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### Crackdown on Campus Sexual Harassment Investigations

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# Verdict

JANUARY 6, 2015

JOANNA L. GROSSMAN

## Crackdown on Campus Sexual Harassment Investigations

[https://verdict.justia.com/wp-](https://verdict.justia.com/wp-content/uploads/2013/09/female_athlete.jpg)



[content/uploads/2013/09/female\\_athlete.jpg](https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html)) The federal Office for Civil Rights (OCR), which is charged with implementation of Title IX, has said very publicly that it is focused on the problem of sexual assault and violence in schools. And the release this past week of its finding that Harvard Law School was out of compliance with Title IX is yet another reminder that OCR means business. Although OCR's interpretation of Title IX in the sexual harassment context has been the subject of some controversy—especially at Harvard, where a large group of law school professors made **a very public objection** (<http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>) to the new policy Harvard adopted under federal government pressure—other universities and educational institutions should take heed and review their own policies, procedures, and common practices to avoid being the object of a similar investigation.

In this column, I'll explain the governing standards, the recent administrative steps taken to increase compliance with Title IX, and the reason Harvard Law School failed aspects of OCR's scrutiny.

### Title IX's Ban on Sex Discrimination

Title IX of the Education Amendments of 1972 broadly bans sex discrimination by educational institutions that receive federal funding. A broad understanding of "federal

funding” means that virtually all colleges and universities, public and private, are bound by Title IX’s mandates. The most public face of Title IX involves sports—and the requirement that schools provide boys and girls with equal opportunity to participate in competitive athletics. But Title IX also applies to other issues, including sexual harassment and sexual violence. And OCR’s recent attention to these issues has caught many schools by surprise.

Title IX provides that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” Because Title IX itself is so succinct, a good deal of our understanding of it comes from federal regulations. Regulations adopted early on in the life of the statute, for example, impose affirmative obligations on covered institutions to adopt anti-discrimination policies, and to designate a Title IX officer to oversee compliance with the statute. OCR also has the authority to issue enforcement guidelines reflecting its interpretation of the statute, as well as to audit institutions, initiate investigations, and impose penalties on non-compliant institutions.

## **Sexual Harassment and Sexual Violence Claims Under Title IX**

Title IX was first invoked in sexual harassment cases in the 1990s, prompted perhaps by the release of the earliest surveys and studies showing that harassment was much more common in schools than one might expect. Tracking developments under Title VII, which prohibits sexual harassment in the workplace, courts began to recognize that sexual harassment by students, teachers, and other personnel could be actionable as a form of sex discrimination under Title IX. But serious divides arose over the question of liability—when, and under what circumstances, should schools be held liable for the harassment that occurred in the context of an educational program or activity?

Early on, the Supreme Court had held that Title IX created a private right of action—meaning that individual students or employees could sue in court for violations of the statute—and also that schools could be on the hook not only for injunctive relief (e.g., a forced change in policy or procedure), but also for money damages. But until 1998, it had not clarified the rules for institutional liability. Then, in ***Gebser v. Lago Vista Independent School District*** (<http://supreme.justia.com/cases/federal/us/524/274/>) (1998), a case involving a teacher who fondled and initiated sexual contact with a middle-school student, the Court held that an educational entity, such as a school district, cannot be held liable for money damages unless an official of the school district with the authority to institute corrective measures has actual notice of, and is deliberately indifferent to, the harassment. The following year, the Court held, in ***Davis v. Monroe County Board of Education***

[\(http://supreme.justia.com/cases/federal/us/526/629/\)](http://supreme.justia.com/cases/federal/us/526/629/) (1999), that the same standard would determine institutional liability for peer harassment.

While the rulings in *Gebser* and *Davis* were in some sense victories for the victims of harassment, the Court established a standard for liability that is in fact very hard to meet. More than a decade of litigation after these rulings has made that clear. However, the standard set forth in those cases has no bearing on the agency's own enforcement of Title IX—they simply determine the circumstances under which a private plaintiff can collect money damages because of a school's failure to respond appropriately to harassment. That is a distinction that was, frankly, lost on most educational institutions before OCR began to step up enforcement and clarify its position on institutional obligations.

### **The OCR's Administrative Interpretation of Title IX**

After *Gebser* and *Davis* were handed down, OCR issued a revised policy guidance setting forth its own standards for the administrative enforcement of Title IX. The *Gebser/Davis* standards only apply to actions for money damages in court. If a complainant seeks only injunctive relief or administrative enforcement, or if OCR initiates an investigation on its own, the standard for compliance is not as high.

#### **In the 2001 guidance**

[\(<http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>\)](http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html), OCR laid out the administrative standards for compliance. For example, OCR imposes the following standard on schools: If a school knows or should know about peer harassment, then it has to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects. As noted above, schools also must publish a notice of non-discrimination, adopt and publish grievance procedures, and ensure that their employees are trained to report harassment and to respond to it.

In April 2011, OCR issued a **“Dear Colleague” letter** [\(<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>\)](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html) (DCL) to clarify the application of Title IX to incidents of sexual violence in schools and universities. The letter served to remind schools of their obligations to promptly and effectively respond to sexual violence if the school knows or should know that it has occurred. While the same standards apply to sexual violence as apply to all forms of sexual harassment, the DCL provides illustrations and warnings that specifically apply to sexual violence. It also warns recipients to avoid some common missteps in handling complaints of sexual violence.

The DCL defines sexual violence as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or

alcohol. An individual may also be unable to give consent due to an intellectual or other disability.” The physical acts at issue can include rape, sexual assault, sexual battery, and sexual coercion.

As educational institutions establish procedures and handle individual complaints, they are cautioned by the DCL to keep in mind that: (i) peer harassment/violence may be covered by Title IX even if it occurs off grounds initially, if it has continuing effects in the school setting; (ii) they must respond even if the harassed student does not file a complaint; (iii) they should obtain consent from the complainant before beginning an investigation, and should take all reasonable steps to protect confidentiality if requested; (iv) they should notify the complainant of his or her right to file a criminal complaint—and should not dissuade him or her from doing so while awaiting the outcome of the internal investigation; (v) they should not wait for the conclusion of a criminal investigation before commencing their own investigation—they must take immediate steps to protect the student in the educational setting, regardless of any parallel criminal process; (vi) they should be using a preponderance-of-the-evidence standard when it comes to the burden of proof—which is the standard used by OCR when evaluating compliance with Title IX—and not the higher clear and convincing evidence standard; (vii) they should develop specific training materials on sexual violence; (viii) these rules apply to all students, including athletes and coaches.

These are all issues that prior cases have raised; OCR is suggesting corrective measures for bad tendencies that some educational institutions seem to have developed when confronted with harassment.

Then, in April 2014, OCR issued another document, entitled ***Questions and Answers on Title IX and Sexual Violence*** (<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>), designed to provide further guidance to institutions on administrative standards because many had submitted requests for help after the 2011 DCL.

### **OCR’s Investigation into Harvard Law School’s Sexual Assault Cases**

OCR began an investigation into Harvard Law School’s (HLS) sexual harassment policies and procedures based on a complaint from a student. The complainant alleged that HLS failed to comply with Title IX by not providing for the prompt and equitable resolution of sexual harassment complaints. Specifically, the complainant cited three flaws: (1) requiring victims to choose between pursuing criminal charges and an internal complaint; (2) allowing for “rehearings” in the Law School causing further delay to the process; and (3) applying a “clear and convincing” evidentiary standard to the resolution of complaints.

After an investigation, OCR did find that HLS had failed to comply with Title IX, but not exactly in the way alleged by the complainant. Its findings are explained **in a “Resolution Letter (<http://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf>)**,” the result of a cooperative process in which OCR agrees to close the investigation in return for the institution’s agreement to certain remedial steps.

At the time the complaint was brought, HLS had one policy in place; during the course of the investigation, Harvard University adopted a global policy to govern all individual schools within the university, and the Law School adopted a policy consistent with it. The Resolution Letter criticizes both the original and revised policies.

OCR found the following deficiencies in the original policies and procedures:

- Not all decisionmakers involved in sexual harassment investigations and hearings were adequately trained in Title IX requirements;
- The policy directed decisionmakers to apply a “clear and convincing” evidentiary standard instead of the “preponderance of the evidence” standard required by OCR;
- The grievance procedures did not contain a specific timetable for the resolution of formal complaints;
- The policy provided post-hearing rights for a student sanctioned for harassment with dismissal or expulsion, but provided no comparable appeal rights for the complainant;
- The policy did not require written notification of the outcome of an investigation to the complainant, cover harassment by third parties connected to the institution, or provide assurances that the school will take steps to stop harassment and remediate its effects;
- The policy did not expressly prohibit the use of mediation for complaints of sexual assault or violence or preclude the possibility that the complainant and accused in such a case would be required to work out issues directly.

As to the actual investigation undertaken in the complainant’s case, OCR found most of the deficiencies above had some effect on the processing of the claim. The wrong standard was applied to decide whether the policy had been violated; the process involved lengthy delays; and the accused student was given post-hearing process with the representation of counsel, while the complainant was excluded from the process. OCR noted that HLS did provide adequate interim measures to protect the complainant (even though the policy on its face did not guarantee such measures).

Because HLS adopted a revised sexual harassment policy while the investigation was pending, OCR reviewed that one as well. It did note several deficiencies in the new policy, but most of them were minor. For example, the policy did not—but needs to—specifically

state that complainants are permitted to proceed with criminal charges simultaneously with the internal grievance procedures. Likewise, the policy needs to clarify that individual schools cannot overturn findings at the university level and that mediation will not be used for sexual assault or violence cases.

The “resolution” of this investigation requires HLS to submit new policies and procedures remedying all the noted deficiencies. HLS has also agreed to appoint its own Title IX coordinator, who will provide information to students and employees and oversee the institutional response to complaints. It also agreed to provide information to students and training for those involved in processing complaints. Finally, HLS agreed to conduct annual assessments of the “campus climate,” including surveys or other mechanisms for collecting feedback directly from students about sexual harassment on campus, and to respond to any systemic problems identified through that process.

## Conclusion

OCR’s approach to this complaint reflects its commitment to strict enforcement of its interpretation of Title IX, previewed by its Dear Colleague letter in 2011 and its follow-up Q&A in 2014. Although many on the Harvard Law School faculty feel its harassment policy goes too far—OCR believes it does not go far enough.



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