BEYOND ATHLETICS: The Dear Colleague Letter and the New Title IX Regime

Baltimore Collegetown & MICUA

April 30, 2013
What is Title IX?
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.”

What activities does Title IX govern?
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.”

The Dear Colleague Letter
April 4, 2011
What is a DCL?

• Significant guidance document
• Legal authority is based on law and regulations
• Must be consistent with law and regulations
Prior Guidance Documents

• Key guidance documents issued in 1997 and 2001.
• 2001 Revised Guidance document offered institutions the opportunity to comment before it was published.
• 2011 DCL did not have that same comment period.
2001 Guidance

• Focused on sexual harassment of students by employees, other students, and third parties.

• Squaring Title IX with Supreme Court decisions in Gebser and Davis, which confirmed individual damages available for Title IX violations.

• 2001 Guidance explained that individual lawsuit or not, institution must act to provide a prompt and equitable resolution for complaints of sexual harassment.
2001 Guidance

Also mentioned a number of things that are reiterated in April 2011, including:

• For more severe conduct, even a single incident may constitute sexual harassment that triggers the institution’s duty to act.
• Acquiescence in the sexual conduct does not always mean the conduct was welcome, nor does it always mean it was not harassment.
• “If harassment has occurred, doing nothing is always the wrong response.”
2011 DCL

• Incorporates 2001 Guidance.

• Focuses on sexual violence as a violation of Title IX
Logic of the 2011 DCL

Sexual Discrimination is prohibited.

Sexual Harassment = Sex Discrimination

Sexual Violence = Sexual Harassment

THEREFORE …

Sexual Violence = Sexual Discrimination
“Guidance”?

In one 19-page DCL:
- 41 “musts”
- 71 “shoulds”
- 17 “recommends”
- 46 “mays”
Core Title IX Requirements – per 2011 DCL

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; and …
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.” (p. 4)
Training

– Employees:
  • Institutional obligations and issues of confidentiality.
  • “[R]ecognizing and appropriately addressing allegations of sexual harassment or violence under Title IX”
  • Institutional policies and procedures.
  • Preventative education programs as part of orientation.

– Students:
  • See above.
Title IX Notices
Notice of Nondiscrimination

• “The notice must be widely distributed to all students ... employees, applicants for admission and employment, and other relevant persons.” (p. 6)

• OCR “recommends that a ... nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers.” (p. 7)
Notice of Grievance Procedures

• Procedures should be easily understood, easily located, and widely distributed. Whether Complaints vs. other student, employee, faculty member, or others.

• 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.
And Introducing (or re-introducing)…
Title IX Coordinator

• Trained as to what constitutes sexual harassment, including sexual violence
• Understand grievance procedures
• Available to provide assistance to school law enforcement regarding response
• Identify and address systemic issues
Title IX Coordinator

• Oversight

• Not leading every investigation

• Work to avoid appearance of conflict of interest – taking the “30,000 foot” view
Prompt and Equitable Grievance Procedures
Grievance Procedures

Critical to achieve compliance:

- Notice of the grievance procedures, including where a complaint 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 provide witnesses and other evidence;
Grievance Procedures

• Designated and reasonably prompt timeframes for the major stages of the complaint process;

• Notice to parties of the outcome of the complaint; and

• 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.
The Grievance Process – Interim Measures

• Must be clear to complainant how to lodge a Complaint. After received …

• Consider interim remedial measures
  – Must Minimize Impact on the Complainant
    • No Contact Orders
    • Move Residence
    • Providing escort to complainant
    • Ensuring that complainant and respondent do not attend the same classes
    • Moving to different residence halls
    • Counseling, medical, academic support services
The Grievance Process – Investigation

• 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
A word on confidentiality from the Department of Education
Confidentiality

• “Schools should obtain consent from the complainant . . . before beginning an investigation.”
Confidentiality

• “If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation.”
Confidentiality

• “If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited.”
Confidentiality

• “[I]f the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students.”

  – The school may weigh the request for confidentiality against several factors and should inform the complainant if it cannot ensure confidentiality.
Confidentiality

• “Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence.”
Umm... WHAT?
The Hearing

• OCR has said mediation is not appropriate for cases involving sexual assault.

• Other forms of informal resolution may still be acceptable as long as complainant and respondent are not “at the table” together.
The Hearing - Impartiality and Standard of Proof

• Fact-finders **must** use a preponderance of the evidence standard

• Must maintain **documentation** of all proceedings, which may include findings of fact, transcripts or audio recordings
Is It Just “Guidance”? 

An OCR Update
Yale University (6/12)

- Designate Title IX Coordinator and deputies.
- Train Title IX Coordinator, deputies, police, deans, freshmen, leaders of student groups.
- Grievance procedures managed by a University-wide committee that is “accessible, representative, and trained.”
- Annual climate assessments.
- Implement actions intended to improve observance of appropriate behavior norms -- drinking, Greek and hazing.
• Implement interim steps while on hold for police.
• Will not use mediation and other informal mechanisms to resolve allegations of sexual assault.
• When a complainant requests confidentiality, the University will take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue and investigation. When the University cannot take disciplinary action against an alleged harasser because of a complainant’s insistence on confidentiality, it will pursue other steps to limit the effects of the alleged harassment and prevent its recurrence.
The Next Wave:
April 18, 2013

• Occidental College students file complaint
  – Title IX violations: not offering effective prevention and response programs for sexual assault

• Swarthmore College students file complaint
  – Clery Act violations: underreporting sexual crimes and systematically discouraging students from reporting sexual misconduct to police
  – stated they would file a follow-up complaint alleging Title IX violations.
Clery Act Amended

Violence Against Women Act reauthorized

March 7, 2013

Amends Clery Act, requiring colleges and universities to include in their annual reports incidents of

– Domestic violence
– Dating violence
– Stalking
Notices under Clery

**Clery Before**
Inform students of procedures victims should follow  
(e.g. preservation of evidence, to whom offenses should be reported)

**Clery After**
ALSO inform about

- victims’ option to notify and seek assistance from law enforcement
- Victims’ rights re: judicial no-contact, restraining & protective orders
Investigation under Clery

Establishes standards for investigation & student discipline process for domestic violence, dating violence, stalking

- Policy must include “statement of standard of evidence” – does not prescribe a standard
- Officials must be trained how to investigate and conduct hearings in a manner that “protects the safety of victims and “promotes accountability”
Training under Clery

New students and employees must be offered training programs that include:

– Statement that the institution prohibits rape, domestic violence, dating violence, sexual assault, and stalking
– Definition of those offenses in jurisdiction
– Definition of consent
– “Safe and positive” options for bystander intervention
– Signs of abusive behavior, how to avoid attacks
### Clery Act ≠ Title IX

<table>
<thead>
<tr>
<th><strong>Clery</strong></th>
<th><strong>Title IX</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Accuser &amp; accused MUST be notified simultaneously and in writing of outcome and of appeal procedures</td>
<td>• Recommends concurrent notice to parties of outcome</td>
</tr>
<tr>
<td>• Policy MUST address how victims’ confidentiality will be protected, including record-keeping</td>
<td>• Encourages consideration of victims’ desire (or not) for confidentiality but does not mandate a confidentiality policy</td>
</tr>
<tr>
<td>• Policy must state standard of evidence</td>
<td>• Requires “more likely than not” standard</td>
</tr>
</tbody>
</table>
Clery Act ≠ Title IX ≠ Md. Code

Md. Code Ann., Educ. §11-601 provides for the creation of a written policy of sexual assault, mandating certain provisions be present in the policy.

- Maryland law already required that notices to students inform them of sexual assault victims’ right to file criminal charges
- Maryland law goes further than Clery (even as amended) in mandating certain forms of assistance to victims: e.g. requiring an institution to offer counseling to victim (Educ. §11-601(c)(5)), rather than simply to notify students of existing services (Clery)
Pop Quiz
TRUE OR FALSE?

Student tells Resident Advisor she was raped by an athlete at an off-campus party, identifying player by name. Student demands that RA not tell anyone. RA nonetheless tells athlete’s coach. Coach brings player in and benches him at next two games, but doesn’t identify female student by name, consistent with her wishes.

True or False: RA and coach have fulfilled the requirements of Title IX.
Who may appeal a hearing outcome?

a) The complainant
b) The respondent
c) Either party, so long as both parties have the option;
d) Neither party
TRUE OR FALSE?

If the local police begin a criminal investigation, the institution should stand down until it has been completed so as not to interfere with the criminal process.
Questions?

James A. Keller, Esquire
Co-Chair, Higher Education Practice Group
(215) 972-1964
jkeller@saul.com

Jennifer A. DeRose, Esquire
Member, Higher Education Practice Group
(410) 332-8930
jderose@saul.com
Title IX panelists

• Xavier Cole
  – Assistant Vice President, Student Development, Loyola University Maryland
  – XCole@loyola.edu

• Jennifer DeRose
  – Associate, Saul Ewing LLP
  – jderose@saul.com

• Beth Gerl
  – Vice President of Student Affairs, McDaniel College
  – bgerl@mcdaniel.edu

• Jim Keller
  – Partner, Saul Ewing LLP
  – jkeller@saul.com