

## Proper Response to Sexual Assault Shields University from Liability

If a university's actions following a sexual assault complaint adhere to all of Title IX's requirements, the victim may have no standing to sue the school, even if two of the students who committed sexual assault-related offenses were permitted to return to the college. A recent ruling by the U.S. District Court for Eastern California, in which the court dismissed all three of the plaintiff's claims under Title IX of the Education Amendments of 1972, demonstrated how a rapid, comprehensive and reasonable response to a sexual assault allegation can shield a school from liability. The case arose after a member of the women's basketball team alleged that she was sexually assaulted by three members of the men's basketball team. *Page 2*

## Cyber Law: What *Quon* May Mean For District Regulation of Technology

In an era when school employees can use their mobile phones or computers to send potentially harassing messages or images to students or colleagues, questions persist as to whether school districts have the authority to regulate technology use without infringing on an individual's Fourth Amendment right to be free from unreasonable searches and seizures. But despite years of tracking the cyber cases that may apply to public administrators such as school officials — rulings that might help balance the freedom of individuals to communicate in cyber space with the need to maintain safe and productive work or educational environments — David R. Hostetler, associate professor of Leadership and Educational Studies at Appalachian State University in Boone, N.C., suggested that the U.S. Supreme Court may have issued a definitive ruling last year. *Page 3*

## Drive to Combat Bullying Continues At Recent White House Conference

The Obama administration continues its strong push to alleviate bullying and harassment in the nation's schools or, at the very least, to help school officials better respond to bullying victims' needs. The White House recently unveiled new tools — a revamped website, a free youth leader toolkit and a technical assistance center — to help state and local educators address bullying. The resources were announced at last month's White House anti-bullying conference, an event that demonstrated a growing federal focus on an issue that is challenging the education community. "If there's one goal of this conference, it's to dispel the myth that bullying is just a harmless rite of passage or an inevitable part of growing up. It's not," President Obama said. *Page 7*

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# Student Harassment

## Appropriate Response to Sexual Assault Allegation Shields California University from Title IX Liability

If a university's actions following a sexual assault complaint adhere to all of Title IX's requirements, the victim may have no standing to sue the school, even if two of the students who committed sexual assault-related offenses were permitted to return to the college.

A recent ruling by the U.S. District Court for Eastern California, in which the court dismissed all three of the plaintiff's claims under Title IX of the Education Amendments of 1972, demonstrated how a rapid, comprehensive and reasonable response to a sexual assault allegation can shield a school from liability.

The case arose after a member of the women's basketball team alleged she was sexually assaulted by three members of the men's basketball team. In granting the university's motion for summary judgment, the district court rejected Jane Doe's argument that the university violated Title IX, which protects students attending federally funded institutions from sexual discrimination, including harassment.

Doe argued the school violated Title IX in three ways:

1. by not preventing the assault;

2. by showing "deliberate indifference" to sexual harassment in failing to appropriately respond to her complaint; and
3. by retaliating against her in limiting unsupervised social interaction between the men's and women's basketball teams.

### University's 'Zero Tolerance' Policy Highlighted

The court noted that the 6,700-student private university, based in Stockton, Calif., employed an extensive program designed to address and prevent sexual harassment and assault, including a "zero tolerance" sexual harassment policy. The policy described procedures a student should follow if a violation occurred and noted that criminal justice prosecution is not required for initiation of the student judicial process.

The university's sexual harassment and assault policies are part of the general student code and are published online and in the student handbook. The school also conducts annual events focused on making students aware of the risk factors associated with alcohol and drug abuse in relation to sexual assault, the court said, and provides students who report being sexually assaulted with counseling and other services.

### Sexual Assault Allegation Triggered Response

Doe said the sexual assault took place on May 10, 2008, after she accepted a ride from Student 1, a men's basketball player. Doe said he offered to take her to a party, but instead brought her and Student 2, another basketball player, to his campus apartment. Once there, Doe said the male students removed her clothes, which she "struggled" to put back on. Then, according to disputed allegations, Student 3, another player, forced her into a closet and sexually assaulted her, although the file redacted the specific actions. Doe said she complied with Student 3's alleged sexual assault "to end the situation."

The plaintiff told friends about the incident and identified Students 1, 2 and 3 as her assailants, with one friend recording the details during a phone conversation. Two days later, Doe flew home to Colorado for the summer without reporting the assault to the university or to the Stockton Police Department. Below is a summary of what allegedly occurred next:

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# Real-World Solutions

## Tracking Cyber Law Trends: What *Quon* Might Mean For School Districts' Ability to Regulate Technology

In an era when school employees can use their mobile phones or computers to send potentially harassing messages or images to students or colleagues, questions persist as to whether school districts have the authority to regulate technology use without infringing on an individual's Fourth Amendment right to be free from unreasonable searches and seizures.

David R. Hostetler, associate professor of Leadership and Educational Studies at Appalachian State University in Boone, N.C., explored this thorny legal territory during a discussion at last year's Education Law Association conference in Vancouver. Hostetler's discussion centered on a paper he wrote on the legality of employee electronic searches and school cyber law trends.

"In the last two or three years, school technology law has now taken a place near the top of the list of litigated issues, particularly the speech issues," he said. Only special education issues may be more central to school-related litigation, Hostetler posited.

### Governing Employee Use of E-Communications

But despite years of tracking cases that may apply to public administrators such as school officials — rulings that might help balance the freedom to communicate in cyber space with the need to maintain safe and productive work or educational environments — the U.S. Supreme Court did not issue a definitive ruling until last year.

In 2010, "we finally get a case ... to help us think through" how the court will govern the "electronic domain and electronic communications," Hostetler said.

Although the Supreme Court's ruling in *City of Ontario, Calif. v. Quon*, 130 S. Ct. 2619 (2010), involved a city police department — not a school — and did not break significantly new legal ground, Hostetler said the facts are instructive for schools interested in understanding the boundaries of regulating cyber communications. Importantly, he said, *Quon* serves as a reminder "that there are some issues you've got to be careful about."

In *Quon*, the High Court ruled that a city had not violated the Fourth Amendment

rights of a police officer who had sent personal messages on a department-issued electronic pager with texting capabilities. *Quon*, a sergeant at the time, and other employees of the department had asserted that the city violated their right to be free of unreasonable searches and seizures by obtaining and reviewing the transcript of *Quon*'s pager messages, and that the device vender, Arch Wireless, violated the federal Stored Communications Act (SCA) by giving the city a transcript of the messages.

Before its ruling was reversed by the Supreme Court, the 9th U.S. Circuit Court of Appeals held that *Quon* had a reasonable expectation of privacy in his text messages and that the city's search was not reasonable even though it was conducted on a legitimate, work-related rationale. The 9th Circuit concluded the search was not reasonable because a "host" of other less-intrusive means could have been employed by *Quon*'s supervisors to determine if the officer had used the device to waste time or to engage in non-police business.

The Supreme Court, on the other hand, held that the city's search of *Quon*'s text messages was reasonable and therefore did not violate the Fourth Amendment.

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## Student Harassment (cont. from p. 2)

- On May 12, Doe’s friends reported the alleged assault to the assistant women’s basketball coach, who, in turn, informed the head coach. The coach called the victim to inquire about her well-being and to let Doe’s parents know about the assault.
- The next day, the coach reported the alleged assault to the athletic director (AD) who then contacted the vice president (VP) of student affairs.
- That morning, the VP met with the AD, the public safety director, the coaches and the school’s judicial affairs director to discuss the next steps.
- On May 14, the university issued a campus-wide alert of a possible sexual assault and reported the incident to the Stockton police. The same day, the VP and head coach tried to reach Doe by phone, but only were able to talk to her father. During the call, the university officials asked about her health, discussed the university’s next steps, urged Doe to undergo a medical examination, and encouraged her to speak with the police. The university offered her counseling and other services.
- Although the plaintiff did not press charges, the university followed its own policies by initiating

an independent judicial process and convening a judicial review board.

### Review Board Proceedings

On June 6, during the review board proceedings, the three accused students received written notice that a hearing would begin 10 days later to adjudicate various charges against them for violations of university policy. Then, on June 10, the judicial affairs director interviewed Doe, who, according to the court, said she was reassured that the university would continue judicial proceedings even though she did not press criminal charges.

During a June 16 hearing, the board — trained on judicial procedures related to sexual assault — listened to conflicting evidence regarding the night of the alleged assault. The accused students said Doe drank alcohol with her team earlier in the evening and kissed a man at a party. She said she could not recall saying “no” at any point during the sexual conduct that occurred between her and Students 1, 2 and 3, and said she did not consent to “all of this sexual conduct,” according to the court. Based on that key point, the board concluded that not all the sexual conduct was consensual.

The board recommended sanctions after finding “clear and convincing” evidence that Student 3 had committed four sexual assault violations. Student 3 was expelled and banned from campus. The board found a preponderance of the evidence confirming only that Students 1 and 2 committed “sexual offenses,” rather than “sexual assaults”; as punishment, the school suspended them for one and two semesters, respectively.

The two sanctioned students were allowed to return to campus under several probationary terms, including a strict “no-contact” rule with Doe that carried the penalty of expulsion if violated. In addition, the students’ records would reflect the suspensions.

### ‘Cooling-Off’ Period

To further protect the victim and defuse tension that existed between the men’s and women’s basketball teams, the AD instituted a temporary ban on social interactions among male and female players. The ban, imposed equally on both teams, was temporary. The AD asserted that the policy was “reasonable” in light of the circumstances, the court said.

Jane Doe took a leave of absence at the end of the summer, but was informed by college officials that her scholarship would be available if she returned and that every effort would be made to smooth her transition back

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## **Student Harassment** (cont. from p. 4)

to the campus community. The two male students could return, but would remain under the “no-contact” rule.

On Oct. 30, 2008, Doe e-mailed her coach that she would not be returning to campus, but said she would have come back if Students 1 and 2 had been expelled. She filed suit on March 18, 2009.

### **Could the University Have Prevented the Assault?**

One of Jane Doe’s claims was that the university violated Title IX by being deliberately indifferent to an assault on a *former* student.

In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the U.S. Supreme Court ruled that certain standards must be satisfied to prove a school violated Title IX — two of its four elements are that the school had actual knowledge of harassment and that a school official with the power to take action was deliberately indifferent or took steps to address the misconduct that were clearly unreasonable in light of the known circumstances.

Under the *Davis* standard, victims also must prove that the school had control over the harasser and the context of the harassment, and that the misconduct in question was so severe, pervasive and objectively offensive that it deprived the student of equal access to educational opportunities.

In the present case, the district court said “the undisputed evidence” was that the university acted reasonably in responding to the former student’s report of an assault, which only came to the school’s attention after Doe allegedly was attacked. “The University,” the court wrote, “did not have actual knowledge of the identities of [the] Former Student’s assailants before [the] plaintiff’s assault, and thus, had no basis to believe that Respondent Students [1, 2 and 3] were involved.”

A vague hunch on the part of one school official that Student 2’s home might have been the location for the assault against the former student also did not give the university enough information and thus did not constitute deliberate indifference, the court added.

Doe also tried to show the university knew of Student 3’s alleged bad reputation. Here again, the court rendered Doe’s evidence not relevant, because the High Court in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), held that a school district’s knowledge of inappropriate teacher comments did not put the school district on “actual notice” that a teacher had sexual relations with a student. School officials need more than hearsay or unproven allegations to have actual notice under Title IX.

Despite the other unnamed student’s lack of cooperation with the school and the police regarding her alleged attack, the university and Stockton police thoroughly investigated the assault. After her report, the university issued a safety alert and conducted a forum at the on-campus townhouses. The court said the alleged assailants of the former student are still unknown.

The other student eventually said she recalled Student 2 standing naked near the door of the room where she was attacked. In this light, Doe might have argued the university “should have known” that one of her attackers had raped another student, the court said. Yet it noted that *Davis* rejected such a broad standard in actions asserting negligence. Even if the school was “negligent, lazy, or careless” (citing *Oden v. Northern Marianas College*, 440 F.3d 1085, 1089 (2006)) in its investigation of the

See *Student Harassment*, p. 6

### **Troubleshooting Tips: Campus Hearings**

When reviewing the actions of a school to determine if it should be liable for sexual harassment because it acted with deliberate indifference to a claim of student-to-student misconduct, one area that a court might review is the adequacy of the hearing process used. Therefore, it is important that the hearing process and procedures be reviewed from time to time, especially if they are rarely used. Officials should ensure that the process and procedures of the hearing are practical and effective for assessing sexual assault allegations. Those who might be selected to hear such cases also need to have their training refreshed periodically to avoid any inappropriate actions or remarks that could taint the appearance of fairness in the process. In addition, they should learn how to structure questions that are most likely to get at the truth. Such hearings do not need all the trappings of criminal processes (unless schools have voluntarily adopted these same procedures). Due-process requirements dictate only that adequate notice to the alleged harasser of the actions he or she is claimed to have done so he or she may prepare a defense and have an opportunity to tell his or her side of the story, either in person or by written communication. In addition, the procedures must guarantee that the person or persons who are hearing the matter are fair and impartial. If these steps are followed, the hearing process likely will be deemed adequate, even if the complainant is dissatisfied with the result. 🏠

— *Elsa K. Cole, Esq.*, is a contributing editor for the Educator’s Guide.

alleged rape of the former student, such negligence would not create liability under Title IX. In any case, the court determined that the college's actions were "clearly not unreasonable" and therefore without liability.

### Did the University Fail to Respond to the Report?

Jane Doe referenced several university actions taken in response to her harassment complaint that she argued demonstrated deliberate indifference to her constitutional rights. She cited the board's "blame-the-victim" approach during the judicial hearings and lack of training as examples. She also was dissatisfied with the failure to expel all three students and the "retaliatory" team-separation policy (the subject of Doe's entire third claim).

The court found "no evidence" the board was improperly trained; in fact, part of its training involved viewing a PowerPoint provided by the victim's counsel. The court made clear that the board was within its rights to ask the victim if the sex was consensual. Moreover, the court noted, the board gave "far more credence" to Doe's testimony than the male students' and took severe actions against all three. The court said a "fundamental legal precept" — and a state law — bars the school from elevating Doe's rights above those of the accused.

In addition, Student 3's purported reputation as a "womanizer" and a coach's warning to students to avoid him were not indications to the university that he would commit rape, the court said, citing *Doe v. Capital Cities*, 50 Cal. App. 4th 1038, 1054-55 (1996), a workplace sexual harassment case that distinguished between an employer's actual knowledge of the violent acts of a sexual predator and a general awareness that someone was a cad.

Despite Doe's contention that the judicial board should have considered the alleged assault of the former student, the court said that the board did not know the details of the case when it was deliberating. Therefore, the court held that the university acted properly in not expelling Students 1 and 2 for the infraction. Relying on *Davis*, the court said the school's obligation was to resolve the situation in a way that was "not clearly unreasonable." By suspending both students, placing the suspension on their records and restricting their contact

with the victim, the court found the school's response satisfied this standard.

### Was the Team-Separation Policy Retaliatory?

Doe's final claim involved the university's decision to ban unsupervised social interaction between the men's and women's basketball teams, a move that she argued was made in retaliation for her sexual assault complaint — and a potential Title IX violation.

Because the Supreme Court has provided no way to analyze similar Title IX claims, courts typically look toward jurisprudence established under Title VII of the Civil Rights Act of 1964, which protects against workplace discrimination. Under a Title VII retaliation claim, a plaintiff must first establish *prima facie* retaliation by meeting three elements: 1) she engaged in protected speech, 2) experienced a materially adverse action after or near the time of the protected activity, and 3) can show a causal link between the protected activity and the adverse action (*Atkinson v. LaFayette College*, 653 F. Supp. 2d 581, 594 (2009); and *Burch v. University of California Davis*, 433 F. Supp. 2d 1110, 1125 (2006)).

The university argued that Doe could not establish a *prima facie* case of retaliation — and the court agreed. The court said there was no evidence that the team-separation policy disadvantaged the victim; in fact, the policy was directed in equal measure at both teams and, therefore, both sexes. While the policy was in place, Doe was free to attend her classes, socialize with her teammates and attend events, and thus she could not prove that it "seriously impaired her educational experience at the university," the court said.

Even if she could establish a *prima facie* case, the court reasoned that Doe was hard-pressed to show that the school's motive for setting the policy was retaliatory. Instead, the university appeared to have the opposite intention — to mitigate the strain between the players and prevent the victim from any further harassment — a response the court found "clearly reasonable."

Doe also failed to show that the university's policy was a *pretext* for discrimination, whereupon, as required by *Atkinson*, she would have had to demonstrate that the university's explanation for its policy showed "weaknesses, implausibilities, inconsistencies, or contradictions."

"Here, the evidence is clear that the University has consistently stated that its basis for implementing the policy was to protect [the] plaintiff and to reduce and defuse tensions among the players of both teams," the court said. (*Jane Doe v. University of the Pacific*, 2010 WL 5135360, E.D. Calif., Dec. 8, 2010) ♠

— Erika Fitzpatrick

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# Prevention Advisor

## White House Continues With Anti-Bullying Efforts; Holds Conference, Unveils New Prevention Tools

The Obama administration continues its strong push to alleviate bullying and harassment in the nation's schools or, at the very least, to help school officials better respond to bullying victims' needs.

As part of its expanded effort, the White House recently unveiled new tools — a revamped website, a free youth leader toolkit and a technical assistance center — to help state and local educators address bullying. The resources were announced at last month's White House anti-bullying conference, an event that demonstrated a growing federal focus on an issue that is challenging the education community.

President Barack Obama and first lady Michelle Obama previewed the White House gathering — attended by more than 150 students, parents, educators and nonprofit leaders — by posting a Facebook video saluting a youth-led “movement” to stop bullying and urging local communities to take steps to prevent the relentless teasing and harassment that can cause emotional distress and hinder children's academic performance.

“If there's one goal of this conference, it's to dispel the myth that bullying is just a harmless rite of passage or an inevitable part of growing up. It's not,” Obama said at the March 10 conference.

As anti-bullying advocates met at 1600 Pennsylvania Avenue, U.S. Education Secretary Arne Duncan and Kevin Jennings, assistant deputy secretary and head of the Office of Safe and Drug-Free Schools, held a conference call to publicize the new set of anti-bullying resources, including the [stopbullying.gov](http://stopbullying.gov) website.

The new website replaced the old [bullyinginfo.org](http://bullyinginfo.org) website, which the U.S. Department of Education (ED) launched a few weeks ago when it released other anti-bullying information, including a guide to state laws on bullying (for more, see the February 2011 newsletter). The website covers cyberbullying, harassment of kids who are gay and other types of bullying. Older teens who want to work with younger children on bullying prevention can download a free “Youth Leader Toolkit.” Likewise, parents, educators and community leaders can use the portal to better recognize the signs of bullying, access the latest research and watch a video from the White House conference. A bullying prevention technical assistance center is also in the works, Duncan and Jennings said.

“Bullying can have destructive consequences for our young people,” Obama told conference attendees, “and it's not something we have to accept.” Parents, students, teachers and communities, he added, “can take steps that will help prevent bullying and create a climate in our schools in which all of our children can feel safe.”

### Private-Sector Commitments

The White House also spotlighted private-sector efforts in response to its call to action against bullying. For instance, the popular social networking site Facebook — an online venue occasionally used to perpetrate bullying — will launch a new multimedia “Safety Center” that includes teen-specific information, according to a fact sheet released by the administration. The company said it also will create a reporting system that allows users to report content that violates Facebook's policies and, at the same time, alert parents and teachers so they can address the reasons behind specific postings.

And SurveyMonkey, the polling website, created a special page ([www.surveymonkey.com/endbullying](http://www.surveymonkey.com/endbullying)) to facilitate data collection for bullying detection. After users sign up, they can access a 10-question bullying survey template that can be customized and distributed by students of any age.

Federal efforts to address bullying ramped up last fall following the release of a “Dear Colleague” letter from ED's Office for Civil Rights (OCR). The letter underscored educators' responsibilities under federal civil rights laws to protect students from bullying, harassment and other forms of discrimination. Since then, however, some national groups, including the National School Boards Association, have voiced concern that the guidance could expand school officials' liability for schoolyard pranks and invite costly lawsuits or infringe on people's right to free expression.

Despite its misgivings, the National School Boards Association was present at the conference and started its own anti-bullying campaign — “Students on Board for Bullying Prevention.” The research-guided conversation series is meant to encourage education boards to discuss school climate with middle- and high-schoolers.

It remains to be seen if schools will face more litigation with the growing federal attention on bullying.

*See Prevention Advisor, p. 12*

### Comprehensive ‘Acceptable Use’ Policies Important

Hostetler argued that the *Quon* decision is “really critical” for school district officials involved in policy reviews and policy development, particularly procedures designed to cover the “acceptable use” of government-issued technologies.

Before the city acquired the new pagers, the facts in *Quon* showed the city maintained an Internet and e-mail policy that applied to all workers. The policy specified, in part, that the city reserved “the right to monitor and log all network activity, including e-mail and Internet use, with or without notice.” The policy, which Quon had signed, added that “users should have no expectation of privacy or confidentiality when using these resources.”

Hostetler contended that school districts should note the confusion that arose when the city issued its employees new pager devices, but failed to amend its computer use policy, which did not explicitly cover text messages.

### Troubleshooting Tips: School-Issued Devices

School administrators should not become paralyzed or intimidated when dealing with new technology and its intersection with the laws protecting against sexual harassment. Communication methods may change — texting and tweeting may be obsolete next week and new ways to message may take their place — but the principles that apply to these modes of communication remain unchanged. To the same extent that schools and school administrators would be liable for harassing behavior if the communication was made by phone, letter or face to face by teachers, employees and students, schools or officials can be liable if an electronic method is used. To ensure there is clarity, schools should issue policies explaining that school-issued electronic devices are to be used for business- and education-related purposes only and that there should be no expectation of any privacy in the communications. Broad language can cover currently known communication technologies and those yet to be developed. But by ensuring a regular review of the policy, wide promulgation and training, schools can help staff and students understand the appropriate use of communication devices and the school’s intent to pursue aggressively any misuse that results in sexual harassment. 🏠

— *Elsa K. Cole, Esq.* is a contributing editor to the Educator’s Guide.

At a staff meeting attended by Quon, the city official responsible for managing the department’s contract with Arch Wireless orally told officers that pager messages were considered e-mail messages covered under the computer use policy and could be audited by the department. Officials also included similar comments in a written memo sent to Quon and other city personnel.

One lesson for school districts in light of these and other facts involving Quon’s use of the device, according to Hostetler, is that “acceptable use” policies need to be updated from time to time to reflect modern technology and legal guidelines. This is especially true if there are any changes in the devices or in the technology being used by individuals.

For instance, Hostetler said, general language should cover new devices — even though each might not be listed by name — to ensure that every technological gadget is addressed in the policy. Likewise, all educational personnel must be aware that their devices can be searched.

School districts should know their policies and not deviate from them “because one shift from the policy can create a Supreme Court case,” Hostetler warned.

### ‘Reasonableness’ Standard

Nonetheless, Hostetler conceded that the Supreme Court basically punted on the question of whether an “expectation of privacy” exists when a government entity acts in its capacity as an employer. In *Quon*, the High Court instead centered its decision on a narrower “reasonableness” standard — both as to the rationale for the search and its scope.

In his paper, Hostetler wrote that “the Court expressed great caution about declaring universal principles regarding privacy expectations when dealing with the ‘changing realities’ of the workplace and technology.” Later, he added, “one is left to wonder whether the justices’ own lack of experience and, perhaps, insecurity about their technological awareness is to blame. Why they could not simply deal with the case’s specific realities in order to render a more definitive statement is unclear.”

Nevertheless, Hostetler said *Quon* sheds light on some practical issues for schools. In *Quon*, the court held that the sergeant’s “limited” privacy expectation allowed the city to engage in the wider search of his pager records, even though there was some question about whether the sergeant knew the messages could be audited.

Elaborating in the paper, he wrote, “if the city simply had its ‘no expectation of privacy’ computer policy,

# Office for Civil Rights

## Retaliation Does Not Necessarily Follow From School's Incomplete Response to Sexual Harassment Complaint

A college's poor response to a sexual harassment complaint that resulted in noncompliance with Title IX of the Education Amendments of 1972 did not also make the institution guilty of improper retaliation, even though the school later disciplined the complaining student and a family member.

This was the mixed conclusion of a 2009 U.S. Department of Education investigation into the actions taken by Clearwater Christian College after a student reported to school officials that she was sexually harassed by two students in a dorm room. Title IX prohibits sex-based discrimination, including sexual harassment.

The department's Office for Civil Rights (OCR) found that the Florida school did not take prompt and effect measures to address the student's complaint, a potential Title IX violation. OCR determined, however, that the school's later disciplinary actions against the student, her boyfriend and her brother for unrelated activities were not retaliatory. Title IX's prohibition on retaliation protects individuals from suffering adverse actions in response to a variety of protected activities, including filing a sexual harassment complaint with an educational institution.

OCR noted in its determination letter that sexual harassment of students can take the form of unwanted conduct of a sexual nature that interferes with, denies or limits, on the basis of sex, a student's participation in or benefit from any education program or activity.

In weighing a sexual harassment allegation, OCR considers, among other factors, whether a school disseminated a policy prohibiting sex discrimination under Title IX and instituted effective grievance policies. In addition, investigators evaluate whether the school properly investigated the allegation and took quick, valid corrective actions.

If retaliation is alleged, OCR assesses the validity of the claim based on a multi-prong standard to determine if:

- the person complaining engaged in a protected activity under a statute enforced by OCR;
- the recipient of the complaint — in this case, the college — knew of the protected activity and took adverse action against the complainant around the same time or subsequent to the protected activity; and

- a causal connection can be “reasonably” inferred to exist between the adverse action and the protected activity.

If all of those elements are established, OCR next examines whether the school had a “legitimate, nondiscriminatory, and nonpretextual reason for its action.”

### Student Complains of Peer Sexual Harassment

In the complaint filed against Clearwater on March 10, 2009, the mother of the student alleged that her daughter was victimized by two students on Sept. 11, 2008, in her dormitory room, part of a four-bedroom unit with a common living and kitchen area that is overseen by an unpaid “devotional” student leader.

The victim, Student #1, arrived in her room one day to find Students A and B sitting on the bed. The students asked Student #1 to take off her shirt and try on a bra, a request that Student #1 at first shrugged off as a joke. Students A and B allegedly became insistent and approached Student #1, who ran and hid in the devotional leader's room.

A few minutes later, Students A and B located Student #1 in the devotional leader's room and came in. Student #1 said the other students climbed on top of her and tried to get the bra on over her clothes.

Student #1 eventually broke free and ran from the unit to the library where she told her boyfriend what happened. She told two other friends about the episode and then reported it to the Resident Director (RD), a college employee. The victim asked the RD for permission to spend the night in a friend's dorm room, a request that he denied.

The next day, the student's mother and father arrived for a scheduled visit and learned the details about the incident from their daughter. Student #1 and her mother then met with the Dean of Women and identified Students A and B as the perpetrators. The victim and the mother exhorted the dean to take the incident seriously. Far from “just a prank gone wrong,” the mother said she felt her daughter had been sexually harassed. The mother and daughter pushed the dean to discipline both students and to “social” them from Student #1, which meant the students would have no contact for a period of time.

After the meeting, during which the mother said the dean took no notes, Student #1 spent the rest of the time

See OCR, p. 10

with her parents hunched over and in a posture that was “indicative” of having undergone a “traumatic experience,” OCR said.

Here is what happened next, according to OCR:

- About a week after the incident, Student #1’s boyfriend told the Vice President (VP) for Student Life that his girlfriend had been sexually assaulted by Students A and B. The boyfriend and a friend met with the vice president to find out why nothing had been done about the incident.
- On Sept. 25, Student #1 met again with the Dean of Women, upset that Student B had not been disciplined (around this time, Student A already had apologized and Student #1 said she wanted Student A to remain as her roommate). The dean later met with Student B and, even though she determined that A was the instigator, she said that B should apologize to Student #1.
- Another meeting was convened on Sept. 29 with the VP, Student #1 and her boyfriend; during the meeting, the student said she had been sexually harassed and requested that the college discipline A and B. The student said the VP replied that the incident was “a spiritual — not a legal — issue” and that Student #1 should forgive A and B and “move on.” The VP also told Student #1 — in comments confirmed by the boyfriend — that because the incident “was not against the law,” the only resolution the college could offer was for all parties to attend VP-moderated group counseling to “open up” and “share their thoughts with one another” about the incident. The student and her boyfriend declined the offer via e-mail, and did not have further contact with the college for the rest of the semester.

### College’s Response Questioned

During OCR’s investigation, the college admitted that the student complained to multiple school employees about the incident; the RD, in particular, spoke to Students A and B after the incident, but did not report the conversations to the dean because the RD said it was just “girls joking around.”

The Dean of Women told OCR that after she learned about the incident directly from Student #1, she offered the student a new roommate. Because Student #1 had reconciled with Student A, the offer was turned down. The Dean of Women advised OCR that in order to resolve student complaints, the college applied the principle of *Matthew 18*, a Bible verse officials said showed that students should work together to resolve

conflicts. The dean also said Student B, on the dean’s urging, apologized to Student #1 but she did not accept the apology.

The VP told OCR that the college was willing to discipline both Students A and B after the Sept. 29 meeting, but that the victim only wanted discipline for B. The VP said disciplining one student was not proper because both students apparently were responsible.

Finally, Student #1 and her boyfriend composed a letter, sent Oct. 2 via e-mail to the VP, acknowledging Student B’s “positive recognition” of Student #1, and asking that Student A not be punished because she “was sincere in her restoration.” OCR said the student had not meant the letter to signify her withdrawal of the sexual harassment complaint; the e-mail was intended only to decline the VP’s counseling offer.

When the college received the Oct. 2 letter, the school considered the matter closed and did not talk about it again until Student #1 was involved in a dating infraction.

In the resulting disciplinary proceedings, Student #1, her boyfriend and her mother all rehashed the bra incident and highlighted the Title IX policies and procedures used by another university to illustrate, in their estimation, the inadequacy of Clearwater’s response.

After that, the Dean of Women re-interviewed the students and witnesses and barred Students A and B from entering Student #1’s unit. College officials told OCR that they did all they could to resolve the situation satisfactorily.

### College’s Harassment Procedures Lacking

OCR concluded that Student #1’s report of the incident put the college “on notice” that she had been sexually harassed. OCR’s investigation of Clearwater found that — at the time of the bra episode — the college lacked a designated Title IX coordinator, Title IX grievance procedures and a published nondiscrimination notice. Given the totality of the complaints — including Student #1 alleging that the other students touched her in a private area without consent and her boyfriend telling the VP that his girlfriend had been sexually assaulted — the school should have treated the incident as potential sexual harassment and taken prompt and effective measures to address it.

Instead, OCR found, the school failed to take the following Title IX-required steps:

- notify the student about the procedures for filing a complaint and where it should be filed;

See OCR, p. 11

## OCR (cont. from p. 10)

- properly categorize the event as possible sexual harassment or give the parties notice of the complaint's outcome; and
- at least in the case of one student, took no action to address the alleged harassment.

### 'Causal Connection' Not Found

Although OCR found that Clearwater fell short in its Title IX compliance, its investigators did not find a causal connection between Student #1's complaint and the college's subsequent adverse actions in disciplining Student #1 and her boyfriend for breaking the school's dating rules and in punishing Student #1's younger brother, a student at Clearwater, for a fire-related incident and accessing online pornography.

The students acknowledged violating the dating rules about four months after Student #1's harassment complaint.

And even though OCR said the discipline was meted out in close proximity to the complaint, the facts showed that the college imposed punishment consistent with its written rules and recent practices.

OCR reached similar conclusions with regard to the college's actions to discipline the student's brother — in one case, to punish him for his admitted accessing of hard-core pornography.

OCR found no evidence to demonstrate that the college was retaliating for his sister's sexual harassment complaint; in fact, officials concluded that the computer technical assistant's actions to uncover the brother's online activities were routine and impartial, and that his punishment was by the book for violations of that nature.

Clearwater Christian College agreed to take a number of corrective actions in response to OCR's investigation, including revisions to its grievance policies for addressing complaints of discrimination on the basis of sex. (Clearwater Christian College, No. 04-09-2084, Sept. 4, 2009) <sup>11</sup>

— Erika Fitzpatrick

## Real-World Solutions (cont. from p. 8)

communicated (orally and in writing) to employees that the policy included pagers, and never deviated from that practice, would the search of Quon's messages be clearly constitutional? It appears so."

"What you say and what you do could have a profound effect on whether you prevail in a search case," Hostetler said at the conference.

To avoid any confusion, he argued that it is important for school districts to not only adopt acceptable use policies, but also to train all employees on the policies' intricacies. Policies should not be allowed to grow stale; instead, officials must constantly review and update

them to ensure that they are specific in terms of usage and devices covered to "avoid creating any expectation of privacy," Hostetler said.

And because *Quon* also involved an outside technology vendor, districts would be wise to include language in third-party contracts addressing public records, searches and ownership issues.

How broadly *Quon* will apply to employee file searches in non-police department settings such as schools remains to be seen. Still, Hostetler wrote that "it seems safe to say that *Quon* will have far-reaching application to most, if not all, government employer searches of electronic files, including personal data" and that the "reasonableness of searches will vary depending on the type of agency involved and the context."

— Erika Fitzpatrick

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- For a copy of the paper, "Legal 'Quondaries' of Employee Electronic Searches and 2010 School CyberLaw Update," contact Hostetler via e-mail [hostetlerdr@appstate.edu](mailto:hostetlerdr@appstate.edu) or by phone 919-308-4652.
- Read *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010), online at <http://www.supremecourt.gov/opinions/09pdf/08-1332.pdf>. <sup>11</sup>

## Prevention Advisor (cont. from p. 7)

But ED is using its administrative power to ensure that schools are addressing the issue. Depending on the specific circumstances, OCR has said that anti-gay bullying can fall under Title IX of the Education Amendments of 1972, which means that school districts failing to sufficiently address misconduct could be out of compliance with the law. OCR launched one such investigation in Tehachapi, Calif., following the suicide of a gay youth who allegedly had been bullied at several schools (for more, see the February 2011 newsletter).

During the call, Jennings confirmed OCR's involvement in bullying-related investigations of schools, but said he was not permitted to disclose the details of ongoing cases. Jennings also did not say how many bullying-related probes had been launched. Nonetheless, Duncan assured attendees that the department will release the investigatory findings to keep the parents and the public informed.

### Funding to Address School Climate

ED wants to provide additional funding to help states, localities and universities improve school safety, including through the implementation of bullying prevention tactics. The department has already awarded \$38 million in Safe and Supportive Schools grants to help 11 states develop measurement systems that assess the extent of bullying on school grounds and other conditions that might impact student safety.

In its budget request for the 2012-13 school year, ED asked for additional resources so that all states can participate. "It is our goal that by fiscal 2012, we will have ramped up the funding sufficiently so that every state in the country that is eligible for such a grant and whose application is worthy can receive one," Jennings said.


Duncan said during the call that bullying is a problem along the educational continuum, including among college students.

Jennings said his office will propose a new program this year to encourage the higher education community to address bullying and harassment. The new Healthy College Campuses program will have four priorities, he said, one of which will recognize colleges and universities that institute exemplary bullying and violence prevention programming.

"We're trying very much to provide resources to institutions of higher education that are trying to address the issue of campus climate and also to highlight those that are doing a good job on it," Jennings said.

— Erika Fitzpatrick

### For More Information

- Visit the new bullying website at <http://www.stopbullying.gov>.
- Download the Youth Leader Toolkit at [http://www.stopbullying.gov/references/white\\_house\\_conference/index.html](http://www.stopbullying.gov/references/white_house_conference/index.html). 

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