

## *Inside an OCR Title IX Investigation*

By: Brett A. Sokolow, JD

Recently, Security-On-Campus, Inc., obtained and publicized the letter of disposition to Georgetown University from the US Department of Education's Office for Civil Rights (OCR) regarding a sex discrimination complaint filed by a former Georgetown student. Many of you who have interest in the Clery Act know that Georgetown was found to be non-compliant with the Clery Act last year, and this OCR complaint arises from the same case. Both complaints were filed by a former student, Kate Dieringer, with the assistance of Security-On-Campus, Inc. Kate was sexually assaulted by another student at Georgetown and turned to Security-On-Campus, Inc., when she became dissatisfied with Georgetown University's response to and handling of her complaint.

Because this letter provides us with greater insight into OCR's methods and expectations, it occurred to me that further discussion of this complaint and the findings would be a good subject for an article, as a case study. While this letter did ultimately clear Georgetown, the university did not emerge unscathed. Parts of this letter may be a source of extreme embarrassment for Georgetown, and for anyone who cares about the public perception of how higher education treats victims. Other areas demonstrate competence, and a number of best practices. I am also told that this case catalyzed significant and important changes internally at Georgetown. Specifically, conduct officers will want to pay close attention to discussions of coordination of procedures, the standard of proof, sanctioning/remedy expectations, and appeals.

### **History: The Clery Violation**

On July 16<sup>th</sup>, 2004, the US Department of Education issued a ruling to make it clear that the practice by Georgetown—or any college—or requiring sexual assault victims to sign non-disclosure agreements in order to be told the results of complaints they brought alleging sexual assault is a violation of the Clery Act. The Clery Act mandates that complainants be told of the outcomes and any sanctions of any hearing based on their complaint of sexual assault. No condition, limitation or confidentiality requirement may interfere with that mandate.

Georgetown had refused to share information on the outcome of her hearing with Kate Dieringer unless she signed a confidentiality agreement. She did, to get the information, but subsequently filed a complaint. Georgetown was ordered to change its policy, and Georgetown has complied. I continued to be baffled by this one. I have clients who call me regularly, asking me to help them find ways to communicate outcomes and sanctions to students who are victims of offenses, who may not be entitled under FERPA to have access to that information. If the "crimes of violence" exception does not apply, there may be other ways, but sometimes there are not. They may backchannel the information anyway, but that is not legal. Some of them tell me they do the right thing, and don't worry too much about FERPA. I cannot counsel that type of practice, no matter how

nonsensical FERPA can be. But, I respect their desire to do the right thing. These administrators always have the same perspective. They are trying to share more information with victims, and to empower them, rather than keeping them in the dark and restricting their rights.

Was Georgetown trying to do the right thing? The Clery Act is clear that complainants have the right to outcomes. Even if they incorrectly misinterpreted the 1992 amendments, the 1998 amendments would have allowed Georgetown to make public disclosure of the outcome of this complaint. Why then could anyone believe that a restriction on redisclosure should apply to the victim? One could argue that until this ruling, Georgetown had no way of knowing that its policies weren't a correct interpretation of FERPA. Couldn't they? Not if they were paying attention. In 2000, William & Mary (my alma mater) took down several posters that had been hung up by a disgruntled campus victim. W&M took them down because they believed the posters improperly redisclosed information from the accused student's educational record, in violation of FERPA. It swung the Security-on-Campus folks, and it was quickly clarified that the posters were permissible, and W&M allowed them to be re-hung. If a victim can hang posters all over a college campus about the outcome of her hearing, you might think this would have provided Georgetown with information that its redisclosure concerns might be overblown and its gag order a bit oppressive.

### **Title IX**

Next, Kate Dieringer filed a complaint against Georgetown for sex discrimination under Title IX. She made 11 separate allegations in six specific grievances. The OCR investigators compiled seventeen pages of findings subsequent to their investigation and campus visit. There is significant information in this letter that will be of use to colleges.

### **Coordination of Procedures**

Georgetown employed three different procedures to address sexual violence and sexual harassment amongst students and staff. OCR noted that none of these procedures cross-referenced each other, and it was unclear to students how each would apply, and when. Creating cooperative liaison, jurisdictional clarity and transparent operation when you do not have a unified "one policy—one process" approach is important.

### **Standard of Proof**

One of the paragraphs of the letter could have wide-ranging implications for every college in the country. OCR instructed Georgetown that it was using an incorrect standard of proof to address campus sexual misconduct complaints. Georgetown had been using the clear and convincing evidence standard. For any college using that standard, and especially for the few campuses using even higher standards, such as Stanford and Chapel Hill, this should raise a question about whether this letter applies just to Georgetown, or whether it has wider implications? I believe that OCR is telling Georgetown--and every other college by extension--what standard to use. After all, why

hold one college to a particular standard, but not the others? Some of my colleagues argue that OCR rulings only apply to the college being investigated, and do not have precedential authority. They are correct, but I do think they have persuasive value. At the very least, any college using one of these two higher standards ought to take a copy of this letter to their legal counsel, and ask them for an interpretation of what it does or might mean for your campus. This may be the best piece of risk management advice I give you all year.

Here is what the paragraph from the OCR letter says:

In addition, under each of the procedures, complaints of sexual harassment were resolved using a clear and convincing evidence standard, a higher standard than the preponderance of the evidence standard, which is the appropriate standard under Title IX for sexual discrimination complaints, including those alleging sexual harassment. This raised concerns that it is more difficult than it should be for the [University] to hold students and employees responsible for acts of sexual harassment.

Georgetown revised its standard of proof to a more likely than not (preponderance) standard. I think this paragraph is pretty unequivocal. I think we should take the hint.

### **The Investigation**

There were a number of allegations made, some of which were ugly, and not all of which will be detailed here. Kate Dieringer alleged that campus officials discouraged her from pursuing her complaint. She alleged that Georgetown's sanctions were insufficient, and that it was not enforcing them. She alleged some things I have never seen in a Title IX complaint before, such as that she was denied equality because the accused student was allowed 4 or 5 character witnesses in the hearing, and she was limited to two. For each allegation, there must be evidence to show discrimination. Because the policy did not limit Dieringer to two character witnesses, and no evidence proved that she had been told she was limited to two, OCR found no violation. It was the same for many of the findings. Dieringer made allegations, and the investigators found there was insufficient evidence to support them.

### **Selective Editing**

In one allegation, she accused Judy Johnson, the Director of Student Conduct at Georgetown, of editing out critical evidence from written statements. Upon investigation, Ms. Johnson provided compelling evidence that the information she redacted was information that was not admissible in the hearing, and would have prejudiced the fairness of the process. This evidence included unconfirmed additional allegations about prior incidents committed by the accused student, and a conclusion from a psychologist as to the cause of the victim's post-traumatic stress disorder. Johnson ruled that the therapist could testify that Dieringer was experiencing post-traumatic stress, but not how

it was caused, which was conjecture and conclusory. That sounds like a best practice to me, designed to protect the victim from unnecessary grounds for appeal by the accused student. OCR found repeatedly that Georgetown followed its own policies (or that deviations were not material), often a strongly defensible practice.

### **A Woman Scorned?**

There is an interesting analysis of whether Judy Johnson tried to discourage the victim from pursuing a complaint, allegedly calling her “a woman scorned.” OCR found no evidence to corroborate that Ms. Johnson said this, and her explanation was that she used this phrase in describing to the victim the accused student’s response to the complaint. The accused student told Johnson that Dieringer was only accusing him because she was “a woman scorned.” Strangely, there was no indication in the letter as to whether OCR asked the accused if he had said this, or if he used that as a defense at the hearing. Ultimately, the victim did pursue the complaint, so any use of this phrase in any context obviously did not deter her. I find the Department of Education’s Investigatory Balkanization interesting. OCR found nothing here to violate Title IX. Do you think the Family Policy Compliance Office would have reached the same result? While I think we are on the periphery of FERPA here, assuming that this “woman scorned” comment was (part of) the accused’s defense, did Georgetown’s conduct office have authority to share it with the victim? Was it just an oral statement? Did the accused sign a FERPA consent?

### **Written Notice of the Outcome**

Most of Dieringer’s allegations were concluded with insufficient evidence, though Balkanization was in issue again with respect to how the hearing outcome was conveyed to her. Dieringer alleged that Georgetown violated Title IX when it refused to provide her with written notice of the outcome and sanction of the hearing. OCR noted correctly that Title IX does not require written notification, though it hinted that written notification would be a good thing. If only the OCR folks were aware that the Clery Act requires written notification in cases like Dieringer’s, but Clery is enforced by a different arm of the Department of Education.

### **Sufficiency of the Remedy**

Two allegations did catch the serious attention of the investigators. A little history of the actual incident is necessary as background. Dieringer was violently assaulted by a fellow student. A date rape drug was suspected. Incapacity was clear. The board who heard the complaint was rather compelled by the unseemly taking advantage of a first-year student by an orientation advisor. The conduct board recommended expulsion, in part because it was apparent that the accused student did not appreciate the wrongfulness of his actions, and the hearing panel was concerned that he would repeat the perpetration. An appeals panel reduced that to a one-year suspension **WITH NO CO-CURRICULAR RESTRICTION UPON HIS RETURN**. If you want your students to file OCR

complaints against you and possibly sue you, just reduce an expulsion to a short suspension. This, more than anything else, likely motivated Dieringer's whole complaint.

OCR investigated Dieringer's allegation that the sanction was an insufficient remedy. You really must read this section in the letter to grasp the investigators' response to dissembling by university officials. It went something like this. Appeals officers were questioned as to why they reduced the sanction. The Chair cited the disruptive influence of Dieringer's father at the hearing (interesting that the father was permitted to be present—Georgetown was obviously doing some things to provide support to Dieringer). "None of the other members of the Appeals Board corroborated this statement during interviews," OCR wrote. It was also not included within the grounds of the appeals board's written statement of conclusions. The other three appeals officers explained that they made the change to bring this outcome in line with previous outcomes for similar offenses. Consider that the accused student's appeal on the basis of "substantial procedural error" was denied, and using the argument of the unfairness of Dieringer's father's participation as an appellate ground becomes even more suspect.

OCR also pointed out that the precedential sanctions cited by the three other appellate officers were not really precedential, because Georgetown had changed its policies, and while the name of the offense was the same, the behaviors it described were now more serious. The underlying behaviors were not comparable, and Dieringer's attack was much more serious. Apples and oranges. Why were these supplied as precedent, then? At one point, the appeals officers also volunteered that they felt that the sanction could be reduced because the accused had no significant previous conduct record. There is an odd logic to that, especially when you note the footnote OCR inserted to clarify that the accused had two previous alcohol violations and a failure to comply with the sanctions from one of them. And, an additional (third) alcohol violation was added in addition to this sex offense, as part of the same complaint. Wouldn't that be good reason, if anything, to enhance the sanction rather than to mitigate it? According to Georgetown's own policy, it is. Alcohol is an aggravating factor that may be considered in sanctioning.

### **Sanctions Too Light**

Here is where the letter gets most interesting to me. OCR voiced concern that this reduction in sanction was indeed discriminatory. In reviewing previous complaints, the Appeals Board members admitted that they reviewed the sanctions for consistency, but did not examine the facts that led to each sanction. Several exchanges between OCR and Georgetown ensued, in which clarification was provided. After the Appeals Board reconvened to clarify its rationale, and sent a letter of explanation to OCR, OCR tellingly wrote, "The letter did not explain why, in their interviews with OCR, the members of the Appeals Board had failed to mention these reasons as the basis for their decision."

Finally, it became clear that the one-year suspension gained some additional terms and conditions once OCR raised its concerns. The accused student, if and when he wishes to reenroll, must receive clearance to do so by the Office of Student Affairs. He will be required to meet with the VPSA to discuss the conditions of his probation, will be

prohibited from any contact with the Dieringer, and will be disqualified from holding any peer leadership position. He will have to meet regularly with a mentor, and Georgetown will promptly and appropriately investigate any allegation that the accused is in violation of this probation. Let me now repeat a sentence from above. “An appeals panel reduced that to a one-year suspension **WITH NO CO-CURRICULAR RESTRICTION UPON HIS RETURN.**”

In order to satisfy OCR, Georgetown seems to have found a number of applicable co-curricular restrictions. After the fact. And while OCR ultimately accepted this, their letter indicated continued concerns about the appeal rationale and the enforcement of the sanctions. I wonder how the accused student feels about these new restrictions? The complaint included allegations that the accused student may still be visiting campus, in violation of his suspension. I think it is likely that the accused student will never return to Georgetown as a student. If he does, Georgetown may have its hands full ensuring that his discriminatory conduct does not reoccur. If there is a Round II, we will be sure to report on it.

### **Risk Management Tip of the Week**

Obviously, Georgetown’s Appeals Board members weren’t paying attention to their conduct training. The initial hearing board decision is owed deference by the Appeals Board. You cannot and should not be making a different decision merely because you disagree with the initial hearing board. Two principles that must guide appellate decisionmaking:

- 1) Change the finding only in cases of clear error;
- 2) Change the sanction only when a compelling justification exists to do so.

*All information offered is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.*

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