

## Pennsylvania Institutions Face Apparent Conflict Between Their State And Federal Obligations To Victims Of Sexual Assault

By Amy C. Foerster and James A. Keller

### SUMMARY

Pennsylvania law may conflict with the Office for Civil Rights' Dear Colleague Letter on Title IX and Sexual Violence with regard to victim confidentiality.

On April 4, 2011, the United States Department of Education's Office for Civil Rights (OCR) issued its Dear Colleague Letter (<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>) on Title IX and Sexual Violence (DCL). The DCL has raised significant questions regarding the obligations of colleges and universities in complying with Title IX of the Education Amendments of 1972 when faced with allegations of sexual harassment, including sexual violence. (Please see Saul Ewing's earlier articles on the DCL for additional background [[http://www.saul.com/media/article/3063\\_NACUA%20Note--OCR%20Title%20IX.pdf](http://www.saul.com/media/article/3063_NACUA%20Note--OCR%20Title%20IX.pdf)] [[http://www.saul.com/media/site\\_files/1904\\_pdf\\_2943.pdf](http://www.saul.com/media/site_files/1904_pdf_2943.pdf)].)

The DCL's discussion of confidentiality has spurred a great deal of conversation, questions and debate. The DCL contemplates, in pertinent part, that there will be situations where the institution "cannot ensure confidentiality" to a victim of sexual violence. (See DCL, p. 5.) OCR's position appears to be that an institution's obligation to address sexual violence can extend beyond a specific complainant to the entire campus community. As a result, an institution may have to investigate an instance of sexual violence, and pursue discipline against the respondent, despite a complainant's request for confidentiality. Doing so may necessarily involve disclosing the alleged victim's identity

Here in Pennsylvania, Article XX-G of the Public School Code, 24 P.S. § 20-2001-G, et seq., took effect on March 17, 2011, just days before OCR issued the DCL. Article XX-G requires that Pennsylvania's institutions of higher education develop sexual violence awareness educational programs including, among other things, "a promise of confidentiality for the victim of sexual assault." 24 P.S. § 20-2001-G.

The Pennsylvania Department of Education (PDE) has now sent colleges and universities a "2012 Assurance of Compliance" form, requiring institutions to confirm, among other things, that they promise confidentiality to victims of sexual assault. This unambiguous promise of confidentiality requested by the "Assurance of Compliance" form (<http://info.saulnews.com/reaction/documents/ComplianceForm.pdf>), which tracks Article XX-G, seems contrary to the DCL's statement that under Title IX, an institution of higher education "cannot ensure confidentiality" to victims of sexual violence.

Until clarification is provided by the PDE or OCR as to how Pennsylvania institutions are to square their federal Title IX obligations with the Commonwealth's requirements under Article XX-G, institutions may

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wish to include a caveat when completing their Assurance of Compliance form. A suggested caveat would indicate that the institution promises confidentiality to victims of sexual assault, but only to the extent consistent with the obligations of Title IX and the April 4, 2011 Dear Colleague Letter issued by the United States Department of Education, Office For Civil Rights.

Please contact Amy Foerster (717-257-7573 or afoerster@saul.com) or Jim Keller (215-972-1964 or jkeller@saul.com) with any questions regarding these or other higher education compliance issues.

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