Comment

Thank you for the opportunity to comment at the virtual public hearing of the Department of Education’s Office of Civil Rights, held

...to gather information for the purpose of improving enforcement of Title IX of the Education Amendments of 1972 (Title IX). OCR seeks comments from the public at the hearing on steps the Department can take to ensure that schools are providing students with educational environments free from discrimination in the form of sexual harassment, which encompasses sexual assault and other forms of sexual violence; to ensure that schools have grievance procedures that provide for the fair, prompt, and equitable resolution of reports of sexual harassment and other sex discrimination, cognizant of the sensitive issues that are often involved; and to address discrimination based on sexual orientation and gender identity in educational environments.

I will restrict my observations to issues affecting institutions of higher education (IHEs).

My comments are based on both experience and research. I have more than four decades of experience as a faculty member at a diverse set of IHEs, including faculty appointments at Brown University, Buffalo State College, Indiana University, Saint Joseph’s University, and UCLA, and visiting appointments at the University of Pennsylvania and Harvard University. As a professor and administrator, I have had direct experience working with students whose education was disrupted by sexual harassment. In addition, I have served for many years as a board member of the Clery Center for Security on Campus, a nonprofit that addresses higher education safety and security. My higher education experience has led me to realize how important the issue of sexual harassment is for IHEs, and at the same time to appreciate how difficult it must be to create regulations for the thousands of diverse IHEs that make up American higher education.

My research includes quantitative national studies of college drinking and its correlates. I am the co-author of several peer-reviewed papers from the Harvard School of Public Health College Alcohol Study about binge drinking and related outcomes, including intoxicated rape; co-author of a paper commissioned by the College Alcohol Task Force of the National Institutes on Alcohol Abuse and Alcoholism about the methodology of researching college alcohol use and related outcomes; author of a chapter about alcohol use in Campus Crime (eds. Sloan and Fisher,
2013 and forthcoming), an anthology of research on campus crime; and author of *College Drinking: Reframing a Social Problem/Changing the Culture* (2013).

The views expressed in this comment are solely my own and do not represent those of any of the institutions mentioned above.

I will focus my detailed comments on the role of alcohol and drugs in sexual assault and in Title IX; the geographical scope of sexual harassment; and the opportunity that OCR has to provide accurate and timely data about sexual assault at IHEs.

**Sexual Assault and Alcohol and Drugs**

I am a co-author of the largest study of rape among college students that uses representative samples of both campuses and students (Mohler-Kuo et al., 2004). Using data for three national surveys on college women (over 25,000 in all), we found that roughly 1 in 20 women had been raped since the beginning of the school year, with 72 percent of them reporting that they could not grant permission for intercourse because they were too intoxicated.

Our study of intoxicated rape is one of the 34 studies of campus sexual assault published from 2000 to 2015 (Fedina et al., 2016). These studies have reported similar findings, with intoxication involved in many if not most college rapes and sexual assaults.

An analysis of claims about sexual assault cases reported to United Educators (2015) found “More than three-fourths (78 percent) of sexual assaults involved the perpetrator, victim, or both consuming alcohol.” A major study of sexual assault (Krebs et al., 2009) concluded: “Findings indicate that almost 20% of undergraduate women experienced some type of completed sexual assault since entering college. Most sexual assaults occurred after women voluntarily consumed alcohol, whereas few occurred after women had been given a drug without their knowledge or consent.”

The recent climate surveys conducted at Association of American Universities (AAU) institutions are an important source of data about alcohol and sexual assault:

One of the more important risk factors for nonconsensual sexual contact is the use of alcohol and drugs. Among undergraduate females, about as many individuals reported penetration by incapacitation (5.4%) as by physical force (5.7%). For sexual touching, a larger percentage of the undergraduate females reported being physically forced when compared to being incapacitated (12.8% vs. 6.6%). There are small percentages that report that both force and incapacitation occurred (e.g., 1.7% of undergraduate females). (Cantor et al. 2015: ix).

**Alcohol and Title IX**

Current policy on Title IX was shaped by its 2018 Notice of Proposed Rule Making (NPRM, U.S. Department of Education, 2018a). Unfortunately, the NPRM did not examine alcohol- or drug-involved rape or sexual assault as a significant problem. The sole exception is found in the “Background” section in a footnote (U. S. Department of Education 2018a: 61464, footnote 6) about an open letter written by members of the Penn Law Faculty noting that Title IX cases “are
likely to involve highly disputed facts, and the ‘he said/she said’ conflict is often complicated by the effects of alcohol and drugs.”

The 2011 “Dear Colleague” letter (DCL) from the U.S. Department of Education argued that Title IX of the Education Acts of 1972 prohibited discrimination on the basis of sex, including sexual harassment and violence. The letter suggested that the Title IX coordinator be trained “on the link between alcohol and drug abuse and sexual harassment and violence and best practices to address that link.” I am not aware that the Department of Education issued anything further on this point, and the Department has withdrawn the 2011 DCL.

Testa and Livingston (2018), leading researchers on the connection between alcohol and sexual assault, have provided a thorough discussion of the implications for prevention: The perpetrator is always responsible for sexual assault, but if scientific evidence “...points to women’s heavy drinking as a factor that significantly increases vulnerability to sexual assault, it would be unethical to withhold this information from the public. Rather, this knowledge can empower women to reduce their personal risk of sexual victimization and potentially can aid in the development of policies and intervention programs that can reduce the risk at the community level.”

Avoiding blaming the victim is central. Research needs to clarify the role of alcohol use by both parties.

Given the high prevalence of alcohol- and drug-involved sexual assault among college students and its powerful role in affecting reporting and adjudication, I would urge the Department to focus attention and analysis on this issue as well as require training and technical assistance for Title IX coordinators about how alcohol and drugs play a role in sexual harassment.

**Sexual Assault On- or Off-Campus**

The NPRM (U.S. Department of Education 2018a: 61468) argued that a proposed section “also reflects the statutory provision that a recipient is only responsible for responding to conduct that occurs within its ‘education program or activity.’ …Whether conduct occurs within a recipient’s education program or activity does not necessarily depend on the geographic location of an incident (e.g., on a recipient’s campus versus off of a recipient’s campus).”

Summaries of recent evidence (Kaukinen et al 2017, esp. Ch. 2) conclude that many sexual assaults of college students occur off campus, in many cases in areas near to campus. The NPRM (U.S. Department of Education 2018a: 61487, footnote 27) referred to a United Educators (2015) study that found that 41 percent of legal claims about sexual assault occurred off campus. For this reason, studies of rape and sexual assault such as our report from the Harvard College Alcohol Study as well as the Association of American Universities climate survey usually survey students regardless of where they live or where they were assaulted.

Quantitative data on campus crime (Fisher and Sloan 2013: 145, emphasis in original) show that “most violent crimes experienced by college students occur off campus. For example, between 2001 and 2010, the average annual rate of off-campus victimization of college student (32.3 per 1,000 students) was about 16 times greater than the average annual rate of on-campus victimization of college students (2.1 per 1,000 students).”
In the past decade, the daily lives of American college students have been transformed by the use of digital media. Much of the verbal harassment that precedes or follows sexual assault now occurs online, making the physical boundaries of a campus of little or no importance. The central role of online interaction in the lives of students makes it all the more important to make all incidents of alleged sexual harassment subject to Title IX, not just those that occur on campus.

OCR should mandate that incidents of sexual harassment and assault that occur off-campus should be treated just as are on-campus events.

The Need for Title IX Data

Finally, the absence of data about Title IX is striking when compared to the rich set of data on higher education available from the Department of Education. The Department maintains a robust data collection effort on crime at IHEs as part of the Clery Act, making data available through both its Cutting Tool and in published reports from the National Center for Educational Statistics. States like Maryland and New York collect some information about individual IHE Title IX activity.

OCR should begin to collect and publish data on Title IX incidents and adjudications by expanding the yearly effort mandated by the Clery Act. Climate surveys that assess sexual assault should always examine

Conclusion

Before attempting to improve Title IX enforcement, OCR should review a document that it cited in the NPRM to support its case for changing the way sexual assault complaints are handled (Volokh, 2015):

First, we fully recognize serious concerns about the problem of sexual assaults on college campuses. Although our comments and criticisms focus on universities’ procedures for adjudicating sexual assault complaints, we recognize the far more important issue: how can universities help to change the culture and attitudes that lead to sexual assaults? Our first priority should be to reduce the frequency of assaults. After-the-fact disciplinary proceedings, while useful, cannot by themselves adequately protect our students. Universities must take more steps to deal with excessive use of alcohol and drugs, substances that all too often fuel the conditions that lead to contested sexual assault complaints.

In the future, OCR should address the role of alcohol in sexual assault, and how it shapes Title IX in American higher education.

References


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