



Defending Against Academic Sexual Assault Allegations (Title IX)

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Disclaimer

The content in this book is intended to be general legal information for unrepresented students. I do not know the specifics of your case, and this book is not legal advice based upon the particular details of your case. I do not automatically become your attorney just because you are reading this book. If you are already represented by an attorney, then you should listen to him or her. With that out of the way, happy reading!

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Question #1: Why is this happening?

The shortest, easiest, and most troubling answer is that you will probably never know. The “Jackie” accuser in the fabricated Rolling Stone magazine article created entire fake identities and ripped off lines from Dawson’s Creek just to get a boy’s attention that she liked.

In other cases, maybe it truly is a difference of opinion, where you felt the sex was consensual and she does not.

In others, an accuser is put under social pressure by friends or was caught by a partner and had to create a scenario wherein he or she was not ‘cheating.’

In some cases, an accuser goes to the University faculty and just says, “I don’t remember what happened last night,” and the snowball begins rolling from there.

At Colorado State University – Pueblo, an accuser told faculty, “I’m fine and I wasn’t raped,” and the alleged perpetrator was still

suspended until the accuser remained at the school.

It is natural to wonder what is behind the accusation, but you must quickly move past this stage of grief and begin preparing your defense, because the case is not going to go away, and you have sharp deadlines ahead.

Question #2: Where do I begin?

First, you need to understand the area of law that you are in. Generally speaking, the federal government threatens to take away federal funding if universities do not provide a discrimination-free environment.

Title IX states that: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Second, you need to look at the specific policy at your particular University, because this policy provides the ‘rules’ that dictate how

you, the accuser, and the University must behave. You can probably do a web search for your University and “Title IX” and find the Title IX handbook. Also search for “Code of Student Conduct.”

For example, the University policy will state how they define “consent,” whether there is amnesty for other behaviors (such as drinking or doing drugs), whether the policy extends to complaints that occurred off-campus (most do), and all of the procedural details about the investigation, the hearing, and potential sanctions.

This guide should not go into too much detail about consent because each University defines it differently, but it will be a very different definition than what you think it is just using your common sense. For example, one local University defines it as follows:

Affirmative Consent: Means an affirmative, conscious decision by each participant to engage in mutually agreed-upon sexual activity. All five of the following elements are essential in order to have affirmative consent. If one or more of the following is absent, there is no affirmative consent.

1. Consists of Mutually Understandable Communication: Communication regarding consent consists of mutually understandable words and/or actions that indicate an unambiguous willingness to engage in sexual activity. In the absence of clear communication or outward demonstration, there is no consent. Consent may not be inferred from silence, passivity, lack of resistance or lack of active response. An individual who does not physically resist or verbally refuse sexual activity is not necessarily giving consent. Relying solely upon non-verbal communication can lead to a false conclusion as to whether consent was sought or given. Verbal communication is the best way to ensure all individuals are willing and consenting to the sexual activity.
2. Informed and Reciprocal: All parties must demonstrate a clear and mutual understanding of the nature and scope of the act to which they are consenting and a willingness to do the same thing, at the same time, in the same way.

3. Freely and Actively Given: Consent cannot be obtained through the use of force, coercion, threats, intimidation or pressuring, or by taking advantage of the incapacitation of another individual.
4. Not Unlimited: Consent to one form of sexual contact does not constitute consent to all forms of sexual contact, nor does consent to sexual activity with one person constitute consent to activity with any other person. Each participant in a sexual encounter must consent to each form of sexual contact with each participant. Even in the context of a current or previous intimate relationship, each party must consent to each instance of sexual contact each time. The consent must be based on mutually understandable communication that clearly indicates a willingness to engage in sexual activity. The mere fact that there has been prior intimacy or sexual activity does not, by itself, imply consent to future acts.
5. Not Indefinite: Consent may be withdrawn by any party at any

time. Recognizing the dynamic nature of sexual activity, individuals choosing to engage in sexual activity must evaluate consent in an ongoing manner and communicate clearly throughout all stages of sexual activity. Withdrawal of consent can be an expressed “no” or can be based on an outward demonstration that conveys that an individual is hesitant, confused, uncertain or is no longer a mutual participant. Once consent is withdrawn, the sexual activity must cease immediately and all parties must obtain mutually expressed or clearly stated consent before continuing further sexual activity.

<http://handbook.rhodes.edu/xx-definitions>

That’s probably a lot more than you were expecting, right? And now that you know what you’re up against, you probably won’t have sex with someone ever again without a pre-drafted, notarized release form created by your attorney – that’s at least what the people who draft these policies seem to expect.

But as you can see, there is a whole lot more to it than, “She/he didn’t say no,” or “She/he was into it,” or “She/he and I were both drunk and didn’t talk about it beforehand.”

Under any definition, consent cannot be given by a person who is completely passed out, suffering from a mental defect like dementia, or under age.

Don’t assume that the school administrators know their own policy, so you need to!

Question #3: Do I need an attorney?

Yes, and here are several of the reasons why:

1. **Advise and Defend.** Your University may have a Title IX policy that does not meet the government requirements for fairness. Sure, you can read the policy for yourself and get a general

understanding of it, but you probably don't know to make objections about the unfairness of the policy itself. There are also distinctions between the requirements of public and private schools.

In many cases, I write a "litigation hold" letter to the University reserving our right to sue the University in the event that their policy is inherently unfair or whether the application of the policy is unfair. This can help keep them from steamrolling you.

2. **Confidentiality.** Although the University may provide you with an 'advisor' who has received several hours of Title IX training (probably a box lunch and a PowerPoint presentation), that person is an employee of the University, and anything that you say to them can be used against you not only in a criminal prosecution but even against the Title IX investigation!

Before saying anything to the list of providers, ask them, "Are you able to

tell other people in the University what I tell you?” If they tell you yes, then stop talking to them, and if they tell you no, then stop believing them and stop talking to them.

3. **Train for Battle.** The greatest area where an attorney can help you is through diligent preparation prior to both the investigation and the hearing. I once had a young man call me on a Friday meeting and tell me that he had three business days to meet with the Title IX Coordinator on campus.

The Coordinator wanted him to come in so that she could record his statement and use it against him. He had no idea what to do, so we met that weekend and not only laid out a strategy for how to respond to the Coordinator, but we also met with over seven witnesses in person and took their sworn statements.

When the investigation concluded, we met in my office many times as I prepared him to represent himself (since I was not able to participate as

anything more than an advisor). Lots of good-intentioned people who have no jury trial experience can give you some advice that sounds good in theory, but you and they do not really know what they're talking about.

For example, I looked at this guy's list of questions for the Title IX hearing, and his questions just weren't going to cut it. He and his parents had spent a lot of time on them, so he didn't want to change them, so I said, "Okay, let's roleplay this – I'll be the accuser and you be yourself."

Here is how it went:

Q: "Will you admit that when we were making out, you straddled me and guided me in...?"

A: "No."

Q: ***"But ... that's what happened!
You're lying!"***

A: "No I'm not. You raped me, and I'll never forget it for the rest of my life."

Okay, so I was giving him a rough time of it, but what do you think the accuser will do? He/she will probably be sobbing uncontrollably, and you will look like a real jerk if you respond by getting angry and flustered.

You see, he shouldn't have even been asking questions that he couldn't "prove up" with other evidence, and he shouldn't have given the witness an opportunity to stab him in the back like that. Also, he got upset and it made the panel think that he was aggressive and angry, playing right into the accuser's script.

On top of that, you won't even get a chance to have half of your questions asked – you're going to have to submit them to a panel, and they're going to cross out half of them, and then you're going to have some script that you were going to use for a speech at the end of the hearing where you said stuff like, "You will remember that she admitted..." and then you'll realize that you have no idea what you're doing.

Look, I'm not picking on you. It's not like you wanted to represent yourself – it's the University making you do it, but my point is that the next best thing to have an attorney represent you is having an attorney sit with you and painstakingly prepare you with appropriate questions and help you become nimble on your feet if unexpected objections or other situations occur.

Question #4: What will the hearing look like?

An investigation is defined generally as the process the school uses to resolve sexual complaints. An investigation includes the fact-finding investigation and also the hearing and decision-making process that the school uses to determine 1) whether the alleged conduct occurred, and 2) if the conduct occurred, what actions the school will take to end the sexual

violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the accuser and the broader student population.

Procedures. While the government gives universities unprecedented flexibility to structure their investigation process, it does mandate a few general guidelines. In all cases, a school's Title IX investigation must be:

- 1) Adequate
- 2) Reliable
- 3) Impartial
- 4) Prompt, and
- 5) Include the opportunity for both parties to present witnesses and other evidence.

For example, if the school doesn't allow the alleged perpetrator to be represented by a lawyer during the hearing, then the school cannot allow the accuser to be represented by a lawyer either.

If the school permits one side to appeal, then it must do so equally for both parties. If the school permits one side to submit third-

party expert testimony, it must do so for both parties. If the school allows one party to be present for the entire hearing, it must do so for both parties.

While this sounds nice in theory, there is ample opportunities for these hearings to go awry, so keep the above ‘goals’ in mind, but prepare to be disappointed. For example, you aren’t even guaranteed a right to a hearing at all.

What are the key differences between a criminal case and a school’s Title IX investigation?

Trust me – you would never confuse one for the other.

In a criminal case, you have Constitutional protections like the right to an attorney, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confront your accusers. A criminal case is intended to determine whether a defendant violated criminal law, and if the defendant is found guilty, he or she may be imprisoned or subject to other criminal penalties.

A Title IX investigation, by contrast, does not provide the same procedural protections and legal standards. Victim advocacy groups justify the lack of protections by stating that since an alleged perpetrator cannot be imprisoned through this process, it's okay to just get screwed civilly, such as being branded as a rapist and expelled.

This means that you may never receive a hearing, you will probably have to represent yourself (with a supporter and advisor who can sit behind you, but not participate), you will not be able to ask questions directly to the person who has accused you, and the accuser may not even have to attend the hearing.

In fact, the accuser does not even have to be the alleged victim; in most universities, a third-party who has nothing to do with the case can file an anonymous complaint, and you may never even know who accused you.

In addition, you may never get to see the investigator's notes, you may not get to hear the hearing panel's rationale for their decision, and in some cases, you may never be able to appeal. If you are pleased with the result, the

accuser may appeal and try to make the punishment harsher for you. Yeah, really.

Standard of Proof. Because Title IX is a civil case, rather than a criminal case, universities use the “preponderance of evidence” standard — a lower bar than the criminal system’s “beyond a reasonable doubt.” This means that if the hearing panel is 51% convinced that the allegations are accurate, you lose. Another name for this standard is “more likely than not,” so think of a set of scales that are tipped 1% against you, then the accuser wins.

Question #5: Should I
make a statement/
participate in the
hearing?

If you're charged both a criminal case and a Title IX Investigation, the University does not have to wait until criminal investigation. In fact, the government encourages them not to. This may put you in a jam, because the University can hold it against you if you do not make a statement or otherwise participate in their Title IX proceedings, but everything that you say in an effort to keep from getting expelled can be used against you in a criminal case. You don't want to fight to stay in school and make statements that are used to support a rape conviction! In these situations, you absolutely need an attorney to help you navigate the tricky waters. An attorney can tell you if a criminal case is likely to occur, or whether it makes sense in your particular case to go ahead and participate in the Title IX process. An attorney can also help you take advantage of the criminal protections to gain leverage and evidence to be used in the Title IX investigation.

Also, universities have a duty under Title IX to resolve complaints and provide a safe, nondiscriminatory environment for all students, so even if a criminal case is dismissed, that will not affect the Title IX case. Usually,

the Title IX case will move much faster (approximately 60 days from the complaint), while a criminal case could take over a year.

Even if there is no criminal case, you should be polite and respectful with University administrators – they’re probably good people in general – but never trust that they have your best interests at heart.

Question #6: Will people find out about this?

The government sidesteps the question of whether the accuser has a First Amendment right to go public. However, you must be very careful as the alleged perpetrator in discussing the case with others because it could be seen as attempt to directly or indirectly retaliate against the accuser, and then you will be looking at an entirely new set of charges.

While the Family Educational Rights and Privacy Act (“FERPA”) prevents the school from ‘going public,’ that doesn’t mean that it prevents the accuser herself of saying anything. Obviously, she can go to the police, and some have even gone to the media in an attempt to turn up the heat. It’s just one more example of how Title IX Coordinators will pretend like the rules equally apply when they do not.

Question #7: Can I show evidence of the accuser’s sexual history?

You will not be able to ask questions the accuser about his or her sexual history with anyone other than the alleged perpetrator under Title IX. In addition to that, even if you and the accuser have had a sexual relationship in the past, that does not necessarily mean that that sexual violence did not occur on the date in question.

In a criminal case, the Rape Shield law is a rule of evidence that determines the admissibility of the alleged victim's sexual behavior when a defendant is charged with certain sexual offenses. See Tennessee Rule of Evidence 412.

Generally speaking, reputation testimony, opinion testimony, and specific instances of a victim's sexual behavior are all 'shielded,' or inadmissible from court proceedings. This means that the jury will not be able to hear any of this information regarding the victim's sexual behavior. The rule makes a distinction between evidence of sexual activity between the alleged victim and the defendant and evidence of sexual activity between the alleged victim and other sexual partners.

Why does it exist? This rule was put into effect because some defendants might introduce this evidence in an attempt to shame the victim or make the victim's morality the central issue in the case. Additionally, the rule may make more victims hesitant to report sexual offenses for fear that their personal sex lives will become public. One can certainly understand that a rape victim who has had

multiple sexual partners in his or her personal life should not fear that such information would be made public during the rape trial when it has nothing to do with whether or not a rape occurred.

Does it go too far? While this rule achieves positive social aims, some people feel that the rule goes too far when it denies the jury from being able to hear whether the victim has made false accusations in the past, as this might certainly be relevant in determining whether the alleged victim is making a false claim in the present case. Other people do not believe that the rule goes too far and believe that it should be even more expansive.

When does it apply? This rule applies not only to the actual trial, but also to the preliminary hearing, depositions, and other proceedings. This rule applies when a defendant is accused of certain sexual offenses, as listed below. In the few exceptions where evidence of the victim's sexual behavior is admissible, there are additional conditions that must be met. The defense attorney must comply with a pre-trial procedure if this testimony is to be admitted, wherein the court

can determine whether the evidence will be used for a permissible purpose.

Tennessee Rule of Evidence 412: Sex Offense Cases; Relevance of Victim’s Sexual Behavior.

“Notwithstanding any other provision of law, in a criminal trial, preliminary hearing, deposition, or other proceeding in which a person is accused of ... 39-13-506 [statutory rape] ..., or the attempt to commit any such offense, the following rules apply:

(a) Definition of sexual behavior. In this rule “sexual behavior” means sexual activity of the alleged victim other than the sexual act at issue in the case.

(b) Reputation or opinion. Reputation or opinion evidence of the sexual behavior of an alleged victim of such offense is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this Rule and required by the Tennessee or United States Constitution.

(c) Specific instances of conduct. Evidence of specific instances of a victim’s sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is:

(1) Required by the Tennessee or United States Constitution, or

(2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or

(3) If the sexual behavior was with the accused, on the issue of consent, or

(4) If the sexual behavior was with persons other than the accused,

(i) to rebut or explain scientific or medical evidence, or

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or

(iii) to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented."

Question #8: How much trouble am I in?

This is another area where you need to review the particular University policy to see what sanctions are possible. In some cases, an attorney (or yourself) can even try to negotiate a pre-hearing settlement.

There are also many other issues like what accommodations need to be made between when the complaint is first filed until the investigation and hearing can be held. You may have to completely change the way you walk across campus to your classes, be banned from the cafeteria, be moved out of your dorm, and more. This could all help before there is any finding that a sexual assault occurred. An attorney can help you from getting bullied in this area.

As with many sex crime accusations, the greatest penalty of a conviction may not be not the actual potential jail time, but the social stigma it can cause. Imagine that a potential employer does a background check on you,

and he or she learns that you were accused of having non-consensual sex with another student! So whether you actually have to serve jail time on it or not, your primary focus should be trying to avoid a conviction altogether. If no criminal case exists in addition to the Title IX case, you have to focus on a future (at this University or elsewhere), where you can move forward with your life without wearing a scarlet letter.

A conviction for this offense could result in jail, placement on the Sex Offense Registry (in some cases), a felony on your record, loss of your marriage, child visitation, employment, immigration status, loss of car or house (in some cases), and many more.

A Title IX penalty could result in suspension, expulsion, public shaming, and more.

Title IX of the Education Amendments of 1972

Title IX states that: **No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.**

Title IX applies to institutions that receive federal financial assistance, including state and local educational agencies. These agencies include approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums.

Educational programs and activities must operate in a nondiscriminatory manner. Some key issue areas in which recipients have Title IX obligations are: recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education; and employment. Also, a recipient may not retaliate against any person for opposing an unlawful educational practice or policy, or made charges, testified or participated in any complaint action under Title IX.

More information at:

http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html

Notes

Title IX Coordinator: _____

Hearing date: _____

Hearing location: _____

Potential favorable witnesses: _____

Questions for the attorney: _____

Special Offer

If you found this consumer guide to be helpful and would like to read more, please contact me using the information below to request my book, 10 Mistakes that Can Sabotage Your Criminal Case.

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About the Author

J. Jeffrey Lee is one of only five Certified Criminal Trial Specialists in Memphis, Tennessee. He has been certified as a Criminal Trial Specialist by the Tennessee Commission on C.L.E. and Specialization and Certified as a Criminal Trial Specialist by the National Board of Trial Advocacy.

He has attended the Tennessee Criminal Defense College on numerous occasions, along with the renowned National Criminal Defense College in Macon, Georgia and Gerry Spence's Trial Lawyer's College. He was recently inducted into The National Trial Lawyers Top 100 Trial Lawyers. He has also been selected as a 2015 Mid-South Rising Star by Super Lawyers. However, the distinction that gives J. Jeffrey Lee the greatest pleasure is the Client's Choice award from AVVO, and the "10 Best" Client Satisfaction Award from the American Institute of Criminal Law Attorneys, because that means that his clients are pleased with the representation he provides. He is a member of TACDL (Tennessee Association of Criminal Defense Lawyers) and NACDL (National Association of Criminal Defense Lawyers).

Mr. Lee began as an Assistant Public Defender in the 25th Judicial District of Tennessee (Lauderdale, Tipton, Fayette, Hardeman, and McNairy Counties). His responsibilities included representing the indigent accused in General Sessions Court, Circuit Court, and the Court of Criminal Appeals. He performed a variety of matters, including preliminary hearings, suppression hearings, jury and bench trials, appeals, revocation hearings, and post-conviction hearings.

After working as a public defender, he formed his own law practice and he has recently narrowed and focused his practice in the area of serious felonies and sex crimes in an effort to serve an underrepresented and marginalized group of defendants who desperately need a first-rate defense.

The Law Office of J. Jeffrey Lee primarily serves the greater Memphis area. If you or someone you love needs legal representation, please contact the author.

Testimonials

“Mr. Lee was an astounding criminal defense lawyer for my needs. He was professional, prompt, available, dependable, and reliable. He kept me informed and responsive throughout the court dates and situations. He was able to deliver better results than I imagined! Thank you for your dedicated service!”

— Mrs. M Y

“Very Good Person to be around and make you feel comfortable, very knowledgeable and professional. I would definitely use his services again if needed and would recommend him to future clients.”

— Kandice

“I actually got his contact information from a close friend of mine and he had suggested Jeff right off the bat. The first time talking to Jeff he knew exactly what needed to be done for this court date to go smoothly and well in my favor. His knowledge and calm collective way of handling my case was exactly what I was

looking for. Thanks again Jeff I really appreciate your help!”

— Kris

“This attorney provides services that are of a high caliber. He has handled two different cases for me over the past couple of years. He kept me informed of each step involved with this case. Additionally, he explained the worst case outcome and the best case outcome. Thanks to his tenacity, we came out with the best case outcome! I recommended him to several people during the course of my legal case.”

— Federal Crime Client

“Mr. Lee impressed me from the moment I retained him...actually before I gave him any payment at all!! He was accessible throughout my entire legal issue. He not only got my case dismissed, he helped me get my case expunged. I never even had the chance to be nervous that he would not show up on time. He always showed up early and was extremely prompt with all of my paperwork. I trust Mr. Lee and am very comfortable and confident to recommend him to anyone facing any type of

legal issue. I am also happy to say that I found a friend in Jeff and did not feel like just another client. :-)"

— Anonymous

"Jeff took good care of my case. Right from the onset he told me I could get a diversion, and that is what eventually happened. He took care of paperwork effectively, met me promptly at court appointments, and helped me out in court when the judge was pondering why a higher-level offence wasn't issued. He knows what he's doing, and if he didn't know something I would trust him to become knowledgeable in order to help a client."

— Aaron

"Mr. Lee helped me make the best of a very stressful situation. I was simultaneously facing college graduation and jail time (not that they are related.) I was on the fence between being on top of the world and losing it all. Mr. Lee pushed me back towards the former I would definitely hire him again!"

— Adam

Awards



CLIENT SATISFACTION AWARD

American Institute of
Criminal Law Attorneys™



Super Lawyers®



National Board of Legal Specialty Certification



Still have questions?

Please contact the author at:

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