




**OCR Dear Colleague Letter on
Title IX and Sexual Violence**

October 20, 2011
Womble Carlyle Sandridge & Rice, LLP
Elizabeth L. Riley
LRiley@wcsr.com

**Complying with the OCR's 2011
"Dear Colleague Letter" on Sexual
Violence**



Most slides courtesy of NACUA member
Minnesota State Colleges and Universities
Office of General Counsel



Background of DCL

- Acts of sexual violence are vastly under-reported
- 20% of all college women will be victims of attempted or actual sexual assault
- 6% of all college men will also be victims
- Victims more likely to suffer academically and from depression, post-traumatic stress disorder, to abuse alcohol and drugs, and to contemplate suicide.

Source - OCR DCL: Sexual Violence Background, Summary, and Fast Facts 4/4/11





Background of DCL

Recent OCR Resolution Agreements


Notre Dame University (7/12/11)
<http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05072011-b.html>

Eastern Michigan University (3/22/11)
<http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096002-b.pdf>



**Yale Students File Title IX Complaint
Against University
OCR Opens Investigation (March 2011)**

- The complaint is specifically addressed at an Oct. 2010 incident when members of the Delta Kappa Epsilon fraternity chanted, "No means yes! Yes means anal!" on Old Campus, but alleges that the Yale administration's inadequate response to that incident was just one of many instances of the University's failure to properly address public and private events of sexual harassment and assault. In an email sent out to the Yale community Friday evening, Dean Miller said the administration had received "verbal notification" from OCR of the complaint and that "Yale will respond fully to the investigation and cooperate with the Office of Civil Rights."
- <http://yaleherald.com/topstory/breaking-news-yale-students-file-title-ix-suit-against-school/>



**U. S. Department of Education
Office of Civil Rights (OCR)
"Dear Colleague Letter"
Sexual Violence - April 4, 2011**

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>



April 2011 DCL

What is a “Dear Colleague Letter?”

[DCL]

Focus: Student-on-Student

Focus: Complainants



Prior Title IX Guidance

- Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (U.S. Dep’t Ed., 2001) available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>
- Precursor to April 4, 2011 , Dear Colleague Letter
- Highlights the importance of:
 - recognizing that sexual harassment has occurred;
 - taking prompt and effective action to end it and prevent its recurrence;
 - having well-publicized and effective grievance procedures; and
 - following those procedures.



Institutional Policies

- Sexual Violence Policy
- Sexual Violence Procedures
- Nondiscrimination in Employment and Education Opportunity
- Report/Complaint of Discrimination/Harassment Investigation and Resolution
- Student Conduct Policy



DCL Outline

- Substantive Requirements
- Grievance Procedures and the Investigation Procedural Requirements
- Prevention and Remedial Measures



Title IX

- Title IX of the Educational Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 et seq., and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance.
- Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.



Myths about Title IX

- Athletics are not the only component of academic life governed by Title IX. Other areas which fall within the scope of Title IX include:
- Recruitment, Admissions, Financial Aid and Scholarships
- Course Offerings and Access
- Counseling
- Hiring and Retention of Employees
- Benefits and Leave
- Title IX also prohibits sexual harassment, which includes sexual assault and sexual violence.



Sexual Violence Definition

- Sexual violence refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability.
- A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.



Standard

- When a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program.



SCOPE

- All aspects of a school's education program and activities
- Academic
- Extracurricular
- Athletic
- Other programs of the school on or off-campus
- "Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities."
- "Consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus."

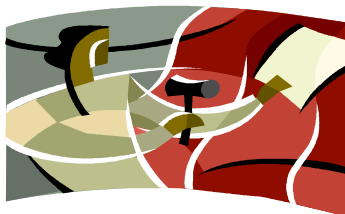


Duty

- If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.



Grievance Procedures and Investigations



Prompt & Equitable Requirements

- Notice of where complaints may be filed
- Application of the procedures
- Adequate, reliable, and impartial investigation
- Designated and reasonably prompt time frames
- Notice to parties of the outcome
- Assurance that the school will take steps to prevent recurrence and correct any discriminatory effects



Initial Meeting with Complainant

- Attempt to Obtain Consent
- Information on Retaliation
- Request for Confidentiality or to Not Pursue Complaint



Interim Steps

- The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate.
- When taking steps to separate the parties, a school should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing the perpetrator to remain.



Standard of Proof

- Must be “preponderance of the evidence”
(i.e., more likely than not that sexual harassment or violence occurred)
- Cannot be “clear and convincing”
– (i.e., highly probably or reasonable certain that sexual harassment or violence occurred)



Mediation

- NOT OK for Sexual Violence Allegations
- “In cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.”



Athletics

- School procedures must apply to all students
- If a complaint involves a student athlete,
- the complaint must not be addressed solely by athletic department procedures



Parallel Law Enforcement Proceedings

- School's Title IX obligation is independent from any law enforcement investigation and the existence of a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct



Adequate, Reliable and Impartial Investigations

- Notify complainant of the right to file criminal complaint
- May delay fact-finding at the request of law enforcement (3 to 10 day footnote) but still notify complainant of procedure, take appropriate interim steps
- Any MOU with local police department must allow the school to meet its Title IX obligation



Designated and Reasonably Prompt Time Frames

- Grievance Procedures should specify the time frame for:
 - the investigation
 - both parties receive outcome
 - appeal
- "a typical investigation takes approximately 60 calendar days following receipt of the complaint."
- process for extending time frame



Hearing Procedures: The Equality Principle

- Equal opportunity access to information (but consistent with FERPA), ability to present witnesses, question witnesses, have an advocate, appeal
- OCR "strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing"



Notice of Outcome

- Both parties must be notified in writing of the outcome of both the complaint and any appeal
 - The OCR recommends concurrent notice



Remedies

- Providing an escort
- Ensure parties do not have the same class
- Assigning parties to different residence halls
- Providing counseling services
- Providing medical services
- Providing academic support services
- Arranging for the complainant to re-take a course or withdraw without penalty
- Reviewing any disciplinary action taken against the complainant to see if there is a causal connection with the harassment



Retaliation

- Schools must have policies in place to protect against retaliation.



Procedural Requirements

- Widely disseminate a notice of nondiscrimination
- Designate a **Title IX Coordinator**
 - Responsible for addressing systemic problems
 - No conflicting roles
 - Trained as to what constitutes sexual violence, grievance procedures
- Adopt and publish grievance procedures



Training

- "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."
- Training for all those involved in investigation of complaints, including investigators, fact-finders, decision-makers



Steps to Prevent Sexual Harassment and Violence

1. Education and Prevention
2. Remedial Measures



Education

- Recognize
- Avoid
- Report
- Avoid Retaliation
- How the School will respond
- Student Input (climate surveys, etc.)



Remedial Measures

- Range of Campus Services (counseling, etc.)
- Interim Steps
- Impact on Complainant
- Prompt and Appropriate Action



List of DCL Recommendations (NACUA summary – 34 points/14 pages)

- **BASIC PROCEDURAL REQUIREMENTS**
 - For Title IX Sexual Harassment and Sexual Violence -
- (a) Disseminate a notice of nondiscrimination;
- (b) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities as Title IX coordinator; and
- (c) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints." (Page 6).
-



TITLE IX DCL: CONCLUSION

- “The past year alone has demonstrated that colleges and universities are dealing with a **more activist OCR when it comes to sexual misconduct** and, perhaps, a more activist student body. While the endgame 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.” Amy Foerster & Gloria Hage (NACUA 2011 Annual Conference)



THANK YOU!

**WOMBLE
CARLYLE** ®
INNOVATORS AT LAW®

