

NCHERM WHITEPAPER

“Sexual Harassment and the First Amendment: Will Your Policies Hold Up In Court?”

By: Sandra K. Schuster, Esq., Partner, NCHERM

Introduction

Public colleges and universities strive to create and sustain a learning environment that promotes diversity, maintains civility, and establishes an atmosphere of mutual respect. At the same time, these institutions of higher education proudly acknowledge they represent the “Marketplace of Ideas” and academic freedom where scholarly and divergent opinions are welcomed.

These important and noble goals can create conflict when the expression of an individual’s opinion is articulated in such a way that it offends, embarrasses or degrades another. This challenge is a complex one for public institutions who must uphold the First Amendment rights of students, faculty and staff while maintaining the values of personal dignity and civility to which the institution aspires. It will also challenge private institutions that voluntarily uphold Constitutional rights, and private colleges in California, where Leonard’s Law imposes First Amendment requirements through state statute. Thus, the challenge to institutions of higher education is to find a means to reconcile the often competing values of personal expression and civility. Unfortunately, many institutions choose to maintain their commitment to a civil, respectful community by implementing sexual harassment policies that go far beyond the legal framework created by the legislature and the courts.

Discussion of the Conflict

The conflict of harassment policies with First Amendment freedoms generally stems from two factors. First, institutions frequently apply workplace language related to sexual harassment to their student sexual harassment policies. Restrictions on expression in the workplace are far more expansive and legal than the restrictions on student expression. Second, many institutions do not create clear distinctions about expression versus conduct, thus overreaching through their sexual harassment policies to limit verbal or written interaction among and toward students.

Title VII of the Civil Rights Act of 1964 set forth the standard prohibiting gender discrimination in the workplace. In a 1986 U.S. Supreme Court case, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 5, the Court stated that sexual harassment was a form of gender discrimination, subject to Title VII regulations. Subsequent cases established the framework for holding an employer liable for sexual harassment in the workplace.

The standard for sexual harassment in the workplace includes a prohibition of “quid pro quo” behavior that involves a power differential, and of a “hostile environment”. The standard for liability for hostile environment-based sexual harassment includes behavior that “alters the conditions of one’s employment and creates an abusive work environment”. The Equal Employment Opportunity Commission (EEOC) is the governmental agency charged with overseeing workplace discrimination issues, including sexual harassment. The EEOC publishes language adopted by institutions to describe sexual harassment.

Many public institutions have adopted the sexual harassment language prescribed by the EEOC as the standard for prohibited conduct by students. Sexual harassment behavior related to students is governed by Title IX. Title IX of the Educational Amendments of 1972 is a Federal law that prohibits gender discrimination in the education context. Like Title VII, Title IX was interpreted by the U. S. Supreme Court to apply gender discrimination to sexual harassment (*Franklin v. Gwinnet Cty. Public Schools*, 503 U.S.60 (1992)). The Court further established the contextual parameters of hostile environment sexual harassment under Title IX in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). The Court stated that the conduct or expression must be so “severe, pervasive and objectionably offensive such that it undermines the victim’s educational experience and denies equal access to an institution’s resources and opportunities”.

Although Title VII and Title IX are similar, in that they both prohibit discrimination based on gender, they are not identical laws, and the scope and context to which they are applied are distinctly different. Unfortunately, many public institutions begin with publication of their student sexual harassment policy using the broader language of sexual harassment from the employment context, and then they embellish the context to incorporate prohibition of expression that reinforces the institutional mission related to civility and respect.

Freedom of Expression Issues

Certainly civility, respect and support for diversity are important institutional values, and most institutions strive to reinforce these aspirations. However, using institutional policies that incorporate campus conduct and discipline to enforce these values make the institution vulnerable to challenge by prohibiting forms of expression that are protected under the First Amendment.

The U.S. Supreme Court, in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) stated, “a school may not prohibit speech unless the speech will materially and substantially interfere with the requirements of appropriate discipline on the operation of the school, and further, the Court stated *Healy v. James*, 408 U.S. 169 (1972) that, “the

vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools". These cases underscore the Court's adherence to the principles of free expression in the educational context.

In order to avoid First Amendment challenges, institutions should also ensure that their student sexual harassment policies contain language that clearly articulates what behavior or expression is prohibited and the context within which this prohibited behavior will rise to the level of sexual harassment. Incorporating words such as "offends", "denigrates", "belittles an individual" in a sexual harassment policy makes the institution vulnerable to challenges of having a policy that is vague (the student must guess at how this would translate to their actions), and overbroad (the language encompasses a substantial amount of protected speech along with prohibited speech). A successful challenge to the language of a sexual harassment policy could result in a court issuing an injunction against application of the policy or even an outright declaration that the language of the policy is unconstitutional. In extreme cases, it might lead to personal liability under §1983 for administrators who implement unconstitutional policies.

Recent Cases

Saxe v. State College Area School District, 240 F. 3d 200 206 (3rd Cir. 2001). The 3rd Circuit Court of Appeals struck down the school's sexual harassment policy because it was overbroad and encompassed expression the court stated was constitutionally protected. The court stated that the free speech clause of the First Amendment protects a wide variety of speech that listeners may consider deeply offensive".

DeJohn v. Temple University, 537 F. 3d 301 (3d Cir. 2008). The 3rd Circuit Court of Appeals held that Temple's use of broad terms such as "hostile" and "offensive" without qualifying language rendered its sexual harassment policy sufficiently overbroad and subjective that it could conceivably be applied to cover any speech of a gender motivated nature. The court issued a permanent injunction against Temple, from applying its sexual harassment policy as originally written and from re-implementing its originally challenged policy.

Lopez, et al. v. Candaele, et al., U.S. Dist. Ct. Central Dist. of Calif, (2009). In July, a federal district court issued an injunction against the school, prohibiting it from applying parts of its sexual harassment policy. The court, finding the school's policy was too broad and vague and prohibited a substantial amount of protected speech, held that a school may not prohibit speech unless the speech will "materially and substantially" interfere with the requirements of appropriate discipline in the operation of the school".

Summary

Colleges and universities must carefully review sexual harassment policies to ensure that language specifying prohibited expression is clearly articulated, consistent with the standard established in *Davis*. In addition, institutions must analyze the language of sexual harassment policies to ensure the prohibited language is not unconstitutionally vague, ambiguous or overbroad.

As the court in *Saxe* emphasized, school administrators must avoid careless expansion of institutional harassment policies to include protected expression.

Information about the author

Saunie Schuster is a Partner with NCHERM, a national risk management legal consulting firm. She previously served as the General Counsel for Sinclair Community College, and as Senior Assistant Attorney General for the State of Ohio in the Higher Education Section, representing public colleges and universities. She also served as the Associate General Counsel for the University of Toledo. Prior to practicing law she served as the Associate Dean of Students at The Ohio State University. In addition to her legal work in the higher education community, Ms. Schuster has over twenty-five years experience in college administration and teaching. Ms. Schuster is co-author of "The First Amendment: A Guide for College Administrators", and contributing author to "Campus Conduct Practice".