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New federal policy on sex harassment spurs concern

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A recently issued federal "blueprint" for how colleges and universities should address sexual harassment and assault has critics complaining that the policy's overly broad definition of harassment could violate the First Amendment.

General counsel and their outside attorneys — particularly in the higher-education haven of New England — have been following the issue closely ever since the Department of Education's Office for Civil Rights started aggressively looking into how schools respond to sexual misconduct and assault, an effort that includes the recent opening of an investigation close to home at Dartmouth College in Hanover, N.H.

The so-called blueprint, published by the U.S. Department of Justice and the DOE, was spurred by the conclusion of one such investigation at the University of Montana. In May, the civil rights divisions of both the DOE and DOJ co-authored a letter announcing a resolution of their inquiry into the university's "handling of allegations of sexual assault and harassment" and stated that the agreement "will serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault."

The letter defines sexual harassment simply as "unwelcome conduct of a sexual nature" and goes on to state that the University of Montana's sexual harassment policy "improperly suggests that the conduct does not constitute sexual harassment unless it is objectively offensive."

By defining sexual harassment so broadly and rejecting the notion that unwelcome conduct, including verbal conduct, of a sexual nature need be "objectively offensive" to constitute harassment, critics claim the federal government has essentially enshrined "the right not to be offended" in a document that colleges and universities will have no choice but to treat as binding interpretation of federal law by two major federal agencies.

The Foundation for Individual Rights in Education responded on July 16 with an open letter to the DOJ and DOE, saying that "[u]nder the blueprint's mandate, sexual or gender-based speech that is offensive to only the most unreasonable student constitutes 'sexual harassment' prohibited by Title IV of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 — despite being protected by the First Amendment."

ROBERTS
Boston attorney hopes government issues clarification

The foundation's letter goes on to state that the "threat to free expression and academic freedom is obvious; per the blueprint's definition, a classroom discussion of 'Lolita,' a campus reading of Allen Ginsberg's 'Howl,' a dorm-room viewing of a Sarah Silverman comedy routine, or a cafeteria debate about same-sex marriage will each constitute 'sexual harassment' if a single student is made uncomfortable."

The letter's signatories include attorney Wendy Kaminer of the Massachusetts State Advisory Committee to the U.S. Civil Rights Commission and Steven Pinker, a psychology professor at Harvard University.

The issue is being monitored closely both in Massachusetts — where there are 35 colleges, universities and community colleges with 152,000 students and 42,600 employees in Boston alone, according to the city's Redevelopment Authority — and in Rhode Island.

Providence lawyer Victoria M. Almeida, co-chair of Adler, Pollock & Sheehan's higher education practice group, said that while the new guidance on sexual harassment poses far-reaching implications on campuses, the DOJ/DOE joint letter approaches the subject with the seriousness it deserves.

"The letter appears to impose a greater responsibility, in particular on students and others, as behavior or conduct may need not be 'objectively offensive' to constitute sexual harassment under the blueprint," Almeida said. "In light of the current saturated climate of instant communications that are not always deliberate, thoughtful or circumspect, the blueprint has broad implication in today's higher education settings."

Confusion

While most commonly associated with creating gender equality in college sports, Title IX more broadly requires that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."

Since 1997, the Department of Education has periodically issued guidance in an attempt to make clear to schools that sexual harassment of students can be a form of sexual discrimination covered by Title IX if it is "sufficiently serious to deny or limit the student's ability to participate in or benefit from the program (i.e., the harassment creates a hostile environment)."

Scott A. Roberts is a partner at Hirsch, Roberts, Weinstein, a Boston firm with a number of higher education clients. Prior to the University of Montana letter in May, Roberts said, the most recent guidance on sexual harassment from the DOE came in a

2011 "dear colleague" letter that clarified, among other things, grievance procedures, the need for schools to designate a Title IX coordinator, and the requirement that schools use a "preponderance of the evidence" standard, rather than a "clear and convincing" one, to evaluate complaints.

"When it came out, schools were taking a hard look at whether their policies complied with [the Office for Civil Rights'] expectations for how we're supposed to respond to sexual incidents," Roberts said.

With the University of Montana letter, colleges and universities will have to go through that process all over again, Roberts said, adding that some of the confusion has resulted from the letter's seeming rejection of the "reasonable person" standard.

"OCR was always pretty clear that sexual harassment had to be subjectively unwelcome and objectively unreasonable as well," Roberts said. "The University of Montana agreement came out, and it was a little confusing. That's what's led to consternation at schools. It sounds like anything that is conduct of a sexual nature is harassment and should be reported before it rises to the 'hostile environment' category. … Does that mean if a man asks a woman to go out with him or have sex, and that's unwelcome, that he has just engaged in sexual harassment without this objective determination of whether that's reasonable?"

Roberts said he believes the answer is "no" and that similar warnings and fears from critics are probably overblown. He does, however, understand the confusion and said he would like to see the federal government issue a clarification.

"This was released with a fair amount of fanfare, so people were taking it pretty seriously," he said. "To say something is a blueprint and to roll it out the way they did, it seemed pretty obvious they wanted people to pay attention to this."

Body of work

Richard C. Van Nostrand, whose practice at Mirick, O'Connell, Demallie & Lougee in Worcester incudes clients in higher education, said it helps to consider the letter in the context of there being "a long history of the University of Montana ignoring instances of sexual harassment and assault."

In the face of that persistent insensitivity, Van Nostrand said the feds appropriately laid out a strenuous process for handling allegations of sexual harassment to make absolutely sure it is taken seriously.

"Now that they've developed this very elaborate approach, other colleges and universities should look at that as a blueprint," Van Nostrand said.

The DOE's Office for Civil Rights has responded to criticisms by arguing that the agreement is entirely consistent with the First Amendment and that it did not create any new or broader definition of unlawful sexual harassment. The department sticks by its definition of sexual harassment as any unwelcome conduct of a sexual nature, but stresses that sexual harassment does not violate Title IX unless it creates a "hostile environment" that denies or limits a student's ability to benefit from a school's program.

"To create a hostile environment, something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive must exist," the DOE's response to the Foundation for Individual Rights in Education states.

In rejecting the University of Montana's sexual harassment policy that required conduct to be "objectively offensive," the federal government is simply trying to make sure all complaints get investigated, Van Nostrand said.

"That's how I read it," he said. "Don't ignore a complaint because you want to meet a threshold. One of the things it underscores is, colleges and universities, if they want to stay on the good side of the [DOJ], will take complaints more seriously and should not have a threshold for when a complaint will be investigated."

In that way, schools may be able to address sexual harassment before it rises to the level of creating a hostile environment and running afoul of Title IX. Van Nostrand said the benefit of that outweighs fears of censorship that he believes are unfounded.

"I think the reality is any type of civil rights law, discrimination or what have you, can be taken to the extreme," he said. "That's really something for the process to weed out and not for the person to be prevented from complaining."

Though the DOJ clearly responded strongly in the University of Montana matter, Van Nostrand said some may be "reading too much into it, especially the 'blueprint' line."

"I think the reality is colleges and universities still have the flexibility to dispose of frivolous complaints in a sensible way," he said.

Request for comment from general counsels at several Massachusetts and Rhode Island colleges and universities went mostly unanswered. Boston University General Counsel Todd L. Klipp said only that "we are studying the University of Montana decision and reviewing our policies and procedures in light of that decision."

Roberts recommended that schools and their lawyers go back and look at their policies in light of the University of Montana letter and see how they have defined sexual harassment, but not to view the letter in isolation of other issuances of guidance over the years.

"If you reviewed this document in isolation, there's no doubt it's confusing," Roberts said. "Look at what their body of work is in the area. I also think there needs to be some level of common-sense approach to this."

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