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Title IX, Sexual Harassment, and Academic Freedom: What No One Seems to Understand

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Abstract

Universities and colleges all over the United States are currently revising and implementing policies concerning sexual harassment and sexual misconduct, under the generally expressed concern to comply with Title IX requirements. But there is a very basic problem of equivocation. Both “sexual harassment” and “sexual misconduct” are used in very different ways in different contexts, often by the same entity. The result is a mess in which members of campus communities cannot be sure of their obligations or protections, and which presents a serious threat to academic freedom.

On May 9, 2013, The Department of Justice (DOJ) and the Department of Education Office of Civil Rights (OCR) issued a document (Findings Letter) concerning a Title IX investigation at the University of Montana.¹ On June 6, 2013, Professor Ann Green and Professor Donna Potts of the AAUP Committee on Women in the Academic Profession, included the following paragraph in a letter to the DOJ and the OCR:

We are encouraged by your call for colleges and universities to use the University of Montana agreement as a “blueprint” for creating equal-opportunity climates on campuses nationwide. We are deeply concerned, however, that the redefinition of sexual harassment proposed therein—“unwelcome conduct of a sexual nature [that] can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence”—eliminates the critical standard of “reasonable speech,” and, in so doing, may pose a threat to academic freedom in the classroom.²

The DOJ and the OCR jointly responded to Green and Potts in relevant part (emphasis original, footnotes omitted, clarifications in curly brackets):

We would like to allay the concerns you expressed in your letter, which appear to be based on a misunderstanding that the Findings Letter and terms of the University’s voluntary Agreement (Agreement) with the United States “may pose a threat to academic freedom in the classroom.” . . .

. . . Given the evidence of under-reporting of sexual assault and harassment, the Agreement aims both to create a safe space for students to raise concerns and report complaints of sexual harassment and assault and to give the University tools to address the concerns raised before they amount to a violation of federal civil rights law or cause additional injury to students. Thus, the Agreement calls for the University's policies to clarify that reports of "unwelcome conduct of a sexual nature" can be made to enable the University to investigate *whether* the unwelcome sexual conduct has created a hostile environment, counter under-reporting and establish an early warning system that affords the University a chance to *prevent* such conduct from creating a hostile environment.

In your letter, you express concern that the resolution of the Montana case involved a "redefinition of sexual harassment" that threatens academic freedom. . . . We can assure you that the Findings Letter and Agreement do not redefine sexual harassment or eliminate the inquiry into whether the harassment is objectively offensive. Indeed, both documents' definitions of sexual harassment are completely consistent both with the First Amendment and with longstanding Title IX guidance that has been applied by three Administrations. . . . The standards outlined in the *Guidance* and the *Dear Colleague Letter* state that sexual harassment is "unwelcome conduct of a sexual nature" but that sexual harassment does not create a hostile environment under Title IX unless "the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the [school's] program." In determining whether sexual harassment has created a hostile environment at the University or elsewhere, the United States looks to the "constellation of surrounding circumstances, expectations, and relationships" . . . including whether the sexual harassment is objectively offensive to a reasonable person. The Findings Letter and Agreement reiterate and apply these standards.

Thus, complaints of "unwelcome sexual conduct" are merely a starting point for investigation and do not alone establish a violation of Title IX. . . . Under the Agreement, when someone reports an incident of sexual harassment, that report triggers "an adequate, reliable, prompt, and impartial investigation" to determine whether the harassment created a hostile environment. . . .

. . . Title IX does not reach curriculum or in any way prohibit or abridge the use of particular textbooks or curricular materials. . . . Furthermore, as OCR's 2001 *Guidance* stated,

Title IX is intended to protect students from sex discrimination, not to regulate content of speech. . . . The offensiveness of a particular expression as perceived by students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.

This document {i.e., *Guidance*} also stated that "a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights." Consistent with these principles, neither the Findings Letter nor existing Title IX guidance inhibits academic freedom in the classroom.³

I quote the response at length because it clearly sets out the thinking behind the DOJ and OCR position.⁴ It is my contention that hardly anyone—on college campuses or anywhere else—has noticed what this position is. The result has been a disastrous mixture of campus policies that border on incoherence. And *that* threatens academic freedom.

For ease of exposition I will refer to the joint position outlined above in terms of the OCR. It is a coherent position, perfectly consistent with Title IX. It seems to be very well expressed in the letter quoted at length above. And yet it is problematic.

Do Lawyers Understand the OCR's Position?

The first problem is that academics do not understand the OCR's position. I have plenty of anecdotal evidence of this, in addition to the Green/Potts letter. But maybe the problem is that these academics lack the legal training required to understand the OCR's position. No, that's not it. There are lawyers, including lawyers who claim expertise in the area, who do not understand the OCR's position. Consider the criticism by the Foundation for Individual Rights in Education (FIRE), expressed by Will Creeley, JD, a coeditor of FIRE's *Guide to Free Speech on Campus* (2nd edition). In "How the Federal Blueprint Breaks New Ground" he writes,⁵

Unlike the 2001 *Guidance*, the blueprint requires a new policy distinction between "hostile environment" harassment and "sexual harassment" more generally. . . .

In rejecting the University of Montana definition of sexual harassment . . . OCR and DOJ charge that the university has impermissibly merged the definitions of what it characterizes as two separate offenses: "sexual harassment" and "hostile environment" harassment. . . .

In other words, the blueprint requires universities to distinguish between "hostile environment" harassment and "sexual harassment" more generally—seemingly creating a broad third category of "sexual harassment," distinct from hostile environment harassment and quid pro quo harassment. Accordingly, OCR and DOJ reject the University of Montana's definition, claiming that it *only* reaches hostile environment harassment, and not sexual harassment writ large.

But this distinction between "sexual harassment" and "hostile environment" harassment is very different from the conception of sexual harassment discussed in OCR's 2001 *Guidance*. . . .

. . . Expanding the definition of sexual harassment this broadly means that real harassment will be trivialized, everyone on campus will be effectively branded a harasser, and students and faculty will rationally choose to keep their mouths shut rather than risk offending somebody.⁶

There are two important errors here. First, Creeley is mistaken in thinking that the OCR's 2001 *Guidance* does not make the policy distinction between "hostile environment" sexual harassment and sexual harassment more generally. Second, he incorrectly characterizes the OCR's view as holding that sexual harassment "writ large" is an "offense."

The following excerpt from Creeley is instructive:

But this [blueprint] distinction between "sexual harassment" and "hostile environment" harassment is very different from the conception of sexual harassment discussed in OCR's 2001 *Guidance*. In 2001, OCR stated:

This guidance moves away from specific labels for types of sexual harassment. In each case, the issue is whether the harassment rises to a level that it denies or limits a student's ability to participate in or benefit from the school's program based on sex. However, an understanding of the different types of sexual harassment can help schools determine whether or not harassment has occurred that triggers a school's responsibilities under, or violates, Title IX or its regulations.

The type of harassment traditionally referred to as quid pro quo harassment occurs if a teacher or other employee conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct. Whether the student resists and suffers the threatened harm or submits and avoids the threatened harm, the student has been treated differently, or the

student's ability to participate in or benefit from the school's program has been denied or limited, on the basis of sex in violation of the Title IX regulations.

By contrast, sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct. **Harassment of this type is generally referred to as hostile environment harassment. This type of harassing conduct requires a further assessment of whether or not the conduct is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program based on sex.**

Teachers and other employees can engage in either type of harassment. **Students and third parties are not generally given responsibility over other students and, thus, generally can only engage in hostile environment harassment.**⁷

The bold emphases are added by Creeley. He continues,

Here, OCR makes no functional distinction between "sexual harassment" among students and "hostile environment" harassment at all. Indeed, OCR states that for students, sexual harassment *is* hostile environment harassment. So if the University of Montana's policy impermissibly conflated hostile environment harassment and sexual harassment, as OCR and DOJ charge, then OCR's 2001 *Guidance* is guilty of the same.

OCR's distinction between "hostile environment" harassment and "sexual harassment" more generally is new, and so is requiring schools to make this distinction in their policies.⁸

Creeley is simply misreading the text. He quotes, but then doesn't seem to grasp, the importance of the following:

In each case, the issue is whether the harassment rises to a level that it denies or limits a student's ability to participate in or benefit from the school's program based on sex.

In full context, the *Guidance* first refers to harassment that *does* rise to a problematic level, and it distinguishes between "quid pro quo" and "hostile environment" harassment. *Guidance* then indicates that "generally" there's no such thing as quid pro quo sexual harassment between students, and so "generally" the only problematic student-student sexual harassment is the hostile environment kind.

Creeley fails to capture the force of the OCR's use of *generally*, which presumably allows for exceptions. That alone would invalidate his claim. But Creeley also misreads the relevant paragraph by taking it to refer to all sexual harassment, rather than—more properly—taking it to refer only to sexual harassment prohibited by Title IX. (Perhaps this can be explained by Creeley's apparent view that the OCR holds all sexual harassment to constitute an offense.)

I have further anecdotal evidence of lawyers—lawyers whom one would expect to be informed on such issues—not understanding the OCR's position. (I prefer not to rehearse the evidence here.) So what is the problem? Why all the confusion? The main problem is the choice of nomenclature.⁹

Will the Real Sexual Harassment Please Stand Up?

As FIRE, the AAUP, and others have pointed out, in the history of legal decisions concerning Title IX, *sexual harassment* is used to refer to an offense that counts as sex discrimination under Title IX. The common characterization of it (in this case obtained from the Office of Equity and Inclusion at my own university, the

University of Delaware, but which can be found over and over again in both legal decisions and policies from other campuses) is as follows:

Sexual harassment is defined as unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or academic advancement,
2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions or academic decisions affecting such individual, or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile, or offensive working or academic environment.

Conditions 1 and 2 refer to quid pro quo sexual harassment, whereas condition 3 refers to hostile environment sexual harassment. Call this the *legal definition* of sexual harassment.

The OCR introduced its broader notion of sexual harassment in its 2001 *Guidance*. Call this the *OCR definition*. But the OCR made a poor pragmatic choice. First, it seems obvious in hindsight that many if not most readers would confuse the OCR definition with the legal definition, *especially* because the legal definition is the one that counts for determination of Title IX violations. Second, for the behavior to fall under the OCR definition, it does not have to be sexual harassment at all. It need only meet a purely subjective condition: that the conduct be *unwanted*. But *harassment* is a particularly unfortunate term for such behavior because it carries the implication of wrongdoing. The OCR is (reasonably enough, in my view), trying to improve the prospects of perceived wrongdoing being reported, but it should have picked a better term.

Things get worse: sexual misconduct

Even if we could clear up the confusion over *sexual harassment*, we would have to contend with an additional term that many colleges now use: *sexual misconduct*, which is rife with similar misunderstandings. For instance, the University of Delaware uses the term *sexual misconduct* in a way intended to be coextensive with the OCR definition of *sexual harassment*, and so Delaware's definition does not entail *misconduct* in the ordinary sense of the term:

Sexual misconduct is a term used to encompass unwanted or unwelcome conduct of a sexual nature that is committed without consent.¹⁰

Yale University, on the other hand, seems to use *sexual misconduct* as a narrower term implying not only wrongdoing but also *prohibited* conduct:

Sexual misconduct is antithetical to the standards and ideals of our community, and it is a violation of Yale policy and the disciplinary regulations of Yale College and the Graduate and Professional Schools. Sexual misconduct will not be tolerated.¹¹

But Yale avoids explicit confusion only by not clearly defining *sexual misconduct*, instead giving examples of problematic behavior. Meanwhile, other colleges have even more confusing uses. Here's an excerpt from the University of Iowa's "Operations Manual":

The University of Iowa prohibits sexual misconduct in any form, including sexual assault or sexual abuse, sexual harassment, and any form of nonconsensual sexual conduct. Students should be able to live, study, and work in an environment free from all forms of sexual misconduct.

Sexual misconduct is a broad term encompassing any unwelcome behavior of a sexual nature that is committed without consent or by force, intimidation, threats, coercion, or manipulation. The term includes sexual assault, sexual harassment, sexual exploitation, and sexual intimidation. Sexual misconduct can be committed by a person of any gender, and it can occur between people of the same or different gender.

Any act that falls within the definition of sexual misconduct constitutes a violation of University policy.¹²

The sentence beginning “Sexual misconduct is a broad term encompassing any unwelcome behavior of a sexual nature that is committed without consent” seems to provide a sufficient condition that is equivalent to the OCR definition of sexual harassment. But then it is absurd to suppose that sexual misconduct necessarily violates university policy.¹³

I chose the examples of Yale and Iowa more or less randomly from Google searches. I urge anyone interested in these issues to examine the documents relating to sexual harassment and sexual misconduct policy at the thousands of colleges and universities in the United States. The confusion I have described is the rule, not the exception.

The Effect on Freedom of Expression

The chief downside of all this confusion is that hardly anyone can confidently act in full understanding of his or her responsibilities, under the law or under university policy. The Green/Potts letter is mainly concerned with academic freedom for faculty, but we must consider the chilling effect on students, too, in at least two respects.

First, as seems to be FIRE’s main concern, students can never be confident that they are not manifesting sexual harassment or misconduct under the broad characterization, and so, given the confusion, they can’t be sure that their behavior will not be *taken* as offensive in the narrower, prohibited sense. Worse still, this worry comes in two distinct forms. I suspect most potential offenders simply don’t understand what the requirements are, so they may choose discretion out of a concern for safety. But understanding the OCR position is no help if a student’s college procedures are in the hands of people who lack that understanding.

Second, consider the predicament of a student wishing to report sexual misconduct in the OCR sense. The University of Delaware—which, as we saw, defines *sexual misconduct* as “unwanted or unwelcome conduct of a sexual nature that is committed without consent,” which can *inter alia* “consist of verbal utterances”—states in the same document that “all incidents of sexual misconduct must be reported.” Moreover, a recent letter, signed by both the university president and the provost, to all faculty and staff at the University of Delaware includes the following (emphasis original):

Please be aware that all faculty and staff who do not have a specific legal privilege are required by law to report immediately any information about sexual misconduct, including sexual harassment, sexual assault, domestic/dating violence and stalking. If a student or another employee approaches you and discloses that a crime has occurred, you are mandated to report that information to the University's Title IX Coordinator.

The claim that “all faculty and staff who do not have a specific legal privilege are required by law to report immediately any information about sexual misconduct” seems clearly false. The later claim that one must report *criminal* sexual misconduct might well be true, but it seems that the letter’s authors are forgetting that by their own definition, sexual misconduct need not be criminal, need not be prohibited by Title IX, and

need not be wrongdoing of any sort. (Universities may *want* employees to report all incidents of unwanted conduct of a sexual nature, but that is a different matter.) Why, then, would the University of Delaware say such a thing? I suspect confusion over terms is to blame, once again. A university copies boilerplate from some other university's policy, blissfully ignorant of whether the boilerplate actually fits the local situation.

I do not know how we can extricate ourselves from this mess. The OCR position, properly understood, is coherent, rational, and even sensible; but in an unseemly haste to obey the demands of the OCR—under threat of Title IX investigation and punishment—university administrations across the country are implementing procedures that most people, including the implementers themselves, do not understand. Those procedures can often be interpreted to mean that any behavior, including speech, that is of a sexual nature, and which is unwanted by the recipient, is a violation of Title IX and must be reported as such. To quote the Green/Potts letter, “subjects such as breast feeding, abortion, and sexuality could easily become taboo in a range of classes where such content is appropriate.” That is an intolerable situation for academic freedom.

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Notes

¹. Anurima Bhargava and Gary Jackson to Royce Engstrom and Lucy France, 9 May 2013, United States Department of Justice website, <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf>.

². Ann Green and Donna Potts to Thomas E. Perez and Russlynn Ali, 6 June 6 2013, AAUP website, http://www.aaup.org/file/AAUP_June_2013_Letter_to_DOJ_and_OCR.pdf.

³. Jocelyn Samuels and Seth Galanter to Ann Green and Donna Potts, 12 July 2013, pp. 1–3, AAUP website, http://www.aaup.org/file/DoE_Respons_%20to_6-6-13_letter.pdf. The “Guidance” cited in this letter refers to US Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (January 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. The “Dear Colleague Letter” is Russlynn Ali to Colleague, 4 April 2011, United States Department of Education website, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁴. That is, their position *on this particular issue*. I leave aside all consideration of any other aspect of DOJ or OCR policy.

⁵. *Blueprint* here refers to the Findings Letter and Agreement together.

⁶. Will Creeley, “How the Federal Blueprint Breaks New Ground,” *Foundation for Individual Rights in Education*, May 24, 2013, <http://www.thefire.org/how-the-federal-blueprint-breaks-new-ground/>.

⁷. *Ibid.*

⁸. *Ibid.*

⁹. It is not the only problem. The Findings Letter and Agreement, together with the Dear Colleague letter of April 4, 2011, invite misunderstanding as much as they invite understanding. Consider this excerpt from the Dear Colleague letter:

As noted in the 2001 *Guidance*, however, a recipient’s general policy would not be effective and would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination. (Ali to Colleague, 4 April 2011)

I can well understand someone reading this as stating that sexual harassment is prohibited sex discrimination.

¹⁰. “University of Delaware Title IX Reporting,” University of Delaware, accessed March 15, 2015, <http://www.udel.edu/oei/knowledge-awareness/IXIncidentForm.pdf>.

¹¹. “UWC Procedures,” Yale University, accessed March 15 2015, <http://provost.yale.edu/uwc/procedures>.

¹². “Operations Manual,” University of Iowa, accessed March 15, 2015, <http://www.uiowa.edu/~our/opmanual/iv/02.htm#23>.

¹³. Note that “unwelcome behavior . . . committed without consent,” if not redundant, might somewhat narrow the scope of “sexual misconduct.” But it will not restrict it to prohibited behavior.