Sexual Harassment and Title IX: A Major Compliance Challenge for America’s Colleges and Universities

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SEXUAL HARASSMENT AND TITLE IX:
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by Robert B. Smith

OVERVIEW

In April 2011, the U.S. Department of Education's Office of Civil Rights (OCR) issued a controversial letter ordering colleges and universities to get more aggressive about investigating and prosecuting alleged incidents of sexual assault and harassment. While this 18-page missive began with the cordial salutation “Dear Colleague,” it was anything but a casual communication sent from one friend to another. Backed by the full force of the law, the guidance set new standards for the resolution of sexual assault claims involving college and university students, employees and third parties. It was formulated, however, without hearings, comment periods, revisions or other attempts to seek informed perspectives on the potentially adverse effects of these changes.

The letter directed colleges and universities to drop higher evidentiary requirements in favor of the lesser “preponderance of the evidence” standard. It also spelled out specific requirements for handling off-campus incidents. Naturally, the effects on higher education were immediate. After learning of OCR's tougher stance, for example, a student court at Stanford University switched to the preponderance standard while still in the midst of a sexual assault case. The accused, whose case had been dropped by the prosecutor and police in Palo Alto, Calif., was convicted by the student-run court. Advocates of First Amendment and due process rights began sounding the alarm. After OCR announced that it had reached a settlement with the University of Notre Dame regarding its handling of sexual harassment cases, one analyst said the terms of the agreement revealed that OCR intended to apply the new rules “cookbook style” regardless of the complexities involved in specific cases. Likewise, the Foundation for Individual Rights in Education (FIRE) wrote to OCR noting that its members were “troubled by the [Dear Colleague] letter's failure to explicitly instruct administrators that public universities may not violate the First Amendment rights of students and that private universities must honor their promises of freedom of expression to students.” The new guidelines, FIRE asserted, were likely to erode due process for the accused. “The rights of those accused cannot be sacrificed simply as a function of the accusation itself," FIRE cautioned. The American Association of University Professors also wrote two letters to OCR in which it expressed similar concerns.

As a matter of political philosophy, the issues involved here reflect the typical tension in American society between the desire to protect individual liberty and the understandable urge to protect vulnerable citizens from harm. In an argument for freedom of speech published in the op-ed pages of The Washington Post, FIRE President Greg Lukianoff wrote:

Overly broad harassment codes remain the weapon of choice on campus to punish speech that administrators dislike. In a decade fighting campus censorship, I have seen harassment defined as expressions as mild as “inappropriately directed laughter” and used to police students for references to a student government candidate as a “jerk and a fool” (at the University of Central Florida in 2006) and a factually verifiable if unflattering piece on Islamic extremism in a conservative student magazine (at Tufts University in 2007). Other examples abound. Worryingly, such broad codes and heavy-handed enforcement are teaching a generation of students that it may be safer to keep their mouths shut when important or controversial issues arise. Such illiberal lessons on how to live in a free society are
poison to freewheeling debate and thought experimentation and, therefore, to the innovative thinking that both higher education and our democracy need.

And yet advocates of a tougher line can (and frequently do) point to a host of troubling incidents of sexual assault and harassment at colleges and universities across the country. OCR, for example, highlighted the suicide of a Saint Mary’s College student who had reported being sexually assaulted by a peer from Notre Dame. As noted by The Chicago Tribune, some Notre Dame students have accused the administration of failing to interview sexual assault suspects in a timely manner and of letting cases sit unresolved for months on end. In March 2011, students at Dickinson College, who accused the school of being too lenient in cases involving allegations of rape and sexual assault, conducted a four-day sit-in at the administration building. The protest ended only after Dickenson promised to “lighten its standard of proof and punish rape perpetrators only with expulsion,” according to a report by Inside Higher Ed.

In response to a raft of sexual harassment complaints from students, meanwhile, OCR has initiated Title IX investigations focused on the compliance practices at Yale, Duke, Princeton and Harvard, according to an April 2011 report by The Yale Daily News. The Yale allegations, in particular, have attracted the most coverage in the press and blogosphere. In March 2011, 16 Yale students filed a 26-page complaint in which they described Yale as a sexually hostile environment. They also accused the administration of not doing enough to stop sexual harassment.

Here is an ABC News account of some of the incidents that sparked the Yale complaint, based on a press release issued by the complainants’ group:

In October 2010 a group of fraternity pledges surrounded an area on campus known to house freshman women and shouted, “No means yes! Yes means anal!” according to the release. “A band of loud men shouting threatening and pornographic language at the home of young freshman women creates hostile environment, thereby limiting women’s equal access to education opportunities at Yale,” read the release. And in September 2009, the complainants say that a group of male Yale students circulated an email that listed 53 freshmen women and proceeded to rank them in order of “how many beers it would take to have sex with them.” Also mentioned in the release was an incident in January 2008 when a group of fraternity pledges held up signs reading, “We Love Yale Sluts” in front of the university’s women’s center.

Regardless of one’s political philosophy, such behavior is clearly shocking and inappropriate. The exact way to handle it, however, is at the heart of the tension over Title IX compliance. From OCR’s perspective, the Dear Colleague letter simply clarifies existing, but widely misunderstood reporting and investigation requirements under Title IX, according to statements that Russlynn H. Ali, Assistant Secretary for Civil Rights, made to reporters when the guidance was announced last year. Naturally, victims’ rights advocates lauded OCR’s crackdown. “From our perspective, this is a significant advancement for the victims of sexual violence and preventing sexual violence,” S. Daniel Carter, director of public policy for Security on Campus, told Inside Higher Ed. “The process matters.”
'A HOST OF UNANSWERED QUESTIONS'

Today, college and university administrators are caught in the middle—they must comply with these tough new regulations, on the one hand, and continue to respect and safeguard the rights of the accused, on the other. In a recent newsletter (NACUANOTES, Vol. 10, No. 3), the National Association of College and University Attorneys (NACUA) highlighted some of the specific compliance challenges that have emerged in the wake of the guidance. The article also pointed to “a host of unanswered questions” that continue to bedevil the higher education community as it seeks to follow the requirements of the Dear Colleague letter.

In this first of a series of articles, NACUA explores a few of the key considerations related to OCR’s requirement that schools hire a Title IX coordinator (for the entire campus, not just the athletic department). The authors describe the coordinator’s duties in detail, and also dive into specific changes related to grievance procedures as spelled out by the letter. Make no mistake about it—the responsibilities of the Title IX coordinator are manifold and labor-intensive. “OCR expects that the Title IX Coordinator will be the central repository of Title IX knowledge on your campus. As such, the Coordinator should be well versed in the procedures, policies, and training mechanisms in place for addressing sexual harassment and sexual violence on your campus,” the authors note. The Dear Colleague letter, they advise, states that the coordinator “should be trained as to what constitutes sexual harassment, including sexual violence, in order to serve as a resource to those on campus who may deal directly with a victim of such conduct.” OCR expects the Title IX coordinator’s training to address the investigation of complaints filed by students, staff and faculty, NACUA notes, and the coordinator must also “regularly develop and participate in activities designed to raise awareness in the campus community about sex discrimination and violence, the existence and enforcement responsibilities of OCR and the institution’s Title IX policies and procedures.” The Title IX coordinator must communicate closely with local and campus police departments, and is charged with identifying and addressing systemic compliance issues and other compliance-related tasks. Given this workload, “deputy” Title IX coordinators can be named, NACUA says. For many schools, they will no doubt be necessary.

The NACUA article also highlights some of the primary considerations regarding “grievance procedures” at colleges and universities—i.e. “the internal formal system that your institution has in place to report, process, and adjudicate complaints of sexual harassment and sexual violence.”

OCR considers it critically important that the grievance procedures:

1. provide notice of the grievance procedures, including where and how to file a complaint;

2. apply to complaints alleging harassment by employees, other students and third parties;

3. provide for adequate, reliable, and impartial investigation of complaints, and use a “preponderance of the evidence” standard;

4. include designated and reasonably prompt time frames for the major stages of the complaint process;

5. require notice to parties of the outcome;

6. include 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.
In addressing each of these six factors in detail, NACUA highlights how even those directives that seem straightforward, like the order to “provide notice of the grievance procedures,” can create unanswered questions. “If an institution creates a specific sexual violence policy in response to the DCL, has it properly referenced that policy in the institution’s more general anti-harassment policy? Or, if the institution allows direct cross-examination at most disciplinary hearings, has it ensured that such cross-examination is expressly excluded for cases involving sexual violence?” Indeed, it is now up to colleges and universities to work with their legal counsel to discern precisely what OCR means when it uses subjective phrases such as “adequate, reliable and impartial investigation” and “reasonably prompt time frames,” or when it orders schools to “correct [harassment’s] discriminatory effect on the complainant.”

THE LIABILITY ISSUE

As it seeks to help colleges and universities negotiate these challenges, NACUA is urging the higher education community to avoid “overreacting” to OCR’s letter. Individual institutions, it says, should seek to find solutions that make sense based on contextual considerations such as the size of the school and its available resources. Meanwhile, the Dear Colleague letter contains provisions that even its most vociferous critics see as offering at least some clarification of what OCR expects. Writes Steve Farrell, founder of “The Moral Liberal" blog:

...some of the new requirements were unobjectionable and even welcome—for example, OCR's emphasis on making sure that students accused of sexual harassment and sexual violence are afforded the same access to hearing documents, counsel, party statements, and meetings, as well as the opportunity to present witnesses and evidence. It's vitally important that both the accused and the accuser enjoy an impartial and fair hearing process, particularly when a campus judicial procedure is grappling with an allegation of sexual assault, one of the most heinous and awful of all crimes.

And yet the letter's primary effect, in the eyes of many, comes close to tilting the scales of justice in favor of complainants. This creates inherent liability risks for colleges and universities, over and above the very significant moral and ethical questions involved. If the matter at hand were a minor traffic accident, a breakdown of due process might be unfortunate, but it would not be life-shattering for the party found to be at fault. In matters as serious as rape or sexual harassment, however, due process is more critical, not less. Farrell is quite correct when he describes sexual assault as “one of the most heinous and awful of all crimes.” We want these crimes solved—and quickly. Yet any competent detective will tell you that these cases often reduce to “he said, she said” arguments and involve complex questions relating to anonymity, racial bias, intoxication, subjective interpretation of sexual intent and behavior, and more. Accused students have sued colleges and universities for wrongful prosecution of these reputation-destroying crimes, and there is considerable risk that such suits could increase as a direct result of the Dear Colleague letter.

Forcing educators to be criminal investigators charged with sorting out these complex crimes can be a tall order, especially in light of OCR’s 60-day deadline for the resolution of these cases. These are not crimes that occur at high noon in front of a crowd of witnesses. Rapes and sexual assaults usually take place out of the way, in the dark, with drugs and alcohol in the mix. What if the incident occurs over spring or winter break? What if the complaint is filed the day before school ends in May and all of the witnesses have gone home for the summer? What if the local district attorney says to the university “Your student court had better not talk to my witnesses before I get to them, or the university will face charges of obstruction of justice and witness tampering”?
Backlogs at crime labs are notorious. What happens if DNA analysis takes weeks or months to come back from the lab? It is true that justice delayed is often justice denied, but the complex nature of an investigation into a sexual assault case may not admit of a neat resolution within two months’ time. OCR’s directive, in the eyes of critics, ignores such real-world considerations. Likewise, the “clear and convincing” evidentiary standard that some schools have heretofore relied upon does indeed seem appropriate given the serious nature of these types of accusations. If OCR is unhappy with the conviction rate for these crimes, critics ask, is it truly appropriate to water down the evidentiary standard as a means to improve the conviction rate? According to the letter, meanwhile, schools must accommodate accusers if they want to avoid being in the same room with the accused. Might this stipulation violate one of our basic principles of justice—that the accused must have the ability to confront the witnesses against them?

Officials from OCR frequently assert that one in five students on college campuses will become the victim of sexual assault. This would mean that our college campuses are now vastly more dangerous than the most crime-ridden of U.S. cities. According to FBI statistics, for example, Detroit recorded an average of 33 rapes per 100,000 people in 2006. While it does seem feasible that such incidents might be underreported, DOE would have us believe that 200 sexual assaults will occur on a campus of just 1,000 people in a given year. One wonders whether DOE truly has evidence to support this unprecedented campus crime wave.

THE BOTTOM LINE

In an ideal world, the DOE would partner with higher education in service of a common goal—to improve security and build on-campus cultures that teach people to treat each other with dignity and respect. Unfortunately, the apparent assumption on the part of the federal government is that colleges and universities have somehow been negligent or indifferent regarding the pursuit of justice in these cases. As the astronomer Carl Sagan once said, “Extraordinary claims require extraordinary evidence.” To date, there simply is no evidence that colleges and universities have acted in anything other than good faith to cope with what is, after all, an intractable, societal problem that is not of their making. Ironically, as campuses are forced to spend more money on Title IX-related investigations and lawsuits, they may be less able to invest in cultures of respect or, for that matter, the practical tools and resources required by security and law enforcement. OCR’s job is to adopt and implement regulations per the Congress. This is serious business and involves immense responsibility. Rather than regulate American colleges and universities with the likes of the “Dear Colleague” letter, OCR might have chosen to take a transparent approach to this issue, with the usual public hearings and calls for informed input. Alas, this is not what transpired. Unless successfully challenged at great burden and expense, the letter is the law. And that means that higher education must now do its best to implement OCR’s guidance, step by step. The task will involve protecting victims and the accused, preventing and reducing instances of crime and, of course, spending untold amounts of time and money on the creation and administration of yet another government-mandated bureaucracy.

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