of timeframes for good cause with written notice to the accuser and the accused of the delay and the reason for the delay;
 - Conducted in a manner that is consistent with the institution’s policies and transparent to the accuser and accused;
 - Includes timely notice of meetings at which the accuser or accused, or both, may be present; and
 - Provides timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings; and
 - Conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused
- The right to a resolution that ends discrimination, prevents its recurrence and remedies its effect on the reporting party and the community

- The right to equitable program access
- The right to equitable resolution processes
- The right to simultaneous, written notification of the outcome, which includes the finding, any sanctions, the rationale therefor, when the results become final, any changes that occur to the results before they are finalized, and their appeal options, if any
- The right to notify local law enforcement of their victimization, and to be assisted in making that notification by campus officials
- The right to an advisor of their choosing throughout the campus resolution process
- The right to changes in housing, academic supports and counseling access, to the extent these options are available from a campus
- The right to be free from deliberate indifference, disparate treatment, disparate impact and retaliation on the basis of their sex/gender
- The right to written notification (brochure or pamphlet) of a campus' nondiscrimination policy and procedures, Title IX Coordinator, contact information for OCR, rights, options, existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid, and other services available for victims, both within the institution and in the community
- A statement of applicable campus policies and procedures
- To advance notice of any resolution meeting at which both parties will be present
- The right to have all those involved in the resolution process (investigators, hearing officers, appeals officers) properly trained
- The right to have the preponderance of evidence standard applied
- To a list of all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking
- Confidentiality of any accommodations or protective measures provided to the victim

Rights of the Responding Party

Contrast the rights of the reporting party with those of the responding party, and there is an interesting contrast. The responding party has the following rights:

- To due process, on a public campus. This usually entails written notice, a hearing before an objective decision-maker and a full opportunity to confront and respond to the evidence.
- On a private campus, the right to a fundamentally fair process. This includes the right to have campus policies and procedures followed without material deviation, and the right to a substantively fair decision (one that is neither arbitrary nor capricious)
- A statement of applicable campus policies and procedures
- The right to simultaneous, written notification of the outcome, which includes the finding, any sanctions, the rationale therefor, when the results become final, any changes that occur to the results before they are finalized, and their appeal options, if any
- The right to an advisor of their choosing throughout the campus resolution process
- The right to be free from retaliation (in two of the federal circuits, but not in others, yet)
- The right to have the preponderance of evidence standard applied
- To a list of all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking

- A prompt, fair, and impartial proceeding that is:
 - Completed within reasonably prompt timeframes designated by an institution's policy,
 - Allows for the extension of timeframes for good cause with written notice to the accuser and the accused of the delay and the reason for the delay;
 - Conducted in a manner that is consistent with the institution's policies and transparent to the accuser and accused;
 - Includes timely notice of meetings at which the accuser or accused, or both, may be present; and
 - Provides timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings; and
 - Conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused
- To advance notice of any resolution meeting at which both parties will be present
- The right to have all those involved in the resolution process (investigators, hearing officers, appeals officers) properly trained

There is an interesting debate over which of these two lists conveys broader rights and protections. The Rights of the Responding Party are shorter in number, but broader in protection and legal recourse. It has not felt that way on some campuses since the April 4th, 2011 Dear Colleague Letter (DCL) from OCR. That DCL provided equitable rights for reporting parties, but it can be argued that it conveyed no substantive rights on responding parties. Equity going only one way, if you will. The hotly debated and now often contested question is whether men have rights under Title IX as men, or as respondents? Or both. The difference is important. Here is the legal analysis on this question.

Women have rights under Title IX. Men have rights under Title IX. Reporting parties have rights under Title IX. At this point, legally, responding parties do not. This is a critical distinction. Fairness minded college administrators read the DCL as providing equal rights to reporting and responding parties. It does not. It grants equity (not equality) to men and women, and does so by assuring that rights provided to the responding party (typically a man) are assured to a reporting party (typically a woman). The reverse is not true. If appeal rights are provided to a responding party, we provide appeal rights to a reporting party. Thus, the reporting party only has appeal rights if the responding party does.

When I argue the due process rights are the broader list, above, it is because equity rights for reporting parties are derivative of the due process rights of the responding party. Take the example of an investigation that ends with a finding that the responding party did not violate campus policy. The responding party has a right to a hearing, but he declines, as he has no need for one. Due process gives the responding party a hearing right. The reporting party has no such right. The reporting party only gets a hearing if the responding party does, just like with the appeal.

Thus, if the responding party does not elect for a hearing on the finding, the reporting party has no independent right to elect for one under Title IX. The reporting party has equitably received the same investigation rights that the responding party has, and Title IX is satisfied. In the ATIXA model process, we address this perception of unfairness by allowing the reporting party to make an extraordinary request to the Title IX Coordinator to reopen the investigation or trigger a hearing. The Coordinator has discretion to do so, but will only do so in truly exceptional circumstances.

As we watch the question of the rights of the responding party under Title IX play out in the courts and regulatory agencies, it must be noted that OCR has finally accepted a complaint by a respondent (Brandeis) and opened an investigation. We are all watching the resolution to see if OCR determines the student has Title IX rights as a male or as a responding party. Most astute watchers believe it will be the former, not the latter. However, OCR has indicated when I trained them that this is an ongoing debate within OCR, and remains unsettled. It appears that a consensus is growing internally to OCR for the former too, which is why it granted the investigation. If OCR and the courts begin to grant rights to responding parties under Title IX, that will change the equity equation. We will certainly update you as the law evolves.