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Allegations of Sexual Harassment and Sexual Violence: What Must a School Do?

Recent events at major universities should cause schools to critically examine their policies and procedures concerning the investigation and resolution of sexual harassment and sexual violence allegations. This *GT Alert* examines what an institution must do to limit its potential exposure to lawsuits alleging sexual harassment or sexual violence by students upon students or by faculty or staff upon students.

TITLE IX

All educational institutions that receive federal financial assistance are subject to Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. sections 1681 *et seq.* and the United States Department of Education (DOE) implementing regulations, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex. Sexual harassment, which includes sexual violence, covers student-student, student-staff/faculty and faculty-faculty conduct. The DOE's Office of Civil Rights (OCR), on April 4, 2011, published a "Dear Colleague" letter that reiterates a school's legal obligations to investigate and resolve sexual harassment and sexual violence complaints and warns schools that they must comply with Title IX and DOE, OCR regulations or face DOE sanctions.

A School's Obligations to Respond to Sexual Harassment and Sexual Violence Complaints

Determining what constitutes sexual harassment and sexual violence is often difficult. Though some instances are seemingly obvious, many cases turn on the issue of consent. Title IX does not prohibit all forms of sexual behavior between consenting adults. Rather, it prohibits sexual acts perpetuated against a person's will or where a person is incapable of giving consent due to the victim's abuse of drugs or alcohol. A person may not give consent due to intellectual or other disabilities. Whether proper consent has been given is often a challenging issue.

Where students participate in a school's education programs and activities, Title IX is applicable. It is also applicable, for example, where student upon student sexual harassment or sexual violence occurs off campus and does not involve school programs or activities.

A school that knows, or reasonably should know, about possible sexual harassment or sexual violence must promptly investigate what may have happened and must also take appropriate steps to resolve the situation. Even if the matter is subject to a law enforcement investigation, the school must conduct its own investigation. If a

school has reason to believe that there may have been criminal conduct, the school must immediately notify law enforcement officials.

Schools must also navigate through the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. section 1232g; 34 C.F.R. 99.15. Though FERPA protects student confidentiality, a school may not withhold the identity of the complainant from the alleged harasser.

Procedural Requirements for Sexual Harassment and Sexual Violence Investigations

Under Title IX, schools must, at a minimum, take three procedural steps in investigating sexual harassment and sexual violence complaints. These include:

- Disseminating a Notice of Discrimination;
- Designating at least one employee to serve as a Title IX coordinator;
- Adopting and publishing grievance procedures for prompt and fair resolution of student and employee sex discrimination complaints.

Whether a school's Notice of Discrimination complies with Title IX requires the application of the DOE, OCR's regulations. A Title IX coordinator must have adequate training in Title IX's policies and procedures.

Title IX requires that grievance procedures be published and that they provide a prompt and fair process. Though the grievance procedures need not be separate from normal student disciplinary procedures, they must include:

- Notice to students and employees of the procedures and where complaints may be filed;
- Adequate and impartial investigations carried out by employees where both parties have the right to present witnesses and evidence;
- Designated and reasonably prompt time frames for the process;
- Notice to the parties of the outcome;
- Steps taken to prevent recurrence and correct discriminating effects.

Risk Management

Victims of sexual harassment and sexual violence have the right to seek monetary damages against schools for student upon student and faculty/staff conduct where the school is deliberately indifferent to the victim's complaints. *Davis v. Monroe County Bd. of Ed*, 119 S. Ct. 1661(1999). Compliance with Title IX and the DOE, OCR's regulations, along with a full and fair investigation and grievance process, provides a defense to a lawsuit. In the absence of Title IX and DOE regulatory compliance, or the failure to apply existing school policies and procedures, schools will invite Title IX actions.

A thorough review and assessment of Title IX, DOE, OCR regulations and existing policies and procedures is key to avoiding monetary liability for sexual harassment and sexual violence and in aiding victims.

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