

## NEWS & INSIGHTS

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### LIGHTFOOT'S TAKE ON JURISDICTION IN TITLE IX CASES

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#### The Issue

The Office of Civil Rights' (OCR) jurisdiction is broad. If an institution receives federal funds, to include student financial aid and grants, it is subject to Title IX and OCR's authority. The most public, and typically most troubling, incidents of Title IX violations are alleged incidents of sexual violence. OCR's jurisdiction in sexual violence cases is not limited to on-campus incidents and can be extended off campus where there is a sufficient "connection with [an institution's] education programs and activities." However, OCR's recent closure of an investigation involving Liberty University demonstrates that not all alleged incidents of off-campus sexual violence with a nexus to the institution fall within OCR's jurisdiction.

#### The Facts

The facts of the Liberty allegations are not entirely known, as there has been no litigation or a public release of findings. However, news reports indicate that a female, who was not a student at the school, alleged that a Liberty employee with whom she had a romantic relationship sexually assaulted her. The alleged assault did not occur on campus, nor did it occur at an event or place connected to the institution. The female initiated the complaint after she demanded the employee's termination and Liberty refused. In its letter to Liberty explaining its decision not to investigate further, OCR noted that the only conceivable basis for jurisdiction was the alleged assailant's status as a Liberty employee, which was not sufficient, standing alone, to give OCR jurisdiction over the allegations.

#### Lightfoot's Take

Title IX is an established, and growing, risk area for institutions of higher education, and no matter presents a broader array of risks than an allegation of sexual violence. Such allegations implicate not only legal liability, but threaten an institution's greatest asset — its institutional reputation. The Liberty case demonstrates OCR's reach is not without limits, but off-campus sexual violence is still a risk to be managed. Slight factual variables could have yielded significantly different results. Again, the controlling analysis is whether an incident has a "connection with . . . any education program or activity."

Consider these scenarios:

- The student complainant. Had the complainant been a student, jurisdiction would have been easier to establish. It is difficult to imagine a scenario where an allegation involving a student as a complainant and a faculty member as an assailant would not confer jurisdiction. It is conceivable such an incident could occur, but it is hard to imagine OCR declining to investigate such an allegation merely for lack of jurisdiction.
- The prospective student complainant. OCR's analysis likely would have been significantly different had the complainant been a prospective student and the alleged incident arose from the faculty member's interaction with her in that capacity. This scenario

would encompass off-campus interactions such as recruiting events.

- On-campus effects of the off-campus incident. Alleged instances of off-campus sexual violence can confer OCR jurisdiction in a number of ways. The most obvious would be a scenario where an alleged assailant harasses a victim on campus after an off-campus incident. Such a scenario would clearly implicate OCR's jurisdiction, and an institution with knowledge of such harassment must implement their existing Title IX policy to address it.
- Retaliation. Once a complainant invokes OCR's power to investigate, he or she is due all legal protections typically afforded a victim in such investigations. A lack of jurisdiction over the subject matter of the complaint will not alleviate the institution's policy not to retaliate against the complainant. As such, institutions should make clear to relevant personnel that any allegation of sexual violence that implicates the institution in anyway must be taken seriously, and the complainant, regardless of his or her lack of affiliation with the institution, must be afforded standard victim protections utilized by the institution in all Title IX investigations.