Education Update

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"Dear Colleague . . . "

By Burton Dodd (Atlanta)

With that disarming salutation, a little over a year ago Vice President Joe Biden and Secretary of Education Arne Duncan announced new Department of Education mandates, issued under Title IX of the Education Amendments of 1972, to eliminate sexual assault on American campuses. Simply worded, but vastly complex as well as controversial in application, Title IX prohibits sex discrimination in public and private K-12 schools and universities that receive any federal financial assistance.

The Background

Speaking at the University of New Hampshire, Vice President Biden said: "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." [emphasis added]. Achieving the safest possible environment implicates a zero tolerance standard for, or for what may be perceived and alleged as, sexual violence.

Speaking more bluntly, the Vice President amplified the focus of these new steps: "Rape is rape is rape, and the sooner universities make that clear, the sooner we'll begin to make progress on campuses." Thus, the Dear Colleague requirements have as their object the eradication of sexual violence on campus, but reflect the government's apparent belief that secondary and higher education forgives or condones campus rape. Many see the government's redefinition of sexual assault from a state criminal issue to a federal sex discrimination issue as a radical administrative intrusion into local criminal law enforcement.

If you didn't notice the government's strident tone, if you haven't paid attention to the new Department of Education guidelines, if you haven't ensured that your internal policies (which you must have) are compliant, and if you haven't trained your Title IX Coordinators on their new responsibilities, your school is not in compliance and is at significant risk. The Dear Colleague guidelines are not suggestions; they are mandatory, coercive requirements that you must install and follow as a condition of taking federal money.

Insurance carriers for schools and universities are very concerned that inadequate responses to the Dear Colleague standards by their insureds will lead to increased liability for sexual assault. They are also concerned that the Dear Colleague requirements themselves will encourage increased litigation from alleged victims and also – as an unintended consequence – *from those falsely accused and convicted of sexual assault* in the new school court system. There is nothing to prevent a falsely-accused and wrongly-punished student or faculty member from seeking judicial vindication in the state court system, where the school does not control the process. This very real risk calls for extreme care in planning and carrying out the school investigatory and disciplinary process.

The reason for concern lies in the six primary requirements of the Dear Colleague letter. When a sexual assault is reported, the school must; 1) immediately and appropriately investigate the incident; 2) take prompt and effective steps to end any sexual violence that it discovers, to prevent any recurrence, and to address its effects, regardless of any contemporaneous state or local criminal investigation; 3) protect the complainant; and 4) provide a fair grievance forum and procedure for students to file complaints of sex discrimination, including sexual violence, and the process has to provide for presenting witnesses and evidence and for an appeal for both the victim and the accused.

The next requirement is especially troublesome. The school's grievance procedure must 5) apply the *civil* law "preponderance of the evidence" standard to evaluate and resolve what are in truth complaints of alleged *criminal* behavior. The "preponderance" standard means simply whether it is more likely than not that an assault occurred. In contrast to the "beyond a reasonable doubt" standard that would be applicable in any parallel criminal trial, this evidentiary hurdle is very low and is easily manipulated. Finally, the school must 6) notify both parties of the outcome of its investigation.

While a school cannot deprive a student or a faculty member of liberty for a finding of guilt in this low threshold process, it can impose any of its arsenal of punishments, including expulsion of a student and dismissal of a faculty member. Lives can be ruined and careers can be destroyed in resolving the invariable "she said, he said" dispute by mistakenly "weighing" the evidence and concluding that it is 1% more likely than not that an assault occurred. Hence, the importance of taking these obligations very seriously.

The Actions You Need To Take

Regardless of whether you agree with the new rules, don't ignore them. If your school's policy has not been reviewed and modified to conform with these requirements, your process is tainted and will result in a tainted investigation and a flawed grievance. That in turn could result in liability for your school.

Once a school official is aware of conduct violating Title IX and reacts indifferently to it, perhaps by not ensuring compliance with the Dear Colleague letter, the school is subject to monetary liability. Schools should not take solace in the fact that the Department of Education has never revoked federal funding for a Title IX violation, which historically has been seen as the ultimate sanction; the risk is in private lawsuits, involving significant claims.

What should you do? There are two immediate tasks. First, ensure that your internal policies are up-to-date and in compliance with the Dear Colleague requirements. Second, once the policies are compliant and in place, ensure that your Title IX Coordinators are appropriate for those positions and know their specific responsibilities. You will have to train the Coordinators; on-the-job training is pointless unless the Coordinators know what to do in the first instance.

Remember, in any Title IX lawsuit, the first questions are going to be "what process do you have in place to ensure proper investigation and resolution of reported sexual assault claims," and "what did you do throughout the investigation that shows your understanding of and compliance with that process?"

If you can't point to anything that is compliant with Title IX and its Dear Colleague obligations, you will not be able to answer those questions, and you likely will lose.

For more information contact the author at BDodd@laborlawyers.com or 404.231.1400.

Has Your School Had a Check Up Recently?

By Suzanne Bogdan (Fort Lauderdale)

Now that school has started, it is time to ensure that your house is in order for the school year. Each year we highlight those area in which we see trends developing or issues with which schools consistently have challenges. It is far better to address these issues preventively rather than waiting for a claim or problem to occur.

Child Abuse Reporting. In the wake of Penn State, many states closely examined their reporting statutes and enhanced penalties for failure to report, expanded the persons required to report, and changed procedures for reporting. Some states, such as Georgia, now require volunteers of schools to report concerns with abuse. Several other states have further clarified that child-on-child abuse is reportable. It is important that you know your state's requirements and that you train everyone on your staff regarding their reporting obligations.

Train Your Staff. At least every other year, the school should train all staff on three fundamental issues (a) appropriate adult/student boundaries; (b) avoiding and reporting harassment; and (c) student safety and supervision. Ideally, the best time for this training is during the staff back to school week each year. It ensures that you have everyone's attention while they are fresh and ready for the year and you can easily document that you performed this very important training if you need to rely on the information later.

Get Your Wage Hour House in Order. Wage Hour claims continue to grow for all types of employers, including schools. Although many school employees fall into the professional exemption (such as teachers whose primary duty is teaching, instructing, or imparting of knowledge), many other school employees may be non-exempt, requiring them to maintain a daily and weekly record of their hours worked, be paid minimum wage, and be paid overtime for all hours over 40 in a workweek.

You should be particularly concerned about those employees who hold more than one job or who perform extra duties for extra pay (like stipends for coaching or after care duties). Our experience with schools also has shown that many schools have a large number of employees misclassified as "exempt" due either to the employee being paid on a salary basis or because of the employee's title. These types of compliance issues are easy to address and can save the school tremendous money and frustration by avoiding ugly claims later.

Be Careful in Counting FMLA Hours. When calculating whether an employee has met the hours threshold for FMLA-eligibility (1,250 hours worked in the 12 month period before leave is to commence), remember to count hours that exempt employees (e.g. teachers and many administrators) work at home. Otherwise, if you rely upon the employee's normal working schedule (rather than the actual hours the employee has worked), you may inadvertently determine that an employee who has in fact met the hours threshold is not eligible for leave. This error could result in an FMLA interference claim.

Review and Update your Legal Documents. If you have not had your contracts (enrollment and employment) and handbooks (student and employee) reviewed and updated internally and by counsel in the last few years, put it on the list for this year. Laws, experiences, and best practices change over time. You want to ensure your documents capture these changes, are protective of the school's interests, and provide the school with maximum flexibility and discretion to make hard decisions. Don't wait until the last minute to have the documents reviewed. It is far better to get them reviewed earlier in the year so you are not rushing to complete the project.

Ensure You Properly Address Students with Disabilities. You need to ensure you understand your school's obligations regarding students who may have mental, learning, psychological, or physical disabilities. This is an area where you should use legal counsel to help guide your school through the complicated processes in both analyzing which laws apply to your institution and to determine when and whether you must provide a reasonable accommodation.

Many schools mistakenly believe that they have the right to require students to be psychologically evaluated as a condition to return to school after engaging in misconduct. This may be appropriate in some cases, but likely violates the student's rights and establishes a dangerous precedent in other cases. These situations are made especially difficult because student disability issues is an area in which parents become extremely emotional and aggressive in pursing their child's rights. The financial and public relations toll can be significant if these issues are not handled properly and sensitively.

Watch for Skeletons Coming Out of Your Closets. Many schools have experienced an increase in allegations of old sexual abuse issues since Penn State. Schools should ensure that all inquiries are handled appropriately, with advice of counsel. There may be situations in which the statute of limitations has not yet expired on old claims. In addition, the school may have some type of reporting obligation. It is far better to talk through the best approach with counsel rather than sitting silent, hoping the issue will go away.

If you need assistance in any of these areas, contact your Fisher & Phillips lawyer or the author at SBogdan@laborlawyers.com or 954.847.4705.

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We're interested in your opinion. If you have any suggestions about how we can improve the *Education Update* (or its sister publication the *Labor Letter*), let us know by contacting Suzanne Bogdan, Chair of our Education Practice Group at (954) 847-4705 or sbogdan@laborlawyers.com, or e-mail the editor at mmitchell@laborlawyers.com.