

TOPIC:

OCR'S "DEAR COLLEAGUE" LETTER ON TITLE IX AND SEXUAL VIOLENCE – FIRST STEPS FOR COMPLIANCE

INTRODUCTION:

The higher education community is still grappling with the "Dear Colleague" Letter ("DCL") issued by the U.S. Department of Education, Office for Civil Rights ("OCR"), on April 4, 2011. [\[1\]](#) The DCL represents OCR's first substantive guidance regarding sexual harassment under Title IX of the Higher Education Act of 1972 ("Title IX") since 2001, when OCR issued its "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" (the "2001 Guidance"). [\[2\]](#)

Speaking the same day as the DCL's release, Vice President Biden announced, "Students across the country deserve the safest possible environment in which to learn. That's why we're taking new steps to help our nation's schools, universities and colleges end the cycle of sexual violence on campus." [\[3\]](#) Although Secretary of Education Arne Duncan has denied that the DCL is a "warning" to colleges and universities, the DCL at a minimum provides a clear window into OCR's current compliance focus.

No one doubts the propriety of taking a tough stance against sexual violence on campus. However, in doing so through a letter, without allowing a period for comment or revision (as it did with the 2001 Guidance), OCR has left a host of questions unanswered. [\[4\]](#)

While compliance with this new guidance may seem like a daunting task, this NACUANOTE aims to assist college and university administrators and counsel by identifying the first, most important steps a college or university can take towards compliance. This Note will address the issues of identifying a Title IX Coordinator and his or her duties, and updating grievance procedures to comply with the DCL. A forthcoming NACUANOTE will address a third important consideration – the training obligations set forth in the DCL – and provide practical tips for when and how to train the campus community once the Title IX Coordinator has been established and grievance procedures updated.

DISCUSSION:

A. First Things First: Identify a Title IX Coordinator

1. What Is It?

The Department of Education's Title IX regulations have always required that institutions designate someone on campus to coordinate Title IX compliance. [\[5\]](#) More often than not, this role was

assigned by default to someone in the athletics department, due to the perception that Title IX was primarily an athletics issue. The DCL formalizes this official's role, and confirms that it is one of importance to the entire campus community, not just the athletics department. It also gives the position a title: the "Title IX Coordinator." [6]

OCR expects that the Title IX Coordinator will be the central repository of Title IX knowledge on your campus. As such, the Coordinator should be well versed in the procedures, policies, and training mechanisms in place for addressing sexual harassment and sexual violence on your campus.

2. Who Should Be the Title IX Coordinator?

Despite highlighting the "Title IX Coordinator" title, the DCL does not provide any express guidance as to who should serve in that role. Instead, the DCL states only who, in OCR's judgment, should not be a Title IX Coordinator – namely, anyone who has "other job responsibilities that may create a conflict of interest." [7] By way of example, the DCL states that it may be a "conflict" for the Title IX Coordinator to also be the institution's general counsel, or a disciplinary hearing board member. [8] Popular choices for Title IX Coordinators include a senior official in human resources or an office of diversity, equity or equal opportunity, since these people are likely to be knowledgeable about investigatory procedures and discrimination and training issues. [9]

As soon as the institution selects a Title IX coordinator, it must notify the community as to who will hold that role, and OCR recommends that the institution publish that individual's name, title, office address, email address and telephone number in prominent locations, including the institution's website and student handbooks.

3. What Must a Title IX Coordinator Do?

The DCL explains that in order to fulfill the role effectively, the Title IX Coordinator should:

- Receive Training: The Title IX Coordinator should be trained as to what constitutes sexual harassment, including sexual violence, in order to serve as a resource to those on campus who may deal directly with a victim of such conduct. A 2010 resolution letter with Notre Dame College [10] indicates that OCR also expects Title IX Coordinator training to address:
 - The investigation of complaints filed by students, staff and faculty;
 - The responsibility of the Title IX coordinator to regularly develop and participate in activities designed to raise awareness in the campus community about sex discrimination and violence;
 - The existence and enforcement responsibilities of OCR; and
 - The institution's Title IX policies and procedures.
- Understand Your Institution's Sexual Harassment / Sexual Violence Grievance Procedures: This is consistent with the "central repository" idea. Your Title IX Coordinator should be someone that anyone on campus can turn to with questions regarding the institution's grievance procedures for sexual harassment, including sexual violence.
- Coordinate with Campus Law Enforcement: The Title IX Coordinator needs to make sure the right hand (law enforcement or public safety) and left hand (campus judicial officers) know what each other are doing. The Coordinator also needs a direct line of communication with these departments in order to monitor, evaluate and address systemic issues concerning

sexual harassment on campus.

- Identify and Address Systemic Issues: As OCR conceives of the role, a Title IX Coordinator is an institution's Title IX pilot, evaluating the landscape from a 30,000 foot level and spotting any troubling cultural or systemic sexual harassment issues or patterns.

Although OCR has not provided a job description for a Title IX Coordinator, colleges and universities seem to be developing their own descriptions, largely based on these responsibilities. [\[11\]](#)

4. That's a Lot of Work. Can There Be More Than One Coordinator?

Depending on the size and programmatic scope of your institution, having one person address all Title IX issues campus-wide may seem like an impossible task. OCR has clarified, both in the DCL and in resolution agreements with specific institutions, that institutions can name "deputy" Title IX coordinators. [\[12\]](#) So, for example, you could assign coordinators by categories of complainants – students, faculty members, staff, and third parties. Or, you could assign deputies by area – athletics, student life, human resources, graduate programs, etc. However you choose to slice up the coordinator responsibilities, one thing is clear from the DCL: each institution should have a single "Title IX Coordinator" with ultimate oversight responsibility. According to the DCL, any and all deputy coordinators should report up to that one Title IX Coordinator, and their titles should clearly reflect their deputy or supporting role. [\[13\]](#)

B. Next, Review Grievance Procedures and Revise as Necessary

OCR devotes a significant part of the DCL to the grievance procedure mandated by Title IX. Preliminarily, OCR notes that institutions are not required to have separate sexual harassment and sexual violence grievance procedures apart from their existing disciplinary procedures, but they may. Although "grievance procedure" has different meanings depending on the context, in this instance OCR is referring to the internal formal system that your institution has in place to report, process, and adjudicate complaints of sexual harassment and sexual violence.

The DCL states that in order to be Title IX-compliant, it is "critical" [\[14\]](#) that a school's grievance procedure:

1. Provide notice of the grievance procedures, including where and how to file a complaint;
2. Apply to complaints alleging harassment by employees, other students and third parties;
3. Provide for adequate, reliable, and impartial investigation of complaints, and use a "preponderance of the evidence" standard;
4. Include designated and reasonably prompt time frames for the major stages of the complaint process;
5. Require notice to parties of the outcome; and
6. Include 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.

Addressing each of these factors in turn:

1. Provide Notice of Procedures

This requirement is perhaps the simplest on its face, but may actually prove more complicated in practice as institutions revise policies in response to the DCL. For example, if an institution creates a specific sexual violence policy in response to the DCL, has it properly referenced that policy in the institution's more general anti-harassment policy? Or, if the institution allows direct cross-examination at most disciplinary hearings, has it ensured that such cross-examination is expressly excluded for cases involving sexual violence? Institutions should think through these issues carefully when providing notice of new procedures.

The DCL also recommends that procedures be easily located, widely distributed, and easily understood. [15] They should provide a clear roadmap that will enable all members of the college community – from complainants and respondents to the Title IX Coordinator and the Dean of Students – to successfully navigate the grievance process.

2. Ensure that the Grievance Procedure Applies to Complaints against Students, Employees, and Third Parties

Institutions must have a mechanism to deal with grievances lodged against other students, employees and, indeed, third parties on campus. [16] Although the process invoked may be different if the respondent is a student as opposed to a telecommunications vendor, [17] the point is that your institution's processes must provide the complainant with the means for obtaining a prompt and equitable resolution of the complaint.

3. Ensure the Grievance Process is Adequate, Reliable, Impartial, and Uses a Preponderance of the Evidence Standard

OCR envisions the factual investigation and, if applicable, disciplinary hearing, as a single, fluid process, which must be adequate, reliable and impartial. [18] OCR highlights that:

- An institution should not defer its investigation and related processes until the conclusion of a related criminal matter and it must, if necessary, take immediate action to protect the complainant. A school may, however, briefly delay its fact-finding while the police gather evidence, but must promptly resume and complete its fact-finding once the gathering of evidence is finished. [19]
- Institutions must use a “preponderance of the evidence” standard in determining whether a violation of their sexual harassment or sexual violence policies has occurred. A “preponderance of the evidence” simply means it is more likely than not that a violation occurred. [20] This burden-of-proof standard does not appear in Title IX or its implementing regulations, and has been somewhat controversial. Some have questioned whether it is wise or fair to require that institutions use a mere “preponderance of the evidence” in cases of sexual harassment, while permitting institutions to use a higher standard of proof for cases of racial harassment or other conduct violations. Regardless, the DCL is unambiguous on this matter, and OCR will likely find any procedure that requires “clear and convincing evidence” or “reasonably certain” proof of sexual violence or harassment to be inconsistent with Title IX. [21]
- Institutions must provide the parties with a parity of protections. The DCL approaches this issue from the perspective of the complainant, requiring that she be provided all procedural protections provided to responding students. So, for example, if the respondent gets a pre-hearing meeting with the Dean of Students, the complainant must get one too. If the respondent gets to present character witnesses, the complainant must be allowed to as well. If the respondent gets to appeal the outcome of your grievance process, the complainant

gets to appeal as well. (This latter point raises a slew of additional questions. Does the complainant get to appeal the sanctions if the respondent is permitted to? What if the complainant wants to appeal the result of the respondent's appeal? When is an appeal *really* final?)

But what about confidentiality in investigations?

It is not unusual that the complainant in a case of sexual assault wants to tell someone at the institution what happened, but does not otherwise want to disclose her identity or trigger a formal investigation of the complaint. The DCL makes clear that, in such situations, a college cannot just turn a blind eye to what occurred. However, the DCL is not at all clear how a college is supposed to respond to these type of requests, but instead confusingly states:

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. 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. [\[22\]](#)

So to recap: if the complainant requests that the complaint not be pursued, the school should investigate it consistent with the request that it not be investigated? How can that be?

It appears that OCR is conflating “confidentiality” with dealing with a “reluctant complainant” or “unwilling participant” in the investigation process. In practice, institutions may find that they have to approach such situations along the following lines:

If a complainant reports an assault and wants the respondent punished, but doesn't want you to identify her, you have to ensure she understands that you cannot guarantee confidentiality (absent a privilege protection). You have a duty not only to the complainant, but to the entire campus community, so you may have to pursue discipline against the respondent.

You may be able to begin your investigation without disclosing the complainant's identity, but it's likely you will have to disclose it, especially if a disciplinary proceeding is commenced, so that the respondent can adequately respond and raise a defense to the charges against him.

If the complainant is unwilling to participate in the disciplinary proceeding, you should inform her that the institution's ability to present its case against the respondent may be compromised and that your ability to discipline the respondent may be severely limited.

Although OCR has not offered a formal clarification on this issue, when a version of the explanation above was posed to panelist Richard Katskee, Deputy Director of OCR's Program Legal Office, at the NACUA Annual Conference on June 27, 2011, he seemed to agree. He added, however, that in any event – whether the complainant is engaged or not – the institution must also consider whether steps are necessary to address more systemic issues and the overall campus environment. [\[23\]](#)

In sum, if you make the informed decision that direct action against the respondent is not possible because of the complainant's desire for confidentiality or her unwillingness to participate in a disciplinary proceeding, you may still have to respond by taking broader campus-wide action, such as providing on-line harassment training or meeting with an entire subset of the campus community (e.g. presidents of all sororities and fraternities) to discuss issues concerning harassment prevention and remediation.

5. Designated and Reasonably Prompt Timeframes

In the DCL, OCR states it “will evaluate whether a school’s grievance procedures specify the time frames for all major stages . . . as well as the process for extending timelines.” [24] OCR appears to make a distinction between “designated” (a specific number of days from the event) and “reasonably prompt” timeframes. The latter seems dictated by Title IX which, again, requires prompt resolution of complaints. The former, however, appears nowhere in the law or implementing regulations.

If an institution is inclined to include specific time frames for conducting the full investigation, providing notice of the outcome, and filing an appeal – as DCL recommends but the face of the law does not require – it should also build flexibility into its processes to extend the timeframes when necessary in the institution’s reasonable discretion.

In considering what might constitute “designated and reasonably prompt timeframes,” institutions should not lose sight of the fact that OCR has also taken the position that they must take “immediate action” to eliminate the harassment. [25] In other words, certain interim measures – for example, changing housing arrangements or issuing no contact orders – may be necessary.

6. Provide Notice of Outcome

OCR takes the position that both the complainant and the respondent must be notified, in writing, of the outcome of a complaint and any appeal. [26] “Outcome” for these purposes means whether harassment occurred. An institution can disclose information about the sanctions imposed when they directly relate to the harassed student. So, “respondent may not go within 500 feet of complainant,” is a sanction that could – and presumably should – be disclosed to the complainant. “Respondent has to do 20 hours of community service” is not.

7. Prevention and Remediation

Finally, OCR has stated that an institution’s Title IX grievance procedures must address remediation for the individual complainant and for the broader campus community, and the manner in which remedial efforts can serve to prevent future instances of harassment, including violence. Institutions should ensure that as part of the grievance procedure, they inform the complainant of the available counseling, medical and other support services. It is also necessary to consider the impact the harassment has had on the complainant’s education, offering academic support services as appropriate. It may also be necessary to ensure that the complainant and respondent do not attend the same class or live in the same dormitory – a proposition that becomes much more difficult on small campuses. Institutions sometimes have to think creatively to meet the complainant’s needs while not unnecessarily burdening the respondent, particularly if the remedial measure is being implemented as an interim step pending a disciplinary hearing.

With regard to the campus community, the Title IX Coordinator may determine that the underlying situation reflects a broader hostile environment on campus. If that is the case, the institution should consider additional training and other means of discussing the issue on campus.

CONCLUSION:

Although OCR has articulated new requirements under the auspices of existing Title IX law, institutions should not make the mistake of over-reacting. They must maintain enough flexibility to

address the challenging issues of sexual violence in a way that works for their campus, while providing the general processes contemplated by the DCL.

FOOTNOTES:

FN1.

[April 4 "Dear Colleague" Letter on Sexual Violence](#), U.S. Department of Education (April 4, 2011).

FN2.

[Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties](#), U.S. Department of Education (2001).

FN3.

[Addressing Sexual Violence in Our Schools](#) (last accessed November 9, 2011).

FN4.

OCR uses "recommends," "may," "should" and "must" as qualifiers throughout the DCL. It is probably safe to assume that OCR considers those points which it has characterized as "musts" necessary to achieve compliance with Title IX. Given that OCR issued the DCL to provide institutions with information "to assist them in meeting their obligations" (DCL, page 4), however, it seems likely that OCR would take the position that those steps that it has qualified with a "should" are likewise necessary. At the very least, institutions will need to have good reason to depart from any of the recommendations set forth in the DCL and compelling reason not to follow those guidelines that OCR identifies as "musts."

FN5.

See 34 C.F.R. § 106.8.

FN6.

DCL, page 7.

FN7.

Id.

FN8.

Id.

FN9.

See, e.g., <http://www.udallas.edu/aboutus/offices/cso/titleixcoordinator> and <http://www.utulsa.edu/personnel/pdf/title-ix-coordinator-aug11.pdf> (last accessed November 8, 2011).

FN10.

[OCR Resolution Letter and Agreement with Notre Dame College](#) (September 24, 2010).

FN11.

See, e.g., the University of Tulsa at <http://www.utulsa.edu/personnel/pdf/title-ix-coordinator-aug11.pdf>, Ohio University at <http://www.ohio.edu/equity/titleIX/responsibilities.cfm>, and Eastern Michigan University at <http://www.emich.edu/title-nine/> (last accessed November 9, 2011).

FN12.

See DCL, p. 7.; [OCR Resolution Agreement with Eastern Michigan University](#) (November 15, 2010).

FN13.

Id.

FN14.

DCL, p. 9.

FN15.

DCL, p. 9.

FN16.

DCL, p. 8.

FN17.

For example, a complaint against a student may well trigger the institution's disciplinary procedures as set forth in the student code. A complaint against a vendor, however, may simply result in a call from the institution's CFO to the vendor, reporting that "your employee has been accused of harassing one of our students. You need to send a different representative next time, or we will consider you to be in breach of the standard terms and conditions set forth in our contract."

FN18.

DCL, pp. 9-12.

FN19.

DCL, p. 10.

FN20.

Id.

FN21.

Institutions may find that insertion of this standard into sexual harassment and assault policies necessitates revision of other discrimination, harassment, or retaliation policies to harmonize with these provisions. In addition, institutions may need to take a hard look at discipline or dismissal policies, such as those set forth in Faculty Handbooks. Some institutions have incorporated the AAUP's Recommended Institutional Regulations regarding dismissal-for-cause; these regulations require that an institution prove adequate cause by "clear and convincing" evidence, which is a higher burden than the "preponderance of the evidence" standard. See AAUP, "Recommended Institutional Regulations on Academic Freedom and Tenure," *Policy Documents & Reports* (10th ed. 2006) at 27 (dismissal-for-cause recommendation). It may be problematic for institutions to maintain dismissal policies that would make it difficult to discipline or dismiss faculty members for conduct that OCR, at least, could view as a violation of Title IX.

FN22.

DCL, p. 5.

FN23.

Mr. Katskee said:

There's not much I can add to that. I think that's just right. If you are in one of those situations where you come to the conclusion that respecting the request for confidentiality is going to prevent you from carrying out the procedure with that particular complainant and accused, and if you determine that's the right thing for the sorts of reasons that [were] just said, you may still have obligations to think about more systemic things the educational

components and those sorts of things to change the campus environment and those don't fall away even if you can't deal with the concrete complaint.

FN24.

DCL, p. 12.

FN25.

DCL, p. 4.

FN26.

DCL, p. 13.

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ADDITIONAL RESOURCES:

- [April 4, 2011 "Dear Colleague" Letter on Sexual Violence \(April 4, 2011\)](#)
- [NACUA April 4, 2011 "Dear Colleague" Letter on Sexual Violence Resource Page](#)

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