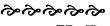


SCHOOL AND COLLEGE LEGAL SERVICES of California

General Counsel
Margaret M. Merchat

Attorneys
Janna L. Lambert
Nancy L. Klein
Marko H. Fong
Carl D. Corbin
Patrick C. Wilson
Loren W. Soukup
Frank Zotter, Jr.


Susanne K. Reed
(1947 – 2010)

*A Joint Powers Authority serving school and
college districts throughout the state with offices in
Eureka, Hayward, San Rafael, Santa Cruz and Santa Rosa*

Reply to:
Santa Rosa Office
5350 Skylane Blvd.
Santa Rosa, CA 95403
(707) 524-2690
Fax: (707) 578-0517
santarosa@sclscal.org


*Employer-Employee
Relations Coordinator*
Robert S. Latchaw

Of Counsel
Robert J. Henry
Virginia A. Riegel

LEGAL UPDATE

April 13, 2011

To: Superintendents/ Member School Districts (K-12)

From: Carl D. Corbin, Assistant General Counsel 

Subject: OCR Dear Colleague Letter Addresses Student Sexual Harassment
Memo No. 06-2011

On April 4, 2011, the United States Department of Education, Office for Civil Rights (“OCR”), released a “Dear Colleague” letter addressing student sexual harassment.¹ The nineteen-page letter describes in detail the responsibilities of school districts and post-secondary institutions to ensure that all educational environments are free from sexual harassment as required by Title IX of the Education Amendments Act of 1972 (“Title IX”) and related law.² The letter supplements guidance provided in 2001 by OCR regarding sexual harassment. At the end of this Legal Update is attached a two-page OCR summary of the letter and a district’s responsibility to comply with Title IX.

The Dear Colleague letter begins with a discussion of a district’s responsibility related to student sexual harassment, including sexual violence, and describes a district’s responsibility to take immediate and effective steps to end sexual harassment. The letter provides detailed guidance and practical examples regarding sexual harassment. The letter also outlines the steps to complete an appropriate sexual harassment investigation. The letter concludes with three pages of very helpful remedies that a district can implement if sexual harassment has occurred.

Significant Issues Discussed in the Dear Colleague Letter

- Provides a definition of when sexual harassment creates a hostile academic environment for a student.

¹ The letter is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

² See 20 U.S.C. sections 1681 et seq. and 34 C.F.R. part 106, which prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance.

- States that a district may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds with the district being responsible for considering the effects of the off-campus harassment in determining whether or not a hostile academic environment has been created on campus.
- States that regardless of whether or not a complaint is formally filed, the district has an affirmative duty to conduct an investigation if the district knows, or reasonably should know, about possible sexual harassment.
- States that if sexual harassment has been determined to have been committed then the district has a duty to take appropriate actions to ensure the sexual harassment stops and, as appropriate, provide a remedy to the victim.
- States that a district should obtain consent from the complainant to begin an investigation and allow, as required, the complainant's name or other identifiable information to be disclosed to the alleged perpetrator. If the complainant insists upon confidentiality then the complainant should be informed that the district's ability to respond may be limited.
- States that, when a district has determined that the complainant's request for confidentiality is outweighed by the district's responsibility to ensure a safe and nondiscriminatory environment for all students, the district should inform the complainant that it cannot maintain confidentiality.
- Provides a detailed description of a district's duty to disseminate a notice of non-discrimination, to designate at least one employee as the contact person for sexual harassment complaints, and adopt procedures for the prompt and equitable resolution of complaints. For K-12 districts, we encourage our clients to consider adopting the model polices on sexual harassment developed by the California School Boards Association ("CSBA").
- States that an investigation should use a "preponderance" of evidence standard in determining whether or not sexual harassment has occurred (i.e. more likely than not that sexual harassment has occurred).
- States that both the complainant and alleged perpetrator should be notified in writing as to whether or not harassment was found to have occurred.
- States that the Family Education Rights and Privacy Act ("FERPA") allows a district to disclose to the harassed student information about the sanction imposed upon a student perpetrator when the sanction directly relates to the victim (e.g. such as an order that the perpetrator stay away from the victim or the perpetrator has been transferred to another class/school); however, disclosure of other information in the perpetrator's educational record (including sanctions that do not directly relate to the victim) may result in a violation of FERPA. Our office is concerned that, contrary to the assertion of OCR, FERPA does not allow an exemption to disclose information to a harassed

student about the sanction imposed upon a student perpetrator. Our office will be contacting the federal agency responsible for implementing FERPA, the Family Policy Compliance Office ("FPCO"), to seek clarification on this issue. In the interim, we encourage districts to contact legal counsel for further assistance if a situation arises regarding this issue.

Please contact any of our attorneys if you have questions regarding this or other legal issues.

U.S. Department of Education Office for Civil Rights



Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts April 4, 2011

Sexual Violence Statistics and Effects

- Acts of sexual violence are vastly under-reported.¹ Yet, data show that our nation's young students suffer from acts of sexual violence early and the likelihood that they will be assaulted by the time they graduate is significant. For example:
 - Recent data shows nearly 4,000 reported incidents of sexual battery and over 800 reported rapes and attempted rapes occurring *in our nation's public high schools*.² Indeed, by the time girls graduate from high school, more than one in ten will have been physically forced to have sexual intercourse in or out of school.³
 - When young women get to *college*, nearly 20% of them will be victims of attempted or actual sexual assault, as will about 6% of undergraduate men.⁴
- Victims of sexual assault are more likely to suffer academically and from depression, post-traumatic stress disorder, to abuse alcohol and drugs, and to contemplate suicide.⁵

Why is ED Issuing the Dear Colleague letter (DCL)?

Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. Sec. 1681, *et seq.*, prohibits discrimination on the basis of sex in any federally funded education program or activity. ED is issuing the DCL to explain that the requirements of Title IX cover sexual violence and to remind schools⁶ of their responsibilities to take immediate and effective steps to respond to sexual violence in accordance with the requirements of Title IX. In the context of the letter, sexual violence means physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent. A number of acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion.

¹ For example, see HEATHER M. KARJANE, ET AL., *SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 3* (Nat'l. Institute of Justice, Dec. 2005).

² SIMONE ROBERS, ET AL., *INDICATORS OF SCHOOL CRIME AND SAFETY 104* (U.S. Dep't of Education & U.S. Dep't of Justice, Nov. 2010), *available at* <http://nces.ed.gov/pubs2011/2011002.pdf>.

³ EATON, D. K., KANN, L., KINCHEN, S., SHANKLIN, S., ROSS, J., HAWKINS, J., ET AL., *YOUTH RISK BEHAVIOR SURVEILLANCE-UNITED STATES 2009, Morbidity and Mortality Weekly Report*.

⁴ CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT STUDY FINAL REPORT* xiii, 5-5 (Nat'l. Criminal Justice Reference Service, Oct. 2007), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

⁵ For example, see WORLD HEALTH ORGANIZATION, *WORLD REPORT ON VIOLENCE AND HEALTH* 162-164 (Etienne G. Krug, et al. eds., 2002), *available at* http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf; CENTERS FOR DISEASE CONTROL, *UNDERSTANDING SEXUAL VIOLENCE: FACT SHEET 1* (2011), *available at* http://www.cdc.gov/violenceprevention/pdf/SV_factsheet_2011-a.pdf.

⁶ "Schools" includes all recipients of federal funding and includes school districts, colleges, and universities.

What does the DCL do?

- Provides guidance on the unique concerns that arise in sexual violence cases, such as the role of criminal investigations and a school's independent responsibility to investigate and address sexual violence.
- Provides guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.
- Discusses proactive efforts schools can take to prevent sexual violence.
- Discusses the interplay between Title IX, FERPA, and the Clery Act⁷ as it relates to a complainant's right to know the outcome of his or her complaint, including relevant sanctions facing the perpetrator.
- Provides examples of remedies and enforcement strategies that schools and the Office for Civil Rights (OCR) may use to respond to sexual violence.

What are a school's obligations under Title IX regarding sexual violence?

- Once a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate action to investigate or otherwise determine what occurred.
- If sexual violence has occurred, a school must take prompt and effective steps to end the sexual violence, prevent its recurrence, and address its effects, whether or not the sexual violence is the subject of a criminal investigation.
- A school must take steps to protect the complainant as necessary, including interim steps taken prior to the final outcome of the investigation.
- A school must provide a grievance procedure for students to file complaints of sex discrimination, including complaints of sexual violence. These procedures must include an equal opportunity for both parties to present witnesses and other evidence and the same appeal rights.
- A school's grievance procedures must use the preponderance of the evidence standard to resolve complaints of sex discrimination.
- A school must notify both parties of the outcome of the complaint.

How can I get help from OCR?

OCR offers technical assistance to help schools achieve voluntary compliance with the civil rights laws it enforces and works with schools to develop approaches to preventing and addressing discrimination. A school should contact the OCR enforcement office serving its jurisdiction for technical assistance. For contact information, please visit ED's website at <http://wdcrocolp01.ed.gov/CFAPPS/OCR/contactus.cfm>.

A complaint of discrimination can be filed by anyone who believes that a school that receives Federal financial assistance has discriminated against someone on the basis of race, color, national origin, sex, disability, or age. The person or organization filing the complaint need not be a victim of the alleged discrimination, but may complain on behalf of another person or group. For information on how to file a complaint with OCR, visit <http://www2.ed.gov/about/offices/list/ocr/complaintintro.html> or contact OCR's Customer Service Team at 1-800-421-3481.

⁷ The Family Educational Rights and Privacy Act is at 20 U.S.C. Sec. 1232g, and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act is at 20 U.S.C. Sec. 1092(f).