

Lehigh University Athletics Legal Update: Title IX

March 5, 2013

**CIVIL LEGAL SYSTEM:
Private University**

(Constitution does not apply to
University actions)

**CRIMINAL LEGAL SYSTEM:
The Government**

(Constitution applies)

Federal Laws:

Federal Funding:
Title IX, Clery Act,
FERPA

Interstate
Commerce:
Title VII



**Student Code of
Conduct**

**Non-discrimination
law**

**Fundamental
fairness**

**Crime disclosure
laws**

**Criminal law:
rape, sexual
assault**

**Constitutional due
process**

Common law:
Negligence, duty of care

Standard of proof:
Preponderance of evidence

Standard of proof:
Beyond a reasonable doubt

The Parties

Victim/Survivor/Complainant

- Parent(s)
- Attorney

Accused/Charged Student

- Parent(s)
- Attorney

University:
Administration, Hearing Bodies

District Attorney

Witnesses

University Police

OCR

University
Friend/Advocate

External Groups
(e.g., Security on Campus)

Title IX of the Education Amendments

- Enacted 1972 (Congressional spending power)
- Prohibits discrimination on the basis of sex in any educational program or activity receiving any type of federal financial aid. Applies to:
 - All University student services and academic programs; and
 - Employment and recruitment consideration or selection under any educational program or activity
- The Office for Civil Rights (OCR) of the Department of Education is responsible for Title IX enforcement.

Evolution of Title IX

- Equity in gender-segregated programs
 - Athletics
- Sex discrimination
 - Programs or activities
 - Employment
- Sexual harassment – a form of discrimination

“Dear Colleague” Letter

- Issued by Office for Civil Rights in April of 2011
- Broad training mandate: colleges and universities should train any employees *likely to witness or receive reports on sexual harassment or sexual violence*
 - The campus community must know how to identify and report sex discrimination, including sexual harassment & sexual assault;
 - The person receiving the report must know what next steps to take; and
 - The investigators and fact-finders must know how to investigate and adjudicate the complaints appropriately.

How to Identify Sex Discrimination under Title IX

- **Sexual Harassment**
 - OCR: Unwelcome conduct of a sexual nature. It can include verbal, nonverbal or physical conduct of a sexual nature. It can occur in connection with any academic, educational, athletic, etc. program occurring at school, or any other location.
 - University: Policy on Harassment
- **Sexual Violence**
 - OCR: 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 or due to an intellectual or other disability.
 - University: Police and Student Code of Conduct

Scenario 1

- Roberta is a college administrator and has hired Alex, right out of graduate school, for a coveted summer position. After Alex starts working, Roberta tells him that the only way he can keep his job is by having sexual relations with her. Alex is appalled at the idea, but decides to go along because it is only for the summer and the position will greatly enhance his resume.

Sexual Harassment – University Policy on Harassment

- Quid pro quo
 - “Something for something” or “this for that”
 - Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature when:
 - Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment (or academic success), or
 - Submission to or rejection of such conduct by an individual is used as a basis for employment (or academic) decisions affecting such individual.

Scenario 2

Max has a habit of leaning in close to Rachel and brushing his hand against her thighs when they are working at a shared workstation. Rachel has brushed him away and asked him to stop several times, but Max continues to annoy her.

Sexual Harassment – University Policy on Harassment

- Hostile environment:
 - Unwelcome verbal or physical conduct
 - Creates an intimidating or offensive work or academic environment
 - Unreasonably interferes with learning, working, or living environment
 - Conduct is sufficiently serious – severe or pervasive

Situations covered as “sexual harassment”

- Employment
 - Supervisor – employee
 - Employee – employee
- Education – Program or Activity:
 - Faculty/administrator – student
 - Student – student
- Gender-based Harassment:
 - Sexual in nature –
 - Quid pro quo
 - Hostile environment
 - Non-sexual – gender stereotyping
- Sexual Violence:
 - Sexual coercion, incapable of consent
 - Sexual assault
 - Rape

Student Harassment Liability

U.S. Supreme Court: universities can be held liable for student-to-student or teacher-to-student harassment when:

- The harassment is so severe, pervasive and objectively offensive that it can be said to deprive the victim of access to educational opportunities or benefits provided by the school;
- The school has control over the context in which the harassment arose;
- The school has disciplinary control over the harasser; and
- The school had actual knowledge of the harassment and responded with deliberate indifference to the complaint

Unwelcome Behavior

Some questions to ask yourself are:

- How would I feel if I were in the position of the recipient?
- Would my spouse, parent, child, sibling or friend like to be treated this way?
- Would I like my behavior published in the Brown & White or local paper?
- Could my behavior offend or hurt other members of the work group?
- Could someone misinterpret my behavior as intentionally harmful or harassing?

If you are unsure if something might be welcome, don't do it. There is no risk in not doing something.

Scenario 3

Emily, a first year student who is a work study student in your office, asks to have a private conversation with you. Emily tells you that she was sexually assaulted by a fellow Lehigh student after a fraternity party 2 weekends ago. Emily tells you that she has not told anyone but you. She is embarrassed and doesn't want anyone to know what happened to her because she was intoxicated at the time, is under 21, and has twice been in trouble at Lehigh for underage drinking.

Emily tells you all of this, including the name of the male student who she says assaulted her, but tells you to keep it secret because she does not want anyone to know.

Sexual Violence – Defined by Dear Colleague Letter

- Sexual violence is a form of sexual harassment
 - Defined 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 or due to an intellectual or other disability.
- Sexual violence includes rape, sexual assault, sexual battery and sexual coercion.

Sexual Misconduct (Violence) – Student Code of Conduct

- Sexual contact that occurs without the explicit consent of each student involved; Consent must be clearly communicated, mutual, non-coercive, and given free of force or threat of force (e.g., rape, sexual assault). A student who is physically or mentally incapacitated by drugs, alcohol, or other circumstances is not capable of giving consent. A student must be fully conscious and awake in order to give consent.
- Conduct that exploits another student in a sexual and non-consensual way (e.g., non-consensual voyeurism, non-consensual recording (audio or visual), etc.)
- Exposure of one's body in an indecent or lewd manner
- Sexual activity in public or semi public places

Challenges: Confidentiality and “Do not pursue” Requests

If complainant doesn't want name mentioned or doesn't want to pursue ...

- Discuss confidentiality standards and concerns
- Inform the complainant that a confidentiality request may limit the University's ability to respond
- Inform the complainant that Title IX and University policy prohibits retaliation & will take steps to prevent retaliation and responsive action if it occurs

Confidentiality and “Do not pursue” Requests (cont.)

If complainant still doesn't want to go forward, University should ...

- Take all reasonable steps to investigate and respond to the complaint consistent with complainant's request as long as doing so doesn't prevent the University from responding effectively to the harassment and preventing harassment of others.
- Take other actions, such as conducting sexual harassment training for the site or department where the problem occurred or conducting student survey

Should the University pursue w/out the complainant?

- Factors to consider :
 - Seriousness of alleged harassment
 - Age of individual harassed
 - Whether there have been other complaints of harassment against the alleged harasser (pattern)
 - Alleged harasser's right to receive info about the allegations if the info is maintained by University as an "education record" under FERPA

...University should inform the complainant if it cannot ensure confidentiality.

University Action to Eliminate, Prevent and Address Possible Sexual Harassment (...includes sexual violence)

General Requirements:

- Immediate action to eliminate the harassment, prevent its recurrence, and address its effects.

Specific Requirements:

- Publish and disseminate notice of non-discrimination
- Coordinate with law enforcement (campus and local)
- Provide prompt and equitable grievance procedures
- Appoint and advertise Title IX Coordinator
- Address confidentiality concerns of complainant
- Develop effective training & education

Notice of Non-Discrimination

- Publish a notice of nondiscrimination, which must include a statement that:
 - We don't discriminate on the basis of sex in our education programs and activities
 - Nondiscrimination is a requirement of Title IX
 - Refers individuals with inquiries to our designated Title IX Coordinator or to OCR
- Distribute notice widely to all students, employees, applicants for admission and employment, and others.
 - Post prominently on website & at various locations
 - Send emails to all members of the community
 - Publish in electronic and printed publications (e.g., handbooks, codes of conduct, catalogs, etc.)