

**Higher Ed Legal Update—
Title IX, Penn State and Other
Items to Keep You Up at Night**
Maryland Association of Community Colleges

*Annapolis Maryland
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**Robert L. Duston
Saul Ewing LLP
Washington, D.C.**

OCR's April 2012 Dear Client Letter on Title IX, Sexual Harassment and Sexual Violence

***A REMINDER THAT IT'S FAR MORE THAN
ATHLETICS***

Title IX

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

20 U.S.C.A. section 1681(a).

Title IX

Admissions

Financial Aid

Academic Advising

Athletics

Housing Recreational Services

Residential Life Programs

Health Services Counseling

Registration Discipline Grading

Recruitment Employment

History of Title IX Guidance

- Early focus in the 1970-1980s on athletics
- 2001 Guidance on Harassment led to lots of training and policy revisions
- Over past decade OCR has issued DCLs and guidance on Title VI Harassment, and Bullying, and lots of guidance and enforcement efforts on athletics
- New OCR focus on sexual harassment and violence

April 2012 DCL

- Published as “guidance” but without notice and comments
- Nothing technically new, but lots of specific guidance
- Focus is on sexual violence as a violation of Title IX
 - Sexual violence includes rape, sexual assault, sexual battery and sexual coercion
- “Harassment” only violates Title IX when it results in a hostile environment, but more emphasis that a single severe incident may be enough.

April 2012 DCL

- Reflects OCR's experience that policies, procedures and training on sex harassment and sexual violence need to be reviewed, and more training needs to be done.
- All of these principles applying equally to all EEO policies and complaint procedures enforced by OCR (Title VI and Section 504)

Title IX Civil Liability of Schools

- Plaintiff must show that a “school official with authority to address the alleged discrimination and to institute corrective measures had actual knowledge of the discrimination and failed to adequately respond.”
- Deliberate indifference standard

Balancing Rights and Liabilities

- OCR Remedies and potential civil claims by both complainants and respondents
- Due Process rights of all parties
- Other laws (FERPA, Cleary Act, HIPPA Section 504 when a party is disabled)

Claims by Accusers

- *Stefanowicz v. Bucknell University*
 - importance of following process
- *McGrath (Megan Wright) v. Dominican College*
 - directed to police, not campus options
 - no remedial efforts on campus
 - delayed until criminal proceedings complete
- *Simpson v. University of Colorado*
 - can be liable for deliberate indifference to obvious need for training

Claims by Accused

- *John Doe v. Sewanee (University of the South)*.
 - Disputed sexual assault charge.
 - Accused student is suspended for a year.
 - Sues on multiple grounds, including alleged Title IX violations for: failing to create transcript of hearing, failing to properly train panel, failure to give all materials to accused sufficiently in advance of hearing.
 - Title IX claim dismissed; but verdict in his favor on negligence claim on September 2, 2011. Negligence claim factually tracked Title IX claim (but no “deliberate indifference” required).

Key Messages in the DCL

- Identification of the Title IX Coordinator(s)
- Published, effective complaint procedures
- Training, Training, Training

Sexual Harassment

- Conduct that:
 - is sexual in nature,
 - is unwelcome, and
 - denies or limits a student's ability to participate in or benefit from a school's educational program.
- Sexual violence is a severe type of sexual harassment

Sexual Harassment

Propositions

Touching

Graffiti

Drawings or Pictures

Written Materials

Gestures

Jokes

Rumors or Rating

Stalking

Websites Email

Sexual Battery

Sexual Assault

Rape Sexual Coercion

Title IX Requirements

Schools must:

- **adopt and publish a policy against sex discrimination;**
- **adopt grievance procedures providing for prompt and equitable resolution of sex discrimination;**
- **designate at least one employee to coordinate and carry out Title IX responsibilities**

About Conduct That Happened Where?

- Schools should “consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus.”
- Must process complaint regardless of where it occurred.

Title IX / Sexual Harassment

- Must have grievance procedures that allow for prompt and equitable resolution of complaints.
- Must take appropriate steps to:
 - End the harassment
 - Prevent any further harassment
 - Prevent retaliation
 - Remedy the effects of harassment
 - Eliminate any hostile environment that has been created

Train, Train, Train

“OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.” (p. 4)

Training of all Involved in Title IX Compliance

- Training for all involved in
 - handling complaints of harassment and violence
 - grievance procedures
 - applicable confidentiality requirements
 - “In sexual violence cases, the fact-finder and decision maker should have adequate training or knowledge regarding sexual violence.”

Title IX Coordinator

- Clearly identified and publicized
- Need to avoid appearance of conflict of interest (*e.g.* leading investigation and hearing, bringing charges and determining discipline, etc.)
- Multiple Hat Syndrome
- Trained as to what constitutes sexual harassment, including sexual violence
- Available to provide assistance to school law enforcement regarding response

Grievance Procedures

- Notice of the grievance procedures, including where complaints may be filed
- Application of the procedures to complaints alleging harassment by employees, other students or third parties
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence

Grievance Procedures

- Designated and reasonably prompt time frames for the major stages of the complaint process
- Notice to parties of the outcome of the complaint
- An assurance that the school will take steps to prevent recurrence of any harassment, and to correct its discriminatory effects on the complainant and others if appropriate.

Notice of Grievance Procedures

- Procedures should be easily understood, easily located, and widely distributed.
- Procedures should be prominently posted on website, sent electronically to all members of school community, available throughout campus, and summarized in or attached to major publications

Investigation of Complaints

- Intersection with local police investigations:
 - Police investigations are NOT determinative and do NOT relieve school of its obligations
 - May need to temporarily delay fact-finding while police are gathering evidence
 - Should notify complainant of the right to file a criminal complaint and not dissuade him/her from doing so

Investigation of Complaints

- **Investigation and Hearing “Equality”**
 - **Parties must have an equal opportunity to present relevant witnesses and other evidence.**
 - **Parties must be afforded similar and timely access to any information to be used at the hearing (consistent with FERPA and other confidentiality issues).**

Investigation of Complaints

- More on hearings ...
 - Schools are “***strongly discouraged***” from allowing the parties to question or cross-examine each other directly
 - Must maintain documentation of all proceedings, which may include findings of fact, transcripts or audio recordings

Slide 26

A1

Amy: Any insight on how long must maintain documentation?

Author, 9/9/2011

Investigation of Complaints

- Any “real or perceived” conflicts of interest between the fact-finder and the parties should be disclosed
- ***Must*** use a preponderance of the evidence standard
 - Note: There is a movement in opposition to this standard as to faculty.

Designated and Reasonably Prompt Time Frames

- Specify time frames for all major stages as well as a process to extend – should include:
 - full investigation
 - response to parties regarding the outcome of the complaint
 - appeal
- Should provide parties with periodic status updates

Notice of Outcome

- Outcome = Whether Harassment Occurred
- Must notify both parties of outcome in writing
- Permitted to disclose sanctions “that directly relate to the complainant” (e.g., a “stay away order”)
- Recommend that notice of outcome be concurrent
- May disclose results to the community if determined that a crime of violence or non-forcible sex offense has occurred in violation of university policy
- Under Clery Act, may not require complainant to abide by a nondisclosure agreement
- Speaking of Clery Act ...

Questions for Your School

- Who is the Title IX Coordinator(s)?
 - Can you find them in the directory?
 - Does everyone know who they are?
- Who gets training on sexual harassment and sexual violence? How often?
- Do your policies:
 - clearly prohibit sexual violence and sexual harassment?
 - address actions off campus?
 - address cyber harassment?
 - prohibit retaliation?

Questions for Your School

- When someone handles intake of a complaint (Title IX Coordinator, campus police, others) do they:
 - Advise of all other rights?
 - Explain any other counseling, law enforcement and medical options?
 - Not discourage students from using other remedies?
- Do your procedures include interim remedies?

Questions for Your School

- Are your Complaint and Investigation Procedures clear about
 - How and where to file complaints?
 - Provide a roadmap of the process?
 - Provide timelines?
 - Explain how the complaint process intertwines with the discipline process?
 - Not impose too high (or low) a burden of proof?
 - Clear about the limits of confidentiality?
 - Ensure that there is no direct cross-examination in sexual harassment or violence cases?

TRUE OR FALSE?

Dean of Students receives anonymous call from a male student stating that he witnessed a female student being assaulted at a fraternity party over the weekend. Male student refuses to identify himself, the female student or the fraternity. Dean of students notifies the Title IX Coordinator of the call. Title IX Coordinator makes note of the incident in a log that she maintains. Title IX Coordinator and Dean take no further action due to lack of information.

True or False: Dean of Students and Title IX Coordinator have fulfilled the requirements of Title IX.

TRUE OR FALSE?

Provost gets an email from a male student complaining that a female faculty member is making inappropriate flirtatious comments to him and other male students in the class. Student requests confidentiality, stating he is concerned that faculty member will retaliate in the form of a bad grade in the class. Provost responds by saying she will advise the faculty member that an anonymous complaint has been made, will remind faculty member of the expectation that she behave professionally in the classroom, and will observe a couple of faculty member's classes over the next several weeks.

True or False: Provost has fulfilled the requirements of Title IX.

Minors on Campus

*Lessons from Penn State and
other concerns*

The Issues Have Not Changed

- Ability of Minors (under age 18) to make contracts, sign waivers of assumption of risk
- When background checks are required for certain classes of employees under Md. Code, Fam. Law 5-561(b)(6)
- Md. Law regulating certain day camps, Md. Code, Health-Gen, 14-401, et. seq.
- Mandatory reporting of sexual abuse
- FERPA, etc.

The Circumstances Have Not Changed

- Increasing course options for High School students; on-line courses
- The ability of those minors to participate in other school programs
- Day and other camps
- Day care centers, pre-K or other elementary classes
- Visitors using campus facilities (e.g. libraries)

Awareness of the Risks and Duties *Has* Changed

- Attention after Penn State scandal to state laws on mandatory reporting, internal procedures, common law duties to protect minors
- Renewed concern over coordination of internal procedures and training

Maryland Reporting Requirements

- 5 Maryland Code, Family Law, subtitle Seven, Child Abuse and Neglect imposes a duty to report, but there are no criminal penalties. This is likely to be addressed this term.
- “Notwithstanding any other provision of law, including any law on privileged communications, each ... educator, or human service worker, acting in a professional capacity in this State: (1) who has reason to believe that a child has been subjected to abuse or neglect, shall notify the local department or the appropriate law enforcement agency; and (2) if acting as a staff member of a hospital, public health agency, child care institution, juvenile detention center, school, or similar institution, shall immediately notify and give all information required by this section to the head of the institution or the designee of the head.”

Who is Covered

- The definition of "Educator or human service worker" means any professional employee of any correctional, public, parochial or private educational, health, juvenile service, social or social service agency, institution, or licensed facility.
- "Educator or human service worker" includes: (i) any teacher; (ii) any counselor; (iii) any social worker; (iv) any caseworker; and (v) any probation or parole officer.
- These definitions do not clearly cover, or exclude, colleges and universities, but leave out many employees of higher ed institutions

What is Covered

- Under 5-701(x) “Sexual abuse’ means any act that involves sexual molestation or exploitation of a child by a parent *or other person who has permanent or temporary care or custody or responsibility for supervision of a child*, or by any household or family member.” “Sexual abuse” includes: (i) incest, rape, or sexual offense in any degree; (ii) sodomy; and (iii) unnatural or perverted sexual practices.

What is Covered

- This provision would require reporting of the alleged conduct of Jerry Sandusky if it involved sexual contact with a victim under age 16 in his “temporary custody”
- This provision might *not* require reporting of sexual violence or assault on minors by other minors, or older students not assigned to supervise them; or of allegedly consensual acts by those 16 or older

BeyOnd Reporting

- Background checks and screening for those working with minors (whether or not required by law)
- Standards of conduct and internal reporting obligations
- Training on
 - Youth Protection and two-deep supervision
 - Reporting
- Education of minors on campus (and their parents) on their rights

Other Civil Rights Issues:

Affecting all Areas

Civil Rights Enforcement

- Increasing enforcement activity, new regulations and new guidance coming from multiple agencies, often in ways that are not subject to Congressional scrutiny:
 - Department of Education OCR
 - Department of Justice
 - EEOC
- Recent actions affect Admissions, Academic Affairs, Student Affairs, Human Resources and Facilities/Construction

DOJ-OCR Letter on Use of Race to Achieve Diversity

- Joint “Dear Colleague Letter” issues December 2, 2011.
<http://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.html>
- Addresses the two Univ. of Mich. decisions (*Grutter* and *Gratz*)
- Examples of what are lawful approaches in Admissions; Recruitment and Outreach; and Mentoring, Tutoring, Retention and Support programs.

ADA Amendments of 2008

- Amended the definition of “disability” for both the ADA and Section 504.
- EEOC issued final regulations that dramatically broadens the scope of what is a covered “disability” to cover many, if not most, physical or mental conditions
- Purpose and effect is to shift the focus from coverage to essential functions of the job or program, and the reasonableness of the request or need
- Just starting to see cases applying the new rules

Implication of the ADAAA for Academic and Student Affairs

- Increases the number of situations where medical issues become an ADA accommodation issue—or could result in an OCR investigation
- DSS may need to broaden it's coverage
- Faculty and staff may need to re-think how they handle requests, and formal procedures for course substitutions, waivers and accommodations may need to be changed
- Does *not* affect what are program requirements or the other defenses
- An appropriate time for refresher training

New DOJ ADA Regulations—the Next Generation

- Published 9/15/10. New regulations for public entities and institutions (Title II) and private (Title III)
- Significant new changes that will affect all colleges in the rules for service animals, mobility devices and event ticketing effective 3/15/11.
- DOJ adopts 2004 ADAAG for new construction, with some changes. New Standards will apply no later than 3/15/12.

Employment Laws: *What's New and Next?*

Key Developments and Trends

- **Litigation is still increasing as an effect of the recession**
- **Government enforcement is increasing across all areas**
- **Look for more agencies to issue guidance and regulations before the deadline when a new administration could overturn them**

2011 - The Supreme Court

- ***Thompson v. North American Stainless LP*** (January 24, 2011) –extended protection of Title VII retaliation provisions to non-employees (a fiancée of an employee)
- ***Staub v. Proctor Hospital*** (March 1, 2011) –if a supervisor acts with discriminatory motive, and that action is the proximate cause of an adverse action, the employer can be held liable

2011 - The Supreme Court

- ***Borough of Duryea v. Guarnieri*** (June 20, 2011)—public employee retaliation case involving the Petition clause—petition must relate to a matter of public concern, and First Amendment interests must outweigh employer’s interests.
- ***Kasten v. Saint-Gobain Performance Plastics Corp.*** (March 22, 2011)—oral complaints can be protected conduct under the FLSA

EEOC Charges on the Rise

- Between 2007 and 2009, race and retaliation charges were highest, and sex harassment a close third
- Disability and national origin discrimination charges hit record highs in 2009, and retaliation charges hit new records each of the past two years
- More charges means more lawsuits later

OFCCP

- Increase in Desk Audits and compliance reviews, with a focus on wage/salary disparities (especially gender)
- Proposed new Section 503 Regulations

Wage Hour Issues

- Misclassification Investigations have increased (employee vs. independent contractor)
- Exempt/Non-exempt issues continue to be major focus of DOL and FLSA Class Actions
- DOL issued an new app to assist workers in tracking their hours and OT

For Colleges with Government Contracts

- Affirmative action audits by OFCCP
 - Increase in Desk Audits and on-site compliance reviews
 - a focus on wage/salary disparities (especially gender)
- Proposed new Section 503 Regulations

Questions?



Contact Information

Robert L. Duston

202.342.3415 (o)

703.338.6353 (c)

rduston@saul.com

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