

# *Sexual Misconduct On Campus*

## New Federal Guidance Under Title IX

Jonathan Orleans

June 18, 2014



**PULLMAN  
& COMLEY<sub>LLC</sub>**  
ATTORNEYS

*Pulling Together. Succeeding Together.*

# New Federal Guidance

---

- No new Title IX regulations – but significant guidance documents from OCR and the White House
- It's not yet clear what “best practices” are in many areas – so be prepared for a process of continuous evaluation and revision

# Background & Sources of Information

- 2001 *“Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties”*
- issued by OCR under authority of Title IX [replaced 1997 guidance document – intended to clarify compliance standards]
  - sexual harassment can deny or limit, on the basis of sex, a student’s ability to participate in or receive benefits, services or opportunities in a school’s program
  - prompted significantly by Supreme Court decisions holding schools liable in damages, under Title IX, for sexual harassment of students where an official with authority to address the harassment has actual knowledge, and that official is deliberately indifferent in responding
    - *Gebser*: teacher harasses student
    - *Davis*: student harasses student



# 2001 Revised Guidance from OCR

---

- a school's conduct need not sink to the level of "deliberate indifference" to violate Title IX. If a school knows or reasonably should know about sexual 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. OCR will enforce this requirement even where a court would not hold the school liable in damages.

# Background & Sources of Information

- *April 4, 2011 Dear Colleague Letter (“DCL”)* “explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.”
  - key concept: “Sexual violence”... refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent ....”
  - Procedural requirements: Notice of nondiscrimination, Title IX Coordinator, grievance procedures
    - the bulk of the 2011 DCL discusses how OCR evaluates grievance procedures to determine whether they provide for “prompt and equitable resolution of sexual harassment [including sexual violence] complaints”

# Background & Sources of Information

---

- April 2014 *Report of the White House Task Force to Protect Students From Sexual Assault: “Not Alone”* [[www.NotAlone.gov](http://www.NotAlone.gov)]
- *If we’re looking for guidance on what OCR considers to be “best practices,” here it is*



# Not Alone

---

- (I) Identifying the Problem – Campus Climate Surveys
  - toolkit
  - “we urge schools to show they’re serious about the problem by conducting the survey next year”
  - “we will explore legislative or administrative options to *require* schools to conduct a survey in 2016”

# Not Alone

---

- (II) Preventing Sexual Assault – and Engaging Men
  - research prevention strategies
  - change culture as well as behavior
  - bystander intervention



# Not Alone

- (III) Effectively Responding When a Student is Sexually Assaulted - pieces of a plan:
  - Provide someone a survivor can talk to in confidence – and note the importance of making it clear to students, in advance, who on campus can maintain confidence and who can't
  - Adopt a comprehensive sexual misconduct policy (checklist provided)
  - Provide trauma-informed training for school officials – DOJ and DOE will develop programs for school officials, campus and local law enforcement, and campus health centers
  - Improve school disciplinary systems – avoid “harsh and hurtful questioning” – consider using trained investigators
  - partner with the community – e.g., rape crisis centers and local law enforcement (model MOU provided)

# Not Alone

---

- (IV) Increasing Transparency and Improving Enforcement
  - NotAlone.gov
  - The government encouraging complaints against schools, posting enforcement data
  - New guidance from OCR



# Background & Sources of Information

- April 29, 2014 “*Questions and Answers on Title IX and Sexual Violence*” from OCR
  - 52 questions and answers – specifically applicable to K-12 as well as colleges (any recipient of federal financial assistance that operates educational programs or activities)
  - Clarification of 2001 Guidance and 2011 DCL
  - Handout: “Distilling the April 29, 2014 OCR Questions & Answers” by Andrea Staff, Associate Counsel, SUNY
  - Key point: *“When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred [subject to confidentiality rules]. If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.”*



# Identifying the Problem – Climate Surveys

---

- The Administration is encouraging schools to conduct climate surveys as a matter of policy. The Administration is considering ways to *require* that schools conduct such surveys. OCR will expect to find that such surveys have been conducted.
- Why conduct a campus climate survey?
  - Sexual assault is underreported.
  - Responses will be more successful if they are tailored to the needs of the particular campus community.
  - It will be useful to understand students' knowledge, attitudes, and perceptions.
  - The sense that the school is addressing the problem may encourage victims to come forward.

# Identifying the Problem – Climate Surveys

---

- The Task Force contemplates that surveys will be repeated over time to measure changes.
- Each school needs to assess its own needs and resources with respect to conducting a survey.
  - Do you have personnel qualified and available to help with survey design, data collection and analysis?
  - Paper or online survey?
  - Do you already have access to an online survey platform?
  - Sample or census?
  - consult with your campus Human Subjects Institutional Review Board to ensure that your survey complies with ethical requirements

# Identifying the Problem – Climate Surveys

---

- Consider regional collaboration
  - Some data may be more useful if it can be aggregated across campuses/institutions.
  - Review toolkit from Task Force – it includes sample questions
  - DOJ is working with Rutgers University to validate the survey as a whole
- *Expect a model survey to be made available later this year, and plan to conduct a survey next Spring*
- *Plan what you will do with the data once it is collected*



# Prevention Strategies

---

- Public Service Announcement
- CDC has conducted a systematic review of prevention strategies for reducing sexual violence, and has released an advance summary of its findings
- Bystander intervention (factsheet)
- CDC panel of experts to be convened this Fall
- DOJ Office on Violence Against Women is developing a multi-year initiative to test and evaluate prevention programs – next group of campus grantees to be selected by October 2014
- You need to tailor your own strategies to your particular institution and campus – but recognize that what is called for is significant cultural change

# Responding Effectively to a Report of Sexual Misconduct

- No response is not an option
- Theme: *Give survivors more control.* Provide options for confidential reporting, victim advocates, “remedies-based” resolutions
- Develop a Campus Sexual Misconduct Policy (see checklist at [NotAlone.gov](http://NotAlone.gov))
- Each institution will have to “tailor the checklist and make the policy its own” in light of its size, mission, student body, location, administrative structure and experience.
- The Task Force will be releasing model language on several particularly challenging issues, including definitions of various forms of sexual misconduct, the role of the Title IX Coordinator, and the proper immediate, interim and long-term measures a school should take on behalf of survivors, whether or not they seek a full investigation. [*Don’t wait to develop a policy, but be prepared to revise it.*]



# Responding Effectively to a Report of Sexual Misconduct

- Engage in a comprehensive policy drafting process driven by campus leadership at the highest level, with participation by key stakeholders, including students, faculty, administrators, and service providers
- The policy should be clear, logical, user-friendly, easily accessible and widely disseminated
- The policy should be reviewed, evaluated, and updated regularly
- Key policy points [culled from Task Force checklist]:
  - Definitions: sexual harassment, hostile environment, sexual assault, domestic violence, dating violence, sexual exploitation, stalking, retaliation, intimidation, *consent*, *incapacitation*
  - Options for both immediate and ongoing assistance following an incident of sexual misconduct



# Responding Effectively to a Report of Sexual Misconduct

- Key policy points, cont.
  - Clearly explain school's confidentiality policy and identify persons to whom a student can report in confidence
  - Identify and describe reporting policies and protocols (including but not limited to Clery Act obligations)
  - Explain options for third-party and anonymous reporting
  - Include a strong no-retaliation statement
  - Describe potential accommodations and interim measures
  - Describe/explain investigation procedures and protocols
    - note that as used by OCR, the term “investigation” includes fact-finding, adjudication, and remedial stage
    - investigations must be “adequate, reliable, impartial, and prompt”

# Responding Effectively to a Report of Sexual Misconduct

- Key policy points, cont.
  - Address preservation of evidence
  - Provide both respondent and complainant equitable rights during the investigative process
  - Explain grievance/adjudication procedures
    - preponderance of the evidence standard
    - restrictions on “admissible” evidence – exclude complainant’s prior sexual conduct with anyone other than the alleged perpetrator
    - evidence of prior consensual relationship between the parties does not by itself imply consent or preclude finding of misconduct
    - restrictions on cross-examination
    - appeal procedures and standards if permitted

# Responding Effectively to a Report of Sexual Misconduct

---

- Key policy points, cont.
  - Describe school's approach to prevention and education
  - Describe training for faculty, staff, and all involved in response, investigation, adjudicating (note that Clery Act also requires training; DOJ will provide online assistance)



# Best Practices

- Campus Climate Survey
- Provide and identify trained, confidential victim advocates who can provide emergency and ongoing support.
- Make it clear who can maintain confidentiality and who can't
- Clearly identify “responsible employees”; inform them of their reporting obligations; consider whether RAs are responsible employees; in any case, train your RAs
- If your policy includes examples, include examples of same-sex violent conduct, and do not assume that the aggressor is always male
- Clearly define consent and incapacity; distinguish between impairment and incapacity
- The federal guidance seems to favor the use of trained investigators for at least the initial fact-finding stage of a Title IX sexual misconduct investigation

# Best Practices

- Parties must be treated equally in investigatory/adjudicatory proceedings
- Merely punishing the offender likely will not satisfy the school's obligations to eliminate the hostile environment and prevent recurrence; remedies must appropriately address the community impacted by the misconduct
- Consider who should NOT be Title IX Coordinator: anyone whose other responsibilities might create a conflict of interest, e.g., General Counsel, Athletic Director, Dean of Students, anyone who serves on judicial/hearing panel or to whom an appeal might be made
- Publicize your Sexual Misconduct Policy and Procedures in multiple ways



# Recent cases

---

- *Bleiler v. College of Holy Cross* (D. MA August 2013)

Court grants summary judgment to College on broad attack by expelled male student on school's Title IX policies and procedures. Plaintiff failed to provide sufficient factual support for his claims that the school's actions were motivated by sexual bias or stereotyping, that its policies were applied in a gender-biased manner, that its definitions of sexual misconduct were biased against men, that the training materials it used for members of the Hearing Panel were biased, or that the process was otherwise unfair, inequitable, arbitrary, or capricious.



# Recent cases

- *Routh v. University of Rochester* (W.D. NY November 2013)

The plaintiff, a male student, had a two-year sexual relationship with a female student that included sadomasochistic conduct. After the relationship ended, she made a complaint that some of the activity in which they had engaged was not consensual. His defense was that she had consented to all of their activity and had brought her complaint in retaliation for his ending the relationship. After a hearing, the plaintiff was expelled, and his appeals were denied. He sued the University and the female student. The court dismissed his breach of contract claim against the University, finding that the allegations of the amended complaint did not establish that the University had violated any of its own rules or procedures. The court also dismissed his Title IX claim, finding that the University did not discriminate against the plaintiff when it refused to allow him to file a “cross-complaint” against the female student, but told him he could file a separate complaint against her which would be separately adjudicated. However, the court allowed the plaintiff’s defamation claim against the female student to proceed.



# Recent Cases

- *Keerikkattil v. Hrabowski* (D. MD September 2013)

Male student found to have stalked a female student and suspended for a year stated a claim for First Amendment retaliation (alleged that he was given enhanced sanction because he defended himself).

- *Johnson v. Western State Colorado University* (D. CO November 2013)

University received complaint from third party about relationship between male and female students, based on “50 Shades of Grey” email. This led to a disciplinary proceeding and mild discipline with no charge or finding of sexual misconduct. Subsequently the female student complained of sexual misconduct, and the University instituted a second proceeding. The male student sought to enjoin the proceeding. The court rejected his claims that the second proceeding would violate the student’s due process rights based on either “double jeopardy” or the right to counsel (where the University had stated that the student could have counsel present in an advisory capacity at the hearing).

# Recent Cases

---

- *Roe v. St. Louis University* (Eighth Circuit March 2014)

University not liable under Title IX (deliberate indifference standard) where an administrator met with an assault victim on the same day she learned of the assault, referred the victim to counseling, informed her of process for reporting a rape, made other efforts to provide support, and respected her request for confidentiality.

- *Harris v. St. Joseph's University* (E.D. PA May 2014)

Male student found responsible for sexually assaulting a female student stated claims for unfair trade practices, defamation, and intentional interference with contractual relations (against the complainant). Plaintiff was given leave to amend his complaint to state claims for “false light,” breach of contract, gender bias in violation of Title IX (based on erroneous outcome and/or selective enforcement), negligence, and intentional infliction of emotional distress.



# Tufts University Resolution Agreement

---

- A window into OCR's thinking

# Future Trends

---

- Culture will change
- Administration will change
- Legal challenges
  - Right to counsel?
  - Standard of proof?
  - Right to cross-examination?

# Contact Information

---

**PULLMAN  
& COMLEY<sup>LLC</sup>**  
ATTORNEYS

**Jonathan Orleans  
Pullman & Comley LLC  
850 Main Street  
Bridgeport, CT 06601  
Ph. 203.330.2129**

**Email: [jborleans@pullcom.com](mailto:jborleans@pullcom.com)**



PULLMAN  
& COMLEY<sub>LLC</sub>  
ATTORNEYS

---

*Pulling Together. Succeeding Together.*

BRIDGEPORT

|

HARTFORD

|

STAMFORD

|

WATERBURY

|

WHITE PLAINS

[www.pullcom.com](http://www.pullcom.com)