

#### **MEMORANDUM**

**TO:** Clients and Friends

**FROM:** William King (wking@lightfootlaw.com)

Jack Sharman (jsharman@lightfootlaw.com)

Caitlin Looney

**DATE:** August 10, 2014

**RE:** Universities and the Department of Education's "Dear Colleague" Letter on

Sexual Assault and Disciplinary Proceedings

On Wednesday, July 30, 2014, a bipartisan group of eight senators introduced legislation aimed at curbing on-campus rape. The Campus Safety and Accountability Act would require colleges to assign campus "Confidential Advisors" to act as a resource to victims of sexual assault. The Act would also require a uniform process for disciplinary proceedings and require colleges to coordinate investigations with law enforcement. Penalties for noncompliance could include up to 1% of their total operating budget and a \$150,000 fine per violation. The Act would also include annual surveys of students, the results of which would be posted online for the benefit of parents and prospective students. The proposed Act represents the latest development in a flurry of governmental involvement in recent years on issue of sexual assault in schools.

\_

<sup>&</sup>lt;sup>1</sup> Maya Rhodan, *Bipartisan Bill Aims to Reform Campus Sexual Assault Investigations*, TIME (July 30, 2014), http://time.com/3058840/campus-sexual-assault-bipartisan-bill-aims-to-reform-the-investigation-process/.

## I. "Dear Colleague" Letter

The Office for Civil Rights ("OCR") in the U.S. Department of Education ("DOE") issued a "Dear Colleague" letter on April 4, 2011, addressing sexual violence in schools. This letter was deemed a "significant guidance document." OCR issues letters and other documents like these to provide guidance on how recipients of Title IX financial assistance can ensure compliance with its requirements. The letter supplemented OCR's *Revised Sexual Harassment Guidance* issued in 2001 ("2001 Guidance"). It cited "troubling" statistics on sexual violence that prompted a "call to action."

Under Title IX, if a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, the school is required to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.<sup>3</sup> A single instance of rape can create what OCR deems a hostile environment.<sup>4</sup>

The letter outlined procedural requirements that recipients must comply with under Title IX. The requirements include: disseminating a notice of nondiscrimination, designating an employee to coordinate compliance with Title IX, and adopting and publishing a grievance

\_

<sup>&</sup>lt;sup>2</sup> Statistics cited by the Dear Colleague letter included that 1 in 5 women are victims of completed or attempted sexual assault while in college. CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT XIII (Nat'l Criminal Justice Reference Serv., Oct. 2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf . The study also found that the majority of campus sexual assaults occur when women are incapacitated, primarily by alcohol. *Id.* at xviii.

<sup>&</sup>lt;sup>3</sup> That is the standard used for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. See 2001 Guidance at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 648 (1999).

<sup>&</sup>lt;sup>4</sup> See, e.g., Jennings v. Univ. of N.C., 444 F.3d 255, 268, 274 n. 12 (4th Cir. 2006) (acknowledging that while not an issue in this case, a single incident of sexual assault or rape could be sufficient to raise a jury question about whether a hostile environment exists, and noting that courts look to Title VII cases for guidance in analyzing Title IX sexual harassment claims); Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 259 n. 4 (6th Cir. 2000) ("[w]ithin the context of Title IX, a student's claim of hostile environment can arise from a single incident" (quoting Doe v. Sch. Admin. Dist. No. 19, 66 F. Supp. 2d 57, 62 (D. Me. 1999))).

procedure that provides for "prompt and equitable resolution" of sex discrimination complaints.

OCR uses the following elements to evaluate a school's grievance procedure:

- Notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- Application of the procedures to complaints alleging harassment carried out by employees, other students and third parties;
- Adequate, reliable, and impartial investigations of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames 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.

One of the most controversial elements relates to the "adequate, reliable, and impartial investigations of complaints." The letter states that a school should not wait until a police investigation has concluded to begin its own investigation. It also said that because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. The letter instructs schools that its procedures should use a preponderance of the evidence standard to evaluate complaints in order to be compliant with Title IX standards. Colleges using the preponderance standard ask in each case whether it is more likely than not that sexual harassment or violence occurred when making its determination. The letter explicitly rejected a more rigorous "clear and convincing" standard (i.e. it is highly probable or reasonably certain that the sexual harassment or violence occurred) used by some schools.

#### II. White House Task Force to Protect Students from Sexual Assault

On January 22, 2014, President Obama issued a Presidential Memorandum that established the "White House Task Force to Protect Students from Sexual Assault" ("Task Force"). The Task Force was charged with sharing best practices with schools as well as increasing transparency, awareness, and enforcement for sexual assault. The first report of the Task Force is entitled "Not Alone." It outlines first action steps and recommendations including: identifying the problem using campus climate surveys, preventing sexual assault by engaging men, effectively responding when a student is sexually assaulted, and increasing transparency and improving enforcement. By September 2014, the Task Force will provide samples of promising policy language to colleges and universities regarding sexual assault investigation and prevention. Sample policy language could provide more clarity to schools about how to be compliant with the new requirements of the OCR and Title IX.

### **III. Office of Civil Rights Investigations**

Anyone who believes that a school has discriminated against someone relating to sexual discrimination can file a complaint with OCR. The person need not be a victim of the alleged discrimination to file a complaint, but may complain on behalf of an individual or a group. On May 1, 2014, OCR released a list of the higher education institutions under investigation for possible violations of Title IX over the handling of sexual violence and harassment complaints. The list included 55 schools and has continued to grow throughout the summer of 2014. OCR

<sup>5</sup> Information related to the Task Force and its reports can be found at: https://www.notalone.gov/.

<sup>&</sup>lt;sup>6</sup> The schools currently under investigation by OCR include: **Arizona**: Arizona State University; **California**: Butte-Glen Community College District, Occidental College, University of California-Berkeley, University of Southern California; **Colorado**: Regis University, University of Colorado at Boulder, University of Colorado at Denver,

states that it offers technical assistance to help schools achieve voluntary compliance with Title IX. When a recipient does not come into compliance, OCR can initiate proceedings to withdraw federal funding by the DOE or refer the case to the Department of Justice for litigation. This is considered an extreme punishment and typically, these investigations result in a "Voluntary Resolution Agreement," in which the OCR does not find an institution to be either compliant or noncompliant, and the institution agrees to implement recommended policies and submit to continued monitoring.<sup>7</sup>

# **IV. Changing Policies**

In light of the increasing role of government in assessing how schools handle sexual assault investigations, many schools are changing their policies in an attempt to be compliant with OCR's recommendations. One of the most noticeable changes schools have made is to the standard of proof used in internal investigations to a preponderance of the evidence standard. Harvard University made news on July 2, 2014 when it announced a new set of policies and

America; Florida: Florida State University; Georgia: Emory University; Hawaii: University of Hawaii at Manoa; Idaho: University of Idaho; Illinois: Knox College, University of Chicago; Indiana: Indiana University-Bloomington, Vincennes University; Maryland: Frostburg State University; Massachusetts: Amherst College, Boston University, Emerson College, Harvard College, Harvard University—Law School, University of Massachusetts-Amherst; Michigan: Michigan State University, University of Michigan-Ann Arbor; New Hampshire: Dartmouth College; New Jersey: Princeton University; New York: CUNY Hunter College, Hobart and William Smith Colleges, Sarah Lawrence College, SUNY at Binghamton; North Carolina: Guilford College, University of North Carolina at Chapel Hill; North Dakota: Minot State University; Ohio: Denison University, Ohio State University, Wittenberg University; Oklahoma: Oklahoma State University; Pennsylvania: Carnegie

University of Denver; Connecticut: University of Connecticut; District of Columbia: Catholic University of

Mellon University, Franklin and Marshall College, Pennsylvania State University, Swarthmore College, Temple University; **Tennessee:** Vanderbilt University; **Texas:** Southern Methodist University, The University of Texas-Pan American; **Virginia:** College of William and Mary, University of Virginia; **Washington:** Washington State University; **West Virginia:** Bethany College, West Virginia School of Osteopathic Medicine; **Wisconsin:** 

University of Wisconsin-Whitewater.

<sup>&</sup>lt;sup>7</sup> A sample Voluntary Resolution Agreement with Yale University can be found at http://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-b.pdf .

procedures that adopted the preponderance standard for sexual assault investigations. Harvard's newly created Office of Sexual and Gender Based Dispute Resolution will also use professional investigators to specifically deal with sexual harassment and assault claims. Harvard University is just one example of many schools that have responded to pressure from the OCR and politicians to change policies and procedures for handling sexual assault, specifically by changing the standard of proof used in investigations. Other schools that have recently changed policies include: Cornell University, Duke University, and Dartmouth College, among many others.

Many student activists have pushed for an "affirmative consent" standard that goes beyond the preponderance standard. Under an affirmative consent standard, sexual partners must actively communicate consent to participate in sexual activity. Antioch College in Ohio is considered to have one of the most stringent standards—it requires that students agree verbally to every stage of a sexual encounter. This standard is a goal for many victims' rights advocates, but has not been widely adopted elsewhere.

#### V. Backlash from the Accused

Some civil libertarians have said that recent changes in the approach to sexual assault investigations tilts the scales unfairly against the accused. For example, The Foundation for Individual Rights in Education, called upon the Task Force and OCR to correct what it deemed as insufficient concern for the rights of accused students and fundamental fairness.<sup>9</sup>

<sup>8</sup> Matthew Q. Clarida & Madeline R. Conway, *Univ. Announces New Sexual Assault Policy Including Central Office, 'Preponderance of the Evidence' Standard*, THE HARVARD CRIMSON (July 2, 2014), http://www.thecrimson.com/article/2014/7/3/new-sexual-assault-policies/.

<sup>&</sup>lt;sup>9</sup> Fire Responds to White House Task Force's First Report on Campus Sexual Violence, FIRE (Apr. 29, 2014), http://www.thefire.org/fire-responds-to-white-house-task-forces-first-report-on-campus-sexual-assault/.

In fact, some students who have been expelled or suspended pursuant to a university policy on sexual assault are suing those schools, claiming their rights to a fair hearing were violated. Schools currently involved in litigation with students under these circumstances include: Vassar College, the University of Michigan, Duke University, Occidental College, Columbia University, Xavier University, Swarthmore College, and Delaware State University, among others. Most of these claims have centered on the argument that the hearing processes under new, more stringent standards are unfair. Some of the accused have claimed that the discipline system is now skewed against them because of their male gender and should likewise be considered a violation of Title IX. The likely success of these lawsuits for the accused remains undetermined, but there has been at least one instance in which a judge intervened to keep a school from expelling a student using its internal procedure.

On May 29, 2014, a judge in North Carolina put the expulsion of a Duke University student on hold. Duke determined the student, Lewis McLeod, had committed a sexual assault and should be expelled before spring finals during his senior year of college. <sup>11</sup> Judge W. Osmond Smith III ruled that McLeod would likely suffer irreparable harm if expelled. His ruling blocked Duke from expelling McLeod pending a final determination on the merits.

The requirements mandated by OCR and Title IX have resulted in rapidly evolving changes to how some schools handle internal sexual harassment and assault investigations. The trend certainly appears to be in favor of changing policies and procedures in order to be compliant with the "Dear Colleague" letter and the recommendations of the Task Force. One

<sup>&</sup>lt;sup>10</sup> Teresa Watanabe, *More College Men are Fighting Back Against Sexual Misconduct Cases*, L.A. TIMES (June 7, 2014), http://www.latimes.com/local/la-me-sexual-assault-legal-20140608-story.html#page=1.

Tyler Kingkade, *Students Expelled For Sexual Assault Turning to Lawsuits To Regain Diplomas*, HUFFINGTON POST (June 4, 2014), http://www.huffingtonpost.com/2014/06/04/sexual-assault-expulsions-lawsuits\_n\_5440665.html.

Clients and Friends August 10, 2014 Page 8

such change is adopting a preponderance of the evidence standard of proof in sexual assault investigations. This change has both supporters and critics and has proven to be a hot button issue. It will be interesting to follow the success of expelled students who have pushed back against these changes by filing lawsuits, claiming that the system is now unfairly skewed against the accused.