

Survivors of sexual assault face pending federal policy changes

By **Avery Ellfeldt** - December 6, 2018

Survivors of sexual assault may be less likely to report their assault to the College due to recently proposed policy changes from the Trump administration that would require St. Olaf to alter its Title IX investigation process.

The new regulations, proposed by Education Secretary Betsy DeVos Nov. 16, both reduce the liability of colleges in Title IX cases and increase the rights of students accused of sexual assault.

The proposed rules mark a significant departure from Obama-era Title IX enforcement and serve as the first legally-binding changes to the 1972 federal law prohibiting gender discrimination at federally-funded educational institutions. The rules now face a 60-day public comment period after which they will be finalized.

The regulations define sexual assault as “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity” – a much narrower definition than used under the Obama administration. Previously, any “unwelcome conduct of a sexual nature” was considered assault.

The rules also give colleges the option to raise the standard of evidence necessary to find a defendant at fault and only require colleges to investigate when an alleged assault takes place on campus or at a college-sponsored event. The regulations aim to require schools to apply “basic due process protections for students, including a presumption of innocence,” according to the Department of Education.

If finalized, the proposed rules would require the reporting party and defendant in Title IX cases to participate in a live hearing. This requirement will be one of the most impactful changes for the College’s investigation process, General Counsel Carl Lehmann ’91 said.

“They are clearly trying to approach it from wanting the process to be fair and impartial for accused students,” Lehmann said. “[The hearing will] require that we have both the accused and reporting parties be subject to cross-examination.”

The two students will be cross-examined by the other’s legal advisor, expanding advisors’ role from being solely legal counselors prohibited from direct interruption or advocacy during investigation proceedings.

"The aim is to give the respondent more power in the situation, which I think is problematic," Sexual Assault Resource Network Co-Chair Nina Hendel said.

Colleges will also be required to initiate an investigation if the student accused of assault has been reported in the past. If the College had control, it wouldn't set a "hard and fast rule," Lehmann said. He said this requirement will further decrease reporting students' control over their cases and may dissuade survivors from seeking information and resources.

Damage control

Upon finalization of the rules, the reporting and responding students in sexual assault investigations would be required to both hear and see one another during the hearing. Advocates warn that requiring survivors to recount their assault or harassment during cross-examination could be traumatizing. St. Olaf will use video calling technology to minimize the potential impact of such processes on students, Title IX Coordinator Kari Hohn said.

"If a student requests to have that hearing process occur in separate rooms so the reporting student and the accused student aren't physically in the same room together, that's something we would accommodate," Hohn said.

The hearing and cross-examination rules are two elements among many that Hohn and Lehmann fear will deter students from pursuing the Title IX process at all.

"If we have to add a hearing process, we'll do that," Lehmann said. "We're going to go forward and do it in a way that's the least victimizing."

The College hopes to preserve the existing St. Olaf Title IX procedures wherever possible, Lehmann said. While the proposed regulations will not require schools to investigate off-campus cases – such as at a house on St. Olaf Avenue or during any of the College's 95 study abroad programs – Lehmann anticipates the College will still investigate such cases at the request of reporting students.

The Gray Shirts Campaign

In recent years, St. Olaf has worked to reduce barriers to reporting in response to student feedback and the 2016 Gray Shirt Campaign – a Title IX awareness movement led by 10 students who wore t-shirts which read, "Ask me how my college is protecting my rapist."

"The Gray Shirts did a wonderful job of raising awareness of these issues throughout our campus community," Lehmann said. "One of the main changes that came out of that policy review was our decision to adopt a case management approach to responding to reports of sexual misconduct."

The College also eliminated campus alerts that were sent to the community when assaults were reported, and considered reporting students' input in sanctioning defendants who were found responsible.

Lehmann and Hohn think the proposed changes to Title IX will reinforce students' fears that they may lose control of the situation if they report their assault to College officials.

Doug Carmody '16, a member of the 2016 Gray Shirts Campaign, said the regulations will lead to fewer accused students being found responsible.

"It's just making it more difficult for someone who has been sexually assaulted to get a favorable outcome," Carmody said. "It's making it more difficult at a higher standard of evidence than a U.S. civil court would even have."

Lawsuit, "gender bias against males"

Proponents of the regulations say the new rules will ensure colleges do not unjustly find those accused of sexual assault to be at fault.

Former St. Olaf student Dilip Rao filed a lawsuit against the College in September 2018 after he was found responsible for sexual assault and expelled from the College in January.

Rao's lawsuit characterizes the St. Olaf investigation process as a "kangaroo court," and accuses St. Olaf's handling of the case "to be wrongful, willful, intentional, and reckless." Rao alleges that the College investigator did not ask the reporting student the questions he had requested be asked. Rao also claimed he was repeatedly denied access to the evidence being used against him.

"The erroneous outcome of the hearing and purported appeal can only be explained by gender bias against males in cases involving allegations of sexual assault," the lawsuit reads.

Lehmann said St. Olaf's Title IX policies already provide appropriate protections for students accused of sexual assault.

"We feel so confident that we've asked the court to dismiss the lawsuit out of the gates," Lehmann said.

Carmody agreed.

"They keep saying they're protecting the rights of the accused, but if you look at the St. Olaf policy, the rights of the accused are already protected," Carmody said.

Despite the lawsuit's claim of gender bias against males, in the past year the College has found exactly 50 percent of defendants to be at fault for alleged assault. Of 37 cases of sexual assault reported to the College in 2017, six were investigated, according to the St. Olaf 2018 sexual assault data reported to the State of Minnesota. Defendants were found responsible in three of those six cases.

"I think our statistics on the number of cases where people are found responsible shows that it's not a foregone conclusion and we don't go into these cases assuming that everyone's responsible," Lehmann said.

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