

2013 North American Society for Sport Management Conference (NASSM 2013)

Is the OCR Sexual Violence Standard “Reasonable”?

Barbara Osborne, University of North Carolina at Chapel Hill

Legal aspects

Friday, May 31, 2013

**20-minute oral presentation
(including questions)**

Abstract 2013-127

11:10 AM

(Room 404)

Sexual harassment is a serious problem within our schools, from elementary schools through colleges and universities. Eighty-one percent of students experience some form of sexual harassment during the school years. In a study released in November 2011, almost half of students in grades 7 through 12 indicated that they were sexually harassed during the 2010-2011 school year. About 44 percent of students were sexually harassed in person, while 30% reported being sexually harassed through texting, email, social networking sites, or other electronic means. Girls were about four times as likely as boys to have been physically intimidated (9% of girls compared to 2% of boys) or forced to do something sexual (4% of girls compared to 1% of boys). In a report issued jointly by the U.S. Department of Education and the U.S. Department of Justice, more than 3,800 sexual batteries and over 800 rapes and attempted rapes were reported in high schools in the 2007-2008 school year. In colleges and universities, about 20% of college women and just over 6% of college men reported incidents of sexual assault or attempted assault. As disturbing as these facts are, it is important to remember that acts of sexual violence are seriously under-reported.

Sexual assault and sexual violence should also be a significant concern for athletics administrators. Research indicates that masculine dominated environments such as athletics teams promote objectification of women. This, combined with the athletes' expectation of entitlement, peer support and approval, rewards for engaging in aggressive behavior, and failure of coaches or administrators to discipline athletes have been found to increase the likelihood that athletes will commit acquaintance rape, sexual violence, and sexual assault. A 2004 USA Today expose identified 164 athletes or former athletes involved in sexual assaults over the previous decade. Incidents involving college student-athletes accused of sexual assault and/or rape have embarrassed the athletics departments (and the institutions) at Yale, Notre Dame, Eastern Michigan, Wake Forest, Marquette, Iowa, Colorado, Winthrop and Washington among others. Colleges and universities have also been named as defendants in lawsuits when student-athletes have raped other students, both on and off campus.

The U.S. Department of Education and its Office for Civil Rights (OCR) are responsible for ensuring that all students have equal access to education. Sexual harassment disrupts and deprives students of equal access to education. Because children have a right to be protected against gender-based harassment and violence in schools, the US Department of Education, Office for Civil Rights distributed a Dear Colleague Letter addressing sexual violence on April 4, 2011. The purpose of the Dear Colleague Letter: Sexual Violence is “to provide recipients with information to assist them in meeting their obligations and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations...”

This guidance document has been significantly criticized, primarily by college and university administrators that believe the investigation requirements are too onerous and the burden of proof too low. The burden of proof is a preponderance of the evidence standard, which many critics argue is inappropriate for situations involving sexual violence. These critics argue that the higher level criminal standard “beyond a reasonable doubt” is more appropriate to establish institutional liability.

This legal research examines whether the OCR Dear Colleague Letter: Sexual Violence applies the correct legal standard for schools relative to liability for sexual harassment and sexual violence. The requirements of the 2011 Dear Colleague Letter: Sexual Violence were examined and compared with past policy documents issued by the U.S. Department of Education Office for Civil Rights and the developing case law related to institutional liability for sexual violence and sexual assault in schools, including the March 2001 “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties”, *Gebser v. Lago Vista Independent School District* (1998), *Davis v. Monroe County Board of Education* (1999), *Williams v. Board of Regents of the University System of Georgia* (2007), *Simpson v. University of Colorado* (2007), *S.S. v. Alexander and the University of Washington* (2008), and *J.K. v. Arizona Board of Regents* (2008).

2013 North American Society for Sport Management Conference (NASSM 2013)

This legal analysis revealed that the Dear Colleague Letter: Sexual Violence is merely a consolidation of past OCR policy and current common law precedent. The preponderance of the evidence standard is appropriately applied to situations involving sexual harassment and sexual violence because school liability is a civil liability issue. Whether or not the student-athlete accused of committing the assault is criminally charged (under the appropriate criminal beyond a reasonable doubt standard) is irrelevant to an administrative or civil analysis of the school's obligations to respond to sexual harassment and sexual violence.

The implications for athletics administrators are clear: coaches need to be diligent in recruiting to determine whether matriculating student-athletes pose a risk of sexual assault or sexual violence on campus. When a coach or athletics department employee (or any other school administrator) becomes aware of an alleged incident of sexual harassment or sexual violence, the school must take "immediate action to eliminate the harassment, prevent its recurrence, and address its effects". Athletics and/or school personnel that try to shame the victim, cover up or discourage reporting of accusations of sexual harassment or sexual violence, or try to keep the incident in-house may also have personal liability beyond institutional liability.