Harassment and Discrimination

Title VII, Title IX, Clery Act and More!

Rider University

January 11 and February 2, 2012
Agenda

• Discrimination and Harassment (employee focus)

• Title IX (student perspective)

• Clery Act

• Rider University’s Anti-Harassment and Non-Discrimination Policy

• Rider University’s Conflict of Interest Policy
The Employee Perspective
EEO LAWS

• Title VII of the Civil Rights Act of 1964

• Age Discrimination in Employment Act of 1967 (“ADEA”)

• Americans with Disabilities Act (“ADA”)

Title VII

• Prohibits discrimination based on race, religion, sex or national origin

• Prohibits sexual harassment as a form of sex discrimination

• Prohibits pregnancy discrimination
ADEA

- Prohibits discrimination against individuals age 40 and over
ADA

- Prohibits employment discrimination against qualified individuals with disabilities
It’s No Joking Matter

- Adversely affects morale
- Adversely affects productivity
- Adversely affects teamwork
- Adversely affects employee retention
- Costs money
- Just plain unprofessional and wrong!
Sexual Harassment
What is Sexual Harassment?

- Unwelcome sexual advances
- Requests for favors
- Other verbal or physical conduct of a sexual nature

WHEN...
What is Harassment?

• Submission to advances is made explicitly or implicitly a condition of employment,

• Submission to or rejection of advances is basis for decisions affecting the employee, or

• Purpose or effect of conduct substantially interferes with person’s work performance, or creates intimiding, hostile or offensive work environment
Harassment Can Occur:

*Anywhere at any time*

- During working hours
- During non-working hours
- In the office
- Outside of the office
Quid Pro Quo

- Submission to the conduct is made either explicitly or implicitly a term or condition of employment, or

- Submission to or rejection of such conduct by an individual is used as a basis for employment decisions about the individual.
Hostile Work Environment

Conduct has the purpose or effect of *unreasonably*:

- Interfering with employee’s work performance
- Creating an intimidating, hostile or offensive work environment
Whose Perspective?
His?
Or Hers?
Or theirs?
Power Imbalances and Changing Circumstances

• Everyone interprets events based upon their own background, experiences, hopes and wishes.

• You cannot be sure that someone who depends on your good favor will view a pass as innocent or believe that rejection would be free of consequences.

• Current events will be interpreted in light of subsequent events.
The Reasonable Person

- Pervasiveness and severity are judged by a reasonable person standard.
- The reasonable victim’s perspective must be considered in determining whether or not a reasonable person would find the conduct offensive.
- Employers are not required to accommodate the individualized concerns of hyper-sensitive employees.
Intent vs. Impact

• *Intent* is **not relevant** in determining whether or not a behavior is sexual harassment.

• All that matters is the **impact** of the behavior on the work environment.
When is an environment “hostile” or “abusive”? 

- Look at all circumstances.
- How frequent is the conduct?
- How severe is the conduct?
- Is the conduct physically threatening or humiliating?
- Is it “a mere offensive utterance”?
- Does it unreasonably interfere with work performance?
Tips on Prevention

- Avoid references to person’s appearance
- Avoid comments about sex, race, age, disability or other protected characteristic
- Avoid off-color jokes
- Grandmother/ Daughter test
- Avoid physical contact -- “personal space”
- Maintain professional workplace
- Off-site meetings, out of town travel
- “No” means NO!
Tips on Prevention

• Respect the people around you
• Think before acting
• Imagine how other people might be feeling
• Exercise common courtesy, and
• Think twice before making a joke, pun, sarcastic comment
Be Sensitive To

- Posters with scantily clad women, sexual graffiti, and cartoons offensive to specific sex or minority
- Repeated teasing of one sex or minority
- Frequent sexual jokes, even if everyone joins in
- Office romances
- Hostility to specific sex or minority
How to Stop Harassment

• Inform person that conduct is unwelcome

• If persists or if unable to speak directly to person, notify Supervisor, HR, etc.

• The University can only address if it is told of problem
The Student Perspective

Title IX
What is Title IX?
“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Who is governed by Title IX?
Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

What activities of the school does Title IX govern?
Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Title IX

Admissions  Financial Aid
Academic Advising  Athletics
Housing  Recreational Services
Residential Life Programs
Health Services  Counseling
Registration  Discipline  Grading
Recruitment  Employment
What conduct does Title IX prohibit?
Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to DISCRIMINATION under any education program or activity receiving Federal financial assistance.”

What beyond athletics is covered by Title IX?
Sexual Harassment

Conduct that:

• is sexual in nature,

• is unwelcome, and

• denies or limits a student’s ability to participate in or benefit from a school’s educational program.
Sexual Harassment

- Propositions
- Touching
- Graffiti
- Drawings or Pictures
- Written Materials
- Gestures
- Jokes
- Rumors or Rating
- Stalking
- Websites
- Email
- Sexual Battery
- Sexual Assault
- Rape
- Sexual Coercion
What do we do with a claim of sexual harassment?
Title IX / Sexual Harassment

Must have grievance procedures that allow for prompt and equitable resolution of complaints.

Must take appropriate steps to:
- End the harassment
- Prevent any further harassment
- Prevent retaliation
- Remedy the effects of harassment
- Eliminate any hostile environment that has been created
The Harasser

- Harasser could be an employee, another student, or a third party visiting campus.

- Harassed could be male or female, including same sex as harasser.
The Complainant

- Victim
- Roommate
- Teammate
- Parent
- Employee
- Newspaper reporter
- Anonymous
The Complaint Recipient

- Dean of Students
- Campus security
- Coach
- Professor
- Others
About Conduct That Happened Where?

- Schools should “consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus.”

- Must process complaint regardless of where it occurred.
When does an institution get in trouble?
Institutional exposure to:

- OCR enforcement action
- Private lawsuits
- Other interested parties
- Court of public opinion
April 4, 2011

- The United States Department of Education, Office of Civil Rights ("OCR") releases a "Dear Colleague Letter"
A New World?

THE 2011 DCL …

• Major shakeup, or affirmation of principles from 1972?
What is a DCL?

- Significant guidance document
- Legal authority is based on law and regulations
- Must be consistent with law and regulations
Prior Guidance Documents

• Key guidance documents issued in 1997 and 2001.
• 2001 Revised Guidance document offered institutions the opportunity to comment before it was published.
• 2011 DCL did not have that same comment period.
2001 Guidance

- Focused on sexual harassment of students by employees, other students, and third parties.
- Squaring Title IX with Supreme Court decisions confirming individual damages available for Title IX violations.
- 2001 Guidance explained that individual lawsuit or not, institution must act to provide a prompt and equitable resolution for complaints of sexual harassment.
2011 DCL

- Incorporates 2001 Guidance.

- Focuses on sexual violence as a violation of Title IX
  - Sexual violence includes rape, sexual assault, sexual battery and sexual coercion.

- Sexual violence interferes with a student’s right to an education free from sex discrimination
2011 DCL

Sexual Discrimination is prohibited.
Sexual Harassment = Sex Discrimination
Sexual Violence = Sexual Harassment

THEREFORE …
Sexual Violence = Sexual Discrimination
Title IX Requirements – per 2011 DCL

Schools must:

– adopt and publish a policy against sex discrimination;

– adopt grievance procedures providing for prompt and equitable resolution of sex discrimination;

– designate at least one employee to coordinate and carry out Title IX responsibilities; and …
Train, Train, Train

“OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.” (p. 4)
Notice of Nondiscrimination

• “The notice must be widely distributed to all students ... employees, applicants for admission and employment, and other relevant persons.” (p. 6)

• OCR “recommends that a ... nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers.” (p. 7)
And Introducing
(or re-introducing)…
Title IX Coordinator

• Trained as to what constitutes sexual harassment, including sexual violence
• Understand grievance procedures
• Available to provide assistance to school law enforcement regarding response
• Have access to law enforcement unit investigation notes
• Identify and address systemic issues
Title IX Coordinator

“Duties and Responsibilities: Monitoring and oversight of overall implementation of Title IX Compliance at the University, including coordination of training, education, communications, and administration of grievance procedures for faculty, staff, students and other members of the University community.”

Title IX Coordinator

• Oversight

• Not leading every investigation

• Work to avoid appearance of conflict of interest – taking the “30,000 foot” view

• What about deputies?
The Grievance and Investigation Process
Grievance Procedures

• Not required to have separate sexual harassment and sexual violence grievance procedures

• Athletes must be subject to the same procedures
Grievance Procedures

Critical to achieve compliance:

- Notice of the grievance procedures, including where a complaint may be filed;
- Application of the procedures to complaints alleging harassment by employees, other students or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to provide witnesses and other evidence;
Grievance Procedures

• Designated and reasonably prompt time frames for the major stages of the complaint process;
• Notice to parties of the outcome of the complaint; and
• An assurance that the school will take steps to prevent recurrence of any harassment, and to correct its discriminatory effects on the complainant and others if appropriate.
Notice of Grievance Procedures

• Procedures should be easily understood, easily located, and widely distributed.
• Procedures should be prominently posted on website, sent electronically to all members of school community, available throughout campus, and summarized in or attached to major publications.
The Grievance Process – Initial Steps

• Must be clear to complainant how to lodge a complaint. After received …

• Are interim remedial measures necessary?
  – Must Minimize Impact on the Complainant
    • No Contact Orders
    • Move Residence
    • Providing escort to complainant
    • Ensuring that complainant and respondent do not attend the same classes
    • Counseling, medical, academic support services
The Grievance Process – Investigation

• Intersection with local police investigations:
  – Police investigations are NOT determinative and do NOT relieve school of its obligations
  – May need to temporarily delay fact-finding while police are gathering evidence
  – Should notify complainant of the right to file a criminal complaint and not dissuade him/her from doing so
Investigation of Complaints

• Training for all involved in investigations
  – handling complaints of harassment and violence
  – grievance procedures
  – applicable confidentiality requirements
  – “In sexual violence cases, the fact-finder and decision maker should have adequate training or knowledge regarding sexual violence.”
“Designated and Reasonably Prompt Time Frames”

• Specify time frames for all major stages as well as a process to extend – should include time frames for:
  – full investigation
  – response to parties regarding the outcome of the complaint
  – appeal
• Should provide parties with periodic status updates during investigation process
Confidentiality

A word on confidentiality…

• “Schools should obtain consent from the complainant … before beginning an investigation.” (p. 5)
Confidentiality

• “If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation.”
Confidentiality

• “If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited.”
Confidentiality

• “[l]f the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students.”

– The school may weigh the request for confidentiality against several factors and should inform the complainant if it cannot ensure confidentiality.
Confidentiality

• “Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence.”
Umm…

WHAT?
The Grievance Process – Hearing

• Investigation and Hearing “Equality”
  – Parties must have an equal opportunity to present relevant witnesses and other evidence.
  – Parties must be afforded similar and timely access to any information to be used at the hearing (consistent with FERPA and other confidentiality issues).
The Hearing

• OCR has said mediation is not appropriate for cases involving sexual assault.

• Other forms of informal resolution may still be acceptable as long as complainant and respondent are not “at the table” together.
The Hearing

• If “alleged perpetrator” (respondent) gets a pre-hearing meeting to tell his side, complainant should get the same.

• If respondent gets to present character witnesses, so should complainant.

• Respondent should not be allowed to review the complainant's statement unless the complainant gets to do the same.
The Hearing

• If lawyers are allowed to participate, opportunities must be the same for both parties

• Recommends an appeal process, but it must be available to both parties
The Hearing

- Schools are “strongly discouraged” from allowing the parties to question or cross-examine each other directly.

- Any “real or perceived” conflicts of interest between the fact-finders and the parties should be disclosed.
The Hearing – Impartiality and Standard of Proof

• Fact-finders **must** use a preponderance of the evidence standard
  – Note: There is a movement in opposition to this standard as to faculty.

• Must maintain documentation of all proceedings, which may include findings of fact, transcripts or audio recordings
The Hearing – “He Said, She Said”

• Not much in 2011 DCL.

• But 2001 Guidance actually talked about this in some detail:
“If there is a dispute about whether harassment occurred or whether it was welcome – in a case in which it is appropriate to consider whether the conduct would be welcome – determinations should be made based on the totality of the circumstances.”
The Hearing – “He Said, She Said”

• Specifically should consider –
  – witness statements
  – level of detail and consistency of each person’s account
  – any evidence that alleged harasser has been found to have harassed others, or that accuser has made false allegations against others
  – timing of complaint as compared to alleged harassment
    • 2001 Guidance, p. 9.
Grievance Process – Notice of Outcome

• Outcome = Whether Harassment Occurred
• Must notify both parties of outcome in writing
• Permitted to disclose sanctions “that directly relate to the complainant” (e.g., a “stay away order”)
• Recommend that notice of outcome be concurrent
FERPA and Title IX

If a conflict, Title IX wins. Or at least OCR says so:

“FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.” 2011 DCL, page 13, fn. 32.
Grievance Process – Notice of Outcome

• May disclose results to the community if determined that a crime of violence or non-forcible sex offense has occurred in violation of university policy
• Under Clery Act, may not require complainant to abide by a nondisclosure agreement
• Speaking of Clery Act …
Clery Act

• Briefly, has four key components:
  – Disclosure of policies regarding campus safety.
  – Timely warning of certain crimes that might represent an ongoing threat.
  – Compilation and maintenance of crime information.
  – Reporting of crime information.
Clery Act and Title IX Issues

• If an alleged crime of sexual violence is reported to a “campus security authority,” it must be reported and recorded.

• Campus security authority is not just campus police. Includes any official “with significant responsibility for student and campus activities” – residence hall advisors, etc.

• **Note that pastoral counselors and professional mental health counselors on campus are exempt from disclosure requirement**
Clery Act and Title IX Issues

• So … under DCL, receipt of information by a “campus security authority” about sexual violence will not just prompt a Title IX investigation but will also prompt Clery Act reporting.
Clery Act and Title IX Issues

• Under Clery: must advise both accused and accuser of outcome – final determination and any sanctions imposed – whenever institutional proceeding involves a sex offense.

• So, to square with FERPA guidance and 2011 DCL: if it is a sex offense and accused is found to have violated policy, those folks must know the outcome and the sanctions, and anyone else may know. If it is an alleged sex offense but accused is not found to have violated policy, accused and accuser must know.
A Note on Mandatory Reporting – Minors On Campus

• New Jersey law requires that “[a]ny person having reasonable cause to believe that a child has been subjected to child abuse . . . shall report the same immediately to the Division of Youth and Family Services by telephone or otherwise.”
Title IX

Private Lawsuits
Title IX Civil Liability

• Plaintiff must show that a “school official with authority to address the alleged discrimination and to institute corrective measures had actual knowledge of the discrimination and failed to adequately respond.”

• Deliberate indifference standard
Title IX Civil Liability – (accuser)

- **Stefanowicz v. Bucknell University**
  - importance of following process

- **McGrath (Megan Wright) v. Dominican College**
  - directed to police, not campus options
  - no remedial efforts on campus
  - delayed until criminal proceedings complete

- **Simpson v. University of Colorado**
  - can be liable for deliberate indifference to obvious need for training
Title IX Civil Liability (accused)

- John Doe v. Sewanee (University of the South).
  - Disputed sexual assault charge.
  - Accused student is suspended for a year.
  - Sues on multiple grounds, including alleged Title IX violations for: failing to create transcript of hearing, failing to properly train panel, failure to give all materials to accused sufficiently in advance of hearing.
  - Title IX claim dismissed; but verdict in his favor on negligence claim on September 2, 2011. Negligence claim factually tracked Title IX claim (but no “deliberate indifference” required).
Rider University’s Sexual Harassment Policy
Harassment

“Any action that may reasonably be expected to threaten, coerce or intimidate and individual or class of individuals.”
Sexual Harassment

Unwelcome sexual advances (including, but not limited to, sexual assault and sexual misconduct), requests for sexual favors, and/or physical, verbal or written conduct of a sexual nature when:

1. Submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment, education, or participation in University programs or activities, or

2. Submission to or rejection of such conduct by an individual is used as a basis for decisions pertaining to an individual’s employment, education, or participation in University programs or activities, or

3. Such speech or conduct is directed against another and is abusive or humiliating and persists after the objection of the person targeted by the speech or conduct, or

4. Such conduct would be regarded by a reasonable person as creating an intimidating, hostile or offensive environment that substantially interferes with an individual’s work, education, or participation in University programs or activities.
Prompt Reporting

- Rider encourages its community to promptly report experienced or observed incidents of discrimination or harassment.

- All “responsible employees” must report. (Responsible employees are those with authority to take action to redress the alleged misconduct, those with a duty to report, or those whom a student could reasonably believe has the authority or responsibility to redress or report.)
How to Report

• Complaints against a student, employee or non-student third-party shall be reported in writing to the Associate Vice President for Human Resources, who is the Affirmative Action Officer and Title IX Coordinator.
  – *Alternatives:* Associate VP for Student Affairs or Department of Public Safety
Confidential Discussions

• Any student who believes the Policy has been violated is “free to discuss the matter, in confidence, with the University’s Counseling Center, a University Chaplain, or the University Health Center.”
Interim Measures

• When the accused is a student, the Associate Vice President for Student Affairs (or designee) may take all reasonable interim measures to protect the complainant, the accused and third-party witnesses.
Investigations

• Informal and formal options available, but informal not appropriate for cases involving alleged sexual assault.

• If informal mediation is appropriate and elected, it can be ended at any time in favor of the formal process.
Formal Investigations Involving Accused Employees

• Respondent has 14 days from commencement of formal investigation to provide written response to allegations

• Response provided to complainant

• Investigation shall include interviews of complainant, accused, witnesses who agree to be interviewed
Formal Investigations Involving Accused Employees

- Parties may present witnesses and other evidence
- Investigator (i.e., Title IX coordinator or designee) will investigate the complaint and report findings to appropriate vice-president / division head
- Summary of the report to complainant and accused
- General time frame for completion of investigations is 30 weekdays, excluding scheduled recesses
- Disciplinary procedures in accord with collective bargaining agreement and/or Employee Handbook
Informal Process When Student is the Accused

- Only if both parties are Rider students
- Mediator to be appointed within 14 days of the parties’ agreement to mediate
- Support person allowed to attend
- Mediator will:
  - Ask each side to give their version of events
  - Identify key issues and facilitate discussion
  - Help parties develop a written agreement
Informal Process When Student is the Accused

- Written agreement signed by parties and approved by mediator and Associate VP for Student Affairs
- No appeal
- Process may be ended before signing the Mediation Agreement and formal process elected
Formal Investigation Involving Accused Student

- Initiated by VP for Student Affairs
- Generally completed within 30 weekdays after receipt of complaint
- Matter assigned to Investigator (trained member of University staff)
- Investigator explains process to parties
Formal Investigation Involving Accused Student

• Accused may provide written response to the complaint within 14 days (copy to the complainant)

• Investigation shall include interviews of complainant, accused, witnesses who agree to be interviewed, and review of documentation and other evidence
Investigation Report

• Investigator prepares a written report summarizing factual findings
• Provided to accused, complainant, VP for Student Affairs
• Accused may provide written response within 10 business days of delivery of the report
Determination of Charges

• Upon receipt of Investigation Report, VP for Student Affairs determines:
  – Whether evidence is sufficient to warrant a formal hearing
  – What charges, if any, will be referred for formal hearing
• Written determination to be provided to complainant and accused
• If complainant’s request for formal hearing is denied, he/she may appeal to Title IX Coordinator within 5 business days
Notice of Charges

• If Formal Hearing is required, Office of Community Standards will commence the process by providing the complainant and the accused with written notice of the charges, including:

  – Nature of the complaint
  – Offense alleged
  – Complainant
  – Date, time, place of hearing
  – Date, time, place of pre-hearing meeting
  – Names of Board members who will hear the case
Pre-Hearing Submissions

• Parties shall provide the Board Chair with brief written position statements, a witness list, and copies of documents and other evidence they intend to present at the hearing 7 days prior to hearing

• Chair provides copies to opposing party
Hearing Process

- Formal Hearing before the Student Anti-Discrimination/Harassment/Sexual Assault/Sexual Misconduct Board
- Board: 3 trained, professional staff members
- Within 14 days after delivery of Notice of Charges
- Administrative hearing if the complaint cannot be resolved in a timely manner or is filed within 60 days of the accused's intended graduation
- Hearing Moderator may be present
- Parties may request presence of a support person; if allowed, support person may not actively participate
Hearing Process (Cont’d)

• The hearing may be recorded
• No attorneys unless criminal charges are pending
• Only the Board members may question parties and witnesses
• Investigator will not testify absent extraordinary circumstances
• Accused retains the right not to testify
• Complainant may present a statement recommending a sanction and accused may respond
Hearing Outcome

- Finding of responsibility must be supported by a preponderance of the evidence
- If charged with sexual assault, Board may consider whether sexual misconduct, harassment or other discrimination occurred even if evidence is insufficient to support a finding of assault
- Board issues sanction fair and proportionate to the offense in accord with Code of Student Conduct
- Written determination generally issued within 10 days of the hearing to complainant, accused and VP for Student Affairs
- Written determination will state name of accused, whether or not found responsible for charges, and sanction
Appeal

• Either party may appeal to the VP for Student Affairs within seven days of the Board’s decision

• Non-appealing party has seven days to respond

• Appellate Panel: VP for Student Affairs, VP for Human Resources and another administrator
Rider’s Conflict of Interest Policy

• Avoid actual and apparent conflicts of interest, e.g.:
  – Employee has an interest or potential interest which may impair or appear to impair the employee’s judgment when performing University responsibilities;
  – Employee receives or may receive a benefit from knowledge of confidential or proprietary University information;
  – Either of these situations arises with respect to a household member or organization with which employee or family member has a significant management, ownership or material association

• If conflict arises:
  – Disclose to VP of Finance, cease from further participation in the matter, follow direction of University
Rider’s CEPA Policy

• Protects employees from retaliation for:
  – Disclosing or threatening to disclose to a supervisor or public body any activity, policy, or practice of the University that the employee reasonably believes violates law;
  – Providing information to or testifying before an investigating body regarding the University’s alleged violation of law, rule or regulation;
  – Objecting to or refusing to participate in any University activity, policy or practice which the employee reasonably believes to violate law, rule, regulation or clear public policy.

• Employee must first bring the issue to the attention of the University in writing and provide an opportunity to cure (exception for emergency situations).
Questions?

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