

Sexual Harassment and Violence on Campus - Recent Developments

Last year the Office of Civil Rights (OCR) in the U. S. Department of Education issued a major update to the government's interpretation of the requirements of Title IX, Education Amendments of 1972. This update was issued in the form of a "Dear Colleague Letter" (the "2011 DCL") intended to provide guidance to the recipients of federal financial assistance, including colleges and universities, about their obligations under Title IX. Title IX is the federal law that prohibits sex discrimination in educational programs or activities conducted by such recipients. While the main thrust of Title IX is the protection of students from sex discrimination, it encompasses sex discrimination against employees as well.

The 2011 DCL, nearly twenty pages in length, takes its place alongside two previously issued regulatory or guidance documents: the original implementing regulations (34 C.F.R. Part 106) and a document issued in 2001 (the "*Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*"). OCR's motivation for

disseminating this additional guidance is said to be its concern over the widespread occurrence of *sexual assault* in the nation's high schools and universities. Indeed, in a summary document accompanying the DCL, OCR states that its intent is "to explain that the requirements of Title IX cover sexual violence and to remind schools of their responsibilities to take immediate and effective steps to respond to sexual violence in accordance with the requirements of Title IX."

At the beginning of the DCL, OCR describes how the various forms of sexual misconduct relate in the context of Title IX: "Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination covered under Title IX" and "All . . . acts of sexual violence are forms of sexual harassment covered under Title IX." 2011 DCL, pp. 1, 2. Thus, sexual harassment is a subset of unlawful sex discrimination, and sexual violence is a subset of sexual harassment. While the stated focus of the 2011 DCL is on sexual violence, it is clear that its admonitions apply as well to the broader category of sexual harassment.

The purpose of the DCL is, of course, to persuade institutions to take action to prevent sexual harassment/violence because of the harm caused to their students. The DCL is also intended to help institutions position themselves under the law to avoid institutional liability. Liability under Title IX can result from a claim by a student victim or a claim by the government itself. An educational institution may be held liable for money damages to a student if a teacher or other employee harasses a student, and 1.) an official in authority knew about the harassment, and 2.) the official was deliberately indifferent to the known harassment and failed to respond in an appropriate way. *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 574 (1998). An institution may also be liable to a student when the harassment is carried out by another student, if the two *Gebser* conditions mentioned above are present and the harassment is so severe, pervasive, and offensive that it adversely affects the student's educational environment. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). And, of course, OCR can (and has) sought to impose monetary penalties on universities whose relevant policies and procedures are found, in a compliance review, to be deficient under Title IX standards.

Sexual violence is defined in the DCL as consisting of “physical acts perpetrated against a person’s will or where the person is incapable of giving consent due to the victim’s use of drugs or alcohol.” *2011 DCL*, p. 1. Lack of consent may also be due to “intellectual or other disability.” *Id.* Examples of sexual violence include rape, sexual assault, sexual battery, etc.

A major theme of the DCL is the importance of an institution’s designation of a Title IX coordinator and its wide dissemination of contact information about the coordinator within the campus community. The coordinator is responsible for overseeing the institution’s compliance program, including the grievance/complaint procedure, training and educational efforts, coordination with campus police, etc.; and for serving as the institution’s chief Title IX resource. The *2011 DCL* indicates that deputy coordinators may be appointed. Ms. Delois Smith has long served in the role of Title IX Coordinator for the University, and she has been “redesignated” as the University’s Senior Title IX Coordinator and the Coordinator for Faculty. The Assistant Vice President for Human Resources, Ms. Laurel Long, has been appointed the Deputy Title IX Coordinator for Staff (and for “Third Parties,” in the event of a case involving a campus-related claim against a non-employee/non-student). The Dean of Students, Dr. Regina Hyatt, has been appointed the Deputy Title IX Coordinator for Students. These individuals are currently participating in training programs to help them understand more fully their duties under Title IX. Contact information for all coordinators is being communicated to the campus in a variety of ways.

Several changes have also been made to the University’s Equal Opportunity and Affirmative Action statement, principally to recognize that sexual violence is considered a form of sexual harassment under that policy and to identify the Title IX coordinators. Those involved in implementing Title IX and related policies will receive additional training, and campus-wide educational programs for students and employees generally to increase their awareness of sexual harassment/violence issues and policies will be carried out in the months ahead.

Changes are also being made to the University’s Discrimination Grievance Procedures pursuant to the *2011 DCL* requirement that an institution provide a “prompt and effective resolution” of Title IX sexual violence complaints. The initial investigation following the receipt of information about an incident involving possible sexual harassment or violence will be carried out by the appropriate Title IX coordinator. The *2011 DCL* is emphatic in stressing that an institution should proceed to address a complaint notwithstanding the fact that criminal charges for the same conduct are pending or may be initiated. Conduct occurring off-campus is also to be addressed where the effects of such conduct contribute to a hostile environment on campus. Interim measures to protect an alleged victim may be implemented where appropriate.

In any formal hearing, the *2011 DCL* provides that the fact-finder must not insist on a higher standard of proof for the complaining party’s case than “preponderance of evidence” (which means “it is more likely than not that sexual harassment or violence occurred”). *2011 DCL*, pp. 10-11. While this has been a somewhat controversial requirement, OCR has made it clear that any higher standard will be viewed as inconsistent with Title IX. Another requirement that has occasioned considerable discussion is that an institution must designate reasonably prompt time frames “for all major stages of the procedure.” *2011 DCL*, p. 12. Though OCR

posits a 60 day time frame as reasonable, it does concede that a judgment as to whether a process is timely may depend on the “complexity of the investigation and the severity and extent of the harassment.” *Id.* A number of other elements of a grievance procedure are dealt with (*e.g.*, participation by attorneys, fact-finder bias or conflict of interest issues, documentation of proceedings, appeal rights, notice of outcome, etc.) Most of these elements are already present in the University’s processes. Recognizing that there are two parties (the accused party as well as the purported victim) with an immediate and direct interest in the procedure, the *2011 DCL* cautions, though only in a single reference, that public educational institutions must provide “due process to the alleged perpetrator.” *2011 DCL*, p. 12.

One troublesome issue receiving attention in the letter is that presented by a victim who insists on anonymity or who is otherwise unwilling to cooperate in the investigation or the formal hearing. An institution is still required, in such an instance, to investigate and respond to information about possible sexual harassment/violence, but that duty is qualified by the limitations imposed by any request for confidentiality. The victim is to be told that such a request may restrict the institution’s ability to deal with the misconduct. The institution may, after weighing all relevant considerations, decide that it cannot provide an assurance of confidentiality. Ultimately, even if the victim’s lack of cooperation means that the perpetrator cannot be disciplined, a university’s responsibility is to stop any ongoing misconduct and/or prevent its recurrence. This duty may compel the institution to go forward with at least a modified response.

The *2011 DCL* has generated a continuing wave of commentary, workshops, online discussions, etc. While it does not have the effect of a substantive federal regulation, it is a significant guidance document that can be ignored by educational institutions only at their peril. Many of the features of a Title IX program outlined in the letter were already in place at the University, but in a number of instances some modest changes to its policies and procedures must be made. This process, and the task of implementing the expectations of OCR expressed in the *2011 DCL*, will continue over the coming months. One commentator offered this sage advice to educational entities in the present Title IX regulatory environment:

This past year alone has demonstrated that colleges and universities are dealing with a more activist OCR when it comes to sexual misconduct. While the end-game of preventing sexual harassment is clearly a goal shared by all, there is not yet a consensus as to how we get there or when liability should accrue. What is clear is that institutions taking a proactive approach, not only showing a swift and effective response to complaints of harassment, but also educating students and employees as to prevention, will fare best.

Foerster and Hage, *It’s Beyond Athletics: New Efforts to Push the Frontiers of Title IX Liability for Sexual Misconduct.*