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Q: What does Title IX have to do with sexual harassment?

Both the Department of Education and the United States Supreme Court have found that sexual harassment is a form of sexual discrimination prohibited by Title IX. In January 2001, the Department published "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties." That Title IX guidance updates and revises the original 1997 guidelines to incorporate and discuss important Supreme Court cases that were decided on the subject in the interim: Gebser v. Lago Vista Independent School District (a claim involving a teacher and student); Davis v. Monroe County Board of Education (student-on-student sexual harassment); and Oncale v. Sundowner Offshore Services, Inc. (same-sex sexual harassment). The guidance is designed to help schools chart a course though what can sometimes be a very complicated area of the law.

Schools have an obligation under Title IX to have a well-publicized policy against sexual discrimination, including sexual harassment, effective grievance procedures for the prompt and equitable resolution of complaints and the designation of a Title IX officer. The Title IX officer should know enough about Title IX to ensure compliance with the law generally, including oversight of investigations into noncompliance complaints. While the Title IX officer must be knowledgeable about harassment investigations, he or she also must be the point person for other Title IX compliance concerns such as equitable athletics participation, athletics scholarships and the host of treatment areas commonly known as the laundry list (for example, equipment, facilities, travel, publicity, etc.).

So what is sexual harassment anyway? It is defined as "unwelcome conduct of a sexual nature" that may include "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." Sexual harassment also encompasses nonsexual conduct, provided the behavior is unwelcome, is based on sex or sexual stereotyping, and has the effect of interfering with a student's ability to participate in or benefit from a school program, such as participation in athletics. Traditionally, courts have recognized two types of sexual harassment: quid pro quo and hostile-environment sexual harassment. Where compliance is linked, either directly or indirectly, to a benefit or detriment (for example, increased playing time or increased bench time), the harassment is considered to be quid pro quo. Other forms of harassment generally fall into the hostile-environment area. Harassment may include behavior between students, between staff and students, between staff, and may occur between members of the opposite sex or between members of the same sex.

Once a school learns that a complaint of harassment exists, it has an obligation to investigate the incident(s) promptly. When determining whether hostile-environment harassment has occurred, a school should (and OCR will) consider the totality of the circumstances surrounding the alleged incidents including, but not limited to, the following factors:

- The degree to which the conduct affected one or more students' education.
- The type, frequency, and duration of the conduct.
- The identity of and relationship between the alleged harasser and the subject(s) of the harassment.
- The number of individuals involved.
- The age and sex of the alleged harasser and the subject(s) of the harassment.
- The size of the school, location of the incidents and the context in which they occurred.
- Other incidents at the school.
- Incidents of gender-based, but nonsexual harassment.

Where a school determines that harassing behavior occurred, it still must determine whether the behavior was welcome. For example, if a student normally tells sexually explicit stories or jokes, it would be difficult for that student to show that similar stories or jokes told by others are "unwelcome." That said, a student who does not tell the jokes or stories but merely is present can show that the behavior was "unwelcome" even if he or she did not object to the language at the time.

If a school determines that sexual harassment is in violation of Title IX (or its own school policy, which may be more restrictive than Title IX), the institution has an obligation to take immediate and effective corrective action. It must stop the harassment, take reasonable steps to prevent its recurrence, and where warranted, remedy its effects. The guidance contains good examples to help those who are responsible for investigating and resolving complaints of sexual harassment. It also contains a thoughtful discussion of the implications of other concerns that may be implicated in an harassment investigation, such as student-record confidentiality, due process and freedom of speech, that certainly are beyond the scope of this discussion.

Sexual harassment continues to be a concern on college campuses. Policies and grievance procedures are great, but they typically do not prevent harassment. Relevant and thought-provoking in-person training usually does. Sexual harassment is a subject often misunderstood by students and staff members. Accordingly, athletics departments should consider conducting annual training on the subject using actual cases from the athletics world. Staff and students who are trained in a way that permits men and women to ask questions without being judged, to voice opinions, to work through difficult hypothetical situations, to discuss policies and the reasons behind them, and to work through potential penalties for violations are better equipped to make informed decisions in this area.

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