Sonoma County Office of Education

TITLE IX PART I -
TITLE IX COORDINATOR ESSENTIALS
K-12

September 19, 2019

Presented by:

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Education
Juris Doctorate, University of San Francisco School of Law (2003); Master of Science in Gerontology, University of Southern California (1999); Bachelor of Science in Gerontology, University of Southern California (1998).

School and College Legal Services (SCLS) is a joint powers authority serving school districts, county offices of education, SELPAs, and community colleges in over fifteen counties in Northern California. Our primary focus, as a preventative law firm, is helping clients avoid future costly legal problems. We are a collaborative office, working to ensure our clients receive the most legally defensible advice in the most efficient manner possible.
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Areas of Expertise
Collective Bargaining  
Personnel  
Title IX & the Clery Act  
Website Accessibility

Experience
Ms. Austin’s practice focuses on collective bargaining negotiations and personnel matters. She assists school districts, county offices of education, and community college districts in negotiating collective bargaining agreements, resolving grievances and unfair practice charges, and handling personnel matters. Ms. Austin also assists clients with Title IX and Clery Act compliance, as well as investigations of alleged discrimination or harassment.

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Education
B.A. Humboldt State University, Geography magna cum laude (2007)  
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## Title IX Part I - Title IX Coordinator Essentials

**K-12**

**September 19, 2019**

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Title IX Part I –
Title IX Coordinator Essentials
September 19, 2019

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Agenda
• Title IX Workshop Series
• What is Title IX?
• Title IX Investigations Requirements
• Role of the Title IX Coordinator
• Wide Application of Title IX
• Enforcement
• Next Steps

Fall 2019
Title IX Workshop Series at SCOE
• Part 2 – Conducting Title IX Investigations, October 9, 2019
• Part 3 – Nuts and Bolts of the Title IX Coordinator’s Role, November 12, 2019
• Part 4 – CCD Only – Additional Title IX Challenges for Community Colleges, December 12, 2019
I. What Is Title IX?

What Is Title IX?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”


What Is Title IX?

• Title IX of the Education Amendments of 1972

• Established to combat discrimination against women in the educational system

• Two objectives:
  • Prevent use of federal resources to support discriminatory practices in education
  • Provide individuals with protection against those practices

• Title IX protects any “person” against sex discrimination – both males and females
What Is Title IX?

- Title IX applies to “recipients of Federal financial assistance.”
- Every recipient must ensure that a student is not denied or limited in the ability to participate in or benefit from a school program or activity on the basis of sex.

Title IX Regulatory Framework

- Federal statutes - 20 U.S.C. §1681
- Implementing regulations - 34 C.F.R. Part 106
- OCR’s regulatory guidance
- Resolution Agreements and Letters with OCR and DOJ
- Trump Administration rescission of Transgender Dear Colleague Letter, 2011 and 2014 Title IX guidance, and new OCR investigatory guidance scaling back OCR’s oversight purview
- Overlapping and related California law

September 2017 Dear Colleague Letter

- Rescinded 2011 Dear Colleague Letter on Sexual Violence and 2014 Q&A on Title IX and Sexual Violence
- Refers schools to 2001 Revised Sexual Harassment Guidance and 2006 Dear Colleague Letter on Sexual Harassment
- Significant changes:
  - Removed 60-day investigatory time frame
  - Allowed schools to choose between preponderance of the evidence and clear and convincing evidence standards
  - Provided responding party explicit rights during investigation and before decisionmaking
  - Allowed schools to provide interim remedies to both parties
Where Does Title IX Apply?

• Title IX protects students in connection with all academic, educational, extracurricular, athletic, and other programs of the district.

• Programs can take place in a district facility, on a school bus, at a program sponsored by the district at another location, or on a school-sponsored field trip.

Requirements Under Title IX

• Once an institution knows or reasonably should know of sex discrimination, it must:
  • Investigate
  • End the discrimination
  • Prevent discrimination from occurring again

• Procedural requirements:
  • Adoption of certain policies
  • Adoption and publication of grievance procedures
  • Designation of a Title IX Coordinator
  • Fair and equitable investigations and proceedings

Responsible Employees

• A “responsible employee” is any employee:
  • Who has the authority to take action to redress sexual violence;
  • Who has been given the duty of reporting incidents of sexual violence/misconduct to the Title IX Coordinator/designee; or
  • Whom a student could reasonably believe has this authority or duty.

• When a “responsible employee” knows or should have known of sexual harassment/discrimination, the district must take certain steps.
II. Title IX Investigations

Requirements

• A recipient must adopt and publish grievance procedures for “prompt and equitable resolution” of Title IX complaints.

• Procedures must specify timelines for major stages of the process.

• Grievance procedures may include voluntary informal mechanisms for resolving some types of complaints, but must include formal mechanisms for resolving complaints.
Title IX Grievance Procedures

- Grievance procedures MUST include:
  - Notice of procedures, including where complaints may be filed;
  - Application of the procedures to complaints alleging harassment on the basis of sex;
  - Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
  - Notice to parties of the outcome of the complaint; and
  - An assurance the district will take steps to prevent recurrence of any harassment and to correct its discriminatory effects.

Pop Quiz!

Title IX Investigation Procedures: Duty to Investigate

- If a district knows or reasonably should know about an alleged Title IX violation, the district’s duty to investigate is triggered.

- A direct complaint from the victim is not necessary to trigger the duty to investigate and remediate.

- The district must take immediate action to eliminate the discrimination/harassment, prevent its recurrence, and address its effects.
Investigations

• Investigations into alleged violations of Title IX must be prompt, thorough, and impartial.

• Investigators should be credible, impartial, and trained.

• Investigations may use either the preponderance of the evidence standard or the clear and convincing evidence standard.

• Respondents should be directed not to retaliate against the complainant or any other participants in the investigation and complaint process.

Standards of Evidence

• 2017 Title IX guidance gives districts the ability to choose between two standards:
  • Preponderance of the Evidence (51%)
    - More likely than not
  • Clear and Convincing Evidence (~75%)
    - Substantially more likely than not

Pop Quiz!

??
Title IX Investigation Procedures: Law Enforcement

- In cases involving potential criminal conduct, district personnel must determine whether law enforcement should be notified.
- District personnel should never discourage an alleged victim from reporting to law enforcement.
- Law enforcement involvement and/or separate investigation(s) does not relieve the district of its independent Title IX obligation to investigate the conduct.
- Conduct may constitute a violation of Title IX even if law enforcement does not have sufficient evidence of a criminal violation - different standards of evidence.

Title IX Investigation Procedures: During and After Investigation

- The complainant may request confidentiality and/or that their identifiable information not be disclosed to alleged perpetrator.
- Both parties should be given periodic status updates as to the course of the district’s investigation (these time frames should be noted in your grievance procedures).
- Both parties should be notified, in writing, about the outcome of the complaint and any right to appeal, regardless of the results of the investigation.

Title IX Investigation Procedures: Procedural Requirements

- Both complainant and respondent must have the same meaningful access to information that will be used during disciplinary meetings and hearings.
- Both parties have the right to respond to the investigation report in writing in advance of the decision of responsibility or hearing to determine responsibility.
- Any process made available to one party in the adjudication procedure must be made equally available to the other party.
Title IX Investigation Procedures: Interim Protective Measures

- After receiving a complaint, the district must take immediate steps to protect complainant in the educational setting.
- Under 2017 Guidance, OCR expanded interim measures to be available to the respondent too.
- Respondent employees may be placed on paid administrative leave (check CBA/policies).
- When separating complainant and respondent, minimize burden on complainant - do not as a matter of course remove complainant from classes or programs while allowing respondent to remain.

Title IX Investigation Procedures: Interim Protective Measures

- Interim measures may include:
  - Counseling
  - Extensions of time or other course-related adjustments
  - Modifications of work or class schedules
  - Campus escort services
  - Restrictions on contact between the parties
  - Changes in work or housing locations
  - Leaves of absence
  - Increased security and monitoring of certain areas of campus
  - Special training or other interventions to repair educational environment
  - Dissemination of information
  - Issuance of new policy statements

Title IX Investigation Procedures: Hearings

- The parties must have an equal opportunity to present relevant witnesses and other evidence.
- Decisionmaking must make findings of fact and conclusions as to each allegation.
- Recipients must maintain documentation of all hearing proceedings, which may include transcripts, written findings of fact, or audio recordings.
Title IX Investigation Procedures: Notice of Outcome

- Notice of outcome of disciplinary proceedings should be provided to complainant and respondent concurrently.

- Notice of outcome should include, at a minimum:
  - Whether district found that the conduct occurred as to each allegation
  - Any individual remedies offered to the complainant (only in complainant’s copy)
  - Any sanctions imposed on the responding party (only those that relate directly to complainant in complainant’s copy)
  - Other steps district has taken to remedy hostile environment

Title IX Investigation Procedures: Appeals

- Under 2017 guidance, if district’s Title IX grievance procedures allow for appeals, OCR mandates that districts provide appeal rights for either: (1) respondent only, or (2) respondent and complainant.

- The appeals timeline should be clear in the Title IX grievance policies.

Title IX Investigation Procedures: Respondent’s Due Process Rights

- Respondents have Title IX rights too.

- The complaint procedure and its implementation, including the investigation and decisionmaking processes, must be fair and impartial.

- The respondent does not have a right to be notified of the outcome of the investigation prior to the complainant; both parties should be notified concurrently.
## Remedies and Sanctions

- If the district determines Title IX has been violated, the district must implement appropriate final remedies.
- Remedies for a complainant might include:
  - Money damages
  - Moving complainant or respondent to a new class or residence hall
  - Restoration of leave time
  - Providing counseling, medical, or academic services
- Remedies for the broader student/employee population might include:
  - Counseling and training
  - Campus climate check/survey

## Recordkeeping

- Title IX regulations require institutions to keep records to send to OCR for compliance reviews.
- Records are also important in the event of any external review, such as judicial proceedings.
- The records are also important for the Title IX Coordinator – who should be conducting periodic reviews on whether patterns of conduct exist, and whether further steps are necessary to ensure student safety.

## Pop Quiz!

"???"
III. Role of the Title IX Coordinator

Who is the Title IX Coordinator?

Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations. The recipient shall notify all its students and employees of the name, office address, and telephone number of the employee or employees appointed pursuant to this paragraph.

28 C.F.R. 54.135(a)

Title IX Coordinator

- The Title IX Coordinator has many responsibilities, including broadly:
  - Promoting gender equity in education
  - Overseeing the response to Title IX reports and complaints
  - Involvement in drafting and revising Title IX policies and regulations
  - Ensuring proper posting of notices
  - Identifying and addressing patterns of gender inequity revealed by reports and complaints
Title IX Coordinator

- The Title IX Coordinator may also:
  - Evaluate requests for confidentiality in complaints;
  - Determine appropriate interim and final remedies for a complainant and the community, and sanctions for the perpetrator; and
  - Work with local law enforcement and service providers.

Title IX Coordinator: Training Requirements

- The Title IX Coordinator must both receive training and provide trainings to staff and students.
  - Title IX Coordinator and all persons involved in implementing the grievance procedures must have training/experience handling complaints of sexual harassment and sexual violence, and in the recipient’s grievance procedures.
  - At the community college level, Title IX Coordinators have additional annual training requirements under Clery.

Title IX Coordinator: Coordination with Law Enforcement

- The Title IX Coordinator/designee should provide assistance to district law enforcement unit employees regarding how to respond appropriately to reports of sexual violence.
- The Title IX Coordinator should be given access to district law enforcement investigation notes and findings as necessary for the Title IX investigation, so long as doing so does not compromise the criminal investigation.
- These procedures can be outlined in practice guidelines for the district’s Title IX office and its law enforcement unit.
Hypo

IV. Wide Application of Title IX

Athletics

• Recipients must provide equal athletic opportunities for members of both sexes.
• Recipients must also effectively accommodate students’ athletic interests and abilities.
• Recipients can demonstrate compliance in 3 ways:
  1. Provide participation opportunities for male and female students substantially proportionate to their respective enrollments; or
  2. For the sex currently or historically underrepresented in sports, show a history and continuing practice of expanding programs that is responsive to the interests of that sex; or
  3. If the recipient cannot show a history and continuing practice of program expansion, demonstrate that the district is meeting the interests and abilities of that sex with current programming.
Athletics

Part Two of the Three-Part Test

Showing a History and Continuing Practice of Expanding Programs that is Responsive to the Interests of that Sex

• These factors may indicate a history of expansion:
  • The institution’s record of adding intercollegiate teams or upgrading teams to intercollegiate status for the underrepresented sex;
  • The institution’s record of increasing the numbers of participants in intercollegiate sports of the underrepresented sex; or
  • The institution’s affirmative responses to students’ requests for addition or elevation of sport.

• These factors may indicate a continuing practice of expansion:
  • The institution’s current implementation of a nondiscriminatory policy of procedure for requesting the addition or elevation of supports and the effective communication of the policy to students; and
  • The institution’s current implementation of a plan to expand programming in response to developing interests and abilities.

Athletics

Part Three of the Three-Part Test

Fully and Effectively Accommodating the Interests and the Abilities of the Underrepresented Sex

• For part three, OCR considers all three questions:
  1. Is there unmet interest in a particular sport?
  2. Is there sufficient ability to sustain a team in the sport?
  3. Is there a reasonable expectation of competition for the team?

• If the answers to all three questions is “yes,” OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three.

• Title IX Coordinator should regularly evaluate the equity between the institution’s athletics opportunities.
• Whether equal athletic opportunities are provided to both sexes is based upon a “laundry list” of factors.
Athletics

• “Laundry list” of factors:
  • Equipment and supplies
  • Scheduling of games and practice time
  • Travel and per diem allowances
  • Opportunity for coaching and academic tutoring
  • Assignment and compensation of coaches and tutors
  • Provision of locker rooms and practice and competitive facilities
  • Publicity
  • Recruitment
  • Support services

Starting with the 2015-16 school year, all public schools and charter schools that offer competitive athletics must make certain data publicly available:

• Total enrollment, by gender
• Number of pupils enrolled at the school who participate in competitive athletics, by gender
• Number of boys’ and girls’ teams, classified by sport and competition level
• If the school has a website, the data must be available on the website

Single-Sex Education*

• Except as specifically allowed by law, districts may not carry out programs or activities separately on the basis of sex.
• Single-sex classes may be offered under certain circumstances:
  • Contact sports in physical education classes;
  • Classes or portions of classes that deal primarily with human sexuality;
  • Non-vocational classes and extracurricular activities that meet specific criteria.
• Consider the difference between designated single-sex classes versus classes with predominantly male or female students.

*This slide does not address athletics (see prior slides).
Discipline

- Title IX prohibits institutions from applying different rules of behavior, sanctions, or other treatment, including discipline, based on sex.
- Title IX Coordinators should regularly review discipline data to ensure that similarly situated students are not being disciplined differently based on sex for the same offense.
- Students should not be disciplined based on their gender identity or for failing to conform to stereotypical notions of masculinity or femininity in their appearance or behavior.

Financial Assistance

- Recipients may not provide different amounts or types of financial assistance, limit eligibility for financial assistance, or apply different criteria on the basis of sex in administering financial assistance.
- Recipients may not assist any entity offering sex-restricted financial aid.
- Three broad exceptions. (see next slide)
Recruitment, Admissions & Counseling

- Title IX prohibits higher education, vocational education, and professional education institutions from recruiting, admitting, and counseling or guiding students on the basis of sex.

- Title IX Coordinator should regularly review enrollment data to ensure disproportionate enrollment by one sex (e.g., in the STEM fields) is not the result of counseling practices or counseling materials.

Sex-Based Harassment

- Sexual harassment is a prohibited form of sex discrimination.

- Two types:
  - Hostile educational environment harassment
  - Quid pro quo harassment

- Title IX prohibits sexual harassment by students, employees, and third parties (such as visiting speakers and athletes).

- Title IX prohibits same-sex sexual harassment too.

Sex-Based Harassment: Sexual Violence

- Sexual violence = physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol or intellectual or other disability.

- A district may be notified directly or indirectly of a claim of sexual violence.

- Once a district knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate.
Gender-Based Discrimination

- Title IX prohibits gender-based discrimination, including:
  - verbal, nonverbal, or physical aggression, harassment, intimidation, or
  - hostility, based on sex or sex stereotyping, even if not sexual in nature.
- Includes not using a transgender student’s preferred name or
  pronouns when the school uses these tools for gender-conforming students.
- Federal guidance related to transgender students has shifted dramatically in recent years.
- In this and all areas of Title IX, districts must also consider
  California law.

Pop Quiz!

Sexual Orientation Harassment

- Title IX does not prohibit discrimination on the basis of sexual orientation (but CA law does).
- Harassment directed at LGBTQ students that is 
  sufficiently serious to limit/deny their ability to
  participate in/benefit from the school’s services, 
  activities, or programs is covered by Title IX.
- Title IX also prohibits discrimination based on sex or
  sex stereotyping, even if not sexual in nature.
Pregnant and Parenting Students

- A district may not require a pregnant student to participate in a separate school program.
- A district must provide the same special services to pregnant students that it does to students with other temporary medical conditions.
- A district must excuse a student’s absences due to pregnancy or related conditions, including recovery from childbirth or termination of pregnancy, as long as student’s physician deems absences medically necessary.
- Harassment based on pregnancy or related conditions constitutes sex-based harassment and is prohibited under Title IX.

Pregnant and Parenting Students: Lactating Students

- Districts must provide reasonable accommodation to lactating students to express breast milk, breastfeed an infant child, or address other related needs.
  - Breastfeeding students may not be penalized academically as a result of needing to express breastmilk during the school day, and must be provided the opportunity to make up any missed work.

Abortion

- Title IX prohibits discrimination against, excluding, or denying benefits to a person (applicant, student, or employee) because they have obtained, sought, or will seek an abortion.
- Title IX does not require or prohibit any person, or public or private entity, from providing or paying for any benefit or service, including the use of facilities, related to an abortion (unless necessary to save the life of the woman).
Employment

• Title IX protects employees from sex discrimination in their employment.
• Title IX prohibits discrimination in:
  • Recruitment, advertising, and the application process
  • Hiring, upgrading, promoting, demoting, transferring, laying off, termination, returning from layoff, and rehiring
  • Pay, compensation, and fringe benefits
  • Job assignments, classifications, and structure
  • Leaves of absence
  • Selection and financial support for training
  • Employer-sponsored activities

Retaliation

• Title IX protects complainants and other participants in the investigation/complaint process from retaliation.
• “Among the most important immediate responsibilities of an [institution] is to ensure that students who allege harassment…are not subject to retaliation.”
• If retaliation occurs, districts should take strong responsive action.

You Decide: Title IX Violation?

1. Your institution’s grievance procedures allow for the termination of the Title IX process if either party initiates a civil, criminal, or agency (e.g., EEOC, DFEH) proceeding.
2. You conduct an investigation and determine that the evidence does not warrant a hearing. The complainant does not appeal the decision.
3. A student is raped on campus by another student. You provide her services and transfer her schools (at her request) but do not address the impact of the assault on other students at the school.
4. Your school has an abundance of sexual drawings/graffiti on walls, in bathrooms, on lockers, and in hallways.
V. Enforcement of Title IX

In 1979, the U.S. Supreme Court upheld a private right of action under Title IX. Title IX is enforced by the U.S. Department of Education, Office for Civil Rights (OCR). A possible penalty for violating Title IX is the loss of all federal funding.

In 1979, the U.S. Supreme Court upheld a private right of action under Title IX.

If OCR finds a recipient has violated Title IX, OCR will seek appropriate remedies. OCR may propose a Resolution Agreement with the district that requires various corrective measures. If a district refuses to negotiate a Resolution Agreement, OCR may initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant Federal financial assistance. OCR may refer the case to the Department of Justice.
2017 Changes in OCR

- In June 2017, OCR released “Instructions to the Field re Scope of Complaints”
- Aimed to resolve “backlog” of complaints
- Disclaims “one size fits all” approach to certain types of complaints, particularly discipline in sexual violence complaints
- OCR will not expand its investigations to include the recipient’s recent compliance (3 years prior to complaint) unless the particular situation necessitates such review

Caselaw Updates

1. In respondent’s claim against the University of Michigan, the court held that the Constitution’s guarantee of procedural due process required the university to permit respondent, or his representative, to cross-examine complainant regarding her account of the evening. Describing cross-examination as “the greatest legal engine ever invented for uncovering the truth,” the court explained that cross-examination would have provided a critical opportunity for respondent to test complainant’s credibility before the panel. It held that the burden on the university to allow cross-examination was modest and that the impact on complainant could be minimized by the use of a witness screen or other physical separation of the parties. (Doe v. Baum (6th Cir. Sept. 7, 2018).)

2. “We hold that where, as here, John was facing potentially severe consequences and the Committee’s decision against him turned on believing Jane, the Committee’s procedures should have included an opportunity for the Committee to assess Jane’s credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee’s asking her appropriate questions proposed by John or the Committee itself.” (Doe v. Claremont McKenna College (Cal. Ct. App. Aug. 8, 2018).)
Caselaw Updates

3. University was not deliberately indifferent to sexual assault victim where a public safety officer called an ambulance immediately after victim reported the assault; called for a sexual assault advocate; investigated the scene of the incident in victim's dorm room; and within a couple of hours, had reported the assault to San Diego PD. "Title IX deliberate indifference requires more than mere negligence." (Ramser v. Univ. of San Diego, 2019 WL 2950095, at *1 (9th Cir. July 9, 2019).)

4. In D.N. v. Stockton University, the District Court of New Jersey found that victim's Title IX claims for deliberate indifference were time barred by the State's tort claims act statute of limitations. Furthermore, the national fraternity was not liable for sexual assault at fraternity "rush party" because sexual assault was not "reasonably foreseeable." (Civil No. 18-11932, Jun. 28, 2019).

5. University did not discriminate against accused student in Title IX sexual assault investigation where he was provided with opportunity to review investigative materials; given multiple opportunities to submit evidence; presented affidavits signed by witnesses; submitted questions to be asked of complainant on cross-examination; he did not allege any panel member failed to review applicable materials or demonstrated bias during hearing; and where he voiced concerns about potential bias, appeals officer originally assigned to his case was removed. (Doe v. Columbia Coll. Chicago, 933 F.3d 849 (7th Cir. 2019).)
6. University violated accused student's due process rights where it granted him only an "informal" interview prior to suspending him, and pending his expulsion, where the suspension lasted 5 months before the expulsion hearing. As a general rule, both notice and a hearing should precede a suspension, except where an exigency exists. (Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56, 71 (1st Cir. 2019).)

7. Accused student pled plausible Title IX discrimination claim by alleging university's federal funding was at risk if it could not show it was vigorously investigating/punishing sexual misconduct; university's dean of students credited accuser's account without hearing directly from her; majority of disciplinary panel appeared to credit accuser based on unsworn accusation; panel refused to hear any impeachment evidence; and university center that supported victims of sexual violence believed men as a class were responsible for problem of campus sexual assault. (Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019).)

8. Student athletes accused of sexual misconduct were afforded procedural due process in disciplinary hearing where they were represented by counsel and given a choice of a Special Administrative Conference or a Panel Hearing with a panel of students, faculty, and staff and the option to appeal; and where they signed a Special Choice of Resolution Form and chose the Special Administrative Conference, which removed the possibility of expulsion and a potential "negative notation" on their academic record. (Austin v. Univ. of Oregon, 925 F.3d 1133, 1139 (9th Cir. 2019).)
9. When a private university student faces serious discipline for alleged sexual misconduct, and the credibility of witnesses is central to the adjudication of the charge, fundamental fairness requires that the university must at least permit cross-examination of adverse witnesses at a hearing in which the witnesses appear in person or by some other means, such as means provided by technology like videoconferencing, before one or more neutral adjudicators with the power independently to judge credibility and find fact. Moreover, the factfinder may not be a single individual with the divided and inconsistent roles. (*Doe v. Allee*, 30 Cal. App. 5th 1036, 242 Cal. Rptr. 3d 109 (Ct. App. 2019)).

VI. Next Steps

- Review your district’s grievance procedures for compliance with new OCR guidance and Title 5 regulations.
- Ensure your districts have appointed a Title IX Coordinator, and that individual is identified in the grievance procedures and online.
- Ensure your Title IX Coordinator and all “responsible employees” are receiving the necessary training.
Additional Resources – K-12

• U.S. Department of Education, Office for Civil Rights: Title IX and Sex Discrimination, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
• National Center on Safe Supportive Learning Environments, https://safesUPPORTIVElearning.ed.gov/safe-place-to-learn-k12

Additional Resources – Community Colleges

• U.S. Department of Education, Office for Civil Rights: Title IX and Sex Discrimination, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
• The Center for Changing Our Campus Culture, www.changingourcampus.org
• California Office of the Attorney General, Campus Sexual Assault guidance and resources, https://oag.ca.gov/campus-sexual-assault
• California Community Colleges Chancellor’s Office, www.cccco.edu

Questions?

Information in this presentation, including but not limited to PowerPoint handouts and presenters’ comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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ATTACHMENTS
LEGAL UPDATE

October 4, 2017

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

From: Damara L. Moore, Senior Associate General Counsel
Ellie R. Austin, Schools Legal Counsel

Subject: OCR Withdraws Significant Title IX Guidance; Issues New Dear Colleague Letter and Q&A on Title IX

Memo No. 22-2017

On September 22, 2017, the Department of Education issued a Dear Colleague Letter which withdrew guidance on Title IX previously provided by the Office of Civil Rights ("OCR") (“2017 Dear Colleague Letter”).1 OCR utilizes "Dear Colleague" letters to help clarify how OCR will apply existing laws to schools, districts, and educational institutions of higher learning (hereinafter “schools”). The withdrawn guidance addressed investigations of Title IX complaints of student-on-student sexual violence. Simultaneously, OCR issued a Question and Answer on Campus Sexual Misconduct2 (“2017 Q&A”) to provide information regarding how OCR will evaluate a school’s compliance with Title IX under the new guidance.3

Title IX applies to public and private elementary and secondary schools, school districts, colleges and universities receiving federal financial assistance. It prohibits discrimination on the basis of sex, including sexual harassment, in federally funded education programs.4

I. The Withdrawn Guidance

The 2017 Dear Colleague Letter withdraws two documents issued by OCR under the Obama Administration: the 2011 Dear Colleague Letter on Sexual Violence (“2011 Dear Colleague Letter”) and the 2014 Questions and Answers on Title IX and Sexual Violence (“2014 Q&A”). The former guidance was significant in that

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1 Available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf
2 In the 2017 Q&A, OCR defines sexual misconduct to include “peer-on-peer sexual harassment and sexual violence.”
3 References to the new guidance within this Legal Update are to the 2017 Q&A unless otherwise noted.
it specifically stated that sexual violence is a form of sexual harassment, and was thus prohibited under Title IX. OCR stated that the reason for the withdrawal of the 2011 and 2014 guidance documents was that they did not adequately ensure that the due process rights of the responding party were protected. Additionally, OCR took issue with the fact that the 2011 and 2014 guidance documents were adopted without notice and an opportunity for public comment.

II. **New Guidance**

The 2017 Dear Colleague Letter explicitly refers schools to OCR’s 2001 Revised Sexual Harassment Guidance (“2001 Guidance”) and 2006 Dear Colleague Letter on Sexual Harassment5 (“2006 Dear Colleague Letter”) to understand their continuing obligations to address sexual misconduct in education programs and activities. The new guidance also discusses a number of other topics, including: interim measures, grievance procedures and investigations, informal resolutions of complaints, the decision-making process, notices of the outcome, the right to appeal, and the effect of the rescission of the former guidance on previously-entered voluntary resolution agreements.

a. **What Is the Same**

Much remains the same under the new guidance. Schools continue to have a responsibility to promptly and effectively address sexual misconduct, prevent its recurrence, and remedy its effects.6 Schools continue to have an obligation to designate a Title IX coordinator to ensure they are meeting their Title IX obligations. The new guidance affirms that schools are deemed to have notice of sexual misconduct when a “responsible employee” knows or should know of such conduct.7 Schools must still adopt grievance procedures to address sexual misconduct. When conducting an investigation, schools have the burden to gather evidence and conduct a fair, impartial investigation. The current guidance, like the previous guidance, acknowledges that during the period of time that adjudication is pending, interim steps may be taken to separate the reporting and responding parties. The new guidance continues to recognize that schools may need to address issues which arise due to off-campus misconduct if it creates a hostile educational environment in educational programs or activities. Consistent with the previous guidance, each party is entitled to access the same processes and information as the other party during the school’s investigation.

b. **What Is Different**

This Legal Update highlights many of the changes that are made by the new guidance, but is not a comprehensive list of all changes.

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5 Available at https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html
7 A “responsible employee” remains, as previously defined, “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees or an individual who a student could reasonably believe has this authority or responsibility.” 2001 Guidance V.C.
**Timeframe.** Title IX investigations no longer must be concluded within 60 calendar days. Instead, the guidance provides that “[t]here is no fixed time frame under which a school must complete” its investigation. OCR will now evaluate on a case-by-case basis a “school’s good faith effort to conduct a fair, impartial investigation in a timely manner.”

**Interim Remedies.** The 2017 Q&A provides that interim measures might be appropriate for either the reporting or the responding parties prior to an investigation or while an investigation is pending. This is a departure from previous OCR guidance, where interim measures were offered only to the reporting party.

**Standard of Evidence.** Significantly, the 2017 Q&A provides that schools may apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The clear and convincing evidence standard represents a higher standard of proof, somewhere in between preponderance of the evidence and beyond a reasonable doubt. Previous guidance provided that all Title IX investigations must proceed using the preponderance of the evidence standard. The new guidance also requires that the standard of proof utilized for evaluating a claim of sexual misconduct be consistent with the standard that applies in other student misconduct cases. In other words, a school cannot use the preponderance of the evidence standard in sexual misconduct cases but the clear and convincing evidence standard in plagiarism cases.

**Informal Resolution for Allegations of Sexual Assault.** Previous Title IX guidance provided that allegations of sexual assault could not be resolved using an informal mediation process, even if both the reporting and responding parties agreed. The new guidance allows schools to facilitate voluntary resolution processes, such as mediation, for any Title IX complaint, including those involving allegations of sexual assault.

**Rights During Decision Making Process.** The new guidance makes explicit the requirement that both the reporting and responding parties have access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report, and provides that the responding party must have the opportunity to respond to the report in writing in advance of any decision about responsibility and/or hearing.

**Notice of Outcome of Disciplinary Proceedings.** The new guidance provides that a “written notice of the outcome of disciplinary proceedings” must be provided to both the reporting and responding parties, and recommends that both parties be notified “concurrently.” For elementary and secondary schools, the notice must inform the reporting party whether the investigation found that the alleged conduct occurred, any individual remedies offered to the reporting party, any sanctions imposed on the responding party that relate directly to the reporting party, and other steps the school has taken to eliminate the hostile environment. In elementary and secondary schools, the notice should be provided to the parents of students under 18 and directly to students who are 18 or older.

**Obligation to Produce Written Report.** The 2017 guidance mandates that any investigation under Title IX that may lead to disciplinary action against the responding party
must result in a written investigation report “summarizing the relevant exculpatory and inculpatory evidence.”

**Right to Cross-Examine.** The 2017 guidance makes clear that if one party is permitted to cross-examine the other party, that right must extend to the other party.

**Right to Appeal.** Under the former guidance, if a school granted a right to appeal investigation findings, the school was required to allow both parties the right to appeal. Under the new guidance, if a school chooses to allow appeals from either its decision regarding responsibility or its disciplinary sanctions, it may choose to allow an appeal only for the responding party or for both parties.

### III. Impact

Despite the withdrawal of two major guidance documents, the majority of schools’ Title IX obligations remain intact. Many other advisory letters and guides related to sex discrimination and harassment remain in place, and can assist schools in understanding their continuing obligations under Title IX.

However, with the increased focus by OCR on the responding party’s due process rights, schools should examine their policies and practices to ensure they provide due process to those under investigation for sexual misconduct. Schools may also reconsider and heighten the standard of proof they believe is appropriate in such investigations. Counsel should be consulted to ensure any new policies are in alignment with the changes in the law.

Additionally, the 2017 Q&A provides that voluntary resolution agreements previously entered into between a school and OCR remain binding on the school.

OCR has indicated that it will engage in rulemaking after a public comment process. This will allow schools the ability to provide input into the development of new regulations related to Title IX’s requirements for investigating student-on-student sexual misconduct. The Department of Education has not released any dates for the public comment period as of the time of publication of this Legal Update; however, we will keep our clients updated on this developing issue.

Please contact our office with questions regarding this Legal Update or any other legal matter.

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The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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8 Including the 2001 Revised Sexual Harassment guidance, the 2006 Dear Colleague Letter on Sexual Harassment Issues, the 2015 Dear Colleague Letter on Title IX Coordinators, and the 2015 Title IX Resource Guide.
Notice of Language Assistance

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The Department of Education’s mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.
Dear Colleague:

The purpose of this letter is to inform you that the Department of Education is withdrawing the statements of policy and guidance reflected in the following documents:

- Dear Colleague Letter on Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 4, 2011.
- Questions and Answers on Title IX and Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 29, 2014.

These guidance documents interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student-on-student sexual misconduct. The 2011 Dear Colleague Letter required schools to adopt a minimal standard of proof—the preponderance-of-the-evidence standard—in administering student discipline, even though many schools had traditionally employed a higher clear-and-convincing-evidence standard. The Letter insisted that schools with an appeals process allow complainants to appeal not-guilty findings, even though many schools had previously followed procedures reserving appeal for accused students. The Letter discouraged cross-examination by the parties, suggesting that to recognize a right to such cross-examination might violate Title IX. The Letter forbade schools from relying on investigations of criminal conduct by law-enforcement authorities to resolve Title IX complaints, forcing schools to establish policing and judicial systems while at the same time directing schools to resolve complaints on an expedited basis. The Letter provided that any due-process protections afforded to accused students should not “unnecessarily delay” resolving the charges against them.

Legal commentators have criticized the 2011 Letter and the 2014 Questions and Answers for placing “improper pressure upon universities to adopt procedures that do not afford fundamental fairness.”¹ As a result, many schools have established procedures for resolving allegations that “lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.”²

The 2011 and 2014 guidance documents may have been well-intentioned, but those documents have

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² Rethink Harvard’s Sexual Harassment Policy, BOSTON GLOBE (Oct. 15, 2014) (statement of 28 members of the Harvard Law School faculty); see also ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS, RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT (2017); AMERICAN COLLEGE OF TRIAL LAWYERS, TASK FORCE ON THE RESPONSE OF UNIVERSITIES AND COLLEGES TO ALLEGATIONS OF SEXUAL VIOLENCE, WHITE PAPER ON CAMPUS SEXUAL ASSAULT INVESTIGATIONS (2017).
September 2017

Q&A on Campus Sexual Misconduct

Under Title IX of the Education Amendments of 1972 and its implementing regulations, an institution that receives federal funds must ensure that no student suffers a deprivation of her or his access to educational opportunities on the basis of sex. The Department of Education intends to engage in rulemaking on the topic of schools’ Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence. The Department will solicit input from stakeholders and the public during that rulemaking process. In the interim, these questions and answers—along with the Revised Sexual Harassment Guidance previously issued by the Office for Civil Rights—provide information about how OCR will assess a school’s compliance with Title IX.

SCHOOLS’ RESPONSIBILITY TO ADDRESS SEXUAL MISCONDUCT

Question 1:

What is the nature of a school’s responsibility to address sexual misconduct?

Answer:

Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows or reasonably should know of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately. In particular, when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student’s ability to participate in or benefit from the school’s programs or activities, a hostile environment exists and the school must respond.

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2 2001 Guidance at (VII).

3 Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 631 (1999); 34 C.F.R. § 106.31(a); 2001 Guidance at (V)(A)(1). Title IX prohibits discrimination on the basis of sex “under any education program or activity” receiving federal financial assistance, 20 U.S.C. § 1681(a); 34 C.F.R. § 106.1, meaning within the “operations” of a postsecondary institution or school district, 20 U.S.C. § 1687; 34 C.F.R. § 106.2(h). The Supreme Court has explained that the statute “confines the scope of prohibited conduct based on the recipient’s degree of control over the harasser and the environment in which the harassment occurs.” Davis, 526 U.S. at 644. Accordingly, OCR has informed institutions that “[a] university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient.” Oklahoma State University Determination Letter at 2, OCR Complaint No. 06-03-2054 (June 10, 2004); see also University of Wisconsin-Madison Determination Letter, OCR Complaint No. 05-07-2074 (Aug. 6, 2009) (“OCR determined that the alleged assault did not occur in the context of an educational program or activity operated by the University.”). Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities. Under the Clery Act, postsecondary institutions are obliged to collect and report statistics on crimes that occur on campus, on noncampus properties controlled by the institution or an affiliated student organization and used for educational purposes, on public property within or immediately adjacent to campus, and in areas within the patrol jurisdiction of the campus police or the campus security department. 34 C.F.R. § 668.46(a); 34 C.F.R. § 668.46(c).
Each recipient must designate at least one employee to act as a Title IX Coordinator to coordinate its responsibilities in this area. Other employees may be considered “responsible employees” and will help the student to connect to the Title IX Coordinator.

In regulating the conduct of students and faculty to prevent or redress discrimination, schools must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech.

THE CLERY ACT AND TITLE IX

Question 2:
What is the Clery Act and how does it relate to a school’s obligations under Title IX?

Answer:
Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX. Each year, institutions must disclose campus crime statistics and information about campus security policies as a condition of participating in the federal student aid programs. The Violence Against Women Reauthorization Act of 2013 amended the Clery Act to require institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault, and stalking, and to include certain policies, procedures, and programs pertaining to these incidents in the annual security reports. In October 2014, following a negotiated rulemaking process, the Department issued amended regulations to implement these statutory changes. Accordingly, when addressing allegations of dating violence, domestic violence, sexual assault, or stalking, institutions are subject to the Clery Act regulations as well as Title IX.

INTERIM MEASURES

Question 3:
What are interim measures and is a school required to provide such measures?

Answer:
Interim measures are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending. Interim measures include counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.

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4 34 C.F.R. § 106.8(a).
5 2001 Guidance at (V)(C).
8 See 34 C.F.R. § 668.46.
9 See 2001 Guidance at (VII)(A).
It may be appropriate for a school to take interim measures during the investigation of a complaint. 10 In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education. The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students’ evolving needs.

**GRIEVANCE PROCEDURES AND INVESTIGATIONS**

**Question 4:**

What are the school’s obligations with regard to complaints of sexual misconduct?

**Answer:**

A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct. 11 OCR has identified a number of elements in evaluating whether a school’s grievance procedures are prompt and equitable, including whether the school (i) provides notice of the school’s grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees; (ii) applies the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties; (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (iv) designates and follows a reasonably prompt time frame for major stages of the complaint process; (v) notifies the parties of the outcome of the complaint; and (vi) provides assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate. 12

**Question 5:**

What time frame constitutes a “prompt” investigation?

**Answer:**

There is no fixed time frame under which a school must complete a Title IX investigation. 13 OCR will evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.

**Question 6:**

What constitutes an “equitable” investigation?

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10 2001 Guidance at (VII)(A). In cases covered by the Clery Act, a school must provide interim measures upon the request of a reporting party if such measures are reasonably available. 34 C.F.R. § 668.46(b)(11)(v).

11 34 C.F.R. § 106.8(b); 2001 Guidance at (V)(D); see also 34 C.F.R. § 668.46(k)(2)(i) (providing that a proceeding which arises from an allegation of dating violence, domestic violence, sexual assault, or stalking must “[i]nclude a prompt, fair, and impartial process from the initial investigation to the final result”).

12 2001 Guidance at (IX); see also 34 C.F.R. § 668.46(k). Postsecondary institutions are required to report publicly the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, and stalking, 34 C.F.R. § 668.46 (k)(1)(i), and to include a process that allows for the extension of timeframes for good cause with written notice to the parties of the delay and the reason for the delay, 34 C.F.R. § 668.46 (k)(3)(i)(A).

13 2001 Guidance at (IX); see also 34 C.F.R. § 668.46(k)(3)(i)(A).
Answer:

In every investigation conducted under the school’s grievance procedures, the burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed. A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.

An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.14

Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.15 Restricting the ability of either party to discuss the investigation (e.g., through “gag orders”) is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable. Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.16

Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school’s sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.17 Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.18

INFORMAL RESOLUTIONS OF COMPLAINTS

Question 7:

After a Title IX complaint has been opened for investigation, may a school facilitate an informal resolution of the complaint?

Answer:

If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.

14 2001 Guidance at (V)(A)(1)-(2); see also 34 C.F.R. § 668.46(k)(2)(ii).
15 2001 Guidance at (X).
16 34 C.F.R. § 106.31(a).
DECISION-MAKING AS TO RESPONSIBILITY

**Question 8:**
What procedures should a school follow to adjudicate a finding of responsibility for sexual misconduct?

**Answer:**

The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school’s sexual misconduct policy. If the complaint presented more than a single allegation of misconduct, a decision should be reached separately as to each allegation of misconduct. The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.19

The decision-maker(s) must offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.20 The parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.

Any process made available to one party in the adjudication procedure should be made equally available to the other party (for example, the right to have an attorney or other advisor present and/or participate in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses).21 When resolving allegations of dating violence, domestic violence, sexual assault, or stalking, a postsecondary institution must “[p]rovide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.”22 In such disciplinary proceedings and any related meetings, the institution may “[n]ot limit the choice of advisor or presence for either the accuser or the accused” but “may establish restrictions regarding the extent to which the advisor may participate in the proceedings.”23

Schools are cautioned to avoid conflicts of interest and biases in the adjudicatory process and to prevent institutional interests from interfering with the impartiality of the adjudication. Decision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.

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19 The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases. In a recent decision, a court concluded that a school denied “basic fairness” to a responding party by, among other things, applying a lower standard of evidence only in cases of alleged sexual misconduct. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016) (“[T]he lowering of the standard appears to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove—and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct. The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused.”). When a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided. A postsecondary institution’s annual security report must describe the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault, or stalking. 34 C.F.R. § 668.46(k)(1)(ii).


21 A school has discretion to reserve a right of appeal for the responding party based on its evaluation of due process concerns, as noted in Question 11.

22 34 C.F.R. § 668.46(k)(2)(iii).

23 34 C.F.R. § 668.46(k)(2)(iv).
DECISION-MAKING AS TO DISCIPLINARY SANCTIONS

Question 9:

What procedures should a school follow to impose a disciplinary sanction against a student found responsible for a sexual misconduct violation?

Answer:

The decision-maker as to any disciplinary sanction imposed after a finding of responsibility may be the same or different from the decision-maker who made the finding of responsibility. Disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school's code of student conduct while considering the impact of separating a student from her or his education. Any disciplinary decision must be made as a proportionate response to the violation.24 In its annual security report, a postsecondary institution must list all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking.25

NOTICE OF OUTCOME AND APPEALS

Question 10:

What information should be provided to the parties to notify them of the outcome?

Answer:

OCR recommends that a school provide written notice of the outcome of disciplinary proceedings to the reporting and responding parties concurrently. The content of the notice may vary depending on the underlying allegations, the institution, and the age of the students. Under the Clery Act, postsecondary institutions must provide simultaneous written notification to both parties of the results of the disciplinary proceeding along with notification of the institution's procedures to appeal the result if such procedures are available, and any changes to the result when it becomes final.26 This notification must include any initial, interim, or final decision by the institution; any sanctions imposed by the institution; and the rationale for the result and the sanctions.27 For proceedings not covered by the Clery Act, such as those arising from allegations of harassment, and for all proceedings in elementary and secondary schools, the school should inform the reporting party whether it found that the alleged conduct occurred, any individual remedies offered to the reporting party or any sanctions imposed on the responding party that directly relate to the reporting party, and other steps the school has taken to eliminate the hostile environment, if the school found one to exist.28 In an elementary or secondary school, the notice should be provided to the parents of students under the age of 18 and directly to students who are 18 years of age or older.29

24 34 C.F.R. § 106.8(b); 2001 Guidance at (VII)(A).
25 34 C.F.R. § 668.46(k)(1)(iii).
26 34 C.F.R. § 668.46(k)(2)(v). The Clery Act applies to proceedings arising from allegations of dating violence, domestic violence, sexual assault, and stalking.
27 34 C.F.R. § 668.46(k)(3)(iv).
28 A sanction that directly relates to the reporting party would include, for example, an order that the responding party stay away from the reporting party. See 2001 Guidance at vii n.3. This limitation allows the notice of outcome to comply with the requirements of the Family Educational Rights and Privacy Act. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10; 34 C.F.R. § 99.12(a). FERPA provides an exception to its requirements only for a postsecondary institution to communicate the results of a disciplinary proceeding to the reporting party in cases of alleged crimes of violence or specific nonforcible sex offenses. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 99.31(a)(13).
29 20 U.S.C. § 1232g(d).
Question 11:
How may a school offer the right to appeal the decision on responsibility and/or any disciplinary decision?

Answer:
If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.30

EXISTING RESOLUTION AGREEMENTS

Question 12:
In light of the rescission of OCR’s 2011 Dear Colleague Letter and 2014 Questions & Answers guidance, are existing resolution agreements between OCR and schools still binding?

Answer:
Yes. Schools enter into voluntary resolution agreements with OCR to address the deficiencies and violations identified during an OCR investigation based on Title IX and its implementing regulations. Existing resolution agreements remain binding upon the schools that voluntarily entered into them. Such agreements are fact-specific and do not bind other schools. If a school has questions about an existing resolution agreement, the school may contact the appropriate OCR regional office responsible for the monitoring of its agreement.

Note: The Department has determined that this Q&A is a significant guidance document under the Final Bulletin for Agency Good Guidance Practices of the Office of Management and Budget, 72 Fed. Reg. 3432 (Jan. 25, 2007). This document does not add requirements to applicable law. If you have questions or are interested in commenting on this document, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339).

30 2001 Guidance at (IX). Under the Clery Act, a postsecondary institution must provide simultaneous notification of the appellate procedure, if one is available, to both parties. 34 C.F.R. § 668.46(k)(2)(v)(B). OCR has previously informed schools that it is permissible to allow an appeal only for the responding party because “he/she is the one who stands to suffer from any penalty imposed and should not be made to be tried twice for the same allegation.” Skidmore College Determination Letter at 5, OCR Complaint No. 02-95-2136 (Feb. 12, 1996); see also Suffolk University Law School Determination Letter at 11, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) (“[A]ppeal rights are not necessarily required by Title IX, whereas an accused student’s appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University.”); University of Cincinnati Determination Letter at 6, OCR Complaint No. 15-05-2041 (Apr. 13, 2006) (“[T]here is no requirement under Title IX that a recipient provide a victim’s right of appeal.”).
Notice of Language Assistance

Dear Colleague Letter on Title IX Coordinators

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: 如果您不懂英語,或者使用英語有困難，您可以要求獲取大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339)，或電郵：Ed.Language.Assistance@ed.gov。


영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보 센터에 일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로 제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800-USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov으로 연락하시기 바랍니다.


Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.
Dear Colleague:

I write to remind you that all school districts, colleges, and universities receiving Federal financial assistance must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX of the Education Amendments of 1972 (Title IX), which prohibits sex discrimination in education programs and activities.¹ These designated employees are generally referred to as Title IX coordinators.

Your Title IX coordinator plays an essential role in helping you ensure that every person affected by the operations of your educational institution—including students, their parents or guardians, employees, and applicants for admission and employment—is aware of the legal rights Title IX affords and that your institution and its officials comply with their legal obligations under Title IX. To be effective, a Title IX coordinator must have the full support of your institution. It is therefore critical that all institutions provide their Title IX coordinators with the appropriate authority and support necessary for them to carry out their duties and use their expertise to help their institutions comply with Title IX.

The U.S. Department of Education’s Office for Civil Rights (OCR) enforces Title IX for institutions that receive funds from the Department (recipients).² In our enforcement work, OCR has found that some of the most egregious and harmful Title IX violations occur when a recipient fails to designate a Title IX coordinator or when a Title IX coordinator has not been sufficiently trained or given the appropriate level of authority to oversee the recipient’s compliance with Title IX. By contrast, OCR has found that an effective Title IX coordinator often helps a recipient provide equal educational opportunities to all students.

OCR has previously issued guidance documents that include discussions of the responsibilities of a Title IX coordinator, and those documents remain in full force. This letter incorporates that existing OCR guidance on Title IX coordinators and provides additional clarification and recommendations

¹ 34 C.F.R. § 106.8(a). Although Title IX applies to any recipient that offers education programs or activities, this letter focuses on Title IX coordinators designated by local educational agencies, schools, colleges, and universities.

² 20 U.S.C. §§ 1681–1688. The Department of Justice shares enforcement authority over Title IX with OCR.
as appropriate. This letter outlines the factors a recipient should consider when designating a Title IX coordinator, then describes the Title IX coordinator’s responsibilities and authority. Next, this letter reminds recipients of the importance of supporting Title IX coordinators by ensuring that the coordinators are visible in their school communities and have the appropriate training.

Also attached is a letter directed to Title IX coordinators that provides more information about their responsibilities and a Title IX resource guide. The resource guide includes an overview of the scope of Title IX, a discussion about Title IX’s administrative requirements, as well as a discussion of other key Title IX issues and references to Federal resources. The discussion of each Title IX issue includes recommended best practices for the Title IX coordinator to help your institution meet its obligations under Title IX. The resource guide also explains your institution’s obligation to report information to the Department that could be relevant to Title IX. The enclosed letter to Title IX coordinators and the resource guide may be useful for you to understand your institution’s obligations under Title IX.

Designation of a Title IX Coordinator

Educational institutions that receive Federal financial assistance are prohibited under Title IX from subjecting any person to discrimination on the basis of sex. Title IX authorizes the Department of Education to issue regulations to effectuate Title IX. Under those regulations, a recipient must designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX and the Department’s implementing regulations. This position may not be left vacant; a recipient must have at least one person designated and actually serving as the Title IX coordinator at all times.

In deciding to which senior school official the Title IX coordinator should report and what other functions (if any) that person should perform, recipients are urged to consider the following:

A. Independence

The Title IX coordinator’s role should be independent to avoid any potential conflicts of interest and the Title IX coordinator should report directly to the recipient’s senior leadership, such as the district superintendent or the college or university president. Granting the Title IX coordinator this

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4 34 C.F.R. § 106.8(a).
5 Many of the principles in this document also apply generally to employees required to be designated to coordinate compliance with other civil rights laws enforced by OCR against educational institutions, such as Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; 34 C.F.R. § 104.7(a), and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131–12134; 28 C.F.R. § 35.107(a).
independence also ensures that senior school officials are fully informed of any Title IX issues that arise and that the Title IX coordinator has the appropriate authority, both formal and informal, to effectively coordinate the recipient’s compliance with Title IX. Title IX does not categorically exclude particular employees from serving as Title IX coordinators. However, when designating a Title IX coordinator, a recipient should be careful to avoid designating an employee whose other job responsibilities may create a conflict of interest. For example, designating a disciplinary board member, general counsel, dean of students, superintendent, principal, or athletics director as the Title IX coordinator may pose a conflict of interest.

B. Full-Time Title IX Coordinator

Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest and in many cases ensure sufficient time is available to perform all the role’s responsibilities. If a recipient designates one employee to coordinate the recipient’s compliance with Title IX and other related laws, it is critical that the employee has the qualifications, training, authority, and time to address all complaints throughout the institution, including those raising Title IX issues.

C. Multiple Coordinators

Although not required by Title IX, it may be a good practice for some recipients, particularly larger school districts, colleges, and universities, to designate multiple Title IX coordinators. For example, some recipients have found that designating a Title IX coordinator for each building, school, or campus provides students and staff with more familiarity with the Title IX coordinator. This familiarity may result in more effective training of the school community on their rights and obligations under Title IX and improved reporting of incidents under Title IX. A recipient that designates multiple coordinators should designate one lead Title IX coordinator who has ultimate oversight responsibility. A recipient should encourage all of its Title IX coordinators to work together to ensure consistent enforcement of its policies and Title IX.

Responsibilities and Authority of a Title IX Coordinator

The Title IX coordinator’s primary responsibility is to coordinate the recipient’s compliance with Title IX, including the recipient’s grievance procedures for resolving Title IX complaints. Therefore, the Title IX coordinator must have the authority necessary to fulfill this coordination responsibility. The recipient must inform the Title IX coordinator of all reports and complaints raising Title IX issues, even if the complaint was initially filed with another individual or office or the investigation will be conducted by another individual or office. The Title IX coordinator is responsible for coordinating the recipient’s responses to all complaints involving possible sex discrimination. This responsibility includes monitoring outcomes, identifying and addressing any patterns, and assessing effects on the campus climate. Such coordination can help the recipient avoid Title IX violations, particularly violations involving sexual harassment and violence, by preventing incidents
from recurring or becoming systemic problems that affect the wider school community. Title IX does not specify who should determine the outcome of Title IX complaints or the actions the school will take in response to such complaints. The Title IX coordinator could play this role, provided there are no conflicts of interest, but does not have to.

The Title IX coordinator must have knowledge of the recipient’s policies and procedures on sex discrimination and should be involved in the drafting and revision of such policies and procedures to help ensure that they comply with the requirements of Title IX. The Title IX coordinator should also coordinate the collection and analysis of information from an annual climate survey if, as OCR recommends, the school conducts such a survey. In addition, a recipient should provide Title IX coordinators with access to information regarding enrollment in particular subject areas, participation in athletics, administration of school discipline, and incidents of sex-based harassment. Granting Title IX coordinators the appropriate authority will allow them to identify and proactively address issues related to possible sex discrimination as they arise.

Title IX makes it unlawful to retaliate against individuals—including Title IX coordinators—not just when they file a complaint alleging a violation of Title IX, but also when they participate in a Title IX investigation, hearing, or proceeding, or advocate for others’ Title IX rights. Title IX’s broad anti-retaliation provision protects Title IX coordinators from discrimination, intimidation, threats, and coercion for the purpose of interfering with the performance of their job responsibilities. A recipient, therefore, must not interfere with the Title IX coordinator’s participation in complaint investigations and monitoring of the recipient’s efforts to comply with and carry out its responsibilities under Title IX. Rather, a recipient should encourage its Title IX coordinator to help it comply with Title IX and promote gender equity in education.

**Support for Title IX Coordinators**

Title IX coordinators must have the full support of their institutions to be able to effectively coordinate the recipient’s compliance with Title IX. Such support includes making the role of the Title IX coordinator visible in the school community and ensuring that the Title IX coordinator is sufficiently knowledgeable about Title IX and the recipient’s policies and procedures. Because educational institutions vary in size and educational level, there are a variety of ways in which recipients can ensure that their Title IX coordinators have community-wide visibility and comprehensive knowledge and training.

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6 34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e)).
A. Visibility of Title IX Coordinators

Under the Department’s Title IX regulations, a recipient has specific obligations to make the role of its Title IX coordinator visible to the school community. A recipient must post a notice of nondiscrimination stating that it does not discriminate on the basis of sex and that questions regarding Title IX may be referred to the recipient’s Title IX coordinator or to OCR. The notice must be included in any bulletins, announcements, publications, catalogs, application forms, or recruitment materials distributed to the school community, including all applicants for admission and employment, students and parents or guardians of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient.7

In addition, the recipient must always notify students and employees of the name, office address, telephone number, and email address of the Title IX coordinator, including in its notice of nondiscrimination.8 Because it may be unduly burdensome for a recipient to republish printed materials that include the Title IX coordinator’s name and individual information each time a person leaves the Title IX coordinator position, a recipient may identify its coordinator only through a position title in printed materials and may provide an email address established for the position of the Title IX coordinator, such as TitleIXCoordinator@school.edu, so long as the email is immediately redirected to the employee serving as the Title IX coordinator. However, the recipient’s website must reflect complete and current information about the Title IX coordinator.

Recipients with more than one Title IX coordinator must notify students and employees of the lead Title IX coordinator’s contact information in its notice of nondiscrimination, and should make available the contact information for its other Title IX coordinators as well. In doing so, recipients should include any additional information that would help students and employees identify which Title IX coordinator to contact, such as each Title IX coordinator’s specific geographic region (e.g., a particular elementary school or part of a college campus) or Title IX area of specialization (e.g., gender equity in academic programs or athletics, harassment, or complaints from employees).

The Title IX coordinator’s contact information must be widely distributed and should be easily found on the recipient’s website and in various publications.9 By publicizing the functions and responsibilities of the Title IX coordinator, the recipient demonstrates to the school community its commitment to complying with Title IX and its support of the Title IX coordinator’s efforts.

7 34 C.F.R. § 106.9.
8 34 C.F.R. § 106.8(a).
9 34 C.F.R. § 106.9.
Supporting the Title IX coordinator in the establishment and maintenance of a strong and visible role in the community helps to ensure that members of the school community know and trust that they can reach out to the Title IX coordinator for assistance. OCR encourages recipients to create a page on the recipient’s website that includes the name and contact information of its Title IX coordinator(s), relevant Title IX policies and grievance procedures, and other resources related to Title IX compliance and gender equity. A link to this page should be prominently displayed on the recipient’s homepage.

To supplement the recipient’s notification obligations, the Department collects and publishes information from educational institutions about the employees they designate as Title IX coordinators. OCR’s Civil Rights Data Collection (CRDC) collects information from the nation’s public school districts and elementary and secondary schools, including whether they have civil rights coordinators for discrimination on the basis of sex, race, and disability, and the coordinators’ contact information.10 The Department’s Office of Postsecondary Education collects information about Title IX coordinators from postsecondary institutions in reports required under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act and the Higher Education Opportunity Act.11

**B. Training of Title IX Coordinators**

Recipients must ensure that their Title IX coordinators are appropriately trained and possess comprehensive knowledge in all areas over which they have responsibility in order to effectively carry out those responsibilities, including the recipients’ policies and procedures on sex discrimination and all complaints raising Title IX issues throughout the institution. The resource guide accompanying this letter outlines some of the key issues covered by Title IX and provides references to Federal resources related to those issues. In addition, the coordinators should be knowledgeable about other applicable Federal and State laws, regulations, and policies that overlap with Title IX.12 In most cases, the recipient will need to provide an employee with training to act as its Title IX coordinator. The training should explain the different facets of Title IX, including regulatory provisions, applicable OCR guidance, and the recipient’s Title IX policies and grievance procedures. Because these laws, regulations, and OCR guidance may be updated, and

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12 See, e.g., the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, and its implementing regulations, 34 C.F.R. Part 99; and the Clery Act, 20 U.S.C. § 1092(f), and its implementing regulations, 34 C.F.R. Part 668. These documents only address an institution’s compliance with Title IX and do not address its obligations under other Federal laws, such as the Clery Act.
recipient policies and procedures may be revised, the best way to ensure Title IX coordinators have the most current knowledge of Federal and State laws, regulations, and policies relating to Title IX and gender equity is for a recipient to provide regular training to the Title IX coordinator, as well as to all employees whose responsibilities may relate to the recipient’s obligations under Title IX. OCR’s regional offices can provide technical assistance, and opportunities for training may be available through Equity Assistance Centers, State educational agencies, private organizations, advocacy groups, and community colleges. A Title IX coordinator may also find it helpful to seek mentorship from a more experienced Title IX coordinator and to collaborate with other Title IX coordinators in the region (or who serve similar institutions) to share information, knowledge, and expertise.

In rare circumstances, an employee’s prior training and experience may sufficiently prepare that employee to act as the recipient’s Title IX coordinator. For example, the combination of effective prior training and experience investigating complaints of sex discrimination, together with training on current Title IX regulations, OCR guidance, and the recipient institution’s policies and grievance procedures may be sufficient preparation for that employee to effectively carry out the responsibilities of the Title IX coordinator.

Conclusion

Title IX coordinators are invaluable resources to recipients and students at all educational levels. OCR is committed to helping recipients and Title IX coordinators understand and comply with their legal obligations under Title IX. If you need technical assistance, please contact the OCR regional office serving your State or territory by visiting http://wdcrobcollp01.ed.gov/CFAPPS/OCR/contactus.cfm or call OCR’s Customer Service Team at 1-800-421-3481; TDD 1-800-877-8339.

Thank you for supporting your Title IX coordinators to help ensure that all students have equal access to educational opportunities, regardless of sex. I look forward to continuing to work with recipients nationwide to help ensure that each and every recipient has at least one knowledgeable Title IX coordinator with the authority and support needed to prevent and address sex discrimination in our nation’s schools.

Sincerely,

/s/
Catherine E. Lhamon
Assistant Secretary for Civil Rights
LEGAL UPDATE

October 20, 2016

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

From: Mia N. Robertshaw
Assistant General Counsel

Subject: Senate Bill 1375 / Title IX Notifications
Memo No. 37-2016

The Governor has signed California Senate Bill (“SB”) 1375, attached, which adds section 221.61 to the Education Code, imposing new requirements on all public schools, county offices of education, charter schools, and private schools which are subject to Title IX requirements (herein, “education entities”). New section 221.61 requires these education entities to post information relating to Title IX on their websites in a “prominent and conspicuous location” no later than July 1, 2017. Education entities that do not have websites are not required to establish websites for this section, but if they do not have websites then the required information must be posted on the district website or the county office of education website.

Posted information must include:

1. The name and contact information of the Title IX Coordinator, including the Title IX Coordinator’s telephone number and email address.

2. The rights of the pupil and responsibilities of the education entity under Title IX, including the list of rights in Education Code section 221.8 as well as links to relevant websites of the U.S. Department of Education Office for Civil Rights and the California Department of Education’s Office for Equal Opportunity.

3. A description of how to file a Title IX complaint, including:

   “(A) An explanation of the statute of limitations within which a complaint must be filed after an alleged incident of discrimination has occurred, and how a complaint may be filed beyond the statute of limitations.
(B) An explanation of how the complaint will be investigated and how the complainant may further pursue the complaint, including, but not limited to, Internet Web links to this information on the United States Department of Education Office for Civil Rights’ Internet Web site.

(C) An Internet Web link to the United States Department of Education Office for Civil Rights complaints form, and the contact information for the office, which shall include the phone number and email address for the office.”

If a district’s schools have their own websites, this information must be posted on the school website in addition to the district website. The district website should specify that the Title IX information provided on the district website applies to every school site (if this is true). If a school site has its own Title IX Coordinator, the school Title IX Coordinator and the district lead Title IX Coordinator should both be listed on both the school and district websites.

Finally, SB 1375 provides that if the Commission on State Mandates determines that SB 1375 imposes state-mandated costs, these costs may be reimbursed to local agencies and school districts pursuant to Government Code section 17500 et seq.

All education entities should add the required information to their websites promptly and no later than July 1, 2017. Every education entity should ensure that it has a designated Title IX Coordinator who is trained and has proper authority to oversee the entity’s efforts to comply with Title IX. School & College Legal Services is offering a Title IX Coordinator 101 workshop on April 21, 2017 at the Sonoma County Office of Education. Please visit www.sclscal.org/workshops for more information and to register.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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1 Education Code section 221.61.
An act to add Section 221.61 to the Education Code, relating to educational equity.

[Approved by Governor September 26, 2016. Filed with Secretary of State September 26, 2016.]

LEGISLATIVE COUNSEL’S DIGEST

SB 1375, Jackson. Educational equity: sex equity in education: federal Title IX notifications.

Existing law, the Sex Equity in Education Act, states the policy of the state that elementary and secondary school classes and courses, including nonacademic and elective classes and courses, be conducted without regard to the sex of the pupil enrolled in these classes or courses. Existing federal law, known as Title IX, prohibits a person, on the basis of sex, from being excluded from participation in, being denied the benefits of, or being subject to discrimination under, any education program or activity receiving federal financial assistance.

This bill would require, on or before July 1, 2017, all public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools to post in a prominent and conspicuous location on their Internet Web sites specified information relating to Title IX. The bill would require the Superintendent of Public Instruction to annually send a letter through electronic means to all public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools informing them of the new requirement that would be created by this bill and of their responsibilities under Title IX. Because the bill would impose additional duties on public schools, school districts, county offices of education, and charter schools, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:
(a) The goal of Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681 et seq.) is to provide greater levels of gender equity in schools. The results have been higher enrollment in colleges and universities, increased numbers of graduate degrees in science and mathematics, increased participation in athletics, and fairer treatment in cases of sexual and gender harassment. These benefits not only lead to higher self-esteem and enhanced leadership skills, but also to higher rates of graduation and greater levels of career success. Title IX was approved in 1972, yet noncompliance with its requirements is still problematic.


(c) On January 20, 2015, the Senate Judiciary Committee held an informational hearing entitled “Attaining Equal Opportunity for Girls in California’s Secondary Schools: How our Schools are Complying with Title IX.” During the hearing, the committee heard from the United States Department of Education Office for Civil Rights and the State Department of Education.

(d) As demonstrated by testimony provided during the informational hearing, school districts are often unaware that Title IX requires them to do the following:

1. Appoint a Title IX coordinator at both the district and school levels who is responsible for coordinating the school and school district’s Title IX compliance. The coordinator should not have other responsibilities that create a conflict of interest with his or her role as coordinator.

2. Adopt and publish rules and procedures on how to receive, investigate, and respond to a complaint filed under Title IX.

3. Notify all pupils, parents and guardians of pupils, and school staff of their rights under Title IX.

(e) A 2015 American Civil Liberties Union (ACLU) of California report found widespread unawareness among pupils and school administrators of the rights of pregnant and parenting pupils, including an extremely limited knowledge that pregnant pupils and those recovering from childbirth and related medical conditions are entitled to services available to other pupils with temporary medical conditions.

(f) The ACLU report found that only 4 percent of school districts surveyed included “parenting” status within the list of categories in the nondiscrimination board policy, 25 percent of pupil survey respondents indicated that they had been restricted from participating in an extracurricular activity, such as physical education or a sport, due to their pregnancy status, and 13 percent of pupil survey respondents said that they were required by their school district to move to an alternative or continuation school as a result of their pregnancy despite the law requiring that enrollment in separate programs for parenting pupils be strictly voluntary.

(g) Since Title IX was passed 44 years ago, it has been the subject of over 20 proposed amendments, reviews, Supreme Court cases, and other
political actions. It is a living, breathing law that benefits countless women and girls. The lack of knowledge of and training on Title IX harms pupils.

SEC. 2. Section 221.61 is added to the Education Code, immediately following Section 221.6, to read:

221.61. (a) On or before July 1, 2017, public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools shall post in a prominent and conspicuous location on their Internet Web sites all of the following:

1) The name and contact information of the Title IX coordinator for that public school, private school, school district, county office of education, or charter school, which shall include the Title IX coordinator’s phone number and email address.

2) The rights of a pupil and the public and the responsibilities of the public school, private school, school district, county office of education, or charter school under Title IX, which shall include, but shall not be limited to, Internet Web links to information about those rights and responsibilities located on the Internet Web sites of the department’s Office for Equal Opportunity and the United States Department of Education Office of Civil Rights, and the list of rights specified in Section 221.8.

3) A description of how to file a complaint under Title IX, which shall include all of the following:

A) An explanation of the statute of limitations within which a complaint must be filed after an alleged incident of discrimination has occurred, and how a complaint may be filed beyond the statute of limitations.

B) An explanation of how the complaint will be investigated and how the complainant may further pursue the complaint, including, but not limited to, Internet Web links to this information on the United States Department of Education Office for Civil Rights’ Internet Web site.

C) An Internet Web link to the United States Department of Education Office for Civil Rights complaints form, and the contact information for the office, which shall include the phone number and email address for the office.

(b) On or before April 1, 2017, and annually thereafter, the Superintendent shall send a letter through electronic means to all public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools informing them of the requirement specified in subdivision (a) and of their responsibilities under Title IX.

(c) A public school that does not maintain an Internet Web site may comply with subdivision (a) by posting the information specified in paragraphs (1) to (3), inclusive, of subdivision (a) on the Internet Web site of its school district or county office of education.

(d) Nothing in this section shall be construed to require a school or local educational agency to establish an Internet Web site if the school or local educational agency does not already maintain one.
SEC. 3. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.
To: Superintendents, Member School Districts (K-12)

From: Mia N. Robertshaw
Assistant General Counsel

Subject: Title IX Notifications Sample Posting
SUPPLEMENT to Memo No. 37-2016

As we explained in Legal Update Memo No. 37-2016, new Education Code section 221.61 requires public schools, county offices of education, charter schools, and private schools which are subject to Title IX (herein, “education entities”) to post information relating to Title IX on their websites. A number of clients requested a sample posting to use to comply with new Education Code section 221.61. We are supplementing Legal Update Memo No. 37-2016 to include the attached sample posting for your use or reference.

If you choose to use this sample posting, please review it carefully and fill in district-specific information as noted. Any words set forth in brackets [like this] are notes to the district which should not be included in the final posting except as noted. Highlighted material may be necessary depending on the practices and policies of each district. Please ensure that the information in your final posting is consistent with your applicable policies and procedures.

The information required by Education Code section 221.61 must be posted in a “prominent and conspicuous location” of the education entity’s website no later than July 1, 2017. The information must be posted on the district website. If any school has its own website, the information must be posted on the school website as well as the district website. If the district does not have a website, this information must be posted on the county office of education website.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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Title IX – Sex-Based Discrimination is Prohibited

What is Title IX?

Title IX of the Education Amendments of 1972 (“Title IX”) is a federal law that prohibits sex-based discrimination in all educational programs and activities, including athletic programs. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity operated by the District. Title IX protects all participants in the District’s educational programs and activities, including students, parents, employees, and job applicants. The District does not discriminate on the basis of sex. Discrimination on the basis of sex can include sexual harassment and sexual violence.

In addition to Title IX, the California Education Code prohibits discrimination on the basis of sex in schools. (California Education Code §§ 220-221.1.) Other state and federal laws also prohibit discrimination and ensure equality in education. Please refer to Board Policies [insert relevant Board Policy numbers] and Administrative Regulations [insert relevant Administrative Regulation numbers] for more information on the District’s anti-discrimination policies.

Title IX information provided here applies to every school site and to all District programs and activities.

What are my rights under Title IX?

You have the following rights under Title IX, to the extent applicable at the District:

- You have the right to fair and equitable treatment and you shall not be discriminated against based on your sex.
- You have the right to be provided with an equitable opportunity to participate in all academic extracurricular activities, including athletics.
- You have the right to inquire of the athletic director of your school or appropriate District personnel as to the athletic opportunities offered by the school.
- You have the right to apply for athletic scholarships if the District offers any.
- You have the right to receive equitable treatment and benefits in the provision of all of the following related to athletics, if any are provided by the District:
  - Equipment and supplies;
  - Scheduling of games and practices;
  - Transportation and daily allowances;
  - Access to tutoring;
  - Coaching;
  - Locker rooms;
  - Practice and competitive facilities;
  - Medical and training facilities and services; and
  - Publicity.
• You have the right to have access to a sex/gender equity coordinator, referred to as the Title IX Coordinator, to answer questions regarding sex/gender equity laws.
• You have the right to contact the State Department of Education and the California Interscholastic Federation to access information on sex/gender equity laws.
• You have the right to file a confidential discrimination complaint with the United States Department of Education Office for Civil Rights or the California Department of Education if you believe you have been discriminated against or if you believe you have received unequal treatment on the basis of your sex.
• You have the right to pursue civil remedies if you have been discriminated against.
• You have the right to be protected against retaliation if you file a discrimination complaint. (California Education Code § 221.8.)

The District has a responsibility to respond promptly and effectively to sex-based discrimination, including sexual harassment and sexual violence. If the District knows or reasonably should know about sex discrimination, it must take action to eliminate the sex discrimination, prevent its recurrence, and address its effects. The District must resolve complaints of sex discrimination promptly and equitably. Information on filing a complaint alleging sex-based discrimination is below, including contact information for the District’s Title IX Coordinator.

For more information specific to anti-discrimination in District employment, please contact the Title IX Coordinator.

Learn more about your rights under Title IX:
• Review United States Department of Education Office for Civil Rights, Know Your Rights documents:
  o Title IX prohibits sexual harassment and sexual violence:
    https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf.
  o Title IX requires the District to address sexual violence:
    https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201404-title-ix.pdf.
  o Title IX prohibits discrimination against pregnant or parenting individuals:
    http://www2.ed.gov/about/offices/list/ocr/docs/dcl-know-rights-201306-title-ix.pdf.
• Visit the website of the California Department of Education Office of Equal Opportunity at http://www.cde.ca.gov/re/di/eo/ and the webpage on Gender Equity/Title IX at http://www.cde.ca.gov/re/di/eo/genequitytitleix.asp.

Review related District policies and regulations:
• [Provide links to or information about how to obtain District policies and regulations regarding Title IX, including sexual harassment.]
Who is the Title IX Coordinator?

The District has a Title IX Coordinator who oversees the District’s compliance with Title IX requirements and promotes sex equity in the District’s programs. Contact the District’s Title IX Coordinator:

[Name], Title IX Coordinator
[Office/Building Location]
[Street Address]
[City], California [Zip Code]
Telephone: [(__) ___-____]
Email: [___________@________]

[Note: The Title IX Coordinator’s telephone number and email must be included.]

(Optional statement to include if the District has additional Title IX Coordinators for school sites or program, such as Deputy Title IX Coordinators:)

In addition, the District has designated Deputy Title IX Coordinators for [specify school site/program, etc.]. You may contact these Deputy Title IX Coordinators or the lead Title IX Coordinator listed above. Contact the Deputy Title IX Coordinators at:

[Name], Deputy Title IX Coordinator
[Office/Building Location]
[Street Address]
[City], California [Zip Code]
Telephone: [(__) ___-____]
Email: [___________@________]

[Name], Deputy Title IX Coordinator
[Office/Building Location]
[Street Address]
[City], California [Zip Code]
Telephone: [(__) ___-____]
Email: [___________@________]

How do I file a complaint of sex discrimination?

A student, parent, guardian, employee, individual, or organization may file a written complaint alleging discrimination, harassment, intimidation, and/or bullying on the basis of a protected characteristic under the District’s Uniform Complaint Procedure by sending a complaint to:

[Name], [Title]
[Office/Building Location]
[Street Address]
[City], California [Zip Code]
Telephone: [(__) ___-____]
Email: [___________@________]
The Uniform Complaint Procedure is available at [provide a direct link or information on where to obtain the procedure]. If you need assistance putting your complaint in writing, please contact [specify which position or office a person should contact for help putting a complaint in writing]. You may file a complaint anonymously, but the District’s ability to investigate and respond may be limited by a lack of information.

You may also file a discrimination complaint with the U.S. Department of Education Office for Civil Rights. For more information, visit http://www2.ed.gov/about/offices/list/ocr/complaintintro.html. The electronic complaint form for the Office for Civil Rights is available online at https://ocrcas.ed.gov/. Contact the Office for Civil Rights at:

San Francisco Office
Office for Civil Rights
U.S. Department of Education
50 United Nations Plaza
San Francisco, CA 94102
Telephone: (415) 486-5555
Fax: (415) 486-5570; TDD: (800) 877-8339
Email: ocr.sanfrancisco@ed.gov

For information about how to file other types of complaints and the procedures for those complaints, please contact the District Office at [(___) ___-____].

When must a complaint be filed?

A complaint alleging unlawful discrimination or retaliation must be filed no later than six months from the date the discrimination or retaliation occurred, or six months from when the complainant first learned of the unlawful discrimination. The Superintendent or designee may extend this timeline by up to ninety days for good cause, upon written request by the complainant setting forth the reasons for the extension.

How will a complaint be investigated?

Complaints filed under the District’s Uniform Complaint Procedure will be investigated and a decision made within sixty calendar days of the District’s receipt, unless the complainant agrees to an extension. The District’s compliance officer or designee may interview alleged victims, alleged offenders, and relevant witnesses. The compliance officer may review available records, statements, or notes related to the complaint, including evidence or information received from the parties during the investigation. The compliance officer may visit reasonably accessible locations where discrimination is alleged to have occurred. As appropriate, the District’s compliance officer periodically will inform the parties of the status of the investigation. The complainant will be notified when a decision is made.
Complaints that are not filed under the District’s Uniform Complaint Procedure will be investigated and decided pursuant to the applicable procedure.

**What happens when the investigation is complete?**

For complaints filed under the Uniform Complaint Procedure, the compliance officer will prepare and send a final written decision to the complainant and respondent, if any, within ___ [insert the appropriate number of days pursuant to your UCP – for example, 30 or 60] calendar days of the District’s receipt of the complaint (unless this deadline is extended by mutual agreement).

[This paragraph should be included only by districts that allow appeals to the Board: If the complainant or respondent is not satisfied with the decision, either the complainant or respondent may, within five business days, file the complaint in writing with the Board. The Board may consider the matter at a Board meeting or decide not to hear the complaint, in which case the compliance officer’s decision shall be final.]

The complainant or respondent may appeal the District’s decision within fifteen calendar days to the California Department of Education. The appeal must specify the reason for the appeal and whether the District’s facts are incorrect and/or the law is misapplied. The appeal must include a copy of the original complaint to the District and a copy of the District’s decision. For more information, visit the California Department of Education’s webpage on Uniform Complaint Procedures: [http://www.cde.ca.gov/re/cp/uc/index.asp](http://www.cde.ca.gov/re/cp/uc/index.asp).

For complaints alleging unlawful discrimination based on state law, the complainant may pursue available civil law remedies, including seeking assistance from mediation centers or public/private interest attorneys, sixty calendar days after filing an appeal with the California Department of Education. (California Education Code § 262.3.) Note that this sixty day moratorium does not apply to complaints seeking injunctive relief in state courts or to discrimination complaints based on federal law. (California Education Code § 262.3.)

Complaints may also be filed with the United States Department of Education, Office for Civil Rights, within 180 days of the alleged discrimination. For contact information, see the section above on “How do I file a complaint of sex discrimination?” For more information, visit [http://www2.ed.gov/about/offices/list/ocr/complaintintro.html](http://www2.ed.gov/about/offices/list/ocr/complaintintro.html).

If the compliance officer finds that a complaint has merit, the District will take appropriate corrective action.
How do I get more information?

For more information regarding Title IX and sex equity in education or in District employment, please contact the District’s Title IX Coordinator.
REVISED SEXUAL HARASSMENT GUIDANCE:
HARASSMENT OF STUDENTS
BY SCHOOL EMPLOYEES, OTHER STUDENTS,
OR THIRD PARTIES

TITLE IX

January 2001

U.S. Department of Education
Office for Civil Rights
Summary

The Assistant Secretary for Civil Rights, U.S. Department of Education (Department), issues a new document (revised guidance) that replaces the 1997 document entitled “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” issued by the Office for Civil Rights (OCR) on March 13, 1997 (1997 guidance). We revised the guidance in limited respects in light of subsequent Supreme Court cases relating to sexual harassment in schools.

The revised guidance reaffirms the compliance standards that OCR applies in investigations and administrative enforcement of Title IX of the Education Amendments of 1972 (Title IX) regarding sexual harassment. The revised guidance re-grounds these standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages and clarifying their regulatory basis as distinct from Title VII of the Civil Rights Act of 1964 (Title VII) agency law. In most other respects the revised guidance is identical to the 1997 guidance. Thus, we intend the revised guidance to serve the same purpose as the 1997 guidance. It continues to provide the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance.

Purpose and Scope of the Revised Guidance

In March 1997, we published in the Federal Register “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.” 62 FR 12034. We issued the guidance pursuant to our authority under Title IX, and our Title IX implementing regulations, to eliminate discrimination based on sex in education programs and activities receiving Federal financial assistance. It was grounded in longstanding legal authority establishing that sexual harassment of students can be a form of sex discrimination covered by Title IX. The guidance was the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers. We also made the document available for public comment.

Since the issuance of the 1997 guidance, the Supreme Court (Court) has issued several important decisions in sexual harassment cases, including two decisions specifically addressing sexual harassment of students under Title IX: Gebser v. Lago Vista Independent School District (Gebser), 524 U.S. 274 (1998), and Davis v. Monroe County Board of Education (Davis), 526 U.S. 629 (1999). The Court held in Gebser that a school can be liable for monetary damages if a teacher sexually harasses a student, an

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1 As in the 1997 guidance, the revised guidance uses the term “school” to refer to all schools, colleges, universities, and other educational institutions that receive Federal funds from the Department.
official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment. In *Davis*, the Court announced that a school also may be liable for monetary damages if one student sexually harasses another student in the school’s program and the conditions of *Gebser* are met.

The Court was explicit in *Gebser* and *Davis* that the liability standards established in those cases are limited to private actions for monetary damages. See, e.g., *Gebser*, 524 U.S. 283, and *Davis*, 526 U.S. at 639. The Court acknowledged, by contrast, the power of Federal agencies, such as the Department, to “promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,” even in circumstances that would not give rise to a claim for money damages. See, *Gebser*, 524 U.S. at 292.

In an August 1998 letter to school superintendents and a January 1999 letter to college and university presidents, the Secretary of Education informed school officials that the *Gebser* decision did not change a school’s obligations to take reasonable steps under Title IX and the regulations to prevent and eliminate sexual harassment as a condition of its receipt of Federal funding. The Department also determined that, although in most important respects the substance of the 1997 guidance was reaffirmed in *Gebser* and *Davis*, certain areas of the 1997 guidance could be strengthened by further clarification and explanation of the Title IX regulatory basis for the guidance.

On November 2, 2000, we published in the *Federal Register* a notice requesting comments on the proposed revised guidance (62 FR 66092). A detailed explanation of the *Gebser* and *Davis* decisions, and an explanation of the proposed changes in the guidance, can be found in the preamble to the proposed revised guidance. In those decisions and a third opinion, *Oncale v. Sundowner Offshore Services, Inc.* (*Oncale*), 523 U.S. 75 (1998) (a sexual harassment case decided under Title VII), the Supreme Court confirmed several fundamental principles we articulated in the 1997 guidance. In these areas, no changes in the guidance were necessary. A notice regarding the availability of this final document appeared in the *Federal Register* on January 19, 2001.

**Enduring Principles from the 1997 Guidance**

It continues to be the case that a significant number of students, both male and female, have experienced sexual harassment, which can interfere with a student’s academic performance and emotional and physical well-being. Preventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn. As with the 1997 guidance, the revised guidance applies to students at every level of education. School personnel who understand their obligations under Title IX, e.g., understand that sexual harassment can be sex discrimination in violation of Title IX, are in the best position to prevent harassment and to lessen the harm to students if, despite their best efforts, harassment occurs.

One of the fundamental aims of both the 1997 guidance and the revised guidance has been to emphasize that, in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.
A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. If harassment has occurred, doing nothing is always the wrong response. However, depending on the circumstances, there may be more than one right way to respond. The important thing is for school employees or officials to pay attention to the school environment and not to hesitate to respond to sexual harassment in the same reasonable, commonsense manner as they would to other types of serious misconduct.

It is also important that schools not overreact to behavior that does not rise to the level of sexual harassment. As the Department stated in the 1997 guidance, a kiss on the cheek by a first grader does not constitute sexual harassment. School personnel should consider the age and maturity of students in responding to allegations of sexual harassment.

Finally, we reiterate the importance of having well-publicized and effective grievance procedures in place to handle complaints of sex discrimination, including sexual harassment complaints. Nondiscrimination policies and procedures are required by the Title IX regulations. In fact, the Supreme Court in Gebser specifically affirmed the Department’s authority to enforce this requirement administratively in order to carry out Title IX’s nondiscrimination mandate. 524 U.S. at 292. Strong policies and effective grievance procedures are essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it.

Analysis of Comments Received Concerning the Proposed Revised Guidance and the Resulting Changes

In response to the Assistant Secretary’s invitation to comment, OCR received approximately 11 comments representing approximately 15 organizations and individuals. Commenters provided specific suggestions regarding how the revised guidance could be clarified. Many of these suggested changes have been incorporated. Significant and recurring issues are grouped by subject and discussed in the following sections:

Distinction Between Administrative Enforcement and Private Litigation for Monetary Damages

In Gebser and Davis, the Supreme Court addressed for the first time the appropriate standards for determining when a school district is liable under Title IX for money damages in a private lawsuit brought by or on behalf of a student who has been sexually harassed. As explained in the preamble to the proposed revised guidance, the Court was explicit in Gebser and Davis that the liability standards established in these cases are limited to private actions for monetary damages. See, e.g., Gebser, 524 U.S. at 283, and Davis, 526 U.S. at 639. The Gebser Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX. In Gebser, the Court was concerned with the possibility of a money damages award against a school for harassment about which it had not known. In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools
aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.

Commenters uniformly agreed with OCR that the Court limited the liability standards established in Gebser and Davis to private actions for monetary damages. See, e.g., Gebser, 524 U.S. 283, and Davis, 526 U.S. at 639. Commenters also agreed that the administrative enforcement standards reflected in the 1997 guidance remain valid in OCR enforcement actions. 2 Finally, commenters agreed that the proposed revisions provided important clarification to schools regarding the standards that OCR will use and that schools should use to determine compliance with Title IX as a condition of the receipt of Federal financial assistance in light of Gebser and Davis.

Harassment by Teachers and Other School Personnel

Most commenters agreed with OCR’s interpretation of its regulations regarding a school’s responsibility for harassment of students by teachers and other school employees. These commenters agreed that Title IX’s prohibitions against discrimination are not limited to official policies and practices governing school programs and activities. A school also engages in sex-based discrimination if its employees, in the context of carrying out their day-to-day job responsibilities for providing aid, benefits, or services to students (such as teaching, counseling, supervising, and advising students) deny or limit a student’s ability to participate in or benefit from the school’s program on the basis of sex. Under the Title IX regulations, the school is responsible for discrimination in these cases, whether or not it knew or should have known about it, because the discrimination occurred as part of the school’s undertaking to provide nondiscriminatory aid, benefits, and services to students. The revised guidance distinguishes these cases from employee harassment that, although taking place in a school’s program, occurs outside of the context of the employee’s provision of aid, benefits, and services to students. In these latter cases, the school’s responsibilities are not triggered until the school knew or should have known about the harassment.

One commenter expressed concern that it was inappropriate ever to find a school out of compliance for harassment about which it knew nothing. We reiterate that, although a school may in some cases be responsible for harassment caused by an employee that occurred before other responsible employees of the school knew or should have known about it, OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation. This is consistent with the Court’s underlying concern in Gebser and Davis.

Most commenters acknowledged that OCR has provided useful factors to determine whether harassing conduct took place “in the context of providing aid, benefits, or services.” However, some commenters stated that additional clarity and examples regarding the issue were needed. Commenters also suggested clarifying

2 It is the position of the United States that the standards set out in OCR’s guidance for finding a violation and seeking voluntary corrective action also would apply to private actions for injunctive and other equitable relief. See brief of the United States as Amicus Curiae in Davis v. Monroe County.
references to quid pro quo and hostile environment harassment as these two concepts, though useful, do not determine the issue of whether the school itself is considered responsible for the harassment. We agree with these concerns and have made significant revisions to the sections “Harassment that Denies or Limits a Student’s Ability to Participate in or Benefit from the Education Program” and “Harassment by Teachers and Other Employees” to clarify the guidance in these respects.

**Gender-based Harassment, Including Harassment Predicated on Sex-stereotyping**

Several commenters requested that we expand the discussion and include examples of gender-based harassment predicated on sex stereotyping. Some commenters also argued that gender-based harassment should be considered sexual harassment, and that we have “artificially” restricted the guidance only to harassment in the form of conduct of a sexual nature, thus, implying that gender-based harassment is of less concern and should be evaluated differently.

We have not further expanded this section because, while we are also concerned with the important issue of gender-based harassment, we believe that harassment of a sexual nature raises unique and sufficiently important issues that distinguish it from other types of gender-based harassment and warrants its own guidance.

Nevertheless, we have clarified this section of the guidance in several ways. The guidance clarifies that gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim’s failure to conform to stereotyped notions of masculinity and femininity. Although this type of harassment is not covered by the guidance, if it is sufficiently serious, gender-based harassment is a school’s responsibility, and the same standards generally will apply. We have also added an endnote regarding Supreme Court precedent for the proposition that sex stereotyping can constitute sex discrimination.

Several commenters also suggested that we state that sexual and non-sexual (but gender-based) harassment should not be evaluated separately in determining whether a hostile environment exists. We note that both the proposed revised guidance and the final revised guidance indicate in several places that incidents of sexual harassment and non-sexual, gender-based harassment can be combined to determine whether a hostile environment has been created. We also note that sufficiently serious harassment of a sexual nature remains covered by Title IX, as explained in the guidance, even though the hostile environment may also include taunts based on sexual orientation.

**Definition of Harassment**

One commenter urged OCR to provide distinct definitions of sexual harassment to be used in administrative enforcement as distinguished from criteria used to maintain private actions for monetary damages. We disagree. First, as discussed in the preamble to the proposed revised guidance, the definition of hostile environment sexual harassment used by the Court in *Davis* is consistent with the definition found in the proposed guidance. Although the terms used by the Court in *Davis* are in some ways different from
the words used to define hostile environment harassment in the 1997 guidance (see, e.g., 62 FR 12041, “conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment”), the definitions are consistent. Both the Court’s and the Department’s definitions are contextual descriptions intended to capture the same concept -- that under Title IX, the conduct must be sufficiently serious that it adversely affects a student’s ability to participate in or benefit from the school’s program. In determining whether harassment is actionable, both Davis and the Department tell schools to look at the “constellation of surrounding circumstances, expectations, and relationships” (526 U.S. at 651 (citing Oncale)), and the Davis Court cited approvingly to the underlying core factors described in the 1997 guidance for evaluating the context of the harassment. Second, schools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose.

Several commenters suggested that we develop a unique Title IX definition of harassment that does not rely on Title VII and that takes into account the special relationship of schools to students. Other commenters, by contrast, commended OCR for recognizing that Gebser and Davis did not alter the definition of hostile environment sexual harassment found in OCR’s 1997 guidance, which derives from Title VII caselaw, and asked us to strengthen the point. While Gebser and Davis made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the Davis Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX. We also believe that the factors described in both the 1997 guidance and the revised guidance to determine whether sexual harassment has occurred provide the necessary flexibility for taking into consideration the age and maturity of the students involved and the nature of the school environment.

Effective Response

One commenter suggested that the change in the guidance from “appropriate response” to “effective response” implies a change in OCR policy that requires omniscience of schools. We disagree. Effectiveness has always been the measure of an adequate response under Title IX. This does not mean a school must overreact out of fear of being judged inadequate. Effectiveness is measured based on a reasonableness standard. Schools do not have to know beforehand that their response will be effective. However, if their initial steps are ineffective in stopping the harassment, reasonableness may require a series of escalating steps.

The Relationship Between FERPA and Title IX

In the development of both the 1997 guidance and the current revisions to the guidance, commenters raised concerns about the interrelation of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and Title IX. The concerns relate to two issues: (1) the harassed student’s right to information about the outcome of a sexual harassment complaint against another student, including information about sanctions imposed on a student found guilty of harassment; and (2) the due process rights of
individuals, including teachers, accused of sexual harassment by a student, to obtain information about the identity of the complainant and the nature of the allegations.

FERPA generally forbids disclosure of information from a student’s “education record” without the consent of the student (or the student’s parent). Thus, FERPA may be relevant when the person found to have engaged in harassment is another student, because written information about the complaint, investigation, and outcome is part of the harassing student’s education record. Title IX is also relevant because it is an important part of taking effective responsive action for the school to inform the harassed student of the results of its investigation and whether it counseled, disciplined, or otherwise sanctioned the harasser. This information can assure the harassed student that the school has taken the student’s complaint seriously and has taken steps to eliminate the hostile environment and prevent the harassment from recurring.

The Department currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim. It has been the Department’s position that there is a potential conflict between FERPA and Title IX regarding disclosure of sanctions, and that FERPA generally prevents a school from disclosing to a student who complained of harassment information about the sanction or discipline imposed upon a student who was found to have engaged in that harassment. 3

There is, however, an additional statutory provision that may apply to this situation. In 1994, as part of the Improving America’s Schools Act, Congress amended the General Education Provisions Act (GEPA) -- of which FERPA is a part -- to state that nothing in GEPA “shall be construed to affect the applicability of … title IX of the Education Amendments of 1972.” 4 The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. The Department is in the process of developing a consistent approach and specific factors for implementing this provision. OCR and the Department’s Family Policy Compliance Office (FPCO) intend to issue joint guidance, discussing specific areas of potential conflict between FERPA and Title IX.

3 Exceptions include the case of a sanction that directly relates to the person who was harassed (e.g., an order that the harasser stay away from the harassed student), or sanctions related to offenses for which there is a statutory exception, such as crimes of violence or certain sex offenses in postsecondary institutions.

4 20 U.S.C. 1221(d). A similar amendment was originally passed in 1974 but applied only to Title VI of the Civil Rights Act of 1964 (prohibiting race discrimination by recipients). The 1994 amendments also extended 20 U.S.C. 1221(d) to Section 504 of the Rehabilitation Act of 1973 (prohibiting disability-based discrimination by recipients) and to the Age Discrimination Act.
FERPA is also relevant when a student accuses a teacher or other employee of sexual harassment, because written information about the allegations is contained in the student’s education record. The potential conflict arises because, while FERPA protects the privacy of the student accuser, the accused individual may need the name of the accuser and information regarding the nature of the allegations in order to defend against the charges. The 1997 guidance made clear that neither FERPA nor Title IX override any federally protected due process rights of a school employee accused of sexual harassment.

Several commenters urged the Department to expand and strengthen this discussion. They argue that in many instances a school’s failure to provide information about the name of the student accuser and the nature of the allegations seriously undermines the fairness of the investigative and adjudicative process. They also urge the Department to include a discussion of the need for confidentiality as to the identity of the individual accused of harassment because of the significant harm that can be caused by false accusations. We have made several changes to the guidance, including an additional discussion regarding the confidentiality of a person accused of harassment and a new heading entitled “Due Process Rights of the Accused,” to address these concerns.
REVISED SEXUAL HARASSMENT GUIDANCE:
HARASSMENT OF STUDENTS
BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES

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I. Introduction

Title IX of the Education Amendments of 1972 (Title IX) and the Department of Education’s (Department) implementing regulations prohibit discrimination on the basis of sex in federally assisted education programs and activities. The Supreme Court, Congress, and Federal executive departments and agencies, including the Department, have recognized that sexual harassment of students can constitute discrimination prohibited by Title IX. This guidance focuses on a school’s fundamental compliance responsibilities under Title IX and the Title IX regulations to address sexual harassment of students as a condition of continued receipt of Federal funding. It describes the regulatory basis for a school’s compliance responsibilities under Title IX, outlines the circumstances under which sexual harassment may constitute discrimination prohibited by the statute and regulations, and provides information about actions that schools should take to prevent sexual harassment or to address it effectively if it does occur.

II. Sexual Harassment

Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual harassment of a student can deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program. Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance.

It is important to recognize that Title IX’s prohibition against sexual harassment does not extend to legitimate nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher’s consoling hug for a child with a skinned knee will not be considered sexual harassment. Similarly, one student’s demonstration of a sports maneuver or technique requiring contact with another student will not be considered sexual harassment. However, in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher’s repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment.

III. Applicability of Title IX

Title IX applies to all public and private educational institutions that receive Federal funds, i.e., recipients, including, but not limited to, elementary and secondary schools, school districts, proprietary schools, colleges, and universities. The guidance uses the terms “recipients” and “schools” interchangeably to refer to all of those institutions. The “education program or activity” of a school includes all of the school’s operations. This means that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school,
whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

A student may be sexually harassed by a school employee, another student, or a non-employee third party (e.g., a visiting speaker or visiting athletes). Title IX protects any “person” from sex discrimination. Accordingly, both male and female students are protected from sexual harassment engaged in by a school’s employees, other students, or third parties. Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex. An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.

Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance. For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim’s ability to participate in or benefit from the school’s program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student’s sexual orientation (e.g., “gay students are not welcome at this table in the cafeteria”), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.

Though beyond the scope of this guidance, gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student’s ability to participate in or benefit from the educational program. For example, the repeated sabotaging of female graduate students’ laboratory experiments by male students in the class could be the basis of a violation of Title IX. A school must respond to such harassment in accordance with the standards and procedures described in this guidance. In assessing all related circumstances to determine whether a hostile environment exists, incidents of gender-based harassment combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual harassment alone would be sufficient to do so.

IV. Title IX Regulatory Compliance Responsibilities

As a condition of receiving funds from the Department, a school is required to comply with Title IX and the Department’s Title IX regulations, which spell out prohibitions against sex discrimination. The law is clear that sexual harassment may constitute sex discrimination under Title IX.

Recipients specifically agree, as a condition for receiving Federal financial assistance from the Department, to comply with Title IX and the Department’s Title IX regulations. The regulatory provision requiring this agreement, known as an assurance of
compliance, specifies that recipients must agree that education programs or activities operated by the recipient will be operated in compliance with the Title IX regulations, including taking any action necessary to remedy its discrimination or the effects of its discrimination in its programs.\textsuperscript{21}

The regulations set out the basic Title IX responsibilities a recipient undertakes when it accepts Federal financial assistance, including the following specific obligations.\textsuperscript{22} A recipient agrees that, in providing any aid, benefit, or service to students, it will not, on the basis of sex—

- Treat one student differently from another in determining whether the student satisfies any requirement or condition for the provision of any aid, benefit, or service;\textsuperscript{23}
- Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;\textsuperscript{24}
- Deny any student any such aid, benefit, or service;\textsuperscript{25}
- Subject students to separate or different rules of behavior, sanctions, or other treatment;\textsuperscript{26}
- Aid or perpetuate discrimination against a student by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students;\textsuperscript{27} and
- Otherwise limit any student in the enjoyment of any right, privilege, advantage, or opportunity.\textsuperscript{28}

For the purposes of brevity and clarity, this guidance generally summarizes this comprehensive list by referring to a school’s obligation to ensure that a student is not denied or limited in the ability to participate in or benefit from the school’s program on the basis of sex.

The regulations also specify that, if a recipient discriminates on the basis of sex, the school must take remedial action to overcome the effects of the discrimination.\textsuperscript{29}

In addition, the regulations establish procedural requirements that are important for the prevention or correction of sex discrimination, including sexual harassment. These requirements include issuance of a policy against sex discrimination\textsuperscript{30} and adoption and publication of grievance procedures providing for prompt and equitable resolution of complaints of sex discrimination.\textsuperscript{31} The regulations also require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance.\textsuperscript{32}

To comply with these regulatory requirements, schools need to recognize and respond to sexual harassment of students by teachers and other employees, by other students, and by third parties. This guidance explains how the requirements of the Title IX regulations apply to situations involving sexual harassment of a student and outlines measures that schools should take to ensure compliance.
V. Determining a School’s Responsibilities

In assessing sexually harassing conduct, it is important for schools to recognize that two distinct issues are considered. The first issue is whether, considering the types of harassment discussed in the following section, the conduct denies or limits a student’s ability to participate in or benefit from the program based on sex. If it does, the second issue is the nature of the school’s responsibility to address that conduct. As discussed in a following section, this issue depends in part on the identity of the harasser and the context in which the harassment occurred.

A. Harassment that Denies or Limits a Student’s Ability to Participate in or Benefit from the Education Program

This guidance moves away from specific labels for types of sexual harassment. In each case, the issue is whether the harassment rises to a level that it denies or limits a student’s ability to participate in or benefit from the school’s program based on sex. However, an understanding of the different types of sexual harassment can help schools determine whether or not harassment has occurred that triggers a school’s responsibilities under, or violates, Title IX or its regulations.

The type of harassment traditionally referred to as quid pro quo harassment occurs if a teacher or other employee conditions an educational decision or benefit on the student’s submission to unwelcome sexual conduct. Whether the student resists and suffers the threatened harm or submits and avoids the threatened harm, the student has been treated differently, or the student’s ability to participate in or benefit from the school’s program has been denied or limited, on the basis of sex in violation of the Title IX regulations.

By contrast, sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct. Harassment of this type is generally referred to as hostile environment harassment. This type of harassing conduct requires a further assessment of whether or not the conduct is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex.

Teachers and other employees can engage in either type of harassment. Students and third parties are not generally given responsibility over other students and, thus, generally can only engage in hostile environment harassment.

1. Factors Used to Evaluate Hostile Environment Sexual Harassment

As outlined in the following paragraphs, OCR considers a variety of related factors to determine if a hostile environment has been created, i.e., if sexually harassing conduct by an employee, another student, or a third party is sufficiently serious that it denies or limits a student’s ability to participate in or benefit from the school’s program based on sex. OCR considers the conduct from both a subjective and objective perspective. In evaluating the severity and pervasiveness of the conduct, OCR considers all relevant circumstances, i.e., “the constellation of surrounding circumstances, expectations, and relationships.” Schools should also use these factors to evaluate conduct in order to draw commonsense distinctions between conduct that constitutes
sexual harassment and conduct that does not rise to that level. Relevant factors include the following:

- **The degree to which the conduct affected one or more students’ education.** OCR assesses the effect of the harassment on the student to determine whether it has denied or limited the student’s ability to participate in or benefit from the school’s program. For example, a student’s grades may go down or the student may be forced to withdraw from school because of the harassing behavior. A student may also suffer physical injuries or mental or emotional distress. In another situation, a student may have been able to keep up his or her grades and continue to attend school even though it was very difficult for him or her to do so because of the teacher’s repeated sexual advances. Similarly, a student may be able to remain on a sports team, despite experiencing great difficulty performing at practices and games from the humiliation and anger caused by repeated sexual advances and intimidation by several team members that create a hostile environment. Harassing conduct in these examples would alter a reasonable student’s educational environment and adversely affect the student’s ability to participate in or benefit from the school’s program on the basis of sex.

A hostile environment can occur even if the harassment is not targeted specifically at the individual complainant. For example, if a student, group of students, or a teacher regularly directs sexual comments toward a particular student, a hostile environment may be created not only for the targeted student, but also for others who witness the conduct.

- **The type, frequency, and duration of the conduct.** In most cases, a hostile environment will exist if there is a pattern or practice of harassment, or if the harassment is sustained and nontrivial. For instance, if a young woman is taunted by one or more young men about her breasts or genital area or both, OCR may find that a hostile environment has been created, particularly if the conduct has gone on for some time, or takes place throughout the school, or if the taunts are made by a number of students. The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e.g., attempts to grab a female student’s breasts or attempts to grab any student’s genital area or buttocks, it need not be as persistent to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment. On the other hand, conduct that is not severe will not create a hostile environment, e.g., a comment by one student to another student that she has a nice figure. Indeed, depending on the circumstances, this may not even be conduct of a sexual nature. Similarly, because students date one another, a request for a date or a gift of flowers, even if unwelcome, would not create a hostile environment. However, there may be circumstances in which repeated, unwelcome requests for dates or similar conduct could create a hostile environment. For example, a person, who has been refused previously, may request dates in an intimidating or threatening manner.

- **The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.** A factor to be considered, especially in cases involving allegations of sexual harassment of a student by a school employee, is the identity of
and relationship between the alleged harasser and the subject or subjects of the harassment. For example, due to the power a professor or teacher has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student. 47

- The number of individuals involved. Sexual harassment may be committed by an individual or a group. In some cases, verbal comments or other conduct from one person might not be sufficient to create a hostile environment, but could be if done by a group. Similarly, while harassment can be directed toward an individual or a group, 48 the effect of the conduct toward a group may vary, depending on the type of conduct and the context. For certain types of conduct, there may be “safety in numbers.” For example, following an individual student and making sexual taunts to him or her may be very intimidating to that student, but, in certain circumstances, less so to a group of students. On the other hand, persistent unwelcome sexual conduct still may create a hostile environment if directed toward a group.

- The age and sex of the alleged harasser and the subject or subjects of the harassment. For example, in the case of younger students, sexually harassing conduct is more likely to be intimidating if coming from an older student. 49

- The size of the school, location of the incidents, and context in which they occurred. Depending on the circumstances of a particular case, fewer incidents may have a greater effect at a small college than at a large university campus. Harassing conduct occurring on a school bus may be more intimidating than similar conduct on a school playground because the restricted area makes it impossible for students to avoid their harassers. 50 Harassing conduct in a personal or secluded area, such as a dormitory room or residence hall, can have a greater effect (e.g., be seen as more threatening) than would similar conduct in a more public area. On the other hand, harassing conduct in a public place may be more humiliating. Each incident must be judged individually.

- Other incidents at the school. A series of incidents at the school, not involving the same students, could — taken together — create a hostile environment, even if each by itself would not be sufficient. 51

- Incidents of gender-based, but nonsexual harassment. Acts of verbal, nonverbal or physical aggression, intimidation or hostility based on sex, but not involving sexual activity or language, can be combined with incidents of sexual harassment to determine if the incidents of sexual harassment are sufficiently serious to create a sexually hostile environment. 52

It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists. Consequently, in using the factors discussed previously to evaluate incidents of alleged harassment, it is always important to use common sense and reasonable judgement in determining whether a sexually hostile environment has been created.

2. Welcomeness

The section entitled “Sexual Harassment” explains that in order for conduct of a sexual nature to be sexual harassment, it must be unwelcome. Conduct is unwelcome if
the student did not request or invite it and “regarded the conduct as undesirable or offensive.”\textsuperscript{53} Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome.\textsuperscript{54} For example, a student may decide not to resist sexual advances of another student or may not file a complaint out of fear. In addition, a student may not object to a pattern of demeaning comments directed at him or her by a group of students out of a concern that objections might cause the harassers to make more comments. The fact that a student may have accepted the conduct does not mean that he or she welcomed it.\textsuperscript{55} Also, the fact that a student willingly participated in conduct on one occasion does not prevent him or her from indicating that the same conduct has become unwelcome on a subsequent occasion. On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that he or she objects, then the evidence generally will not support a conclusion that the conduct was unwelcome.\textsuperscript{56}

If younger children are involved, it may be necessary to determine the degree to which they are able to recognize that certain sexual conduct is conduct to which they can or should reasonably object and the degree to which they can articulate an objection. Accordingly, OCR will consider the age of the student, the nature of the conduct involved, and other relevant factors in determining whether a student had the capacity to welcome sexual conduct.

Schools should be particularly concerned about the issue of welcomeness if the harasser is in a position of authority. For instance, because students may be encouraged to believe that a teacher has absolute authority over the operation of his or her classroom, a student may not object to a teacher’s sexually harassing comments during class; however, this does not necessarily mean that the conduct was welcome. Instead, the student may believe that any objections would be ineffective in stopping the harassment or may fear that by making objections he or she will be singled out for harassing comments or other retaliation.

In addition, OCR must consider particular issues of welcomeness if the alleged harassment relates to alleged “consensual” sexual relationships between a school’s adult employees and its students. If elementary students are involved, welcomeness will not be an issue: OCR will never view sexual conduct between an adult school employee and an elementary school student as consensual. In cases involving secondary students, there will be a strong presumption that sexual conduct between an adult school employee and a student is not consensual. In cases involving older secondary students, subject to the presumption,\textsuperscript{57} OCR will consider a number of factors in determining whether a school employee’s sexual advances or other sexual conduct could be considered welcome.\textsuperscript{58} In addition, OCR will consider these factors in all cases involving postsecondary students in making those determinations.\textsuperscript{59} The factors include the following:

\begin{itemize}
  \item The nature of the conduct and the relationship of the school employee to the student, including the degree of influence (which could, at least in part, be affected by the student’s age), authority, or control the employee has over the student.
  \item Whether the student was legally or practically unable to consent to the sexual conduct in question. For example, a student’s age could affect his or her ability to do so. Similarly, certain types of disabilities could affect a student’s ability to do so.
\end{itemize}
If there is a dispute about whether harassment occurred or whether it was welcome — in a case in which it is appropriate to consider whether the conduct would be welcome — determinations should be made based on the totality of the circumstances. The following types of information may be helpful in resolving the dispute:

- Statements by any witnesses to the alleged incident.

- Evidence about the relative credibility of the allegedly harassed student and the alleged harasser. For example, the level of detail and consistency of each person’s account should be compared in an attempt to determine who is telling the truth. Another way to assess credibility is to see if corroborative evidence is lacking where it should logically exist. However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.

- Evidence that the alleged harasser has been found to have harassed others may support the credibility of the student claiming the harassment; conversely, the student’s claim will be weakened if he or she has been found to have made false allegations against other individuals.

- Evidence of the allegedly harassed student’s reaction or behavior after the alleged harassment. For example, were there witnesses who saw the student immediately after the alleged incident who say that the student appeared to be upset? However, it is important to note that some students may respond to harassment in ways that do not manifest themselves right away, but may surface several days or weeks after the harassment. For example, a student may initially show no signs of having been harassed, but several weeks after the harassment, there may be significant changes in the student’s behavior, including difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school.

- Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the complainant may not be believed rather than that the alleged harassment did not occur.

- Other contemporaneous evidence. For example, did the student claiming harassment write about the conduct and his or her reaction to it soon after it occurred (e.g., in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

**B. Nature of the School’s Responsibility to Address Sexual Harassment**

A school has a responsibility to respond promptly and effectively to sexual harassment. In the case of harassment by teachers or other employees, the nature of this responsibility depends in part on whether the harassment occurred in the context of the employee’s provision of aid, benefits, or services to students.
1. Harassment by Teachers and Other Employees

Sexual harassment of a student by a teacher or other school employee can be discrimination in violation of Title IX. Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence. A school also may be responsible for remedying the effects of the harassment on the student who was harassed. The extent of a recipient’s responsibilities if an employee sexually harasses a student is determined by whether or not the harassment occurred in the context of the employee’s provision of aid, benefits, or services to students.

A recipient is responsible under the Title IX regulations for the nondiscriminatory provision of aid, benefits, and services to students. Recipients generally provide aid, benefits, and services to students through the responsibilities they give to employees. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment – generally this means harassment that is carried out during an employee’s performance of his or her responsibilities in relation to students, including teaching, counseling, supervising, advising, and transporting students – and the harassment denies or limits a student’s ability to participate in or benefit from a school program on the basis of sex, the recipient is responsible for the discriminatory conduct. The recipient is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. This is true whether or not the recipient has “notice” of the harassment. (As explained in the section on “Notice of Employee, Peer, or Third Party Harassment,” for purposes of this guidance, a school has notice of harassment if a responsible school employee actually knew or, in the exercise of reasonable care, should have known about the harassment.) Of course, under OCR’s administrative enforcement, recipients always receive actual notice and the opportunity to take appropriate corrective action before any finding of violation or possible loss of federal funds.

Whether or not sexual harassment of a student occurred within the context of an employee’s responsibilities for providing aid, benefits, or services is determined on a case-by-case basis, taking into account a variety of factors. If an employee conditions the provision of an aid, benefit, or service that the employee is responsible for providing on a student’s submission to sexual conduct, i.e., conduct traditionally referred to as quid pro quo harassment, the harassment is clearly taking place in the context of the employee’s responsibilities to provide aid, benefits, or services. In other situations, i.e., when an employee has created a hostile environment, OCR will consider the following factors in determining whether or not the harassment has taken place in this context, including:

- The type and degree of responsibility given to the employee, including both formal and informal authority, to provide aids, benefits, or services to students, to direct and control student conduct, or to discipline students generally;

- the degree of influence the employee has over the particular student involved, including in the circumstances in which the harassment took place;

- where and when the harassment occurred;

- the age and educational level of the student involved; and
• as applicable, whether, in light of the student’s age and educational level and the way the school is run, it would be reasonable for the student to believe that the employee was in a position of responsibility over the student, even if the employee was not.

These factors are applicable to all recipient educational institutions, including elementary and secondary schools, colleges, and universities. Elementary and secondary schools, however, are typically run in a way that gives teachers, school officials, and other school employees a substantial degree of supervision, control, and disciplinary authority over the conduct of students. Therefore, in cases involving allegations of harassment of elementary and secondary school-age students by a teacher or school administrator during any school activity, consideration of these factors will generally lead to a conclusion that the harassment occurred in the context of the employee’s provision of aid, benefits, or services.

For example, a teacher sexually harasses an eighth-grade student in a school hallway. Even if the student is not in any of the teacher’s classes and even if the teacher is not designated as a hall monitor, given the age and educational level of the student and the status and degree of influence of teachers in elementary and secondary schools, it would be reasonable for the student to believe that the teacher had at least informal disciplinary authority over students in the hallways. Thus, OCR would consider this an example of conduct that is occurring in the context of the employee’s responsibilities to provide aid, benefits, or services.

Other examples of sexual harassment of a student occurring in the context of an employee’s responsibilities for providing aid, benefits, or services include, but are not limited to -- a faculty member at a university’s medical school conditions an intern’s evaluation on submission to his sexual advances and then gives her a poor evaluation for rejecting the advances; a high school drama instructor does not give a student a part in a play because she has not responded to sexual overtures from the instructor; a faculty member withdraws approval of research funds for her assistant because he has rebuffed her advances; a journalism professor who supervises a college newspaper continually and inappropriately touches a student editor in a sexual manner, causing the student to resign from the newspaper staff; and a teacher repeatedly asks a ninth grade student to stay after class and attempts to engage her in discussions about sex and her personal experiences while they are alone in the classroom, causing the student to stop coming to class. In each of these cases, the school is responsible for the discriminatory conduct, including taking prompt and effective action to end the harassment, prevent it from recurring, and remedy the effects of the harassment on the victim.

Sometimes harassment of a student by an employee in the school’s program does not take place in the context of the employee’s provision of aid, benefits, or services, but nevertheless is sufficiently serious to create a hostile educational environment. An example of this conduct might occur if a faculty member in the history department at a university, over the course of several weeks, repeatedly touches and makes sexually suggestive remarks to a graduate engineering student while waiting at a stop for the university shuttle bus, riding on the bus, and upon exiting the bus. As a result, the student stops using the campus shuttle and walks the very long distances between her classes. In this case, the school is not directly responsible for the harassing conduct because it did not occur in the context of the employee’s responsibilities for the provision
of aid, benefits, or services to students. However, the conduct is sufficiently serious to deny or limit the student in her ability to participate in or benefit from the recipient’s program. Thus, the school has a duty, upon notice of the harassment,\(^65\) to take prompt and effective action to stop the harassment and prevent its recurrence.

If the school takes these steps, it has avoided violating Title IX. If the school fails to take the necessary steps, however, its failure to act has allowed the student to continue to be subjected to a hostile environment that denies or limits the student’s ability to participate in or benefit from the school’s program. The school, therefore, has engaged in its own discrimination. It then becomes responsible, not just for stopping the conduct and preventing it from happening again, but for remedying the effects of the harassment on the student that could reasonably have been prevented if the school had responded promptly and effectively. (For related issues, see the sections on “OCR Case Resolution” and “Recipient’s Response.”)

2. Harassment by Other Students or Third Parties

If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student’s ability to participate in or benefit from the program, and if the school knows or reasonably should know\(^66\) about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.\(^67\) As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations. On the other hand, if, upon notice, the school fails to take prompt, effective action, the school’s own inaction has permitted the student to be subjected to a hostile environment that denies or limits the student’s ability to participate in or benefit from the school’s program on the basis of sex.\(^68\) In this case, the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.

Similarly, sexually harassing conduct by third parties, who are not themselves employees or students at the school (e.g., a visiting speaker or members of a visiting athletic team), may also be of a sufficiently serious nature to deny or limit a student’s ability to participate in or benefit from the education program. As previously outlined in connection with peer harassment, if the school knows or should know\(^69\) of the harassment, the school is responsible for taking prompt and effective action to eliminate the hostile environment and prevent its recurrence.

The type of appropriate steps that the school should take will differ depending on the level of control that the school has over the third party harasser.\(^70\) For example, if athletes from a visiting team harass the home school’s students, the home school may not be able to discipline the athletes. However, it could encourage the other school to take appropriate action to prevent further incidents; if necessary, the home school may choose not to invite the other school back. (This issue is discussed more fully in the section on “Recipient’s Response.”)

If, upon notice, the school fails to take prompt and effective corrective action, its own failure has permitted the student to be subjected to a hostile environment that limits
the student’s ability to participate in or benefit from the education program. In this case, the school is responsible for taking corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had the school responded promptly and effectively.

C. Notice of Employee, Peer, or Third Party Harassment

As described in the section on “Harassment by Teachers and Other Employees,” schools may be responsible for certain types of employee harassment that occurred before the school otherwise had notice of the harassment. On the other hand, as described in that section and the section on “Harassment by Other Students or Third Parties,” in situations involving certain other types of employee harassment, or harassment by peers or third parties, a school will be in violation of the Title IX regulations if the school “has notice” of a sexually hostile environment and fails to take immediate and effective corrective action.

A school has notice if a responsible employee “knew, or in the exercise of reasonable care should have known,” about the harassment. A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility. Accordingly, schools need to ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials. Training for employees should include practical information about how to identify harassment and, as applicable, the person to whom it should be reported.

A school can receive notice of harassment in many different ways. A student may have filed a grievance with the Title IX coordinator or complained to a teacher or other responsible employee about fellow students harassing him or her. A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, affirmative action officer, or staff in the office of student affairs. A teacher or other responsible employee of the school may have witnessed the harassment. The school may receive notice about harassment in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The school also may have learned about the harassment from flyers about the incident distributed at the school or posted around the school. For the purposes of compliance with the Title IX regulations, a school has a duty to respond to harassment about which it reasonably should have known, i.e., if it would have learned of the harassment if it had exercised reasonable care or made a “reasonably diligent inquiry.”

For example, in some situations if the school knows of incidents of harassment, the exercise of reasonable care should trigger an investigation that would lead to a discovery of additional incidents. In other cases, the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment — if the harassment is widespread, openly practiced, or well-known to students and staff.
If a school otherwise knows or reasonably should know of a hostile environment and fails to take prompt and effective corrective action, a school has violated Title IX even if the student has failed to use the school’s existing grievance procedures or otherwise inform the school of the harassment.

D. The Role of Grievance Procedures

Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination. (These issues are discussed in the section on “Prompt and Equitable Grievance Procedures.”) These procedures provide a school with a mechanism for discovering sexual harassment as early as possible and for effectively correcting problems, as required by the Title IX regulations. By having a strong policy against sex discrimination and accessible, effective, and fairly applied grievance procedures, a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.

Without a disseminated policy and procedure, a student does not know either of the school’s policy against and obligation to address this form of discrimination, or how to report harassment so that it can be remedied. If the alleged harassment is sufficiently serious to create a hostile environment and it is the school’s failure to comply with the procedural requirements of the Title IX regulations that hampers early notification and intervention and permits sexual harassment to deny or limit a student’s ability to participate in or benefit from the school’s program on the basis of sex, the school will be responsible under the Title IX regulations, once informed of the harassment, to take corrective action, including stopping the harassment, preventing its recurrence, and remedying the effects of the harassment on the victim that could reasonably have been prevented if the school’s failure to comply with the procedural requirements had not hampered early notification.

VI. OCR Case Resolution

If OCR is asked to investigate or otherwise resolve incidents of sexual harassment of students, including incidents caused by employees, other students, or third parties, OCR will consider whether — (1) the school has a disseminated policy prohibiting sex discrimination under Title IX and effective grievance procedures, (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment; and (3) the school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. (Issues related to appropriate investigative and corrective actions are discussed in detail in the section on “Recipient’s Response.”)

If the school has taken, or agrees to take, each of these steps, OCR will consider the case against the school resolved and will take no further action, other than monitoring compliance with an agreement, if any, between the school and OCR. This is true in cases
in which the school was in violation of the Title IX regulations (e.g., a teacher sexually harassed a student in the context of providing aid, benefits, or services to students), as well as those in which there has been no violation of the regulations (e.g., in a peer sexual harassment situation in which the school took immediate, reasonable steps to end the harassment and prevent its recurrence). This is because, even if OCR identifies a violation, Title IX requires OCR to attempt to secure voluntary compliance. Thus, because a school will have the opportunity to take reasonable corrective action before OCR issues a formal finding of violation, a school does not risk losing its Federal funding solely because discrimination occurred.

VII. Recipient’s Response

Once a school has notice of possible sexual harassment of students — whether carried out by employees, other students, or third parties — it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. These steps are the school’s responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action. As described in the next section, in appropriate circumstances the school will also be responsible for taking steps to remedy the effects of the harassment on the individual student or students who were harassed. What constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances.

A. Response to Student or Parent Reports of Harassment; Response to Direct Observation of Harassment by a Responsible Employee

If a student or the parent of an elementary or secondary student provides information or complains about sexual harassment of the student, the school should initially discuss what actions the student or parent is seeking in response to the harassment. The school should explain the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works. If a responsible school employee has directly observed sexual harassment of a student, the school should contact the student who was harassed (or the parent, depending upon the age of the student), explain that the school is responsible for taking steps to correct the harassment, and provide the same information described in the previous sentence.

Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student’s behalf (including in cases involving direct observation by a responsible employee), the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial. (Requests by the student who
was harassed for confidentiality or for no action to be taken, responding to notice of harassment from other sources, and the components of a prompt and equitable grievance procedure are discussed in subsequent sections of this guidance.)

It may be appropriate for a school to take interim measures during the investigation of a complaint. For instance, if a student alleges that he or she has been sexually assaulted by another student, the school may decide to place the students immediately in separate classes or in different housing arrangements on a campus, pending the results of the school’s investigation. Similarly, if the alleged harasser is a teacher, allowing the student to transfer to a different class may be appropriate. In cases involving potential criminal conduct, school personnel should determine whether appropriate law enforcement authorities should be notified. In all cases, schools should make every effort to prevent disclosure of the names of all parties involved -- the complainant, the witnesses, and the accused -- except to the extent necessary to carry out an investigation.

If a school determines that sexual harassment has occurred, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. Appropriate steps should be taken to end the harassment. For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment. In some cases, it may be appropriate to further separate the harassed student and the harasser, e.g., by changing housing arrangements or directing the harasser to have no further contact with the harassed student. Responsive measures of this type should be designed to minimize, as much as possible, the burden on the student who was harassed. If the alleged harasser is not a student or employee of the recipient, OCR will consider the level of control the school has over the harasser in determining what response would be appropriate.

Steps should also be taken to eliminate any hostile environment that has been created. For example, if a female student has been subjected to harassment by a group of other students in a class, the school may need to deliver special training or other interventions for that class to repair the educational environment. If the school offers the student the option of withdrawing from a class in which a hostile environment occurred, the school should assist the student in making program or schedule changes and ensure that none of the changes adversely affect the student’s academic record. Other measures may include, if appropriate, directing a harasser to apologize to the harassed student. If a hostile environment has affected an entire school or campus, an effective response may need to include dissemination of information, the issuance of new policy statements, or other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports that conduct.

In some situations, a school may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student. For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances, the school may be required to make arrangements for an independent reassessment of the student’s work, if feasible, and change the grade accordingly; make arrangements for the student to take the course again
with a different instructor; provide tutoring; make tuition adjustments; offer reimbursement for professional counseling; or take other measures that are appropriate to the circumstances. As another example, if a school delays responding or responds inappropriately to information about harassment, such as a case in which the school ignores complaints by a student that he or she is being sexually harassed by a classmate, the school will be required to remedy the effects of the harassment that could have been prevented had the school responded promptly and effectively.

Finally, a school should take steps to prevent any further harassment and to prevent any retaliation against the student who made the complaint (or was the subject of the harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses. At a minimum, this includes making sure that the harassed students and their parents know how to report any subsequent problems and making follow-up inquiries to see if there have been any new incidents or any retaliation. To prevent recurrences, counseling for the harasser may be appropriate to ensure that he or she understands what constitutes harassment and the effects it can have. In addition, depending on how widespread the harassment was and whether there have been any prior incidents, the school may need to provide training for the larger school community to ensure that students, parents, and teachers can recognize harassment if it recurs and know how to respond.

**B. Confidentiality**

The scope of a reasonable response also may depend upon whether a student, or parent of a minor student, reporting harassment asks that the student’s name not be disclosed to the harasser or that nothing be done about the alleged harassment. In all cases, a school should discuss confidentiality standards and concerns with the complainant initially. The school should inform the student that a confidentiality request may limit the school’s ability to respond. The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint consistent with the student’s request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students.

OCR enforces Title IX consistent with the federally protected due process rights of public school students and employees. Thus, for example, if a student, who was the only student harassed, insists that his or her name not be revealed, and the alleged harasser could not respond to the charges of sexual harassment without that information, in evaluating the school’s response, OCR would not expect disciplinary action against an alleged harasser.

At the same time, a school should evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. The factors that a school may consider in this regard include the seriousness of the alleged harassment, the age of the student harassed, whether there have been other complaints or reports of harassment against the alleged harasser, and the rights of the
accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.²⁷

Similarly, a school should be aware of the confidentiality concerns of an accused employee or student. Publicized accusations of sexual harassment, if ultimately found to be false, may nevertheless irreparably damage the reputation of the accused. The accused individual’s need for confidentiality must, of course, also be evaluated based on the factors discussed in the preceding paragraph in the context of the school’s responsibility to ensure a safe environment for students.

Although a student’s request to have his or her name withheld may limit the school’s ability to respond fully to an individual complaint of harassment, other means may be available to address the harassment. There are steps a recipient can take to limit the effects of the alleged harassment and prevent its recurrence without initiating formal action against the alleged harasser or revealing the identity of the complainant. Examples include conducting sexual harassment training for the school site or academic department where the problem occurred, taking a student survey concerning any problems with harassment, or implementing other systemic measures at the site or department where the alleged harassment has occurred.

In addition, by investigating the complaint to the extent possible — including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX — the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual. In some situations there may be prior reports by former students who now might be willing to come forward and be identified, thus providing a basis for further corrective action. In instances affecting a number of students (for example, a report from a student that an instructor has repeatedly made sexually explicit remarks about his or her personal life in front of an entire class), an individual can be put on notice of allegations of harassing behavior and counseled appropriately without revealing, even indirectly, the identity of the student who notified the school. Those steps can be very effective in preventing further harassment.

C. Response to Other Types of Notice

The previous two sections deal with situations in which a student or parent of a student who was harassed reports or complains of harassment or in which a responsible school employee directly observes sexual harassment of a student. If a school learns of harassment through other means, for example, if information about harassment is received from a third party (such as from a witness to an incident or an anonymous letter or telephone call), different factors will affect the school’s response. These factors include the source and nature of the information; the seriousness of the alleged incident; the specificity of the information; the objectivity and credibility of the source of the report; whether any individuals can be identified who were subjected to the alleged harassment; and whether those individuals want to pursue the matter. If, based on these factors, it is reasonable for the school to investigate and it can confirm the allegations, the considerations described in the previous sections concerning interim measures and appropriate responsive action will apply.
For example, if a parent visiting a school observes a student repeatedly harassing a group of female students and reports this to school officials, school personnel can speak with the female students to confirm whether that conduct has occurred and whether they view it as unwelcome. If the school determines that the conduct created a hostile environment, it can take reasonable, age-appropriate steps to address the situation. If on the other hand, the students in this example were to ask that their names not be disclosed or indicate that they do not want to pursue the matter, the considerations described in the previous section related to requests for confidentiality will shape the school’s response.

In a contrasting example, a student newspaper at a large university may print an anonymous letter claiming that a professor is sexually harassing students in class on a daily basis, but the letter provides no clue as to the identity of the professor or the department in which the conduct is allegedly taking place. Due to the anonymous source and lack of specificity of the information, a school would not reasonably be able to investigate and confirm these allegations. However, in response to the anonymous letter, the school could submit a letter or article to the newspaper reiterating its policy against sexual harassment, encouraging persons who believe that they have been sexually harassed to come forward, and explaining how its grievance procedures work.

VIII. Prevention

A policy specifically prohibiting sexual harassment and separate grievance procedures for violations of that policy can help ensure that all students and employees understand the nature of sexual harassment and that the school will not tolerate it. Indeed, they might even bring conduct of a sexual nature to the school’s attention so that the school can address it before it becomes sufficiently serious as to create a hostile environment. Further, training for administrators, teachers, and staff and age-appropriate classroom information for students can help to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond.

IX. Prompt and Equitable Grievance Procedures

Schools are required by the Title IX regulations to adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex. Accordingly, regardless of whether harassment occurred, a school violates this requirement of the Title IX regulations if it does not have those procedures and policy in place.

A school’s sex discrimination grievance procedures must apply to complaints of sex discrimination in the school’s education programs and activities filed by students against school employees, other students, or third parties. Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, its nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment. Thus, if, because of the lack of a policy or procedure specifically addressing sexual harassment, students are unaware of what kind of conduct constitutes sexual harassment or that such conduct is
prohibited sex discrimination, a school’s general policy and procedures relating to sex discrimination complaints will not be considered effective.\textsuperscript{101}

OCR has identified a number of elements in evaluating whether a school’s grievance procedures are prompt and equitable, including whether the procedures provide for —

- Notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;
- Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- Designated and reasonably prompt timeframes for the major stages of the complaint process;
- Notice to the parties of the outcome of the complaint;\textsuperscript{102} and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.\textsuperscript{103}

Many schools also provide an opportunity to appeal the findings or remedy, or both. In addition, because retaliation is prohibited by Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry.

Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience. In addition, whether complaint resolutions are timely will vary depending on the complexity of the investigation and the severity and extent of the harassment. During the investigation it is a good practice for schools to inform students who have alleged harassment about the status of the investigation on a periodic basis.

A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school’s students, easily understood, and widely disseminated. Distributing the procedures to administrators, or including them in the school’s administrative or policy manual, may not by itself be an effective way of providing notice, as these publications are usually not widely circulated to and understood by all members of the school community. Many schools ensure adequate notice to students by having copies of the procedures available at various locations throughout the school or campus; publishing the procedures as a separate document; including a summary of the procedures in major publications issued by the school, such as handbooks and catalogs for students, parents of elementary and secondary students, faculty, and staff; and identifying individuals who can explain how the procedures work.
A school must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities. The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated. Because it is possible that an employee designated to handle Title IX complaints may himself or herself engage in harassment, a school may want to designate more than one employee to be responsible for handling complaints in order to ensure that students have an effective means of reporting harassment. While a school may choose to have a number of employees responsible for Title IX matters, it is also advisable to give one official responsibility for overall coordination and oversight of all sexual harassment complaints to ensure consistent practices and standards in handling complaints. Coordination of recordkeeping (for instance, in a confidential log maintained by the Title IX coordinator) will also ensure that the school can and will resolve recurring problems and identify students or employees who have multiple complaints filed against them. Finally, the school must make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates.

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so. OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis. Title IX also permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirement of affording a complainant a “prompt and equitable” resolution of the complaint.

In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively. Similarly, schools are cautioned about using the results of insurance company investigations of sexual harassment allegations. The purpose of an insurance investigation is to assess liability under the insurance policy, and the applicable standards may well be different from those under Title IX. In addition, a school is not relieved of its responsibility to respond to a sexual harassment complaint filed under its grievance procedure by the fact that a complaint has been filed with OCR.
X. Due Process Rights of the Accused

A public school’s employees have certain due process rights under the United States Constitution. The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding. Furthermore, the Family Educational Rights and Privacy Act (FERPA) does not override federally protected due process rights of persons accused of sexual harassment. Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions. Of course, schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant. In both public and private schools, additional or separate rights may be created for employees or students by State law, institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements. Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment.

XI. First Amendment

In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved. Free speech rights apply in the classroom (e.g., classroom lectures and discussions) and in all other education programs and activities of public schools (e.g., public meetings and speakers on campus; campus debates, school plays and other cultural events; and student newspapers, journals, and other publications). In addition, First Amendment rights apply to the speech of students and teachers.

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX. In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student’s ability to participate in or benefit from the education program.

Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights. For instance, while the First Amendment may prohibit a school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard. The age of the students involved and the location or forum may affect how the school can respond consistently with the First Amendment. As an example of the application of free speech rights to allegations of sexual harassment, consider the following:

Example 1: In a college level creative writing class, a professor’s required reading list includes excerpts from literary classics that contain descriptions of explicit
sexual conduct, including scenes that depict women in submissive and demeaning roles. The professor also assigns students to write their own materials, which are read in class. Some of the student essays contain sexually derogatory themes about women. Several female students complain to the Dean of Students that the materials and related classroom discussion have created a sexually hostile environment for women in the class. What must the school do in response?

**Answer:** Academic discourse in this example is protected by the First Amendment even if it is offensive to individuals. Thus, Title IX would not require the school to discipline the professor or to censor the reading list or related class discussion.

**Example 2:** A group of male students repeatedly targets a female student for harassment during the bus ride home from school, including making explicit sexual comments about her body, passing around drawings that depict her engaging in sexual conduct, and, on several occasions, attempting to follow her home off the bus. The female student and her parents complain to the principal that the male students’ conduct has created a hostile environment for girls on the bus and that they fear for their daughter’s safety. What must a school do in response?

**Answer:** Threatening and intimidating actions targeted at a particular student or group of students, even though they contain elements of speech, are not protected by the First Amendment. The school must take prompt and effective actions, including disciplinary action if necessary, to stop the harassment and prevent future harassment.
1 This guidance does not address sexual harassment of employees, although that conduct may be prohibited by Title IX. 20 U.S.C. 1681 et seq.; 34 CFR part 106, subpart E. If employees file Title IX sexual harassment complaints with OCR, the complaints will be processed pursuant to the Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance. 28 CFR 42.604. Employees are also protected from discrimination on the basis of sex, including sexual harassment, by Title VII of the Civil Rights Act of 1964. For information about Title VII and sexual harassment, see the Equal Employment Opportunity Commission’s (EEOC’s) Guidelines on Sexual Harassment, 29 CFR 1604.11; for information about filing a Title VII charge with the EEOC, see 29 CFR 1601.7–1607.13, or see the EEOC’s website at www.eeoc.gov.


4 As described in the section on “Applicability,” this guidance applies to all levels of education.

5 For practical information about steps that schools can take to prevent and remedy all types of harassment, including sexual harassment, see “Protecting Students from Harassment and Hate Crime, A Guide for Schools,” which we issued jointly with the National Association of Attorneys General. This Guide is available at our web site at: www.ed.gov/pubs/Harassment.

6 See, e.g., Davis, 526 U.S. at 653 (alleged conduct of a sexual nature that would support a sexual harassment claim included verbal harassment and “numerous acts of objectively offensive touching;” Franklin, 503 U.S. at 63 (conduct of a sexual nature found to support a sexual harassment claim under Title IX included kissing, sexual intercourse); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 60-61 (1986) (demands for sexual favors, sexual advances, fondling, indecent exposure, sexual intercourse, rape, sufficient to raise hostile environment claim under Title VII); Ellison v. Brady, 924 F.2d 872, 873-74, 880 (9th Cir. 1991) (allegations sufficient to state sexual harassment claim under Title VII included repeated requests for dates, letters making explicit references to sex and describing the harasser’s feelings for plaintiff); Lipsett v. University of Puerto Rico, 864 F.2d 881, 904-5 (1st Cir. 1988) (sexually derogatory comments, posting of sexually explicit drawing of plaintiff, sexual advances may support sexual harassment claim); Kadiki v. Virginia Commonwealth University, 892 F.Supp. 746, 751 (E.D. Va. 1995)
professor’s spanking of university student may constitute sexual conduct under Title IX); Doe v. Petaluma, 830 F.Supp. 1560, 1564-65 (N.D. Cal. 1996) (sexually derogatory taunts and innuendo can be the basis of a harassment claim); Denver School Dist. #2, OCR Case No. 08-92-1007 (same to allegations of vulgar language and obscenities, pictures of nude women on office walls and desks, unwelcome touching, sexually offensive jokes, bribery to perform sexual acts, indecent exposure); Nashoba Regional High School, OCR Case No. 01-92-1377 (same as to year-long campaign of derogatory, sexually explicit graffiti and remarks directed at one student.

7 See also Shoreline School Dist., OCR Case No. 10-92-1002 (a teacher’s patting a student on the arm, shoulder, and back, and restraining the student when he was out of control, not conduct of a sexual nature); Dartmouth Public Schools, OCR Case No. 01-90-1058 (same as to contact between high school coach and students); San Francisco State University, OCR Case No. 09-94-2038 (same as to faculty advisor placing her arm around a graduate student’s shoulder in posing for a picture); Analy Union High School Dist., OCR Case No. 09-92-1249 (same as to drama instructor who put his arms around both male and female students who confided in him).

8 20 U.S.C. 1687 (codification of the amendment to Title IX regarding scope of jurisdiction, enacted by the Civil Rights Restoration Act of 1987). See 65 FR 68049 (November 13, 2000) (Department’s amendment of the Title IX regulations to incorporate the statutory definition of “program or activity”).

9 If a school contracts with persons or organizations to provide benefits, services, or opportunities to students as part of the school’s program, and those persons or employees of those organizations sexually harass students, OCR will consider the harassing individual in the same manner that it considers the school’s employees, as described in this guidance. (See section on “Harassment by Teachers and Other Employees.”) See Brown v. Hot, Sexy, and Safer Products, Inc., 68 F.3d 525, 529 (1st Cir. 1995) (Title IX sexual harassment claim brought for school’s role in permitting contract consultant hired by it to create allegedly hostile environment).

In addition, if a student engages in sexual harassment as an employee of the school, OCR will consider the harassment under the standards described for employees. (See section on “Harassment by Teachers and Other Employees.”) For example, OCR would consider it harassment by an employee if a student teaching assistant who is responsible for assigning grades in a course, i.e., for providing aid, benefits, or services to students under the recipient’s program, required a student in his or her class to submit to sexual advances in order to obtain a certain grade in the class.


11 Title IX and the regulations implementing it prohibit discrimination “on the basis of sex;” they do not restrict protection from sexual harassment to those circumstances in
which the harasser only harasses members of the opposite sex. See 34 CFR 106.31. In Oncale v. Sundowner Offshore Services, Inc., the Supreme Court held unanimously that sex discrimination consisting of same-sex sexual harassment can violate Title VII’s prohibition against discrimination because of sex. 523 U.S. 75, 82 (1998). The Supreme Court’s holding in Oncale is consistent with OCR policy, originally stated in its 1997 guidance, that Title IX prohibits sexual harassment regardless of whether the harasser and the person being harassed are members of the same sex. 62 FR 12039. See also Kinman v. Omaha Public School Dist., 94 F.3d 463, 468 (8th Cir. 1996), rev’d on other grounds, 171 F.3d 607 (1999) (female student’s allegation of sexual harassment by female teacher sufficient to raise a claim under Title IX); Doe v. Petaluma, 830 F.Supp. 1560, 1564-65, 1575 (N.D. Cal. 1996) (female junior high student alleging sexual harassment by other students, including both boys and girls, sufficient to raise a claim under Title IX); John Does 1, 884 F.Supp. at 465 (same as to male students’ allegations of sexual harassment and abuse by a male teacher.) It can also occur in certain situations if the harassment is directed at students of both sexes. Chiapuzo v. BLT Operating Corp., 826 F.Supp. 1334, 1337 (D.Wyo. 1993) (court found that if males and females were subject to harassment, but harassment was based on sex, it could violate Title VII); but see Holman v. Indiana, 211 F.3d 399, 405 (7th Cir. 2000) (if male and female both subjected to requests for sex, court found it could not violate Title VII).

In many circumstances, harassing conduct will be on the basis of sex because the student would not have been subjected to it at all had he or she been a member of the opposite sex; e.g., if a female student is repeatedly propositioned by a male student or employee (or, for that matter, if a male student is repeatedly propositioned by a male student or employee.) In other circumstances, harassing conduct will be on the basis of sex if the student would not have been affected by it in the same way or to the same extent had he or she been a member of the opposite sex; e.g., pornography and sexually explicit jokes in a mostly male shop class are likely to affect the few girls in the class more than it will most of the boys.

In yet other circumstances, the conduct will be on the basis of sex in that the student’s sex was a factor in or affected the nature of the harasser’s conduct or both. Thus, in Chiapuzo, a supervisor made demeaning remarks to both partners of a married couple working for him, e.g., as to sexual acts he wanted to engage in with the wife and how he would be a better lover than the husband. In both cases, according to the court, the remarks were based on sex in that they were made with an intent to demean each member of the couple because of his or her respective sex. 826 F.Supp. at 1337. See also Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463-64 (9th Cir. 1994), cert. denied, 115 S.Ct. 733 (1995); but see Holman, 211 F.3d at 405 (finding that if male and female both subjected to requests for sex, Title VII could not be violated).

12 Nashoba Regional High School, OCR Case No. 01-92-1397. In Conejo Valley School Dist., OCR Case No. 09-93-1305, female students allegedly taunted another female student about engaging in sexual activity; OCR found that the alleged comments were sexually explicit and, if true, would be sufficiently severe, persistent, and pervasive to create a hostile environment.
It should be noted that some State and local laws may prohibit discrimination on the basis of sexual orientation. Also, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other Federal legal authority. See Nabozny v. Podlesny, 92 F.3d 446, 460 (7th Cir. 1996) (holding that a gay student could maintain claims alleging discrimination based on both gender and sexual orientation under the Equal Protection Clause of the United States Constitution in a case in which a school district failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student’s gender and sexual orientation).

However, sufficiently serious sexual harassment is covered by Title IX even if the hostile environment also includes taunts based on sexual orientation.

See also, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (where an accounting firm denied partnership to a female candidate, the Supreme Court found Title VII prohibits an employer from evaluating employees by assuming or insisting that they match the stereotype associated with their sex).


See Lipsett, 864 F.2d at 903-905 (general antagonism toward women, including stated goal of eliminating women from surgical program, statements that women shouldn’t be in the program, and assignment of menial tasks, combined with overt sexual harassment); Harris, 510 U.S. at 23; Andrews v. City of Philadelphia, 895 F.2d 1469, 1485-86 (3rd Cir. 1990) (court directed trial court to consider sexual conduct as well as theft of female employees’ files and work, destruction of property, and anonymous phone calls in determining if there had been sex discrimination); see also Hall v. Gus Construction Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (affirming that harassment due to the employee’s sex
may be actionable even if the harassment is not sexual in nature); Hicks, 833 F.2d at 1415; Eden Prairie Schools, Dist. #272, OCR Case No. 05-92-1174 (the boys made lewd comments about male anatomy and tormented the girls by pretending to stab them with rubber knives; while the stabbing was not sexual conduct, it was directed at them because of their sex, i.e., because they were girls).

Davis, 526 U.S. at 650 (“Having previously determined that ‘sexual harassment’ is ‘discrimination’ in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.”); Franklin, 503 U.S. at 75 (“Unquestionably, Title IX placed on the [school] the duty not to discriminate on the basis of sex, and ‘when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor “discriminate[s]” on the basis of sex.’ … We believe the same rule should apply when a teacher sexually harasses and abuses a student.” (citation omitted)).

OCR’s longstanding interpretation of its regulations is that sexual harassment may constitute a violation. 34 CFR 106.31; See Sexual Harassment Guidance, 62 FR 12034 (1997). When Congress enacted the Civil Rights Restoration Act of 1987 to amend Title IX to restore institution-wide coverage over federally assisted education programs and activities, the legislative history indicated not only that Congress was aware that OCR interpreted its Title IX regulations to prohibit sexual harassment, but also that one of the reasons for passing the Restoration Act was to enable OCR to investigate and resolve cases involving allegations of sexual harassment. S. REP. NO. 64, 100th Cong., 1st Sess. at 12 (1987). The examples of discrimination that Congress intended to be remedied by its statutory change included sexual harassment of students by professors, id. at 14, and these examples demonstrate congressional recognition that discrimination in violation of Title IX can be carried out by school employees who are providing aid, benefits, or services to students. Congress also intended that if discrimination occurred, recipients needed to implement effective remedies. S. REP. NO. 64 at 5.

34 CFR 106.4.

These are the basic regulatory requirements. 34 CFR 106.31(a)(b). Depending upon the facts, sexual harassment may also be prohibited by more specific regulatory prohibitions. For example, if a college financial aid director told a student that she would not get the student financial assistance for which she qualified unless she slept with him, that also would be covered by the regulatory provision prohibiting discrimination on the basis of sex in financial assistance, 34 CFR 106.37(a).

34 CFR 106.31(b)(1).

34 CFR 106.31(b)(2).

34 CFR 106.31(b)(3).

See Alexander v. Yale University, 459 F.Supp. 1, 4 (D.Conn. 1977), aff’d, 631 F.2d 178 (2nd Cir. 1980)(stating that a claim “that academic advancement was conditioned upon submission to sexual demands constitutes [a claim of] sex discrimination in education...”); Crandell v. New York College, Osteopathic Medicine, 87 F.Supp.2d 304, 318 (S.D.N.Y. 2000) (finding that allegations that a supervisory physician demanded that a student physician spend time with him and have lunch with him or receive a poor evaluation, in light of the totality of his alleged sexual comments and other inappropriate behavior, constituted a claim of quid pro quo harassment); Kadiki, 892 F.Supp. at 752 (reexamination in a course conditioned on college student’s agreeing to be spanked should she not attain a certain grade may constitute quid pro quo harassment).

34 CFR 106.31(b).

34 CFR 106.31(b).  See Davis, 526 U.S. at 650 (concluding that allegations of student-on-student sexual harassment that is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits” supports a claim for money damages in an implied right of action).

In Harris, the Supreme Court explained the requirement for considering the “subjective perspective” when determining the existence of a hostile environment. The Court stated– “... if the victim does not subjectively perceive the environment to be abusive, the
conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.” 510 U.S. at 21-22.

39 See Davis, 526 U.S. at 650 (conduct must be “objectively offensive” to trigger liability for money damages); Elgamil v. Syracuse University, 2000 U.S. Dist. LEXIS 12598 at 17 (N.D.N.Y. 2000) (citing Harris); Booher v. Board of Regents, 1998 U.S. Dist. LEXIS 11404 at 25 (E.D. Ky. 1998) (same). See Oncale, 523 U.S. at 81, in which the Court “emphasized … that the objective severity of harassment should be judged from the perspective of a reasonable person in the [victim’s] position, considering ‘all the circumstances,’” and citing Harris, 510 U.S. at 20, in which the Court indicated that a “reasonable person” standard should be used to determine whether sexual conduct constituted harassment. This standard has been applied under Title VII to take into account the sex of the subject of the harassment, see, e.g., Ellison, 924 F.2d at 878-79 (applying a “reasonable woman” standard to sexual harassment), and has been adapted to sexual harassment in education under Title IX, Patricia H. v. Berkeley Unified School Dist., 830 F.Supp. 1288, 1296 (N.D. Cal. 1993) (adopting a “reasonable victim” standard and referring to OCR’s use of it).

40 See Davis, 526 U.S. at 651, citing both Oncale, 523 U.S. at 82, and OCR’s 1997 guidance (62 FR 12041-12042).

41 See, e.g., Davis, 526 U.S. at 634 (as a result of the harassment, student’s grades dropped and she wrote a suicide note); Doe v. Petaluma, 830 F. Supp. at 1566 (student so upset about harassment by other students that she was forced to transfer several times, including finally to a private school); Modesto City Schools, OCR Case No. 09-93-1391 (evidence showed that one girl’s grades dropped while the harassment was occurring); Weaverville Elementary School, OCR Case No. 09-91-1116 (students left school due to the harassment). Compare with College of Alameda, OCR Case No. 09-90-2104 (student not in instructor’s class and no evidence of any effect on student’s educational benefits or service, so no hostile environment).


43 See Waltman v. Int’l Paper Co., 875 F.2d 468, 477 (5th Cir. 1989) (holding that although not specifically directed at the plaintiff, sexually explicit graffiti on the walls was “relevant to her claim”); Monteiro v. Tempe Union High School, 158 F.3d 1022, 1033-34 (9th Cir. 1998) (Title VI racial harassment case, citing Waltman; see also Hall, 842 F. 2d at 1015 (evidence of sexual harassment directed at others is relevant to show hostile environment under Title VII).

44 See, e.g., Elgamil 2000 U.S. Dist. LEXIS at 19 (“in order to be actionable, the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive”); Andrews, 895 F.2d at 1484 (“Harassment is pervasive when ‘incidents of harassment occur either in concert or with regularity’”); Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986).
34 CFR 106.31(b). See Vance v. Spencer County Public School District, 231 F.3d 253 (6th Cir. 2000); Doe v. School Admin. Dist. No. 19, 66 F.Supp.2d 57, 62 (D. Me. 1999). See also statement of the U.S. Equal Employment Opportunity Commission (EEOC): “The Commission will presume that the unwelcome, intentional touching of [an employee’s] intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim’s working environment.” EEOC Policy Guidance on Current Issues of Sexual Harassment, 17. Barrett v. Omaha National Bank, 584 F. Supp. 22, 30 (D. Neb. 1983), aff’d, 726 F. 2d 424 (8th Cir. 1984) (finding that hostile environment was created under Title VII by isolated events, i.e., occurring while traveling to and during a two-day conference, including the co-worker’s talking to plaintiff about sexual activities and touching her in an offensive manner while they were inside a vehicle from which she could not escape).

See also Ursuline College, OCR Case No. 05-91-2068 (a single incident of comments on a male student’s muscles arguably not sexual; however, assuming they were, not severe enough to create a hostile environment).

Davis, 526 U.S. at 653 (“The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX’s guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher student harassment.”); Patricia H., 830 F. Supp. at 1297 (stating that the “grave disparity in age and power” between teacher and student contributed to the creation of a hostile environment); Summerfield Schools, OCR Case No. 15-92-1929 (“impact of the ... remarks was heightened by the fact that the coach is an adult in a position of authority”); cf. Doe v. Taylor I.S.D., 15 F.3d 443, 460 (5th Cir. 1994) (Sec. 1983 case; taking into consideration the influence that the teacher had over the student by virtue of his position of authority to find that a sexual relationship between a high school teacher and a student was unlawful).


Cf. Patricia H., 830 F. Supp. at 1297.

See, e.g., Barrett, 584 F. Supp. at 30 (finding harassment occurring in a car from which the victim could not escape particularly severe).

See Hall, 842 F. 2d at 1015 (stating that “evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile environment”) (citing Hicks, 833 F. 2d, 1415-16). Cf. Midwest City-Del City Public Schools, OCR Case No. 06-92-1012 (finding of racially hostile environment based in part on several racial incidents at school shortly before incidents in complaint, a number of which involved the same student involved in the complaint).
In addition, incidents of racial or national origin harassment directed at a particular individual may also be aggregated with incidents of sexual or gender harassment directed at that individual in determining the existence of a hostile environment. Hicks, 833 F.2d at 1416; Jeffries v. Harris County Community Action Ass’n, 615 F.2d 1025, 1032 (5th Cir. 1980).


See Meritor Savings Bank, 477 U.S. at 68. “[T]he fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII.... The correct inquiry is whether [the subject of the harassment] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”

Lipsett, 864 F.2d at 898 (while, in some instances, a person may have the responsibility for telling the harasser “directly” that the conduct is unwelcome, in other cases a “consistent failure to respond to suggestive comments or gestures may be sufficient....”); Danna v. New York Tel. Co., 752 F.Supp. 594, 612 (despite a female employee’s own foul language and participation in graffiti writing, her complaints to management indicated that the harassment was not welcome); see also Carr v. Allison Gas Turbine Div. GMC., 32 F.3d 1007, 1011 (7th Cir. 1994) (finding that cursing and dirty jokes by a female employee did not show that she welcomed the sexual harassment, given her frequent complaints about it: “Even if ... [the employee’s] testimony that she talked and acted as she did [only] in an effort to be one of the boys is ... discounted, her words and conduct cannot be compared to those of the men and used to justify their conduct.... The asymmetry of positions must be considered. She was one woman; they were many men. Her use of [vulgar] terms ... could not be deeply threatening....”).

See Reed v. Shepard, 939 F.2d 484, 486-87, 491-92 (7th Cir. 1991) (no harassment found under Title VII in a case in which a female employee not only tolerated, but also instigated the suggestive joking activities about which she was now complaining); Weinsheimer v. Rockwell Int’l Corp., 754 F.Supp. 1559, 1563-64 (M.D. Fla. 1990) (same, in case in which general shop banter was full of vulgarity and sexual innuendo by men and women alike, and plaintiff contributed her share to this atmosphere.) However, even if a student participates in the sexual banter, OCR may in certain circumstances find that the conduct was nevertheless unwelcome if, for example, a teacher took an active role in the sexual banter and a student reasonably perceived that the teacher expected him or her to participate.

The school bears the burden of rebutting the presumption.

Of course, nothing in Title IX would prohibit a school from implementing policies prohibiting sexual conduct or sexual relationships between students and adult employees.
See note 58.

Gebser, 524 U.S. at 281 ("Franklin ... establishes that a school district can be held liable in damages [in an implied action under Title IX] in cases involving a teacher’s sexual harassment of a student...."); 34 CFR 106.31; See 1997 Sexual Harassment Guidance, 62 FR 12034.

See Davis, 526 U.S. at 653 (stating that harassment of a student by a teacher is more likely than harassment by a fellow student to constitute the type of effective denial of equal access to educational benefits that can breach the requirements of Title IX).

34 CFR 106.31(b). Cf. Gebser, 524 U.S. at 283-84 (Court recognized in an implied right of action for money damages for teacher sexual harassment of a student that the question of whether a violation of Title IX occurred is a separate question from the scope of appropriate remedies for a violation).

Davis, 526 U.S. at 646.

See section on “Applicability of Title IX” for scope of coverage.

See section on “Notice of Employee, Peer, or Third Party Harassment.”

See section on “Notice of Employee, Peer, or Third Party Harassment.”

34 CFR 106.31(b).

34 CFR 106.31(b).

See section on “Notice of Employee, Peer, or Third Party Harassment.”

Cf. Davis, 526 U.S. at 646.

34 CFR 106.31(b).

34 CFR 106.31(b).

Consistent with its obligation under Title IX to protect students, cf. Gebser, 524 U.S. at 287, OCR interprets its regulations to ensure that recipients take reasonable action to address, rather than neglect, reasonably obvious discrimination. Cf. Gebser, 524 U.S. at 287-88; Davis, 526 U.S. at 650 (actual notice standard for obtaining money damages in private lawsuit).

Whether an employee is a responsible employee or whether it would be reasonable for a student to believe the employee is, even if the employee is not, will vary depending on...
factors such as the age and education level of the student, the type of position held by the employee, and school practices and procedures, both formal and informal.

The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. Gebser, 524 U.S. at 290, and Davis, 526 U.S. at 642. The concept of a “responsible employee” under our guidance is broader. That is, even if a responsible employee does not have the authority to address the discrimination and take corrective action, he or she does have the obligation to report it to appropriate school officials.

The Title IX regulations require that recipients designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulations, including complaint investigations. 34 CFR 106.8(a).


For example, a substantiated report indicating that a high school coach has engaged in inappropriate physical conduct of a sexual nature in several instances with different students may suggest a pattern of conduct that should trigger an inquiry as to whether other students have been sexually harassed by that coach. See also Doe v. School Administrative Dist. No. 19, 66 F.Supp.2d 57, 63-64 and n.6 (D.Me. 1999) (in a private lawsuit for money damages under Title IX in which a high school principal had notice that a teacher may be engaging in a sexual relationship with one underage student and did not investigate, and then the same teacher allegedly engaged in sexual intercourse with another student, who did not report the incident, the court indicated that the school’s knowledge of the first relationship may be sufficient to serve as notice of the second incident).

Cf. Katz, 709 F.2d at 256 (finding that the employer “should have been aware of the problem both because of its pervasive character and because of [the employee’s] specific complaints ...”); Smolsky v. Consolidated Rail Corp., 780 F.Supp. 283, 293 (E.D. Pa. 1991), reconsideration denied, 785 F.Supp. 71 (E.D. Pa. 1992) “where the harassment is apparent to all others in the work place, supervisors and coworkers, this may be sufficient to put the employer on notice of the sexual harassment” under Title VII); Jensen v. Eveleth Taconite Co., 824 F.Supp. 847, 887 (D.Minn. 1993); “[s]exual harassment ... was so pervasive that an inference of knowledge arises .... The acts of sexual harassment detailed herein were too common and continuous to have escaped Eveleth Mines had its management been reasonably alert.”); Cummings v. Walsh Construction Co., 561 F.Supp. 872, 878 (S.D. Ga. 1983) (“... allegations not only of the [employee] registering her complaints with her foreman ... but also that sexual harassment was so widespread that defendant had constructive notice of it” under Title VII); but see Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 250-51 (2nd Cir. 1995) (concluding that other students’ knowledge of the conduct was not enough to charge the school with notice, particularly because these students may not have been aware that the conduct was offensive or abusive).
34 CFR 106.9 and 106.8(b).

34 CFR 106.8(b) and 106.31(b).

34 CFR 106.9.

34 CFR 106.8(b).

34 CFR 106.31.

34 CFR 106.31 and 106.3. Gebser, 524 U.S. at 288 (“In the event of a violation, [under OCR’s administrative enforcement scheme] a funding recipient may be required to take ‘such remedial action as [is] deem[ed] necessary to overcome the effects of [the] discrimination.’ §106.3.”).

20 U.S.C. 1682. In the event that OCR determines that voluntary compliance cannot be secured, OCR may take steps that may result in termination of Federal funding through administrative enforcement, or, alternatively, OCR may refer the case to the Department of Justice for judicial enforcement.

Schools have an obligation to ensure that the educational environment is free of discrimination and cannot fulfill this obligation without determining if sexual harassment complaints have merit.

In some situations, for example, if a playground supervisor observes a young student repeatedly engaging in conduct toward other students that is clearly unacceptable under the school’s policies, it may be appropriate for the school to intervene without contacting the other students. It still may be necessary for the school to talk with the students (and parents of elementary and secondary students) afterwards, e.g., to determine the extent of the harassment and how it affected them.

Gebser, 524 U.S. at 288; Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981) (employers should take corrective and preventive measures under Title VII); accord, Jones v. Flagship Int’l, 793 F.2d 714, 719-720 (5th Cir. 1986) (employer should take prompt remedial action under Title VII).

See Doe ex rel. Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380 (5th Cir. 2000) (citing Waltman); Waltman, 875 F.2d at 479 (appropriateness of employer’s remedial action under Title VII will depend on the “severity and persistence of the harassment and the effectiveness of any initial remedial steps”); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309-10 (5th Cir. 1987); holding that a company’s quick decision to remove the harasser from the victim was adequate remedial action).

See Intlekofer v. Turnage, 973 F.2d 773, 779-780 (9th Cir. 1992)(holding that the employer’s response was insufficient and that more severe disciplinary action was
necessary in situations in which counseling, separating the parties, and warnings of possible discipline were ineffective in ending the harassing behavior).

91 Offering assistance in changing living arrangements is one of the actions required of colleges and universities by the Campus Security Act in cases of rape and sexual assault. See 20 U.S.C. 1092(f).

92 See section on “Harassment by Other Students or Third Parties.”

93 University of California at Santa Cruz, OCR Case No. 09-93-2141 (extensive individual and group counseling); Eden Prairie Schools, Dist. #272, OCR Case No. 05-92-1174 (counseling).

94 Even if the harassment stops without the school’s involvement, the school may still need to take steps to prevent or deter any future harassment — to inform the school community that harassment will not be tolerated. Wills v. Brown University, 184 F.3d 20, 28 (1st Cir. 1999) (difficult problems are posed in balancing a student’s request for anonymity or limited disclosure against the need to prevent future harassment); Fuller v. City of Oakland, 47 F.3d 1522, 1528-29 (9th Cir. 1995) (Title VII case).

95 34 CFR 106.8(b) and 106.71, incorporating by reference 34 CFR 100.7(e). The Title IX regulations prohibit intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX.

96 Tacoma School Dist. No. 10, OCR Case No. 10-94-1079 (due to the large number of students harassed by an employee, the extended period of time over which the harassment occurred, and the failure of several of the students to report the harassment, the school committed as part of corrective action plan to providing training for students); Los Medanos College, OCR Case No. 09-84-2092 (as part of corrective action plan, school committed to providing sexual harassment seminar for campus employees); Sacramento City Unified School Dist., OCR Case No. 09-83-1063 (same as to workshops for management and administrative personnel and in-service training for non-management personnel).

97 In addition, if information about the incident is contained in an “education record” of the student alleging the harassment, as defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, the school should consider whether FERPA would prohibit the school from disclosing information without the student’s consent. Id. In evaluating whether FERPA would limit disclosure, the Department does not interpret FERPA to override any federally protected due process rights of a school employee accused of harassment.

98 34 CFR 106.8(b). This requirement has been part of the Title IX regulations since their inception in 1975. Thus, schools have been required to have these procedures in place since that time. At the elementary and secondary level, this responsibility generally lies
with the school district. At the postsecondary level, there may be a procedure for a particular campus or college or for an entire university system.

99 Fenton Community High School Dist. #100, OCR Case 05-92-1104.

100 While a school is required to have a grievance procedure under which complaints of sex discrimination (including sexual harassment) can be filed, the same procedure may also be used to address other forms of discrimination.

101 See generally Meritor, 477 U.S. at 72-73 (holding that “mere existence of a grievance procedure” for discrimination does not shield an employer from a sexual harassment claim).

102 The Family Educational Rights and Privacy Act (FERPA) does not prohibit a student from learning the outcome of her complaint, i.e., whether the complaint was found to be credible and whether harassment was found to have occurred. It is the Department’s current position under FERPA that a school cannot release information to a complainant regarding disciplinary action imposed on a student found guilty of harassment if that information is contained in a student’s education record unless — (1) the information directly relates to the complainant (e.g., an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a postsecondary institution. See note 97. If the alleged harasser is a teacher, administrator, or other non-student employee, FERPA would not limit the school’s ability to inform the complainant of any disciplinary action taken.

103 The section in the guidance on “Recipient’s Response” provides examples of reasonable and appropriate corrective action.

104 34 CFR 106.8(a).

105 Id.

106 See Meritor, 477 U.S. at 72-73.

107 University of California, Santa Cruz, OCR Case No. 09-93-2131. This is true for formal as well as informal complaints. See University of Maine at Machias, OCR Case No. 01-94-6001 (school’s new procedures not found in violation of Title IX in part because they require written records for informal as well as formal resolutions). These records need not be kept in a student’s or employee’s individual file, but instead may be kept in a central confidential location.

108 For example, in Cape Cod Community College, OCR Case No. 01-93-2047, the College was found to have violated Title IX in part because the person identified by the school as the Title IX coordinator was unfamiliar with Title IX, had no training, and did not even realize he was the coordinator.
Indeed, in University of Maine at Machias, OCR Case No. 01-94-6001, OCR found the school’s procedures to be inadequate because only formal complaints were investigated. While a school isn’t required to have an established procedure for resolving informal complaints, they nevertheless must be addressed in some way. However, if there are indications that the same individual may be harassing others, then it may not be appropriate to resolve an informal complaint without taking steps to address the entire situation.

Academy School Dist. No 20, OCR Case No. 08-93-1023 (school’s response determined to be insufficient in a case in which it stopped its investigation after complaint filed with police); Mills Public School Dist., OCR Case No. 01-93-1123, (not sufficient for school to wait until end of police investigation).


The First Amendment applies to entities and individuals that are State actors. The receipt of Federal funds by private schools does not directly subject those schools to the U.S. Constitution. See Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982). However, all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that are not directly subject to the First Amendment.

See, e.g., George Mason University, OCR Case No. 03-94-2086 (law professor’s use of a racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment); Portland School Dist. 1J, OCR Case No. 10-94-1117 (reading teacher’s choice to substitute a less offensive term for a racial slur when reading an historical novel aloud in class constituted an academic decision on presentation of curriculum, not racial harassment).

See Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386 (4th Cir. 1993) (fraternity skit in which white male student dressed as an offensive caricature of a black female constituted student expression).

See Florida Agricultural and Mechanical University, OCR Case No. 04-92-2054 (no discrimination in case in which campus newspaper, which welcomed individual opinions of all sorts, printed article expressing one student’s viewpoint on white students on campus.)

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (neither students nor teachers shed their constitutional rights to freedom of expression at the schoolhouse gates); Cf. Cohen v. San Bernardino Valley College, 92 F.3d 968, 972 (9th Cir. 1996) (holding that a college professor could not be punished for his longstanding teaching methods, which included discussion of controversial subjects such as obscenity and consensual sex with children, under an unconstitutionally vague sexual harassment policy); George Mason University, OCR Case No. 03-94-2086 (law professor’s use of a
racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment.)

117 See, e.g., University of Illinois, OCR Case No. 05-94-2104 (fact that university’s use of Native American symbols was offensive to some Native American students and employees was not dispositive, in and of itself, in assessing a racially hostile environment claim under Title VI.)

118 See Meritor, 477 U.S. at 67 (the “mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee” would not affect the conditions of employment to a sufficient degree to violate Title VII), quoting Henson, 682 F.2d at 904; cf. R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (citing with approval EEOC’s sexual harassment guidelines); Monteiro, 158 F.3d at 1032-34 (9th Cir. 1998) (citing with approval OCR’s racial harassment investigative guidance).

119 Compare Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (Court upheld discipline of high school student for making lewd speech to student assembly, noting that “[t]he undoubted freedom to advocate unpopular and controversial issues in schools must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”), with Iota Xi, 993 F.2d 386 (holding that, notwithstanding a university’s mission to create a culturally diverse learning environment and its substantial interest in maintaining a campus free of discrimination, it could not punish students who engaged in an offensive skit with racist and sexist overtones).
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Notice of Language Assistance
Title IX Resource Guide

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A. Scope of Title IX

Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination based on sex in education programs and activities in federally funded schools at all levels. If any part of a school district or college receives any Federal funds for any purpose, all of the operations of the district or college are covered by Title IX.

Title IX protects students, employees, applicants for admission and employment, and other persons from all forms of sex discrimination, including discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity. All students (as well as other persons) at recipient institutions are protected by Title IX—regardless of their sex, sexual orientation, gender identity, part- or full-time status, disability, race, or national origin—in all aspects of a recipient’s educational programs and activities.

As part of their obligations under Title IX, all recipients of Federal financial assistance must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX and must notify all students and employees of that employee’s contact information. This employee is generally referred to as the Title IX coordinator.

The essence of Title IX is that an institution may not exclude, separate, deny benefits to, or otherwise treat differently any person on the basis of sex unless expressly authorized to do so under Title IX or the Department’s implementing regulations. When a recipient is considering relying on one of the exceptions to this general rule (several of which are discussed below), Title IX coordinators should be involved at every stage and work with school officials and legal counsel to help determine whether the exception is applicable and, if so, properly executed.

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1 20 U.S.C. §§ 1681–1688. The Department of Justice shares enforcement authority over Title IX with OCR. The Department of Education’s Title IX regulations, 34 C.F.R. Part 106, are available at http://www.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html. Although Title IX and the Department’s implementing regulations apply to any recipient institution that offers education programs or activities, this resource guide focuses on Title IX coordinators designated by local educational agencies, schools, colleges, and universities.

2 An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

3 34 C.F.R. § 106.8(a).

4 20 U.S.C. § 1681(a); 34 C.F.R. § 106.31.
B. Responsibilities and Authority of a Title IX Coordinator

Although the recipient is ultimately responsible for ensuring that it complies with Title IX and other laws, the Title IX coordinator is an integral part of a recipient’s systematic approach to ensuring nondiscrimination, including a nondiscriminatory environment. Title IX coordinators can be effective agents for ensuring gender equity within their institutions only when they are provided with the appropriate authority and support necessary to coordinate their institution’s Title IX compliance, including access to all of their institution’s relevant information and resources.

One of the most important facets of the Title IX coordinator’s responsibility is helping to ensure the recipient’s compliance with Title IX’s administrative requirements. The Title IX coordinator must have knowledge of the recipient’s policies and procedures on sex discrimination and should be involved in the drafting and revision of such policies and procedures to help to ensure that they comply with the requirements of Title IX.

The coordinator may help the recipient by coordinating the implementation and administration of the recipient’s procedures for resolving Title IX complaints, including educating the school community on how to file a complaint alleging a violation of Title IX, investigating complaints, working with law enforcement when necessary, and ensuring that complaints are resolved promptly and appropriately. The coordinator should also coordinate the recipient’s response to all complaints involving possible sex discrimination to monitor outcomes, identify patterns, and assess effects on the campus climate. Such coordination can help an institution avoid Title IX violations, particularly violations involving sexual harassment and violence, by preventing incidents from recurring or becoming systemic problems. Title IX does not specify who should determine the outcome of Title IX complaints or the actions the school will take in response to such complaints. The Title IX coordinator could play this role, provided there are no conflicts of interest, but does not have to.

The Title IX coordinator should also assist the institution in developing a method to survey the school climate and coordinate the collection and analysis of information from that survey. Further, the coordinator should monitor students’ participation in athletics and across academic fields to identify programs with disproportionate enrollment based on sex and ensure that sex discrimination is not causing any disproportionality or otherwise negatively affecting a student’s access to equal educational opportunities.

The Title IX coordinator should provide training and technical assistance on school policies related to sex discrimination and develop programs, such as assemblies or college trainings, on issues related to Title IX to assist the recipient in making sure that all members of the school community, including students and staff, are aware of their rights and obligations under Title IX. To perform
this responsibility effectively, the coordinator should regularly assess the adequacy of current training opportunities and programs and propose improvements as appropriate.

A recipient can designate more than one Title IX coordinator, which may be particularly helpful in larger school districts, colleges, and universities. It may also be helpful to designate specific employees to coordinate certain Title IX compliance issues (e.g., gender equity in academic programs or athletics, harassment, or complaints from employees). If a recipient has multiple Title IX coordinators, then it should designate one lead Title IX coordinator who has ultimate oversight responsibility.

Because Title IX prohibits discrimination in all aspects of a recipient’s education programs and activities, the Title IX coordinator should work closely with many different members of the school community, such as administrators, counselors, athletic directors, non-professional counselors or advocates, and legal counsel. Although these employees may not be formally designated as Title IX coordinators, the Title IX coordinator may need to work with them because their job responsibilities relate to the recipient’s obligations under Title IX. The recipient should ensure that all employees whose work relates to Title IX communicate with one another and that these employees have the support they need to ensure consistent practices and enforcement of the recipient’s policies and compliance with Title IX. The coordinator should also be available to meet with the school community, including other employees, students, and parents or guardians, as needed to discuss any issues related to Title IX.

For more information about the role of the Title IX coordinator, please review:

- 34 C.F.R. § 106.8(a);
C. Title IX’s Administrative Requirements

The administrative requirements in the Department’s Title IX regulations are the underpinning of both the Title IX coordinator’s job and a recipient’s compliance with Title IX; their purpose is to ensure that a recipient maintains an environment for students and employees that is free from unlawful sex discrimination in all aspects of the educational experience, including academics, extracurricular activities, and athletics. These requirements provide that a recipient must establish a system for the prompt and equitable resolution of complaints. This allows an institution to resolve complaints of discrimination without the need for involvement by outside entities, such as the Federal government. They also provide that a recipient must ensure that members of the school community are aware of their rights under Title IX, have the contact information for the Title IX coordinator, and know how to file a complaint alleging a violation of Title IX.

1. Grievance Procedures

The Department’s Title IX regulations require a recipient to adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints under Title IX. These procedures provide an institution with a mechanism for discovering incidents of discrimination or harassment as early as possible and for effectively correcting individual and systemic problems. The procedures that each school uses to resolve Title IX complaints may vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements, and what it has learned from past experiences.

There are several ways in which a Title IX coordinator can coordinate the recipient’s compliance with the Title IX regulatory requirement regarding grievance procedures.

- First, the Title IX coordinator should work with the recipient to help make sure that the grievance procedures are written in language appropriate for the age of the audience (such as elementary, middle school, high school, or postsecondary students), and that they are easily understood and widely disseminated.

- Second, the Title IX coordinator should review the grievance procedures to help determine whether they incorporate all of the elements required for the prompt and equitable resolution of student and employee complaints under Title IX, consistent with the Title IX regulatory requirement and OCR guidance.

- Third, the Title IX coordinator should communicate with students, parents or guardians, and school employees to help them understand the recipient’s grievance procedures; train employees and students about how Title IX protects against sex discrimination; and provide consultation and information regarding Title IX requirements to potential complainants.
• Fourth, the Title IX coordinator is responsible for coordinating the grievance process and making certain that individual complaints are handled properly. This coordination responsibility may include informing all parties regarding the process, notifying all parties regarding grievance decisions and of the right to and procedures for appeal, if any; monitoring compliance with all of the requirements and timelines specified in the grievance procedures; and maintaining grievance and compliance records and files.

• Finally, the Title IX coordinator should work with the recipient to help ensure that its grievance procedures are accessible to English language learners\(^5\) and students with disabilities.\(^6\)

For more information about grievance procedures, please review:

• 34 C.F.R. § 106.8(b);


• Dear Colleague Letter: Title IX Grievance Procedures, Elementary and Secondary Education (April 26, 2004), available at http://www.ed.gov/ocr/responsibilities_ix.html; and


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\(^5\) Public schools and State educational agencies must take affirmative steps to ensure that students with limited English proficiency can meaningfully participate in their educational programs and services under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to d-7, and the Equal Educational Opportunities Act, 20 U.S.C. § 1703(f) (1974).

\(^6\) See 28 C.F.R. § 35.130(a) and (b); 34 C.F.R. § 104.4.
2. Notice of Nondiscrimination and Contact Information for the Title IX Coordinator

The Department’s Title IX regulations require a recipient to publish a statement that it does not discriminate on the basis of sex in the education programs or activities it operates and that it is required by Title IX not to discriminate in such a manner. The notice must also state that questions regarding Title IX may be referred to the recipient’s Title IX coordinator or to OCR.

The notice must be widely distributed to all applicants for admission and employment, students and parents or guardians of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient. The notice should be prominently posted on the recipient’s website, at various locations on campus, and in electronic and printed publications for general distribution. In addition, the notice must be included in any bulletins, announcements, publications, catalogs, application forms, or recruitment materials.

A recipient must notify all students and employees of the name or title, office address, telephone number, and email address of the Title IX coordinator, including in its notice of nondiscrimination. The notice should also state any other job title that the Title IX coordinator might have. Recipients must notify students and employees of the Title IX coordinator’s contact information in its notice of nondiscrimination. Recipients with more than one Title IX coordinator must notify the school community of the lead Title IX coordinator’s contact information in its notice of nondiscrimination, and should also make available the contact information for its other Title IX coordinators as well to ensure consistent practices and standards in handling complaints. In doing so, recipients should include any additional information that would help students and employees identify which Title IX coordinator to contact, such as each Title IX coordinator’s specific geographic region (e.g., a particular elementary school or part of a college campus) or area of specialization within Title IX (e.g., gender equity in academic programs or athletics, harassment, or complaints from employees). Because social media are now widespread means for students and other members of the school community to communicate, a recipient should also make the Title IX coordinator’s contact information available on social media to the extent that they are supported or used by the recipient.

The content of the notice must be complete and include current information. The Title IX coordinator should work with the recipient to make sure the text of the notice complies with all applicable requirements, that the notice is published and properly displayed, and the content of the notice remains accurate. One potentially low-cost way to help ensure that a recipient’s notice is properly disseminated and current on the recipient’s website is to create a page on the website that includes the name and contact information of the recipient’s Title IX coordinator(s), relevant Title IX policies and grievance procedures, and other resources related to Title IX compliance and gender equity. A link to this page should be prominently displayed on the recipient’s homepage.
For more information on notices of nondiscrimination, please review:

- 34 C.F.R. §§ 106.8(a), 106.9;
- Dear Colleague Letter: Title IX Grievance Procedures, Postsecondary Education (August 4, 2004), available at http://www.ed.gov/ocr/responsibilities_ix_ps.html; and
D. Application of Title IX to Various Issues

Below is a summary of some of the key issues covered by Title IX, as well as some general information on the legal requirements applicable to each issue area, including citations to the relevant Departmental regulatory provisions and references to OCR’s guidance that address the issue. The discussion of each Title IX issue includes recommended best practices to help a recipient meet its obligations under Title IX.

1. Recruitment, Admissions, and Counseling

Title IX prohibits recipient institutions of vocational education, professional education, graduate higher education, and public colleges and universities from discriminating on the basis of sex in the recruitment or admission of students. The Title IX coordinator at these recipient institutions should help the recipient to ensure that it does not discriminate on the basis of sex in recruitment and admissions by reviewing the recipient’s recruitment materials, admission forms, and policies and practices in these areas.

The Department’s Title IX regulations also prohibit all recipients from discriminating on the basis of sex in counseling or guiding students or applicants for admission. The Title IX coordinator should review any materials used for counseling students in terms of class or career selection, or for counseling applicants for admission, to ensure that the recipient does not use different materials for students based on sex or use materials that permit or require different treatment of students based on sex.

At all types of recipient institutions covered by Title IX, the Title IX coordinator should also work with school officials to help remind the school community that all students must have equal access to all programs. Many fields of study continue to be affected by sex-based disparities in enrollment; these are typically called nontraditional fields. For example, some fields of study in science, technology, engineering, and mathematics or career and technical education are often affected by disproportionate enrollment of students based on sex, which triggers a duty of inquiry on the part of the recipient. Title IX coordinators can help ensure that such disparities are not the result of discrimination on the basis of sex by reviewing enrollment data and working with other employees of the recipient to review counseling practices and counseling or appraisal materials. Under certain circumstances, recipients might encourage students to explore nontraditional fields to address underrepresentation of students of that sex in those fields.

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7 20 U.S.C. §1681(a)(1). The Department’s Title IX regulations regarding admissions do not apply to private institutions of undergraduate higher education or to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex. 34 C.F.R. § 106.15.
For more information about sex discrimination in recruiting, admissions, and counseling, please review:

- 34 C.F.R. §§ 106.3(b), 106.15, 106.36, and 34 C.F.R. Part 106, Subpart C; and

2. Financial Assistance

Generally, a recipient may not: (a) provide different amounts or types of financial assistance, limit eligibility for such assistance, apply different criteria or otherwise discriminate on the basis of sex in administering such assistance; or (b) assist any agency, organization, or person which offers sex-restricted student aid.

The Department’s Title IX regulations provide three exceptions to these general prohibitions. Recipients are permitted to administer or assist in the administration of scholarships, fellowships, or other awards that are restricted to members of one sex if the award is: (a) created by certain legal instruments, including wills or trusts, or by acts of a foreign government, provided the overall effect is nondiscriminatory; (b) for study at foreign institutions if the recipient provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex; or (c) athletic financial assistance. The Department’s Title IX regulatory requirements regarding athletic financial assistance are discussed in the Athletics section, below.

To help the recipient ensure its compliance with these requirements, the Title IX coordinator should help the recipient develop, and subsequently monitor, the procedures and practices for awarding financial assistance and for administering or aiding any foundation, trust, agency, organization, person, or foreign government in awarding financial assistance to its students.

For more information about sex discrimination in financial assistance, please review:

- 34 C.F.R. §§ 106.31(c) and 106.37.
3. Athletics

The Department’s Title IX regulations prohibit sex discrimination in interscholastic, intercollegiate, club, or intramural athletics offered by a recipient institution, including with respect to (a) student interests and abilities; (b) athletic benefits and opportunities; and (c) athletic financial assistance.

(a) Student Interests and Abilities

Under the Department’s Title IX regulations, an institution must provide equal athletic opportunities for members of both sexes and effectively accommodate students’ athletic interests and abilities. OCR uses a three-part test to determine whether an institution is providing nondiscriminatory athletic participation opportunities in compliance with the Title IX regulation. The test provides the following three compliance options:

1. Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

2. Where the members of one sex have been and are underrepresented among athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

3. Where the members of one sex are underrepresented among athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

The three-part test is intended to allow institutions to maintain flexibility and control over their athletic programs consistent with Title IX’s nondiscrimination requirements. The three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

To coordinate the institution’s compliance with this requirement, the Title IX coordinator should compare its enrollment data to the number of athletic participation opportunities it offers; review the institution’s history of expanding participation opportunities for students of the underrepresented sex; and evaluate whether there is unmet interest in a particular sport, whether there is sufficient ability to sustain a team in the sport, and whether there is a reasonable expectation of competition for the team.
For more information about the obligation to provide equal athletic opportunities and to effectively accommodate students’ athletic interests and abilities, please review:

- 34 C.F.R. § 106.41(c)(1);
(b) Athletic Benefits and Opportunities

The Department’s Title IX regulations and OCR guidance require that recipients that operate or sponsor interscholastic, intercollegiate, club or intramural athletics provide equal athletic opportunities for members of both sexes. In determining whether an institution is providing equal opportunity in athletics, the regulations require the Department to consider, among others, the following factors: (1) the provision of equipment and supplies; (2) scheduling of games and practice time; (3) travel and per diem allowances; (4) opportunity for coaching and academic tutoring; (5) assignment and compensation of coaches and tutors; (6) provision of locker rooms, and practice and competitive facilities; (7) provision of medical and training facilities and services; (8) housing and dining services; (9) publicity; (10) recruitment; and (11) support services. These factors are sometimes referred to as the laundry list.

As part of the recipient’s obligation to provide equal athletic opportunity to its students, OCR encourages Title IX coordinators to work with the recipient to periodically review and compare the distribution of athletic benefits and opportunities by sex in each of these areas, including financial expenditures on male and female athletic teams.

For more information about each of these areas, please review:

- 34 C.F.R. § 106.41(c)(2)–(10); and

(c) Athletic Financial Assistance

The Department’s Title IX regulations specify that if a recipient awards athletic financial assistance, including athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in substantial proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics. Separate athletic financial assistance for members of each sex may be provided as part of separate athletic teams for members of each sex.

The Title IX coordinator should help coordinate the recipient’s efforts to ensure that the athletic financial assistance awarded by the recipient complies with these provisions by working with the institution and its athletics department.

For more information about a recipient’s obligations regarding awards of athletic financial assistance, please review:

- 34 C.F.R. § 106.37(c);
- Title IX Policy Interpretation: Intercollegiate Athletics (December 11, 1979), available at http://www.ed.gov/ocr/docs/t9interp.html; and
4. Sex-Based Harassment

In order to best perform academically and to have equal access to all aspects of a recipient’s educational programs and activities, students must not be subjected to unlawful harassment, either in the classroom or while participating in other education programs or activities.8

Title IX prohibits sex-based harassment by peers, employees, or third parties that is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the recipient’s education programs and activities (i.e., creates a hostile environment). When a recipient knows or reasonably should know of possible sex-based harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. If an investigation reveals that the harassment created a hostile environment, the recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent the harassment from recurring, and, as appropriate, remedy its effects.

Title IX prohibits several types of sex-based harassment. Sexual harassment is unwelcome conduct of a sexual nature, such as unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment and refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent (e.g., due to the student’s age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Gender-based harassment is another form of sex-based harassment and refers to unwelcome conduct based on an individual’s actual or perceived sex, including harassment based on gender identity or nonconformity with sex stereotypes, and not necessarily involving conduct of a sexual nature. All of these types of sex-based harassment are forms of sex discrimination prohibited by Title IX.

Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.

Title IX protects all students from sex-based harassment, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to

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8 A Title IX coordinator may receive reports of sex-based harassment of any member of the school community. It is the Title IX coordinator’s responsibility to help make sure that such complaints are processed appropriately.
conform to stereotypical notions of masculinity or femininity, and a recipient must accept and appropriately respond to all complaints of sex discrimination. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a recipient’s obligations. A recipient should investigate and resolve allegations of sexual or gender-based harassment of lesbian, gay, bisexual, and transgender students using the same procedures and standards that it uses in all complaints involving sex-based harassment. The fact that an incident of sex-based harassment may be accompanied by anti-gay comments or be partly based on a student’s actual or perceived sexual orientation does not relieve a recipient of its obligation under Title IX to investigate and remedy such an incident.

The Title IX coordinator must coordinate the recipient’s efforts to accept and appropriately respond to all complaints of sex discrimination and should work with the recipient to prevent sexual and gender-based harassment.

- First, the Title IX coordinator should assist in any training the recipient provides to the school community, including all employees, as to what conduct constitutes sexual and gender-based harassment and how to respond appropriately when it occurs.

- Second, the Title IX coordinator should help the recipient develop a method appropriate to their institution to survey the campus climate, evaluate whether any discriminatory attitudes pervade the school culture, and determine whether any harassment or other problematic behaviors are occurring, where they happen, which students are responsible, which students are targeted, and how those conditions may be best remedied.

- Third, because the Title IX coordinator must have knowledge of all Title IX reports and complaints at the recipient institution, the Title IX coordinator is generally in the best position to evaluate confidentiality requests from complainants in the context of providing a safe, nondiscriminatory environment for all students.

- Fourth, the Title IX coordinator should coordinate recordkeeping (for instance, in a confidential log maintained by the Title IX coordinator), monitor incidents to help identify students or employees who have multiple complaints filed against them or who have been repeated targets, and address any patterns or systemic problems that arise, including making school officials aware of these patterns or systemic problems as appropriate.

- Fifth, the Title IX coordinator should recommend, as necessary, that the recipient increase safety measures, such as monitoring, supervision, or security at locations or activities where harassment has occurred.
Finally, the Title IX coordinator should regularly review the effectiveness of the recipient’s efforts to ensure that the recipient institution is free from sexual and gender-based harassment, and use that information to recommend future proactive steps that the recipient can take to comply with Title IX and protect the school community.

For more information about a recipient’s obligation to address sexual and gender-based harassment, please review:


- Revised Sexual Harassment Guidance (January 19, 2001), available at http://www.ed.gov/ocr/docs/shguide.pdf; and

5. Pregnant and Parenting Students

Under the Department’s Title IX regulations, recipients are prohibited from: (a) applying any rule concerning parental, family, or marital status that treats persons differently on the basis of sex; or (b) discriminating against or excluding any student from its education program or activity, including any class or extracurricular activity on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. Institutions of vocational education, professional education, graduate higher education, and public colleges and universities are prohibited from making pre-admission inquiries as to the marital status of an applicant for admission.

The Title IX coordinator should work with the recipient on its obligation not to discriminate against students based on their parental, family, or marital status, or exclude pregnant or parenting students from participating in any educational program, including extracurricular activities. The Title IX coordinator is responsible for coordinating the recipient’s response to complaints of discrimination against pregnant and parenting students. In addition, the Title IX coordinator should provide training to students so they know that Title IX prohibits discrimination against pregnant and parenting students, provide workshops to administrators, teachers, and other staff on the Department’s Title IX regulations and OCR guidance related to pregnant and parenting students, and assist the recipient in helping to meet the unique educational, child care, and health care needs of pregnant and parenting students.

For more information about a recipient’s obligations regarding pregnant and parenting students, please review:

- 34 C.F.R. §§ 106.21(c), 106.31, 106.40;
- Supporting the Academic Success of Pregnant and Parenting Students (June 2013), available at http://www.ed.gov/ocr/docs/pregnancy.pdf;
6. Discipline

The Department’s Title IX regulations prohibit a recipient from subjecting any person to separate or different rules of behavior, sanctions, or other treatment, such as discriminatory discipline, based on sex.

The Title IX coordinator should review the recipient’s discipline policies to help make sure they are not discriminatory. In addition, the Title IX coordinator should work with other coordinators or school employees to help the recipient keep and maintain accurate and complete records regarding its disciplinary incidents and monitor the recipient’s administration of its discipline policies to ensure that they are not administered in a discriminatory manner. For example, the Title IX coordinator should review the recipient’s disciplinary records and data to ensure that similarly situated students are not being disciplined differently based on sex for the same offense and that the recipient’s discipline policies do not have an unlawful disparate impact on students based on sex. The Title IX coordinator should also help the recipient to ensure that students are not disciplined based on their gender identity or for failing to conform to stereotypical notions of masculinity or femininity in their behavior or appearance.

For more information about a recipient’s obligations regarding nondiscriminatory administration of discipline, please review:

- 34 C.F.R. § 106.31(b)(4); and
7. Single-Sex Education

A recipient is generally prohibited from providing any of its education programs or activities separately on the basis of sex, or requiring or refusing participation by students on the basis of sex unless expressly authorized to do so under Title IX or the Department’s implementing regulations. There are some limited exceptions, the most significant of which are outlined below.

(a) Schools

A recipient generally may offer a single-sex nonvocational elementary or secondary school under Title IX only if it offers a substantially equal school to students of the other sex. Title IX does not prohibit the operation of a single-sex nonvocational private elementary or secondary school or a single-sex nonvocational private institution of undergraduate higher education. 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d). Title IX permits the operation of a nonvocational public charter school that is a single-school local educational agency under State law without requiring the operation of a substantially equal school for the excluded sex.

The substantially equal school may be either single-sex or coeducational. The Department’s Title IX regulations include a non-exhaustive list of factors that are relevant to determining whether a school is substantially equal to a single-sex school. The factors include the admission criteria and policies; the educational benefits provided, including the quality, range, and content of curriculum and other services, and the quality and availability of books, instructional materials, and technology; the qualifications of faculty and staff; geographic accessibility; the quality and range of extracurricular offerings; the quality, accessibility, and availability of facilities and resources provided; and intangible features, such as reputation of faculty. Although the schools do not need to be identical with respect to each factor, they need to be substantially equal. This means that if one school is significantly superior with respect to one factor, or slightly superior with respect to many factors, the schools are likely not substantially equal.

If the recipient offers a single-sex school, then the district’s Title IX coordinator should be involved in assessing the recipient’s compliance with Title IX by helping to ensure that the recipient offers a substantially equal single-sex school or coeducational school.

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9 Title IX does not prohibit the operation of a single-sex nonvocational private elementary or secondary school or a single-sex nonvocational private institution of undergraduate higher education. 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d). Title IX permits the operation of a nonvocational public charter school that is a single-school local educational agency under State law without requiring the operation of a substantially equal school for the excluded sex.
(b) Classes and Extracurricular Activities

The Department’s Title IX regulations do not prohibit recipients from grouping students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex or using requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

The Department’s Title IX regulations identify the following categories for which a recipient may intentionally separate students by sex: (a) contact sports in physical education classes; (b) classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality; and (c) nonvocational classes and extracurricular activities within a coeducational, nonvocational elementary or secondary school if certain criteria are met.

With respect to the third category, a recipient may offer a single-sex nonvocational class or extracurricular activity in a coeducational, nonvocational elementary or secondary school if the class is based on one of two important objectives: to improve its students’ educational achievement through its overall established policy to provide diverse educational opportunities or to meet the particular, identified educational needs of its students. The single-sex nature of each class must be substantially related to achievement of the important objective and the recipient must implement its important objective in an evenhanded manner. In addition, enrollment in a single-sex class must be completely voluntary and the recipient must provide a substantially equal coeducational class in the same subject to all students, and may be required to provide a substantially equal single-sex class for students of the excluded sex. The factors that are relevant to determining whether a single-sex class and a coeducational class are substantially equal are similar to those used to determine whether schools are substantially equal. If a recipient provides a single-sex class under this regulatory exception, it is also required to conduct a periodic evaluation of the class and the original justification behind the class at least every two years. The periodic evaluation must ensure that each single-sex class is based upon a genuine justification and does not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex, and that each single-sex class or extracurricular activity is substantially related to the achievement of the important objective for the class.

If the recipient offers a single-sex class, then the Title IX coordinator should be involved in assessing the recipient’s compliance with Title IX, both when determining whether and how single-sex classes can be offered and during the recipient’s periodic review of single-sex offerings. The Title IX coordinator’s role may include assisting with the preparation and review of the required periodic evaluations, tracking and reviewing complaints involving single-sex classes, confirming that student enrollment in any single-sex class is completely voluntary, and helping to ensure that the recipient offers a substantially equal coeducational class and, as appropriate, substantially equal single-sex class, for each single-sex class offered. The Title IX coordinator should also help ensure that
transgender students are treated consistent with their gender identity in the context of single-sex classes.

For more information about single-sex schools, classes, and extracurricular activities, please review:

- 34 C.F.R. § 106.34;
8. Employment

Under the Department’s Title IX regulations, a recipient is generally prohibited from discriminating on the basis of sex in any employment or recruitment, consideration or selection for employment, whether full-time or part-time.\(^\text{10}\) This includes employment actions such as recruitment, hiring, promotion, compensation, grants of leave, and benefits. A recipient must make employment decisions in a nondiscriminatory manner, and may not enter into contracts, including those with employment agencies or unions, that have the direct or indirect effect of subjecting employees or students to discrimination based on sex. Additionally, Title IX’s employment provisions protect against discrimination based on an applicant’s or employee’s pregnancy or marital or parental status. Finally, a recipient may not employ students in a way that discriminates against one sex, or provide services to any other organization that does so.

The Title IX coordinator should help the recipient in making sure school employees are aware that the Title IX coordinator is available to help employees as well as students. The Title IX coordinator should be familiar with the recipient’s employment policies and procedures, and train the appropriate human resource employees regarding the recipient’s obligations under Title IX.

For more information about employment discrimination, please review:


\(^\text{10}\) Employees are also protected from discrimination on the basis of sex, including sexual harassment, by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. OCR does not enforce Title VII. For information about Title VII, see the Equal Employment Opportunity Commission’s website at [http://www.eeoc.gov](http://www.eeoc.gov).
9. Retaliation

A recipient cannot retaliate against an individual, including a Title IX coordinator, for the purpose of interfering with any right or privilege secured by Title IX. Retaliation against an individual because the individual filed a complaint alleging a violation of Title IX; participated in a Title IX investigation, hearing, or proceeding; or advocated for others’ Title IX rights is also prohibited. The recipient should ensure that individuals are not intimidated, threatened, coerced, or discriminated against for engaging in such activity.

For more information about the prohibition against retaliation, please review:

- 34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e)); and
E. Information Collection and Reporting

The Department requires recipients to report information about Title IX and other civil rights issues that may be useful to the work of Title IX coordinators. In addition, Title IX coordinators can play a helpful role in helping to ensure that their institutions' information is accurate, comprehensive, and effectively used to cure civil rights violations or prevent them from occurring.

OCR administers the Civil Rights Data Collection (CRDC), which collects information on key education and civil rights issues from public local educational agencies (LEAs) and schools, including juvenile justice facilities, charter schools, alternative schools, and schools serving students with disabilities. The information is used by OCR in its enforcement efforts, by other Department offices and Federal agencies, and by the public, including policymakers and researchers.

The CRDC collects information on several key issue areas under Title IX that might help inform the Title IX coordinator’s work, including harassment or bullying, discipline, and participation in various academic classes and programs, single-sex classes and activities, and interscholastic athletics. In addition, the CRDC asks LEAs to report whether they have civil rights coordinators, including Title IX coordinators and to provide each coordinator’s contact information. For Title IX coordinators at elementary and secondary schools, the CRDC may be a useful tool to monitor trends within their districts and schools to determine whether there are patterns or systemic problems under Title IX. Additionally, the CRDC and other information collections at the State and local levels can help recipients and their Title IX coordinators identify patterns of disproportionality that may be rooted in sex discrimination. For example, the CRDC’s information about student enrollment in particular courses of study (e.g., science, technology, engineering, and mathematics courses) may help a Title IX coordinator determine whether a particular sex is underrepresented in such courses. If so, the coordinator should investigate the possible causes of the disproportionality and then recommend measures for reaching greater proportionality, as appropriate.

11 The CRDC collects information on allegations of harassment or bullying, students reported as harassed or bullied, and students disciplined for harassment or bullying, based on sex, race/color/national origin, and disability. For allegations of harassment or bullying, data are also collected based on religion and sexual orientation. As a best practice, OCR recommends that Title IX coordinators assist the recipient in training relevant staff about how information on sex-based harassment should be reported under the CRDC. For example, relevant staff should be knowledgeable about the ways in which harassment based on sex and sexual orientation overlap, and informed that if an incident has multiple bases (e.g., an incident in which a student was harassed both based on gender nonconformity (sex) and sexual orientation), the LEA should report all relevant bases under the CRDC. In addition, the recipient should remind staff who collect, maintain, and report information to the Department of these requirements and of the district’s obligations, including keeping personally identifiable information private.
The Department’s Office of Postsecondary Education also collects information about Title IX coordinators from postsecondary institutions in reports required under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act and the Higher Education Opportunity Act. Title IX coordinators in postsecondary settings should assist the institution’s officials in accurately reporting the required information.

For more information about data collection and reporting, please review:

- CRDC webpage, available at [http://www.ed.gov/ocr/data.html](http://www.ed.gov/ocr/data.html); and


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12 20 U.S.C. § 1092(f). The Department will begin collecting this information in 2015.
Dear Colleague:

Title IX of the Education Amendments of 1972\(^1\) (Title IX) prohibits discrimination on the basis of sex in education programs and activities by recipients of Federal financial assistance, which include schools, colleges and universities. Since its passage, Title IX has dramatically increased academic, athletic and employment opportunities for women and girls. Title IX stands for the proposition that equality of opportunity in America is not rhetoric, but rather a guiding principle.

Although there has been indisputable progress since Title IX was enacted, notably in interscholastic and intercollegiate athletic programs, sex discrimination unfortunately continues to exist in many education programs and activities. I am committed to the vigorous enforcement of Title IX to resolve this discrimination and to provide clear policy guidance to assist a recipient institution (institution) in making the promise of Title IX a reality for all.

To that end, on behalf of the Office for Civil Rights (OCR) of the U.S. Department of Education (Department), it is my pleasure to provide you with this “Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three.” With this letter, the Department is withdrawing the “Additional Clarification of Intercollegiate Athletics Policy: Three Part Test – Part Three” (2005 Additional Clarification) and all related documents accompanying it, including the “User’s Guide to Student Interest Surveys under Title IX” (User’s Guide) and related technical report, that were issued by the Department on March 17, 2005.

OCR enforces Title IX and its implementing regulation.\(^2\) The regulation contains specific provisions governing athletic programs\(^3\) and the awarding of athletic scholarships.\(^4\) Specifically, the Title IX regulation provides that if an institution operates or sponsors an athletic program, it must provide equal athletic opportunities for members of both sexes.\(^5\) In determining whether equal athletic opportunities are available, the regulation requires OCR to consider whether an institution is effectively accommodating the athletic interests and abilities of students of both sexes.\(^6\)

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\(^1\) 20 U.S.C. § 1681 et seq.

\(^2\) 34 C.F.R. Part 106.

\(^3\) 34 C.F.R. § 106.41.

\(^4\) 34 C.F.R. § 106.37(c).

\(^5\) 34 C.F.R. § 106.41(c).

\(^6\) 34 C.F.R. § 106.41(c)(1). The Title IX regulation at 34 C.F.R. § 106.41(c) provides that OCR also will consider other factors when determining whether equal athletic opportunity is available at an institution. This Dear Colleague
The “Intercollegiate Athletics Policy Interpretation”⁷ (1979 Policy Interpretation), published on December 11, 1979, provides additional guidance on the Title IX intercollegiate athletic regulatory requirements.⁸ The 1979 Policy Interpretation sets out a three-part test that OCR uses to assess whether an institution is effectively accommodating the athletic interests and abilities of its students to the extent necessary to provide equal athletic opportunity.⁹ On January 16, 1996, OCR issued the “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test” (1996 Clarification) to provide additional clarification on all parts of the three-part test, including the specific factors that OCR uses to evaluate compliance under the third part of the three-part test (Part Three).¹⁰

In 2005, OCR issued the Additional Clarification regarding application of the indicators in the 1996 Clarification that guided OCR’s analysis of Part Three. The accompanying User’s Guide included a prototype survey instrument (model survey) that institutions could use to measure student interest in participating in intercollegiate athletics and included specific guidance on its implementation. The Additional Clarification and User’s Guide changed OCR’s approach from an analysis of multiple indicators to a reliance on a single survey instrument to demonstrate that an institution is accommodating student interests and abilities in compliance with Part Three. After careful review, OCR has determined that the 2005 Additional Clarification and the User’s Guide are inconsistent with the nondiscriminatory methods of assessment set forth in the 1979 Policy Interpretation and the 1996 Clarification and do not provide the appropriate and necessary clarity regarding nondiscriminatory assessment methods, including surveys, under Part Three. Accordingly, the Department is withdrawing the 2005 Additional Clarification and User’s Guide, including the model survey. All other Department policies on Part Three remain in effect and provide the applicable standards for evaluating Part Three compliance.

Given the resource limitations faced by institutions throughout the nation and the effect on institutions’ athletics programs, I recognize the importance of assisting institutions in developing their own assessment methods that retain the flexibility to meet their unique circumstances, but are consistent with the nondiscrimination requirements of the Title IX regulation. Therefore, this Dear Colleague letter reaffirms, and provides additional clarification

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⁷ 44 Fed. Reg. 71413 (1979). The 1979 Policy Interpretation was published by the former Department of Health, Education, and Welfare, and was adopted by the Department of Education when it was established in 1980.
⁸ Although the 1979 Policy Interpretation is designed for intercollegiate athletics, its general principles, and those of this letter, often will apply to interscholastic, club, and intramural athletic programs. 44 Fed. Reg. at 71413. Furthermore, the Title IX regulation requires institutions to provide equal athletic opportunities in intercollegiate, interscholastic, club, and intramural athletics. 34 C.F.R. § 106.41(c).
⁹ As discussed in the 1979 Policy Interpretation, OCR also considers the quality of competitive opportunities offered to members of both sexes in determining whether an institution effectively accommodates the athletic interests and abilities of its students. 44 Fed. Reg. at 71418.
¹⁰ OCR’s “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance,” which was issued as a Dear Colleague letter on July 11, 2003, also reincorporated the 1996 Clarification’s broad range of specific factors and illustrative examples.
on, the multiple indicators discussed in the 1996 Clarification that guide OCR’s analysis of whether institutions are in compliance with Part Three, as well as the nondiscriminatory implementation of a survey as one assessment technique.

The Three-Part Test

As discussed above, OCR uses the three-part test to determine whether an institution is providing nondiscriminatory athletic participation opportunities in compliance with the Title IX regulation. The test provides the following three compliance options:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.\(^\text{11}\)

The three-part test is intended to allow institutions to maintain flexibility and control over their athletic programs consistent with Title IX’s nondiscrimination requirements. As stated in the 1996 Clarification, “[T]he three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.”

Part Three of the Three-Part Test — Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex

This letter focuses on Part Three — whether an institution is fully and effectively accommodating the athletic interests and abilities of the underrepresented sex. As the 1996 Clarification indicates, while disproportionately high athletic participation rates by an institution’s students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy Part Three if it can show that the underrepresented sex is not being denied opportunities, i.e., that the interests and abilities of

\(^{11}\) 44 Fed. Reg. at 71418.
the underrepresented sex are fully and effectively accommodated. This letter provides information that guides OCR in its evaluation of compliance with Part Three and the nondiscriminatory implementation of assessments of students’ athletic interests and abilities under it.

Under Part Three, the focus is on full and effective accommodation of the interests and abilities of the institution’s students who are members of the underrepresented sex — including students who are admitted to the institution though not yet enrolled. As stated in the 1996 Clarification, and as further discussed below, in determining compliance with Part Three, OCR considers all of the following three questions:

1. Is there unmet interest in a particular sport?
2. Is there sufficient ability to sustain a team in the sport?
3. Is there a reasonable expectation of competition for the team?

If the answer to all three questions is “Yes,” OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three.

A. Unmet Interest and Ability — OCR Evaluation Criteria

In determining whether an institution has unmet interest and ability to support an intercollegiate team in a particular sport, OCR evaluates a broad range of indicators, including:

- whether an institution uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students;
- whether a viable team for the underrepresented sex recently was eliminated;
- multiple indicators of interest;
- multiple indicators of ability; and
- frequency of conducting assessments.

Each of these five criteria is described below. Following the discussion of these criteria, this section provides technical assistance recommendations for effective assessment procedures and the nondiscriminatory implementation of a survey as one component of assessing the interests and abilities of students of the underrepresented sex. This section concludes with a discussion of the multiple indicators OCR evaluates to determine whether there are a sufficient number of students with unmet interest and ability to sustain a new intercollegiate team.

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OCR examines an institution’s recruitment practices under another part of the 1979 Policy Interpretation. See Fed. Reg. at 71417. Accordingly, where an institution recruits potential student athletes for its men’s teams, it must ensure that its women’s teams are provided with substantially equal opportunities to recruit potential student athletes.
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1. Nondiscriminatory Methods of Assessment

Under Part Three, OCR evaluates whether an institution uses processes and methods for assessing the athletic interests and abilities of its students of the underrepresented sex that are consistent with the nondiscrimination standards set forth in the 1979 Policy Interpretation. The 1979 Policy Interpretation states that institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.  

An institution should document its assessment of students' interests and abilities.

2. Assessments Not Used To Eliminate Viable Teams

As discussed in the 1996 Clarification, if an institution recently has eliminated a viable team for the underrepresented sex from the intercollegiate athletics program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport and thus there would be a presumption that the institution is not in compliance with Part Three. This presumption can be overcome if the institution can provide strong evidence that interest, ability, or competition no longer exists.

Accordingly, OCR does not consider the failure by students to express interest during a survey under Part Three as evidence sufficient to justify the elimination of a current and viable intercollegiate team for the underrepresented sex. In other words, students participating on a viable intercollegiate team have expressed interest by active participation, and OCR does not use survey results to nullify that expressed interest.

3. Multiple Indicators Evaluated to Assess Interest

OCR considers a broad range of indicators to assess whether there is unmet athletic interest among the underrepresented sex. These indicators guide OCR in determining whether the institution has measured the interests of students of the underrepresented sex using nondiscriminatory methods consistent with the 1979 Policy Interpretation. As discussed in the

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13 44 Fed. Reg. at 71417.
1996 Clarification, OCR evaluates the interests of the underrepresented sex by examining the following list of non-exhaustive indicators:

- requests by students and admitted students that a particular sport be added;
- requests for the elevation of an existing club sport to intercollegiate status;
- participation in club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interests in particular sports;
- results of surveys or questionnaires of students and admitted students regarding interests in particular sports;\(^{14}\)
- participation in interscholastic sports by admitted students; and
- participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students.\(^{15}\)

In accordance with the 1996 Clarification, OCR also will consider the likely interest\(^{16}\) of the underrepresented sex by looking at participation in intercollegiate sports in the institution’s normal competitive regions.

### 4. Multiple Indicators Evaluated to Assess Ability

As discussed in the 1996 Clarification, OCR considers a range of indicators to assess whether there is sufficient ability among interested students of the underrepresented sex to sustain a team in the sport. When making this determination, OCR examines indicators such as:

- the athletic experience and accomplishments — in interscholastic, club or intramural competition — of underrepresented students and admitted students interested in playing the sport;

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\(^{14}\) OCR evaluates all of the indicators discussed here so OCR does not consider survey results alone as sufficient evidence of lack of interest under Part Three.

\(^{15}\) As discussed in the 1996 Clarification, this indicator may be helpful to OCR in ascertaining likely interest of an institution’s students and admitted students in particular sports, especially in the absence of more direct indicia. However, in conducting its investigations, OCR determines whether an institution is meeting the actual interests and abilities of its students and admitted students.

An institution’s evaluation should take into account sports played in the high schools and communities from which it draws its students, both as an indication of possible interest at the institution, and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex. For example, if OCR’s investigation finds that a substantial number of high schools from the relevant region offer a particular sport that the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR also may interview students, admitted students, coaches, and others regarding interest in that sport.

\(^{16}\) See Footnote 15 above.
• opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain an intercollegiate team; and
• if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Additionally, because OCR recognizes that students may have a broad range of athletic experiences and abilities, OCR also examines other indications of ability such as:

• participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered; and
• tryouts or other direct observations of participation in the particular sport in which there is interest.

As the 1996 Clarification indicated, neither a poor competitive record, nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution’s other athletes, is conclusive evidence of lack of ability. For the purposes of assessing ability, it is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

5. Frequency of Assessments

As discussed in the 1996 Clarification, OCR evaluates whether an institution assesses interest and ability periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. There are several factors OCR considers when determining the rate of frequency for conducting an assessment. These factors include, but are not limited to:

• the degree to which the previous assessment captured the interests and abilities of the institution’s students and admitted students of the underrepresented sex;
• changes in demographics or student population at the institution;¹⁷ and
• whether there have been complaints from the underrepresented sex with regard to a lack of athletic opportunities or requests for the addition of new teams.

Further, OCR will consider whether an institution conducts more frequent assessments if a previous assessment detected levels of student interest and ability in any sport that were close to the minimum number of players required to sustain a team.

¹⁷ For example, in a typical four-year institution, the student body population will change substantially each year, by approximately 25 percent annually.
6. Effective Procedures for Evaluating Requests to Add Teams and Assessing Participation

An institution has a continuing obligation to comply with Title IX’s nondiscrimination requirements; thus, OCR recommends that institutions have effective ongoing procedures for collecting, maintaining, and analyzing information on the interests and abilities of students of the underrepresented sex, including easily understood policies and procedures for receiving and responding to requests for additional teams, and wide dissemination of such policies and procedures to existing and newly admitted students, as well as to coaches and other employees.

OCR also recommends that institutions develop procedures for, and maintain documentation from, routine monitoring of participation of the underrepresented sex in club and intramural sports as part of their assessment of student interests and abilities. OCR further recommends that institutions develop procedures for, and maintain documentation from, evaluations of the participation of the underrepresented sex in high school athletic programs, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students. This is the type of documentation that may be needed in order for an institution to demonstrate that it is assessing interests and abilities in compliance with Part Three.

The Title IX regulation requires institutions to designate at least one employee to coordinate their efforts to comply with and carry out their Title IX responsibilities.\(^\text{18}\) Therefore, institutions may wish to consider whether the monitoring and documentation of participation in club, intramural, and interscholastic sports and the processing of requests for the addition or elevation of athletic teams should be part of the responsibilities of their Title IX coordinators in conjunction with their athletic departments. Another option an institution may wish to consider is to create a Title IX committee to carry out these functions. If an institution chooses to form such a committee, it should include the Title IX coordinator as part of the committee and provide appropriate training on the Title IX requirements for committee members.

7. Survey May Assist in Capturing Information on Students’ Interests and Abilities

As discussed in the 1996 Clarification, institutions may use a variety of techniques to identify students’ interests and abilities. OCR recognizes that a properly designed and implemented survey is one tool that can assist an institution in capturing information on students’ interests and abilities. OCR evaluates a survey as one component of an institution’s overall assessment under Part Three and will not accept an institution’s reliance on a survey alone, regardless of the response rate, to determine whether it is fully and effectively accommodating the interests and abilities of its underrepresented students. If an institution conducts a survey as part of its assessment, OCR examines the content, implementation and response rates of the survey, as well as an institution’s other methods of measuring interest and ability.

\(^{18}\) 34 C.F.R. § 106.8(a).
Under Part Three, OCR evaluates the overall weight it will accord the conclusions drawn by an institution from the results of a survey by examining the following factors, among others:

- content of the survey;
- target population surveyed;
- response rates and treatment of non-responses;
- confidentiality protections; and
- frequency of conducting the survey.

OCR also considers whether a survey is implemented in such a way as to maximize the possibility of obtaining accurate information and facilitating responses. A properly designed survey should effectively capture information on interest and ability\(^\text{19}\) across multiple sports, without complicating responses with superfluous or confusing questions.

OCR has not endorsed or sanctioned any particular survey; however, for technical assistance purposes, this letter contains information that an institution may wish to consider in developing its own survey.

a. **Content of the Survey**

   i. **Purpose**

To ensure students understand the importance of responding to the survey, OCR evaluates whether a survey clearly states its purpose. For technical assistance purposes, an example of a purpose statement might be:

**Purpose:** This data collection is being conducted for evaluation, research, and planning purposes and may be used along with other information to determine whether [Institution] is effectively accommodating the athletic interests and abilities of its students, including whether to add additional teams.

   ii. **Collect information regarding all sports**

In addition, OCR evaluates whether the survey lists all sports for the underrepresented sex recognized by the three primary national intercollegiate athletic associations,\(^\text{20}\) and contains an open-ended inquiry for other sports to allow students to write in any sports that are not

\(^{19}\) Experience in sports generally is one indicator of ability.

\(^{20}\) These associations are the National Collegiate Athletic Association, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association. A current list of these sports for both sexes is: baseball, basketball, bowling, cross country, fencing, field hockey, football, golf, gymnastics, ice hockey, lacrosse, rifle, rowing, skiing, soccer, softball, swimming and diving, tennis, indoor track and field, outdoor track and field, volleyball, water polo, and wrestling.
listed.\textsuperscript{21} OCR considers whether the survey allows students to identify their interest in future or current participation in all of the sports they identify and general athletic experience. OCR also considers whether the survey allows students to provide additional information or comments about their interest, experience, and ability. For technical assistance purposes, the types of questions an institution could ask regarding interest in future participation, current participation, and prior athletic experience might be:

<table>
<thead>
<tr>
<th>Sport</th>
<th>Interest in Future Participation: At what level do you wish to participate in this sport at [Institution]?</th>
<th>Current Participation: At what level are you participating in this sport?</th>
<th>Prior Experience: At what level did you participate in this sport or any other relevant sport in high school, college, or in another capacity?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basketball</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational □ Other ___________</td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other ___________</td>
</tr>
<tr>
<td>Lacrosse</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational □ Other ___________</td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other ___________</td>
</tr>
<tr>
<td>Other sport identified by student\textsuperscript{22}</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational □ Other ___________</td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other ___________</td>
</tr>
</tbody>
</table>

iii. Contact Information

OCR also looks at whether an institution requests contact information, to allow the institution to follow-up with students who wish to be contacted regarding their interests and abilities.

b. Target Population Surveyed

OCR considers the target population surveyed at the institution. Under Part Three, OCR evaluates whether the survey is administered as a census to all full-time undergraduate students.

\textsuperscript{21} An open-ended inquiry for other sports should be prominent or otherwise readily visible and contain a line or other mechanism for students to write in the sport for which they wish to express interest and ability.

\textsuperscript{22} If the survey is provided in paper form, an institution should provide a surplus of rows to ensure that a respondent can provide information for all the sports for which there is interest.
students of the underrepresented sex and admitted students of the underrepresented sex.\textsuperscript{23} Using a census of all students can avoid several issues associated with sample surveys including, but not limited to: selection of the sampling mechanism, selection of the sample size, calculation of sampling error, and using sample estimates. If an institution intends to administer a survey to a sample population to gauge an estimate of interests and abilities, the larger the sample, the more weight OCR will accord the estimate.

c. Responses: Rates and Treatment of Non-Responses

OCR evaluates whether the survey is administered in a manner designed to generate high response rates and how institutions treat responses and non-responses.

OCR looks at whether institutions provide the survey in a context that encourages high response rates, and whether institutions widely publicize the survey; give students, including those participating in club or intramural sports, advance notice of the survey; and provide students adequate time to respond. Generally, OCR accords more weight to a survey with a higher response rate than a survey with a lower response rate, and institutions may want to distribute the survey through multiple mechanisms to increase the response rate.

For example, for enrolled students, an institution may want to administer the survey as part of a mandatory activity, such as during course registration. If administered as part of a mandatory activity, students also should have the option of completing the survey at a later date in order to ensure that they have adequate time to respond. Students who indicate that they wish to complete the survey at a later time should be given the opportunity to provide their contact information to enable the institution to take steps to ensure that they complete the survey. An institution should follow-up with those students who indicate that they wish to respond in the future.

An institution also may choose to send an email to the entire target population that includes a link to the survey. If an institution’s assessment process includes email, OCR considers whether the institution takes appropriate cautionary measures, such as ensuring that it has accurate email addresses and that the target population has access to email.\textsuperscript{24} OCR also expects institutions to take additional steps to follow-up with those who do not respond, including sending widely publicized reminder notices.

If institutions administer the survey through a web-based distribution system, students who indicate that they have no current interest\textsuperscript{25} in athletic participation should be asked to confirm their lack of interest before they exit the system. If response rates using the methods described

\textsuperscript{23} For example, institutions may distribute surveys to all admitted students of the underrepresented sex with acceptance letters.

\textsuperscript{24} OCR also evaluates whether the survey is administered in a manner designed to ensure the accurate identity of the respondent and to protect against multiple responses by the same individual.

\textsuperscript{25} Students may have, or may be unaware of whether they will have, a future interest in athletic participation.
above are low, an institution should consider administering the survey in another manner to obtain higher response rates.

OCR does not consider non-responses to surveys as evidence of lack of interest or ability in athletics. As discussed above, regardless of whether students respond to a survey, OCR also evaluates whether students’ interest and abilities are assessed using the multiple indicators described above.

d. Confidentiality Protections

OCR also looks at whether institutions notify students that all responses as well as any personally identifiable information they provide will be kept confidential, although the aggregate survey information will be shared with athletic directors, coaches, and other staff, as appropriate. When requesting any personal or personally identifiable data, protecting the respondents’ confidentiality helps to ensure that institutions obtain high-quality data and high response rates. If a student has expressed interest in being contacted when responding to the survey, an institution should continue to maintain the student’s confidentiality except to the extent needed to follow-up with the student.

e. Frequency of Conducting the Survey

As discussed above, OCR evaluates whether an institution periodically conducts an assessment of interest and abilities. In addition to the factors OCR considers when determining the rate of frequency for conducting an assessment, OCR also will consider factors such as the size of the previously assessed survey population and the rate of response to the immediately preceding survey(s) conducted by the institution, if any.

8. Multiple Indicators Evaluated to Assess Sufficient Number of Interested and Able Students to Sustain a Team

Under Part Three, institutions are not required to create an intercollegiate team or elevate a club team to intercollegiate status unless there are a sufficient number of interested and able students to sustain a team. When OCR evaluates whether there are a sufficient number of students, OCR considers such indicators as the:

- minimum number of participants needed for a particular sport;
- opinions of athletic directors and coaches concerning the abilities required to field an intercollegiate team; and
- size of a team in a particular sport at institutions in the governing athletic association or conference to which the institution belongs or in the institution’s competitive regions.

When evaluating the minimum number of athletes needed, OCR may consider factors such as the:
rate of substitutions necessitated by factors such as length of competitions, intensity of play, or injury;
• variety of skill sets required for competition; and
• minimum number of athletes needed to conduct effective practices for skill development.

B. **Reasonable Expectation of Competition — OCR Evaluation Criteria**

Lastly, as indicated in the 1996 Clarification, OCR evaluates whether there is a reasonable expectation of intercollegiate competition for the team in the institution’s normal competitive regions. In evaluating available competition, OCR considers available competitive opportunities in the geographic area in which the institution’s athletes primarily compete, including:

• competitive opportunities offered by other schools against which the institution competes; and
• competitive opportunities offered by other schools in the institution’s geographic area, including those offered by schools against which the institution does not now compete.\(^{26}\)

If the information or documentation compiled by the institution during the assessment process shows that there is sufficient interest and ability to support a new intercollegiate team and a reasonable expectation of intercollegiate competition in the institution’s normal competitive region for the team, the institution is under an obligation to create an intercollegiate team within a reasonable period of time in order to comply with Part Three.

**Conclusion**

The three-part test gives institutions flexibility and affords them control over their athletics programs. This flexibility, however, must be used consistent with Title IX’s nondiscrimination requirements. OCR will continue to work with institutions to assist them in finding ways to address their particular circumstances and comply with Title IX. For technical assistance, please contact the OCR enforcement office that serves your area, found at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm.

Sincerely,

Russlynn Ali
Assistant Secretary for Civil Rights

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\(^{26}\) Under the 1979 Policy Interpretation, an institution also may be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex. 44 Fed. Reg. at 71418.
221.9. (a) Commencing with the 2015–16 school year and every year thereafter, each public elementary and secondary school in the state, including each charter school, that offers competitive athletics shall publicly make available at the end of the school year all of the following information:

1. The total enrollment of the school, classified by gender.
2. The number of pupils enrolled at the school who participate in competitive athletics, classified by gender.
3. The number of boys’ and girls’ teams, classified by sport and by competition level.

(b) The data required pursuant to subdivision (a) shall reflect the total number of players on a team roster on the official first day of competition.

(c) The school shall make the information specified in subdivision (a) publicly available as follows:

1. If the school maintains an Internet Web site, by posting the information on the school’s Internet Web site.
2. If the school does not maintain an Internet Web site, by submitting the information to its school district or, for a charter school, to its charter operator. The school district or charter operator shall post the information on its Internet Web site, and the information shall be disaggregated by schoolsite.

(d) The materials used by a school to compile the information specified in subdivision (a) shall be retained by the school for at least three years after the information is posted on the Internet pursuant to subdivision (c).

(e) As used in this section, “competitive athletics” means sports where the activity has coaches, a governing organization, and practices, and competes during a defined season, and has competition as its primary goal.

(Added by Stats. 2014, Ch. 258, Sec. 2. (SB 1349) Effective January 1, 2015.)
LEGAL UPDATE

March 9, 2017

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

From: Ellie R. Austin
Schools Legal Counsel

Subject: U.S. Department of Education and U.S. Department of Justice
Withdraw Guidance on Transgender Students
Memo No. 08-2017


Both documents took the position that Title IX of the Education Amendments of 1972 (“Title IX”), which prohibits discrimination on the basis of sex in educational programs and activities, required transgender students to be able to access sex-segregated facilities, including restrooms and locker rooms, based on their gender identity. The February 22, 2017, Dear Colleague Letter is attached.

The letter provided that the withdrawal of this interpretation “does not leave students without protections from discrimination, bullying, or harassment,” and that “schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment.”

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2 Available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
3 20 U.S.C. § 1681 et seq.
4 See 34 C.F.R. § 106.33.
5 It is also available for download at https://www.justice.gov/opa/press-release/file/941551/download.
Notwithstanding this federal action, California law permits transgender students to participate in school programs and activities and use facilities according to their gender identity. Section 221.5(f) of the Education Code provides:

A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.

California law also prohibits discrimination in public schools on the basis of gender, gender identity, and gender expression.

Superintendent of Public Instruction Tom Torlakson stated his strong support for the rights of transgender students in a News Release issued by the California Department of Education on February 22, 2017. He also clarified that California laws protecting transgender students remain intact.

Meanwhile, the Gloucester County School Board v. G.G. case previously pending before the Supreme Court has been thrown into legal limbo. The G.G. case addresses whether a transgender high school student can use the boys’ restroom consistent with his gender identity. On March 6, 2017, the Supreme Court issued a one-sentence order vacating the Fourth Circuit Court of Appeal’s ruling in favor of the transgender teen and remanding the case back to the Fourth Circuit. The Court of Appeals must now decide whether Title IX’s prohibition on sex discrimination extends to gender identity in the absence of federal guidance on the issue.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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6 Education Code § 200.
7 “Gender” means sex, and includes a person’s gender identity and gender expression. “Gender expression” means a person’s gender-related appearance and behavior, whether or not stereotypically associated with the person’s sex assigned at birth. Education Code § 210.7.
8 Available at http://www.cde.ca.gov/nc/ce/yr17/yr17rel1.asp.
Dear Colleague:

The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in:

- Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and

- Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016.

These guidance documents take the position that the prohibitions on discrimination “on the basis of sex” in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.

This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that the term “sex” in the regulations is ambiguous and deferred to what the court characterized as the “novel” interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term “sex” unambiguously refers to biological sex and that, in any event, the guidance was “legislative and substantive” and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.

In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.

In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them.
Dear Colleague Letter

Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.

This guidance does not add requirements to applicable law. If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339); or the Department of Justice at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Sincerely,

/s/
Sandra Battle
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
T.E. Wheeler, II
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice
OCR Instructions to the Field re Complaints Involving Transgender Students

Regional Directors:

I am writing to explain the effects of developments on the enforcement of Title IX by the Office for Civil Rights. The recent developments include the following:

- On February 22, 2017, the U.S. Departments of Education and Justice issued a letter withdrawing the statements of policy and guidance reflected in the May 13, 2016 Dear Colleague Letter (DCL) on OCR’s enforcement of Title IX with respect to transgender students based on gender identity, as well as a related January 2015 letter, “in order to further and more completely consider the legal issues involved.”

- On March 3, 2017, the U.S. District Court for the Northern District of Texas dismissed without prejudice the multi-state lawsuit challenging the May 2016 DCL and dissolved the preliminary injunction (as clarified in October 2016) that had restricted OCR’s enforcement of Title IX with respect to transgender individuals’ access to “intimate” facilities.

- On March 6, 2017, the U.S. Supreme Court vacated and remanded Gloucester County School Board v. G.G., a case involving Title IX as it relates to transgender students’ access to restrooms. The Court said it was remanding the case to the U.S. Court of Appeals for the Fourth Circuit for further consideration “in light of the guidance document issued by the [Departments] on February 22, 2017” (i.e., the letter withdrawing the May 2016 DCL discussed above).

Thus, OCR may not rely on the policy set forth in the May 2016 DCL or the January 7, 2015 letter to a private individual as the sole basis for resolving a complaint. However, as was stated in the February 22, 2017, letter, “withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment.” Rather, OCR should rely on Title IX and its implementing regulations, as interpreted in decisions of federal courts and OCR guidance documents that remain in effect, in evaluating complaints of sex discrimination against individuals whether or not the individual is transgender.

OCR may assert subject matter jurisdiction over and open for investigation the following allegations if other jurisdictional requirements have been established (see CPM sections 104-106):

- failure to promptly and equitably resolve a transgender student’s complaint of sex discrimination (34 C.F.R. § 106.8(b));
- failure to assess whether sexual harassment (i.e., unwelcome conduct of a sexual nature) or gender-based harassment (i.e., based on sex stereotyping, such as acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, such as refusing to use a transgender student’s preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward
people who do not conform to sex stereotypes) of a transgender student created a hostile environment;
• failure to take steps reasonably calculated to address sexual or gender-based harassment that creates a hostile environment;
• retaliation against a transgender student after concerns about possible sex discrimination were brought to the recipient’s attention (34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e))); and
• different treatment based on sex stereotyping (e.g., based on a student’s failure to conform to stereotyped notions of masculinity or femininity) (34 C.F.R. § 106.31(b)).

It is the goal and desire of this Department that OCR approach each of these cases with great care and individualized attention before reaching a dismissal conclusion. Please evaluate each allegation separately, searching for a permissible jurisdictional basis for OCR to retain and pursue the complaint. It is permissible, for example, for one allegation in a complaint (such as harassment based on gender stereotypes) to go forward while another allegation (such as denial of access to restrooms based on gender identity) is dismissed.

As always, other requirements in evaluating complaints, as explained in OCR’s Case Processing Manual (CPM) apply, including CPM Sections 101, 105 and 106. For example, in establishing whether an allegation includes sufficient information to proceed to investigation, OCR will, consistent with CPM Section 108, “assist the complainant in understanding the information that OCR requires in order to proceed to the investigation of the complainant’s allegation(s). This will include explaining OCR’s investigation process and the rights of the complainant under the statutes and regulations enforced by OCR. OCR will also specifically identify the information necessary for OCR to proceed to investigation.” I also encourage you to contact the Program Legal Group’s Title IX team if you have any questions about whether OCR has jurisdiction over a case involving a transgender student or alleged discrimination based on gender identity.

When a complaint or case is dismissed, an appropriate text for a letter of dismissal could be:

On February 22, 2017, OCR and the U.S. Department of Justice (DOJ) issued a letter withdrawing their joint Dear Colleague Letter on Transgender Students, issued on May 13, 2016. OCR and DOJ stated that they were withdrawing the 2016 guidance in order to further and more completely consider the legal issues involved. OCR is therefore dismissing this [complaint/allegation/monitoring] under Sections 104 and 108 of OCR’s Case Processing Manual. We remind you however, that there are other statutes and legal provisions that bar discrimination. Additionally, as Betsy DeVos, Secretary of the U.S. Department of Education has stated, each school has a responsibility to protect every student in America and ensure that they have the freedom to learn and thrive in a safe environment. Some States and school districts have found adopted policies and practices that protect all students, including transgender students. The Department’s Examples of Policies and Emerging Practices for Supporting Transgender Students, available at www.ed.gov/osee/oshs/emergingpractices.pdf, features some of those policies and practices.
Thank you for your continued dedication to OCR’s core mission. As Secretary DeVos stated on February 22, 2017, OCR remains committed to investigating all claims of discrimination, bullying and harassment against those who are most vulnerable in our schools. I trust you will apply these instructions in line with the attitude and approach we are proud to foster here in OCR: that OCR exists to robustly enforce the civil rights laws under our jurisdiction, and we will do so in a neutral, impartial manner and as efficiently as possible.

If you have any questions about these instructions, please contact your Enforcement Director, and always feel free to reach out to PLG for assistance in brainstorming how to process a particular complaint.

Sincerely,

/s/
Candice Jackson
Acting Assistant Secretary for Civil Rights
Office for Civil Rights
Department of Education
§ 221.5. Policy of State; prohibited discrimination, CA EDUC § 221.5


§ 221.5. Policy of State; prohibited discrimination

Effective: January 1, 2015
Currentness

(a) It is the policy of the state that elementary and secondary school classes and courses, including nonacademic and elective classes and courses, be conducted, without regard to the sex of the pupil enrolled in these classes and courses.

(b) A school district shall not prohibit a pupil from enrolling in any class or course on the basis of the sex of the pupil, except a class subject to Chapter 5.6 (commencing with Section 51930) of Part 28 of Division 4 of Title 2.

(c) A school district shall not require a pupil of one sex to enroll in a particular class or course, unless the same class or course is also required of a pupil of the opposite sex.

(d) A school counselor, teacher, instructor, administrator, or aide shall not, on the basis of the sex of a pupil, offer vocational or school program guidance to a pupil of one sex that is different from that offered to a pupil of the opposite sex or, in counseling a pupil, differentiate career, vocational, or higher education opportunities on the basis of the sex of the pupil counseled. Any school personnel acting in a career counseling or course selection capacity to a pupil shall affirmatively explore with the pupil the possibility of careers, or courses leading to careers, that are nontraditional for that pupil's sex. The parents or legal guardian of the pupil shall be notified in a general manner at least once in the manner prescribed by Section 48980, in advance of career counseling and course selection commencing with course selection for grade 7 so that they may participate in the counseling sessions and decisions.

(e) Participation in a particular physical education activity or sport, if required of pupils of one sex, shall be available to pupils of each sex.

(f) A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.

Credits
222. (a) A school operated by a school district or a county office of education, the California School for the Deaf, the California School for the Blind, and a charter school shall provide reasonable accommodations to a lactating pupil on a school campus to express breast milk, breast-feed an infant child, or address other needs related to breast-feeding. Reasonable accommodations under this section include, but are not limited to, all of the following:

1. Access to a private and secure room, other than a restroom, to express breast milk or breast-feed an infant child.
2. Permission to bring onto a school campus a breast pump and any other equipment used to express breast milk.
3. Access to a power source for a breast pump or any other equipment used to express breast milk.
4. Access to a place to store expressed breast milk safely.

(b) A lactating pupil on a school campus shall be provided a reasonable amount of time to accommodate her need to express breast milk or breast-feed an infant child.

(c) A school specified in subdivision (a) shall provide the reasonable accommodations specified in subdivisions (a) and (b) only if there is at least one lactating pupil on the school campus.

(d) A school subject to this section may use an existing facility to meet the requirements specified in subdivision (a).

(e) A pupil shall not incur an academic penalty as a result of her use, during the school day, of the reasonable accommodations specified in this section, and shall be provided the opportunity to make up any work missed due to such use.

(f) (1) A complaint of noncompliance with the requirements of this section may be filed with the local educational agency under the Uniform Complaint Procedures set forth in Chapter 5.1 (commencing with Section 4600) of Division 1 of Title 5 of the California Code of Regulations.

2. A local educational agency shall respond to a complaint filed pursuant to paragraph (1) in accordance with Chapter 5.1 (commencing with Section 4600) of Division 1 of Title 5 of the California Code of Regulations.

3. A complainant not satisfied with the decision of a local educational agency may appeal the decision to the department pursuant to Chapter 5.1 (commencing with Section 4600) of Division 1 of Title 5 of the California Code of Regulations and shall receive a written decision regarding the appeal within 60 days of the department’s receipt of the appeal.
(4) If a local educational agency finds merit in a complaint, or if the Superintendent finds merit in an appeal, the local educational agency shall provide a remedy to the affected pupil.

(Added by Stats. 2015, Ch. 690, Sec. 2. (AB 302) Effective January 1, 2016.)
Resolution Agreement
Paso Robles Joint Unified School District
09-14-1376

In order to resolve the compliance issues identified during the investigation of the above-referenced complaint filed with the U.S. Department of Education, Office for Civil Rights (OCR), the Paso Robles Joint Unified School District agrees to implement this Resolution Agreement (Agreement).

I. Sex Discrimination Complaint Procedures

a. The District will: revise Administrative Regulation 5145.7 (Student Complaints of Sexual Harassment) and Administrative Regulation 1312.3 (Uniform Complaint Procedure) to clarify how a student, parent or guardian, or third party can file a complaint of sexual harassment and revise either or both procedures, as appropriate, to provide for the prompt and equitable resolution of complaints of sexual harassment. The revisions will, at a minimum, ensure that the applicable procedure(s) include:

   i. a definition and examples of sexual harassment;
   
   ii. notice that voluntary mediation is not available for complaints alleging sexual violence;
   
   iii. an assurance that sexual harassment investigations will be conducted by individuals with knowledge of the applicable legal standards under Title IX of the Education Amendments of 1972, as well as relevant District policies and complaint procedures;
   
   iv. a reasonably prompt investigation timeframe;
   
   v. reference to the availability of interim measures during the investigation to ensure the safety of the alleged victim, to address any ongoing harassment, and to prevent retaliation;
   
   vi. notice of the consequences imposed if the either the alleged victim or the accused individual refuses to provide evidence, fails or refuses to cooperate, or obstructs the investigation;
   
   vii. factors to be considered in reaching a determination and judging the severity of harassment;
   
   viii. applicable appeal rights; and
   
   ix. a requirement to contact the individual harassed within a reasonable period of time following conclusion of the investigation to assess whether there has been ongoing harassment or retaliation, and to determine whether additional supportive measures are needed.

b. The District will provide written notice of the revised AR 5145.7 and AR 1312.3 to all parents and students in the District by email and by publication on the District’s website. Beginning in the 2015-2016 school year, the District will publish a summary of the revised procedures in the annual notification to parents, and in any applicable student handbooks.
c. The District will provide written notice of the revised AR 5145.7 and AR 1312.3 through its internal email system to all staff and administrators in the District, and will ensure the Revised Procedures are including in any applicable employee handbooks beginning in the 2015-2016 school year.

d. Reporting Requirements:
   i. By May 15, 2015, the District will submit its draft revised AR 5145.7 and AR 1312.3 to OCR for review and approval.
   ii. Within 30 days of OCR approval, the County will verify that it has adopted the revised procedures and provided notice to students, parents, staff, and administrators in accordance with Sections I.b.-c. above.

II. Training or Written Guidance

a. The District will take effective action, through training or written guidance, to ensure that all District and site level administrators have a clear understanding of:
   i. the type of information that, when reported or observed, should be considered an allegation of sexual harassment and trigger an investigation under the revised procedure(s) applicable to sexual harassment complaints,
   ii. that the District may have a duty under Title IX of the Education Amendments of 1972 to respond appropriately to reports of sexual harassment, whether or not a formal complaint is filed; and
   iii. the District’s procedures for resolving complaints of sexual harassment and administrators’ responsibility to inform students and parents/guardians who report sexual harassment of the procedures.

b. Reporting Requirements:
   i. By June 30, 2015, the District will report to OCR the effective action that it has taken under II.a. If written guidance is issued, the District will provide a copy to OCR and confirm distribution to all District and site level administrators. If training is conducted, the District will report the date(s), participants, trainer, and information conveyed.

III. Monitoring

a. The District understands that OCR will not close the monitoring of this Agreement until OCR determines that the District has fulfilled its terms and is in compliance with the regulation implementing Title IX, at 34 C.F.R. §§106.31 and 106.8(b), which were at issue in this case.

b. By signing this Agreement, the District agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this Agreement. The District further understands that during the monitoring of this agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of
this Agreement and is in compliance with the regulation implementing Title IX, at 34 C.F.R. §§106.31 and 106.8(b), which were at issue in this case.

c. The District understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (34 C.F.R. §§100.9, 100.10), or judicial proceedings to enforce this Agreement, OCR shall give the District written notice of the alleged breach and a minimum of 60 calendar days to cure the alleged breach.

/s/ Chris Williams   04/16/2015
Superintendent   Date
OCR Instructions to the Field re Scope of Complaints

Regional Directors:

These Instructions set forth new internal guidance regarding the scope of the investigation of all OCR cases. This guidance is effective immediately and applies to all complaints currently in evaluation or investigation, as well as newly-filed complaints. These Instructions shall be applied consistently with OCR's Case Processing Manual (CPM), and if any questions arise about how to apply these Instructions consistently with the CPM, please contact your designated Enforcement Director for clarification.

Effective immediately, there is no mandate that any one type of complaint is automatically treated differently than any other type of complaint with respect to the scope of the investigation, the type or amount of data needed to conduct the investigation, or the amount or type of review or oversight needed over the investigation by Headquarters. There is no longer a “sensitive case” or “call home” list; rather, Headquarters and the Regional Offices (Regional Director) will consult regularly to determine on a case-by-case basis whether complex or problematic investigations require Headquarters review or intervention and when trends emerge that require Headquarters oversight or direction. Cases are retroactive and can/will be returned to the respective Regional Office if the RD feels a case can be adjudicated at the regional level.

In particular, OCR will no longer follow the existing investigative rule of obtaining three (3) years of past complaint data/files in order to assess a recipient’s compliance, which rule had been stated in OCR’s Approach to Title IX PSE Sexual Violence Complaints (January 2014) (for internal discussion), OCR’s Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints (February 12, 2014) (Draft for internal discussion), and other related internal policy documents. For example, if a discipline complaint requires analysis of whether a facially-neutral suspension policy was applied differently against a particular student based on a prohibited classification such as race, the investigative team (supervised by their Team Leader and Regional Director) is empowered to determine what comparative data (CRDC or otherwise) are necessary to, e.g., determine if other similarly-situated students of a different race were, in fact, treated differently from the student on whose behalf the complaint was filed.

The scope of the investigation of all complaints, including ESE discipline and PSE sexual violence complaints, is determined by the statutes and regulations, OCR’s published guidance, and the legal theory(ies) applicable to the allegation(s) stated by the complainant. There is no longer a “one size fits all” approach to the investigation of any category of complaints. Based on the investigative requirements set forth in the statutes and regulations, published guidance, and the legal theory(ies) applicable to the allegation(s) stated by the complainant, it is the investigative team’s responsibility (under appropriate supervision by Team Leaders and other Regional Office supervisors) to determine on a case-by-case basis the type and scope of evidence that is necessary to support a legally sound investigation and determination, with the understanding that all OCR investigations are to be framed in their scope by the allegations of each particular complaint.

For the sake of clarity, these Instructions mean that OCR will only apply a “systemic” or “class-action” approach where the individual complaint allegations themselves raise systemic or class-wide issues or the investigative team determines a systemic approach is warranted through conversations with the complainant.

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Please apply the instructions in this document with the understanding that OCR’s goal is to swiftly address compliance issues raised by individual complaint allegations, reach reasonable resolution agreements with defined, enforceable obligations placed upon recipients directly responsive to addressing the concerns raised in the individual complaint being resolved, and encourage voluntary settlements wherever possible.

I trust you will apply these instructions in line with the attitude and approach we are proud to foster here in OCR: that OCR exists to robustly enforce the civil rights laws under our jurisdiction, and we will do so in a neutral, impartial manner and as efficiently as possible. These instructions in particular are designed to empower our investigative staff to clear case backlogs and resolve complaints within a reasonable time-frame, thus providing effective resolution and justice to complainants and recipients.

Thank you for your continued dedicated to OCR’s core mission to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation’s schools. If you have any questions about these instructions, please contact your Enforcement Director. You may also contact me if further clarification is needed.

Candice Jackson
OCR Acting Assistant Secretary for Civil Rights
Hypothetical Scenario

You are the vice principal of a high school. You are aware that a particular student, Britney, has a habit of wearing revealing tops that violate the school’s dress code. Britney has been sent to the principal’s office on numerous occasions as a result of being written up by her English teacher.

After one such write up, you receive an email from Britney’s mother that the English teacher often refers to Britney as “sweetie” or “honey.” The mother also explains that on one particular occasion, Britney said that the teacher called her out for her dress code violation, and then made her sit next to his desk while he “leered” at her breasts.

Britney later reported to you (the vice principal) that she felt uncomfortable when the teacher commented on sexual themes in a novel the class was studying.

In another email, a few weeks later, the mother expressed concern about what she alleged to be inappropriate comments by the teacher about Britney’s neckline, made during class, which embarrassed the student.

What do you do?

Adapted from: Paso Robles Joint Unified School District, OCR Case No. 09-14-1376
TITLE IX PART I -
TITLE IX COORDINATOR ESSENTIALS
CCD

September 19, 2019

Presented by:

Monica D. Batanero, Sr. Associate General Counsel
Ellie R. Austin, Associate General Counsel
Monica D. Batanero
Senior Associate General Counsel
mbatanero@sclscal.org

Areas of Expertise
General Education Code & Student Issues (including student discipline, interdistrict transfers; general student issues, student’s and parent’s rights); Governance (Brown Act, Public Record Acts, conflicts); Special Education/Section 504

Experience
Ms. Batanero has over 14 years of experience in administrative law; over 10 years of experience in education law. Ms. Batanero’s practice touches upon myriad legal issues relating to students and school personnel. She advises school districts, county offices of education and special education local plan areas statewide regarding all aspects of special education law, student discipline and anti-discrimination laws. In addition to regularly participating in IEP meetings, Ms. Batanero has represented clients before the Office of Administrative Hearings, the California Department of Education and the Office for Civil Rights. Ms. Batanero also assists school districts in negotiating agreements and reaching settlements with parents regarding special education issues. Ms. Batanero also assists school districts and County Boards of Education at all levels of the student discipline process and conducts investigations on behalf of her clients of allegations of discrimination. Prior to joining SCLS, Ms. Batanero worked in education law in Southern California representing school districts in special education matters as well as addressing various legal matters as they arose. Ms. Batanero is a Member of the California State Bar and the California Council of School Attorneys.

Education
Juris Doctorate, University of San Francisco School of Law (2003); Master of Science in Gerontology, University of Southern California (1999); Bachelor of Science in Gerontology, University of Southern California (1998).

School and College Legal Services (SCLS) is a joint powers authority serving school districts, county offices of education, SELPAs, and community colleges in over fifteen counties in Northern California. Our primary focus, as a preventative law firm, is helping clients avoid future costly legal problems. We are a collaborative office, working to ensure our clients receive the most legally defensible advice in the most efficient manner possible.
Experience
Ms. Austin’s practice focuses on collective bargaining negotiations and personnel matters. She assists school districts, county offices of education, and community college districts in negotiating collective bargaining agreements, resolving grievances and unfair practice charges, and handling personnel matters. Ms. Austin also assists clients with Title IX and Clery Act compliance, as well as investigations of alleged discrimination or harassment.

Prior to joining SCLS, Ms. Austin practiced special education law representing public school districts at a law firm in Southern California for over 3 ½ years, where she worked extensively on matters pending before the California Office of Administrative Hearings. She developed expertise in analyzing special education documents, including IEPs, multidisciplinary assessments, and transition plans, for legal compliance. While in law school, she interned at a human rights NGO in Thailand teaching English to refugee women and Thai schoolchildren. Her capstone project for her M.P.A. degree involved a qualitative research study which identified common barriers facing community college students in Oregon as they transferred to four-year institutions.

Education
B.A. Humboldt State University, Geography magna cum laude (2007)
J.D. Drexel University School of Law (2011)
M.P.A. University of Oregon (2016)

School and College Legal Services (SCLS) is a joint powers authority serving school districts, county offices of education, SELPAs, and community colleges in over fifteen counties in Northern California. Our primary focus, as a preventative law firm, is helping clients avoid future costly legal problems. We are a collaborative office, working to ensure our clients receive the most legally defensible advice in the most efficient manner possible.
Title IX Part I - Title IX Coordinator Essentials  
Community College  
September 19, 2019

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Title IX Part I –
Title IX Coordinator Essentials
September 19, 2019

Presented by:
Monica D. Batanero, Sr. Associate General Counsel
Ellie R. Austin, Associate General Counsel
School & College Legal Services of California

Agenda

• Title IX Workshop Series
• What is Title IX?
• Title IX Investigations Requirements
• Role of the Title IX Coordinator
• Wide Application of Title IX
• Enforcement
• Next Steps

Fall 2019
Title IX Workshop Series at SCOE

• Part 2 – Conducting Title IX Investigations, October 9, 2019
• Part 3 – Nuts and Bolts of the Title IX Coordinator’s Role, November 12, 2019
• Part 4 – CCD Only – Additional Title IX Challenges for Community Colleges, December 12, 2019
I. What Is Title IX?

What Is Title IX?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”


What Is Title IX?

• Title IX of the Education Amendments of 1972

• Established to combat discrimination against women in the educational system

• Two objectives:
  • Prevent use of federal resources to support discriminatory practices in education
  • Provide individuals with protection against those practices

• Title IX protects any “person” against sex discrimination – both males and females
What Is Title IX?

• Title IX applies to “recipients of Federal financial assistance.”

• Every recipient must ensure that a student is not denied or limited in the ability to participate in or benefit from a school program or activity on the basis of sex.

Title IX Regulatory Framework

• Federal statutes - 20 U.S.C. § 1681
• Implementing regulations - 34 C.F.R. Part 106
• OCR’s regulatory guidance
• Resolution Agreements and Letters with OCR and DOJ
• Trump Administration rescission of Transgender Dear Colleague Letter, 2011 and 2014 Title IX guidance, and new OCR investigatory guidance scaling back OCR’s oversight purview
• Overlapping and related California law

September 2017 Dear Colleague Letter

• Rescinded 2011 Dear Colleague Letter on Sexual Violence and 2014 Q&A on Title IX and Sexual Violence
• Refers schools to 2001 Revised Sexual Harassment Guidance and 2006 Dear Colleague Letter on Sexual Harassment
• Significant changes:
  • Removed 60-day investigatory time frame
  • Allowed schools to choose between preponderance of the evidence and clear and convincing evidence standards
  • Provided responding party explicit rights during investigation and before decisionmaking
  • Allowed schools to provide interim remedies to both parties
Where Does Title IX Apply?

• Title IX protects students in connection with all academic, educational, extracurricular, athletic, and other programs of the district.

• Programs can take place in a district facility, on a school bus, at a program sponsored by the district at another location, or on a school-sponsored field trip.

Requirements Under Title IX

• Once an institution knows or reasonably should know of sex discrimination, it must:
  • Investigate
  • End the discrimination
  • Prevent discrimination from occurring again

• Procedural requirements:
  • Adoption of certain policies
  • Adoption and publication of grievance procedures
  • Designation of a Title IX Coordinator
  • Fair and equitable investigations and proceedings

Responsible Employees

• A “responsible employee” is any employee:
  • Who has the authority to take action to redress sexual violence;
  • Who has been given the duty of reporting incidents of sexual violence/misconduct to the Title IX Coordinator/designee; or
  • Whom a student could reasonably believe has this authority or duty.

• When a “responsible employee” knows or should have known of sexual harassment/discrimination, the district must take certain steps.
II. Title IX Investigations

Requirements

Title IX Grievance Procedures

- A recipient must adopt and publish grievance procedures for “prompt and equitable resolution” of Title IX complaints.
- Procedures must specify timelines for major stages of the process.
- Grievance procedures may include voluntary informal mechanisms for resolving some types of complaints, but must include formal mechanisms for resolving complaints.
Title IX Grievance Procedures

- Grievance procedures MUST include:
  - Notice of procedures, including where complaints may be filed;
  - Application of the procedures to complaints alleging harassment on the basis of sex;
  - Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
  - Notice to parties of the outcome of the complaint; and
  - An assurance the district will take steps to prevent recurrence of any harassment and to correct its discriminatory effects.

Pop Quiz!

Title IX Investigation Procedures:

Duty to Investigate

- If a district knows or reasonably should know about an alleged Title IX violation, the district’s duty to investigate is triggered.

- A direct complaint from the victim is not necessary to trigger the duty to investigate and remediate.

- The district must take immediate action to eliminate the discrimination/harassment, prevent its recurrence, and address its effects.
Title IX Investigation Procedures: Investigations

• Investigations into alleged violations of Title IX must be prompt, thorough, and impartial.
• Investigators should be credible, impartial, and trained.
• Investigations may use either the preponderance of the evidence standard or the clear and convincing evidence standard.
• Respondents should be directed not to retaliate against the complainant or any other participants in the investigation and complaint process.

Title IX Investigation Procedures: Standards of Evidence

• 2017 Title IX guidance gives districts the ability to choose between two standards:
  • Preponderance of the Evidence (51%)
    • More likely than not
  • Clear and Convincing Evidence (~75%)
    • Substantially more likely than not

Pop Quiz!
Title IX Investigation Procedures: Law Enforcement

- In cases involving potential criminal conduct, district personnel must determine whether law enforcement should be notified.
- District personnel should never discourage an alleged victim from reporting to law enforcement.
- Law enforcement involvement and/or separate investigation(s) does not relieve the district of its independent Title IX obligation to investigate the conduct.
- Conduct may constitute a violation of Title IX even if law enforcement does not have sufficient evidence of a criminal violation - different standards of evidence.

Title IX Investigation Procedures: During and After Investigation

- The complainant may request confidentiality and/or that their identifiable information not be disclosed to alleged perpetrator.
- Both parties should be given periodic status updates as to the course of the district’s investigation (these time frames should be noted in your grievance procedures).
- Both parties should be notified, in writing, about the outcome of the complaint and any right to appeal, regardless of the results of the investigation.

Title IX Investigation Procedures: Procedural Requirements

- Both complainant and respondent must have the same meaningful access to information that will be used during disciplinary meetings and hearings.
- Both parties have the right to respond to the investigation report in writing in advance of the decision of responsibility or hearing to determine responsibility.
- Any process made available to one party in the adjudication procedure must be made equally available to the other party.
Title IX Investigation Procedures: Interim Protective Measures

- After receiving a complaint, the district must take immediate steps to protect complainant in the educational setting.
- Under 2017 Guidance, OCR expanded interim measures to be available to the respondent too.
- Respondent employees may be placed on paid administrative leave (check CBA/policies).
- When separating complainant and respondent, minimize burden on complainant - do not as a matter of course remove complainant from classes or programs while allowing respondent to remain.

Title IX Investigation Procedures: Interim Protective Measures

- Interim measures may include:
  - Counseling
  - Extensions of time or other course-related adjustments
  - Modifications of work or class schedules
  - Campus escort services
  - Restrictions on contact between the parties
  - Changes in work or housing locations
  - Leaves of absence
  - Increased security and monitoring of certain areas of campus
  - Special training or other interventions to repair educational environment
  - Dissemination of information
  - Issuance of new policy statements

Title IX Investigation Procedures: Hearings

- The parties must have an equal opportunity to present relevant witnesses and other evidence.
- Decisionmaking must make findings of fact and conclusions as to each allegation.
- Recipients must maintain documentation of all hearing proceedings, which may include transcripts, written findings of fact, or audio recordings.
Title IX Investigation Procedures: Notice of Outcome

- Notice of outcome of disciplinary proceedings should be provided to complainant and respondent concurrently.

- Notice of outcome should include, at a minimum:
  - Whether district found that the conduct occurred as to each allegation
  - Any individual remedies offered to the complainant (only in complainant’s copy)
  - Any sanctions imposed on the responding party (only those that relate directly to complainant in complainant’s copy)
  - Other steps district has taken to remedy hostile environment

Title IX Investigation Procedures: Appeals

- Under 2017 guidance, if district’s Title IX grievance procedures allow for appeals, OCR mandates that districts provide appeal rights for either: (1) respondent only, or (2) respondent and complainant.

- The appeals timeline should be clear in the Title IX grievance policies.

Title IX Investigation Procedures: Respondent’s Due Process Rights

- Respondents have Title IX rights too.

- The complaint procedure and its implementation, including the investigation and decisionmaking processes, must be fair and impartial.

- The respondent does not have a right to be notified of the outcome of the investigation prior to the complainant; both parties should be notified concurrently.
Remedies and Sanctions

- If the district determines Title IX has been violated, the district must implement appropriate final remedies.
- Remedies for a complainant might include:
  - Money damages
  - Moving complainant or respondent to a new class or residence hall
  - Restoration of leave time
  - Providing counseling, medical, or academic services
- Remedies for the broader student/employee population might include:
  - Counseling and training
  - Campus climate check/survey

Recordkeeping

- Title IX regulations require institutions to keep records to send to OCR for compliance reviews.
- Records are also important in the event of any external review, such as judicial proceedings.
- The records are also important for the Title IX Coordinator – who should be conducting periodic reviews on whether patterns of conduct exist, and whether further steps are necessary to ensure student safety.

Pop Quiz!
III. Role of the Title IX Coordinator

Who is the Title IX Coordinator?

Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations. The recipient shall notify all its students and employees of the name, office address, and telephone number of the employee or employees appointed pursuant to this paragraph.

28 C.F.R. 54.135(a)

Title IX Coordinator

- The Title IX Coordinator has many responsibilities, including broadly:
  - Promoting gender equity in education
  - Overseeing the response to Title IX reports and complaints
  - Training students, staff, and faculty
  - Involvement in drafting and revising Title IX policies and regulations
  - Ensuring proper posting of notices
  - Identifying and addressing patterns of gender inequity revealed by reports and complaints
Title IX Coordinator

- The Title IX Coordinator may also:
  - Evaluate requests for confidentiality in complaints;
  - Determine appropriate interim and final remedies for a complainant and the community, and sanctions for the perpetrator; and
  - Work with local law enforcement and service providers.

Title IX Coordinator: Training Requirements

- The Title IX Coordinator must both receive training and provide trainings to staff and students.
  - Title IX Coordinator and all persons involved in implementing the grievance procedures must have training/experience handling complaints of sexual harassment and sexual violence, and in the recipient’s grievance procedures.
  - At the community college level, Title IX Coordinators have additional annual training requirements under Clery.

Title IX Coordinator: Coordination with Law Enforcement

- The Title IX Coordinator/designee should provide assistance to district law enforcement unit employees regarding how to respond appropriately to reports of sexual violence.
- The Title IX Coordinator should be given access to district law enforcement investigation notes and findings as necessary for the Title IX investigation, so long as doing so does not compromise the criminal investigation.
- These procedures can be outlined in practice guidelines for the district’s Title IX office and its law enforcement unit.
IV. Wide Application of Title IX

Athletics

- Recipients must provide equal athletic opportunities for members of both sexes.
- Recipients must also effectively accommodate students’ athletic interests and abilities.
- Recipients can demonstrate compliance in 3 ways:
  1. Provide participation opportunities for male and female students substantially proportionate to their respective enrollments; or
  2. For the sex currently or historically underrepresented in sports, show a history and continuing practice of expanding programs that is responsive to the interests of that sex; or
  3. If the recipient cannot show a history and continuing practice of program expansion, demonstrate that the district is meeting the interests and abilities of that sex with current programming.
Athletics
Part Two of the Three-Part Test
Showing a History and Continuing Practice of Expanding Programs that is Responsive to the Interests of that Sex
• These factors may indicate a history of expansion:
  • The institution’s record of adding intercollegiate teams or upgrading teams to intercollegiate status for the underrepresented sex;
  • The institution’s record of increasing the numbers of participants in intercollegiate sports of the underrepresented sex; or
  • The institution’s affirmative responses to students’ requests for addition or elevation of sport.
• These factors may indicate a continuing practice of expansion:
  • The institution’s current implementation of a nondiscriminatory policy of procedure for requesting the addition or elevation of supports and the effective communication of the policy to students; and
  • The institution’s current implementation of a plan to expand programming in response to developing interests and abilities.

Athletics
Part Three of the Three-Part Test
Fully and Effectively Accommodating the Interests and the Abilities of the Underrepresented Sex
• For part three, OCR considers all three questions:
  1. Is there unmet interest in a particular sport?
  2. Is there sufficient ability to sustain a team in the sport?
  3. Is there a reasonable expectation of competition for the team?
• If the answers to all three questions is “yes,” OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three.

• Title IX Coordinator should regularly evaluate the equity between the institution’s athletics opportunities.
• Whether equal athletic opportunities are provided to both sexes is based upon a “laundry list” of factors.
Athletics

• “Laundry list” of factors:
  • Equipment and supplies
  • Scheduling of games and practice time
  • Travel and per diem allowances
  • Opportunity for coaching and academic tutoring
  • Assignment and compensation of coaches and tutors
  • Provision of locker rooms and practice and competitive facilities
  • Publicity
  • Recruitment
  • Support services

Starting with the 2015-16 school year, all public schools and charter schools that offer competitive athletics must make certain data publicly available:

• Total enrollment, by gender
• Number of pupils enrolled at the school who participate in competitive athletics, by gender
• Number of boys’ and girls’ teams, classified by sport and competition level

• If the school has a website, the data must be available on the website

Single-Sex Education*

• Except as specifically allowed by law, districts may not carry out programs or activities separately on the basis of sex.
• Single-sex classes may be offered under certain circumstances:
  • Contact sports in physical education classes;
  • Classes or portions of classes that deal primarily with human sexuality;
  • Non-vocational classes and extracurricular activities that meet specific criteria.
• Consider the difference between designated single-sex classes versus classes with predominantly male or female students.

*This slide does not address athletics (see prior slides).
Discipline

- Title IX prohibits institutions from applying different rules of behavior, sanctions, or other treatment, including discipline, based on sex.
- Title IX Coordinators should regularly review discipline data to ensure that similarly situated students are not being disciplined differently based on sex for the same offense.
- Students should not be disciplined based on their gender identity or for failing to conform to stereotypical notions of masculinity or femininity in their appearance or behavior.

Financial Assistance

- Recipients may not provide different amounts or types of financial assistance, limit eligibility for financial assistance, or apply different criteria on the basis of sex in administering financial assistance.
- Recipients may not assist any entity offering sex-restricted financial aid.
- Three broad exceptions. (see next slide)
Recruitment, Admissions & Counseling

- Title IX prohibits higher education, vocational education, and professional education institutions from recruiting, admitting, and counseling or guiding students on the basis of sex.

- Title IX Coordinator should regularly review enrollment data to ensure disproportionate enrollment by one sex (e.g., in the STEM fields) is not the result of counseling practices or counseling materials.

Sex-Based Harassment

- Sexual harassment is a prohibited form of sex discrimination.

- Two types:
  - Hostile educational environment harassment
  - Quid pro quo harassment

- Title IX prohibits sexual harassment by students, employees, and third parties (such as visiting speakers and athletes).

- Title IX prohibits same-sex sexual harassment too.

Sex-Based Harassment: Sexual Violence

- Sexual violence = physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol or intellectual or other disability.

- A district may be notified directly or indirectly of a claim of sexual violence.

- Once a district knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate.
Gender-Based Discrimination

- Title IX prohibits gender-based discrimination, including:
  - verbal, nonverbal, or physical aggression, harassment, intimidation, or
  - hostility, based on sex or sex stereotyping, even if not sexual in nature.

- Includes not using a transgender student’s preferred name or pronouns when the school uses these tools for gender-conforming students.

- Federal guidance related to transgender students has shifted dramatically in recent years.

- In this and all areas of Title IX, districts must also consider California law.

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Pop Quiz!

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Sexual Orientation Harassment

- Title IX does not prohibit discrimination on the basis of sexual orientation (but CA law does).

- Harassment directed at LGBTQ students that is sufficiently serious to limit/deny their ability to participate in/benefit from the school’s services, activities, or programs is covered by Title IX.

- Title IX also prohibits discrimination based on sex or sex stereotyping, even if not sexual in nature.
Pregnant and Parenting Students

• A district may not require a pregnant student to participate in a separate school program.
• A district must provide the same special services to pregnant students that it does to students with other temporary medical conditions.
• A district must excuse a student’s absences due to pregnancy or related conditions, including recovery from childbirth or termination of pregnancy, as long as student’s physician deems absences medically necessary.
• Harassment based on pregnancy or related conditions constitutes sex-based harassment and is prohibited under Title IX.

Pregnant and Parenting Students: Lactating Students

• Districts must provide reasonable accommodation to lactating students to express breast milk, breastfeed an infant child, or address other related needs.

Breastfeeding students may not be penalized academically as a result of needing to express breast milk during the school day, and must be provided the opportunity to make up any missed work.

Abortion

• Title IX prohibits discrimination against, excluding, or denying benefits to a person (applicant, student, or employee) because they have obtained, sought, or will seek an abortion.
• Title IX does not require or prohibit any person, or public or private entity, from providing or paying for any benefit or service, including the use of facilities, related to an abortion (unless necessary to save the life of the woman).
Employment

- Title IX protects employees from sex discrimination in their employment.
- Title IX prohibits discrimination in:
  - Recruitment, advertising, and the application process
  - Hiring, upgrading, promoting, demoting, transferring, laying off, termination, returning from layoff, and rehiring
  - Pay, compensation, and fringe benefits
  - Job assignments, classifications, and structure
  - Leaves of absence
  - Selection and financial support for training
  - Employer-sponsored activities

Retaliation

- Title IX protects complainants and other participants in the investigation/complaint process from retaliation.
- “Among the most important immediate responsibilities of an [institution] is to ensure that students who allege harassment…are not subject to retaliation.”
- If retaliation occurs, districts should take strong responsive action.

You Decide: Title IX Violation?

1. Your institution’s grievance procedures allow for the termination of the Title IX process if either party initiates a civil, criminal, or agency (e.g., EEOC, DFEH) proceeding.
2. You conduct an investigation and determine that the evidence does not warrant a hearing. The complainant does not appeal the decision.
3. A student is raped on campus by another student. You provide her services and transfer her schools (at her request) but do not address the impact of the assault on other students at the school.
4. Your school has an abundance of sexual drawings/graffiti on walls, in bathrooms, on lockers, and in hallways.
V. Enforcement of Title IX

In 1979, the U.S. Supreme Court upheld a private right of action under Title IX. Title IX is enforced by the U.S. Department of Education, Office for Civil Rights (OCR). A possible penalty for violating Title IX is the loss of all federal funding. In 1979, the U.S. Supreme Court upheld a private right of action under Title IX.

If OCR finds a recipient has violated Title IX, OCR will seek appropriate remedies. OCR may propose a Resolution Agreement with the district that requires various corrective measures. If a district refuses to negotiate a Resolution Agreement, OCR may initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant Federal financial assistance. OCR may refer the case to the Department of Justice.
2017 Changes in OCR

- In June 2017, OCR released “Instructions to the Field re Scope of Complaints”

- Aimed to resolve “backlog” of complaints

- Disclaims “one size fits all” approach to certain types of complaints, particularly discipline in sexual violence complaints

- OCR will not expand its investigations to include the recipient’s recent compliance (3 years prior to complaint) unless the particular situation necessitates such review.

Caselaw Updates

1. In respondent’s claim against the University of Michigan, the court held that the Constitution’s guarantee of procedural due process required the university to permit respondent, or his representative, to cross-examine complainant regarding her account of the evening. Descring cross-examination as “the greatest legal engine ever invented for uncovering the truth,” the court explained that cross-examination would have provided a critical opportunity for respondent to test complainant’s credibility before the panel. It held that the burden on the university to allow cross-examination was modest and that the impact on complainant could be minimized by the use of a witness screen or other physical separation of the parties. (Doe v. Baum (6th Cir. Sept. 7, 2018).)

2. “We hold that where, as here, John was facing potentially severe consequences and the Committee’s decision against him turned on believing Jane, the Committee’s procedures should have included an opportunity for the Committee to assess Jane’s credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee’s asking her appropriate questions proposed by John or the Committee itself.” (Doe v. Claremont McKenna College (Cal. Ct. App. Aug. 8, 2018).)
3. University was not deliberately indifferent to sexual assault victim where a public safety officer called an ambulance immediately after victim reported the assault; called for a sexual assault advocate; investigated the scene of the incident in victim's dorm room; and within a couple of hours, had reported the assault to San Diego PD. "Title IX deliberate indifference requires more than mere negligence." (Ramser v. Univ. of San Diego, 2019 WL 2950095, at *1 (9th Cir. July 9, 2019).)

4. In D.N. v. Stockton University, the District Court of New Jersey found that victim's Title IX claims for deliberate indifference were time barred by the State's tort claims act statute of limitations. Furthermore, the national fraternity was not liable for sexual assault at fraternity "rush party" because sexual assault was not "reasonably foreseeable." (Civil No. 18-11932, Jun. 28, 2019).

5. University did not discriminate against accused student in Title IX sexual assault investigation where he was provided with opportunity to review investigative materials; given multiple opportunities to submit evidence; presented affidavits signed by witnesses; submitted questions to be asked of complainant on cross-examination; he did not allege any panel member failed to review applicable materials or demonstrated bias during hearing; and where he voiced concerns about potential bias, appeals officer originally assigned to his case was removed. (Doe v. Columbia Coll. Chicago, 933 F.3d 849 (7th Cir. 2019).)
6. University violated accused student's due process rights where it granted him only an "informal" interview prior to suspending him, and pending his expulsion, where the suspension lasted 5 months before the expulsion hearing. As a general rule, both notice and a hearing should precede a suspension, except where an exigency exists. (Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56, 71 (1st Cir. 2019).)

7. Accused student pled plausible Title IX discrimination claim by alleging university's federal funding was at risk if it could not show it was vigorously investigating/punishing sexual misconduct; university's dean of students credited accuser's account without hearing directly from her; majority of disciplinary panel appeared to credit accuser based on unsworn accusation; panel refused to hear any impeachment evidence; and university center that supported victims of sexual violence believed men as a class were responsible for problem of campus sexual assault. (Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019).)

8. Student athletes accused of sexual misconduct were afforded procedural due process in disciplinary hearing where they were represented by counsel and given a choice of a Special Administrative Conference or a Panel Hearing with a panel of students, faculty, and staff and the option to appeal; and where they signed a Special Choice of Resolution Form and chose the Special Administrative Conference, which removed the possibility of expulsion and a potential "negative notation" on their academic record. (Austin v. Univ. of Oregon, 925 F.3d 1133, 1139 (9th Cir. 2019).)
Caselaw Updates

9. When a private university student faces serious discipline for alleged sexual misconduct, and the credibility of witnesses is central to the adjudication of the charge, fundamental fairness requires that the university must at least permit cross-examination of adverse witnesses at a hearing in which the witnesses appear in person or by some other means, such as means provided by technology like videoconferencing, before one or more neutral adjudicators with the power independently to judge credibility and find fact. Moreover, the factfinder may not be a single individual with the divided and inconsistent roles. (Doe v. Allee, 30 Cal. App. 5th 1036, 242 Cal. Rptr. 3d 109 (Ct. App. 2019).)

VI. Next Steps

• Review your district’s grievance procedures for compliance with new OCR guidance and Title 5 regulations.

• Ensure your districts have appointed a Title IX Coordinator, and that individual is identified in the grievance procedures and online.

• Ensure your Title IX Coordinator and all “responsible employees” are receiving the necessary training.
Additional Resources – K-12

• U.S. Department of Education, Office for Civil Rights: Title IX and Sex Discrimination, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
• National Center on Safe Supportive Learning Environments, https://safesupportivelearning.ed.gov/safe-place-to-learn-k12

Additional Resources – Community Colleges

• U.S. Department of Education, Office for Civil Rights: Title IX and Sex Discrimination, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
• The Center for Changing Our Campus Culture, www.changingourcampus.org
• California Office of the Attorney General, Campus Sexual Assault guidance and resources, https://oag.ca.gov/campus-sexual-assault
• California Community Colleges Chancellor’s Office, www.cccco.edu

Questions?

Information in this presentation, including but not limited to PowerPoint handouts and presenters’ comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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ATTACHMENTS
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From: Damara L. Moore, Senior Associate General Counsel
Ellie R. Austin, Schools Legal Counsel

Subject: OCR Withdraws Significant Title IX Guidance; Issues New Dear Colleague Letter and Q&A on Title IX
Memo No. 20-2017(CC)

On September 22, 2017, the Department of Education issued a Dear Colleague Letter which withdrew guidance on Title IX previously provided by the Office of Civil Rights (“OCR”) (“2017 Dear Colleague Letter”). OCR utilizes "Dear Colleague" letters to help clarify how OCR will apply existing laws to schools, districts, and educational institutions of higher learning (hereinafter “schools”). The withdrawn guidance addressed investigations of Title IX complaints of student-on-student sexual violence. Simultaneously, OCR issued a Question and Answer on Campus Sexual Misconduct ("2017 Q&A") to provide information regarding how OCR will evaluate a school’s compliance with Title IX under the new guidance.

Title IX applies to public and private elementary and secondary schools, school districts, colleges and universities receiving federal financial assistance. It prohibits discrimination on the basis of sex, including sexual harassment, in federally funded education programs.

I. The Withdrown Guidance

The 2017 Dear Colleague Letter withdraws two documents issued by OCR under the Obama Administration: the 2011 Dear Colleague Letter on Sexual Violence (“2011 Dear Colleague Letter”) and the 2014 Questions and Answers on Title IX and Sexual Violence (“2014 Q&A”). The former guidance was significant in that it specifically stated that sexual violence is a form of sexual harassment, and was thus prohibited under Title IX. OCR stated that the reason for the withdrawal of the 2011 and 2014 guidance documents was that they did not adequately ensure that the due process

1 Available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf
2 In the 2017 Q&A, OCR defines sexual misconduct to include “peer-on-peer sexual harassment and sexual violence.”
3 References to the new guidance within this Legal Update are to the 2017 Q&A unless otherwise noted.
rights of the responding party were protected. Additionally, OCR took issue with the fact that the 2011 and 2014 guidance documents were adopted without notice and an opportunity for public comment.

II. New Guidance

The 2017 Dear Colleague Letter explicitly refers schools to OCR’s 2001 Revised Sexual Harassment Guidance (“2001 Guidance”) and 2006 Dear Colleague Letter on Sexual Harassment5 (“2006 Dear Colleague Letter”) to understand their continuing obligations to address sexual misconduct in education programs and activities. The new guidance also discusses a number of other topics, including: interim measures, grievance procedures and investigations, informal resolutions of complaints, the decision-making process, notices of the outcome, the right to appeal, the Clery Act’s reporting requirements,6 and the effect of the rescission of the former guidance on previously-entered voluntary resolution agreements.

a. What Is the Same

Much remains the same under the new guidance. Schools continue to have a responsibility to promptly and effectively address sexual misconduct, prevent its recurrence, and remedy its effects.7 Schools continue to have an obligation to designate a Title IX coordinator to ensure they are meeting their Title IX obligations. The new guidance affirms that schools are deemed to have notice of sexual misconduct when a “responsible employee” knows or should know of such conduct.8 Schools must still adopt grievance procedures to address sexual misconduct. When conducting an investigation, schools have the burden to gather evidence and conduct a fair, impartial investigation. The current guidance, like the previous guidance, acknowledges that during the period of time that adjudication is pending, interim steps may be taken to separate the reporting and responding parties. The new guidance continues to recognize that schools may need to address issues which arise due to off-campus misconduct if it creates a hostile educational environment in educational programs or activities. When addressing allegations of dating violence, domestic violence, sexual assault, or stalking, community colleges must continue to comply with Title IX and the Clery Act.

As under the previous guidance, each party is entitled to access the same processes and information as the other party during the school’s investigation. In disciplinary proceedings relating to allegations of dating violence, domestic violence, sexual assault, or stalking, schools may not limit the presence of an advisor to either party during a hearing, although they may limit restrictions on advocates’ participation.

5 Available at https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html
6 These reporting requirements are unaffected by the 2017 Dear Colleague Letter.
8 A “responsible employee” remains, as previously defined, “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees or an individual who a student could reasonably believe has this authority or responsibility.” 2001 Guidance V.C.
b. What Is Different

This Legal Update highlights many of the changes that are made by the new guidance, but is not a comprehensive list of all changes.

**Timeframe.** Title IX investigations no longer must be concluded within 60 calendar days. Instead, the guidance provides that “[t]here is no fixed time frame under which a school must complete” its investigation. OCR will now evaluate on a case-by-case basis a “school’s good faith effort to conduct a fair, impartial investigation in a timely manner.”

**Interim Remedies.** The 2017 Q&A provides that interim measures might be appropriate for either the reporting or the responding parties prior to an investigation or while an investigation is pending. This is a departure from previous OCR guidance, where interim measures were offered only to the reporting party.

**Standard of Evidence.** Significantly, the 2017 Q&A provides that schools may apply *either* the preponderance of the evidence standard or the clear and convincing evidence standard. The clear and convincing evidence standard represents a higher standard of proof, somewhere in between preponderance of the evidence and beyond a reasonable doubt. Previous guidance provided that all Title IX investigations must proceed using the preponderance of the evidence standard. The new guidance also requires that the standard of proof utilized for evaluating a claim of sexual misconduct be consistent with the standard that applies in other student misconduct cases. In other words, a school cannot use the preponderance of the evidence standard in sexual misconduct cases but the clear and convincing evidence standard in plagiarism cases.

**Informal Resolution for Allegations of Sexual Assault.** Previous Title IX guidance provided that allegations of sexual assault could not be resolved using an informal mediation process, even if both the reporting and responding parties agreed. The new guidance allows schools to facilitate voluntary resolution processes, such as mediation, for any Title IX complaint, including those involving allegations of sexual assault.

**Rights During Decision Making Process.** The new guidance makes explicit the requirement that both the reporting and responding parties have access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report, and provides that the responding party must have the opportunity to respond to the report in writing in advance of any decision about responsibility and/or hearing.

**Notice of Outcome of Disciplinary Proceedings.** The new guidance provides that a “written notice of the outcome of disciplinary proceedings” must be provided to both the reporting and responding parties, and recommends that both parties be notified “concurrently.” For elementary and secondary schools and for allegations at the postsecondary level that do not involve Clery crimes,9 the notice must inform the reporting party whether the investigation found that the alleged conduct occurred, any individual remedies offered to the reporting party, any sanctions imposed on the responding party that relate directly to the reporting party, and other steps the school has taken to eliminate the hostile environment. In elementary and secondary schools, the notice should be provided to the parents of students under 18 and directly to students who are 18 or older.

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9 The 2017 Q&A also incorporates the requirements under the Clery Act with respect to this written notification.
Obligation to Produce Written Report. The 2017 guidance mandates that any investigation under Title IX that may lead to disciplinary action against the responding party must result in a written investigation report “summarizing the relevant exculpatory and inculpatory evidence.”

Right to Cross-Examine. The 2017 guidance makes clear that if one party is permitted to cross-examine the other party, that right must extend to the other party.

Right to Appeal. Under the former guidance, if a school granted a right to appeal investigation findings, the school was required to allow both parties the right to appeal. Under the new guidance, if a school chooses to allow appeals from either its decision regarding responsibility or its disciplinary sanctions, it may choose to allow an appeal only for the responding party or for both parties.

III. Impact

Despite the withdrawal of two major guidance documents, the majority of schools’ Title IX obligations remain intact. Many other advisory letters and guides related to sex discrimination and harassment remain in place, and can assist schools in understanding their continuing obligations under Title IX.

However, with the increased focus by OCR on the responding party’s due process rights, schools should examine their policies and practices to ensure they provide due process to those under investigation for sexual misconduct. Schools may also reconsider and heighten the standard of proof they believe is appropriate in such investigations. Counsel should be consulted to ensure any new policies are in alignment with the changes in the law.

Additionally, the 2017 Q&A provides that voluntary resolution agreements previously entered into between a school and OCR remain binding on the school.

OCR has indicated that it will engage in rulemaking after a public comment process. This will allow schools the ability to provide input into the development of new regulations related to Title IX’s requirements for investigating student-on-student sexual misconduct. The Department of Education has not released any dates for the public comment period as of the time of publication of this Legal Update; however, we will keep our clients updated on this developing issue.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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10 Including the 2001 Revised Sexual Harassment guidance, the 2006 Dear Colleague Letter on Sexual Harassment Issues, the 2015 Dear Colleague Letter on Title IX Coordinators, and the 2015 Title IX Resource Guide.
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The Department of Education’s mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.
September 22, 2017

Dear Colleague:

The purpose of this letter is to inform you that the Department of Education is withdrawing the statements of policy and guidance reflected in the following documents:

- Dear Colleague Letter on Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 4, 2011.
- Questions and Answers on Title IX and Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 29, 2014.

These guidance documents interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student-on-student sexual misconduct. The 2011 Dear Colleague Letter required schools to adopt a minimal standard of proof—the preponderance-of-the-evidence standard—in administering student discipline, even though many schools had traditionally employed a higher clear-and-convincing-evidence standard. The Letter insisted that schools with an appeals process allow complainants to appeal not-guilty findings, even though many schools had previously followed procedures reserving appeal for accused students. The Letter discouraged cross-examination by the parties, suggesting that to recognize a right to such cross-examination might violate Title IX. The Letter forbade schools from relying on investigations of criminal conduct by law-enforcement authorities to resolve Title IX complaints, forcing schools to establish policing and judicial systems while at the same time directing schools to resolve complaints on an expedited basis. The Letter provided that any due-process protections afforded to accused students should not “unnecessarily delay” resolving the charges against them.

Legal commentators have criticized the 2011 Letter and the 2014 Questions and Answers for placing “improper pressure upon universities to adopt procedures that do not afford fundamental fairness.”¹ As a result, many schools have established procedures for resolving allegations that “lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.”²

The 2011 and 2014 guidance documents may have been well-intentioned, but those documents have

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² Rethink Harvard’s Sexual Harassment Policy, BOSTON GLOBE (Oct. 15, 2014) (statement of 28 members of the Harvard Law School faculty); see also ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS, RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT (2017); AMERICAN COLLEGE OF TRIAL LAWYERS, TASK FORCE ON THE RESPONSE OF UNIVERSITIES AND COLLEGES TO ALLEGATIONS OF SEXUAL VIOLENCE, WHITE PAPER ON CAMPUS SEXUAL ASSAULT INVESTIGATIONS (2017).
September 2017

Q&A on Campus Sexual Misconduct

Under Title IX of the Education Amendments of 1972 and its implementing regulations, an institution that receives federal funds must ensure that no student suffers a deprivation of her or his access to educational opportunities on the basis of sex. The Department of Education intends to engage in rulemaking on the topic of schools’ Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence. The Department will solicit input from stakeholders and the public during that rulemaking process. In the interim, these questions and answers—along with the Revised Sexual Harassment Guidance previously issued by the Office for Civil Rights1—provide information about how OCR will assess a school’s compliance with Title IX.

SCHOOLS’ RESPONSIBILITY TO ADDRESS SEXUAL MISCONDUCT

Question 1:

What is the nature of a school’s responsibility to address sexual misconduct?

Answer:

Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows or reasonably should know of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately.2 In particular, when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student’s ability to participate in or benefit from the school’s programs or activities, a hostile environment exists and the school must respond.3


2 2001 Guidance at (VII).

3 Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 631 (1999); 34 C.F.R. § 106.31(a); 2001 Guidance at (V)(A)(1). Title IX prohibits discrimination on the basis of sex “under any education program or activity” receiving federal financial assistance, 20 U.S.C. § 1681(a); 34 C.F.R. § 106.1, meaning within the “operations” of a postsecondary institution or school district, 20 U.S.C. § 1687; 34 C.F.R. § 106.2(h). The Supreme Court has explained that the statute “confines the scope of prohibited conduct based on the recipient’s degree of control over the harasser and the environment in which the harassment occurs.” Davis, 526 U.S. at 644. Accordingly, OCR has informed institutions that “[a] university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient.” Oklahoma State University Determination Letter at 2, OCR Complaint No. 05-07-2074 (Aug. 6, 2009) (“OCR determined that the alleged assault did not occur in the context of an educational program or activity operated by the University.”). Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities. Under the Clery Act, postsecondary institutions are obliged to collect and report statistics on crimes that occur on campus, on noncampus properties controlled by the institution or an affiliated student organization and used for educational purposes, on public property within or immediately adjacent to campus, and in areas within the patrol jurisdiction of the campus police or the campus security department. 34 C.F.R. § 668.46(a); 34 C.F.R. § 668.46(c).
Each recipient must designate at least one employee to act as a Title IX Coordinator to coordinate its responsibilities in this area.\(^4\) Other employees may be considered “responsible employees” and will help the student to connect to the Title IX Coordinator.\(^5\)

In regulating the conduct of students and faculty to prevent or redress discrimination, schools must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech.\(^6\)

**THE CLERY ACT AND TITLE IX**

**Question 2:**

What is the Clery Act and how does it relate to a school’s obligations under Title IX?

**Answer:**

Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX.\(^7\) Each year, institutions must disclose campus crime statistics and information about campus security policies as a condition of participating in the federal student aid programs. The Violence Against Women Reauthorization Act of 2013 amended the Clery Act to require institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault, and stalking, and to include certain policies, procedures, and programs pertaining to these incidents in the annual security reports. In October 2014, following a negotiated rulemaking process, the Department issued amended regulations to implement these statutory changes.\(^8\) Accordingly, when addressing allegations of dating violence, domestic violence, sexual assault, or stalking, institutions are subject to the Clery Act regulations as well as Title IX.

**INTERIM MEASURES**

**Question 3:**

What are interim measures and is a school required to provide such measures?

**Answer:**

Interim measures are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.\(^9\) Interim measures include counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.

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\(^4\) 34 C.F.R. § 106.8(a).

\(^5\) 2001 Guidance at (V)(C).


\(^8\) See 34 C.F.R. § 668.46.

It may be appropriate for a school to take interim measures during the investigation of a complaint. In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education. The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students’ evolving needs.

GRIEVANCE PROCEDURES AND INVESTIGATIONS

Question 4:
What are the school’s obligations with regard to complaints of sexual misconduct?

Answer:

A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct. OCR has identified a number of elements in evaluating whether a school’s grievance procedures are prompt and equitable, including whether the school (i) provides notice of the school’s grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees; (ii) applies the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties; (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (iv) designates and follows a reasonably prompt time frame for major stages of the complaint process; (v) notifies the parties of the outcome of the complaint; and (vi) provides assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.

Question 5:
What time frame constitutes a “prompt” investigation?

Answer:

There is no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.

Question 6:
What constitutes an “equitable” investigation?

Answer:

10 2001 Guidance at (VII)(A). In cases covered by the Clery Act, a school must provide interim measures upon the request of a reporting party if such measures are reasonably available. 34 C.F.R. § 668.46(b)(11)(v).

11 34 C.F.R. § 106.8(b); 2001 Guidance at (V)(D); see also 34 C.F.R. § 668.46(k)(2)(i) (providing that a proceeding which arises from an allegation of dating violence, domestic violence, sexual assault, or stalking must “[i]nclude a prompt, fair, and impartial process from the initial investigation to the final result”).

12 2001 Guidance at (IX); see also 34 C.F.R. § 668.46(k). Postsecondary institutions are required to report publicly the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, and stalking, 34 C.F.R. § 668.46 (k)(1)(i), and to include a process that allows for the extension of timeframes for good cause with written notice to the parties of the delay and the reason for the delay, 34 C.F.R. § 668.46 (k)(3)(i)(A).

13 2001 Guidance at (IX); see also 34 C.F.R. § 668.46(k)(3)(i)(A).
In every investigation conducted under the school’s grievance procedures, the burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed. A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.

An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.\(^\text{14}\)

Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.\(^\text{15}\) Restricting the ability of either party to discuss the investigation (e.g., through “gag orders”) is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable. Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.\(^\text{16}\)

Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school’s sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.\(^\text{17}\) Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.\(^\text{18}\)

**INFORMAL RESOLUTIONS OF COMPLAINTS**

**Question 7:**

After a Title IX complaint has been opened for investigation, may a school facilitate an informal resolution of the complaint?

**Answer:**

If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.

\(^{14}\) 2001 Guidance at (V)(A)(1)-(2); see also 34 C.F.R. § 668.46(k)(2)(ii).

\(^{15}\) 2001 Guidance at (X).

\(^{16}\) 34 C.F.R. § 106.31(a).

\(^{17}\) 2001 Guidance at (VII)(B).

\(^{18}\) 34 C.F.R. § 668.46(k)(3)(i)(B)(3).
DECISION-MAKING AS TO RESPONSIBILITY

Question 8:

What procedures should a school follow to adjudicate a finding of responsibility for sexual misconduct?

Answer:

The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school’s sexual misconduct policy. If the complaint presented more than a single allegation of misconduct, a decision should be reached separately as to each allegation of misconduct. The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.19

The decision-maker(s) must offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.20 The parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.

Any process made available to one party in the adjudication procedure should be made equally available to the other party (for example, the right to have an attorney or other advisor present and/or participate in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses).21 When resolving allegations of dating violence, domestic violence, sexual assault, or stalking, a postsecondary institution must “[p]rovide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.”22 In such disciplinary proceedings and any related meetings, the institution may “[n]ot limit the choice of advisor or presence for either the accuser or the accused” but “may establish restrictions regarding the extent to which the advisor may participate in the proceedings.”23

Schools are cautioned to avoid conflicts of interest and biases in the adjudicatory process and to prevent institutional interests from interfering with the impartiality of the adjudication. Decision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.

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19 The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases. In a recent decision, a court concluded that a school denied “basic fairness” to a responding party by, among other things, applying a lower standard of evidence only in cases of alleged sexual misconduct. Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 607 (D. Mass. 2016) (“[T]he lowering of the standard appears to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove—and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct. The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused.”). When a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided. A postsecondary institution’s annual security report must describe the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault, or stalking. 34 C.F.R. § 668.46(k)(1)(ii).


21 A school has discretion to reserve a right of appeal for the responding party based on its evaluation of due process concerns, as noted in Question 11.

22 34 C.F.R. § 668.46(k)(2)(iii).

23 34 C.F.R. § 668.46(k)(2)(iv).
DECISION-MAKING AS TO DISCIPLINARY SANCTIONS

Question 9:
What procedures should a school follow to impose a disciplinary sanction against a student found responsible for a sexual misconduct violation?

Answer:
The decision-maker as to any disciplinary sanction imposed after a finding of responsibility may be the same or different from the decision-maker who made the finding of responsibility. Disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school’s code of student conduct while considering the impact of separating a student from her or his education. Any disciplinary decision must be made as a proportionate response to the violation.24 In its annual security report, a postsecondary institution must list all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking.25

NOTICE OF OUTCOME AND APPEALS

Question 10:
What information should be provided to the parties to notify them of the outcome?

Answer:
OCR recommends that a school provide written notice of the outcome of disciplinary proceedings to the reporting and responding parties concurrently. The content of the notice may vary depending on the underlying allegations, the institution, and the age of the students. Under the Clery Act, postsecondary institutions must provide simultaneous written notification to both parties of the results of the disciplinary proceeding along with notification of the institution’s procedures to appeal the result if such procedures are available, and any changes to the result when it becomes final.26 This notification must include any initial, interim, or final decision by the institution; any sanctions imposed by the institution; and the rationale for the result and the sanctions.27 For proceedings not covered by the Clery Act, such as those arising from allegations of harassment, and for all proceedings in elementary and secondary schools, the school should inform the reporting party whether it found that the alleged conduct occurred, any individual remedies offered to the reporting party or any sanctions imposed on the responding party that directly relate to the reporting party, and other steps the school has taken to eliminate the hostile environment, if the school found one to exist.28 In an elementary or secondary school, the notice should be provided to the parents of students under the age of 18 and directly to students who are 18 years of age or older.29

24 34 C.F.R. § 106.8(b); 2001 Guidance at (VII)(A).
25 34 C.F.R. § 668.46(k)(1)(iii).
26 34 C.F.R. § 668.46(k)(2)(v). The Clery Act applies to proceedings arising from allegations of dating violence, domestic violence, sexual assault, and stalking.
27 34 C.F.R. § 668.46(k)(3)(iv).
28 A sanction that directly relates to the reporting party would include, for example, an order that the responding party stay away from the reporting party. See 2001 Guidance at vii n.3. This limitation allows the notice of outcome to comply with the requirements of the Family Educational Rights and Privacy Act. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10; 34 C.F.R. § 99.12(a). FERPA provides an exception to its requirements only for a postsecondary institution to communicate the results of a disciplinary proceeding to the reporting party in cases of alleged crimes of violence or specific nonforcible sex offenses. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 99.31(a)(13).
29 20 U.S.C. § 1232g(d).
Question 11:
How may a school offer the right to appeal the decision on responsibility and/or any disciplinary decision?

Answer:
If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.\(^{30}\)

EXISTING RESOLUTION AGREEMENTS

Question 12:
In light of the rescission of OCR’s 2011 Dear Colleague Letter and 2014 Questions & Answers guidance, are existing resolution agreements between OCR and schools still binding?

Answer:
Yes. Schools enter into voluntary resolution agreements with OCR to address the deficiencies and violations identified during an OCR investigation based on Title IX and its implementing regulations. Existing resolution agreements remain binding upon the schools that voluntarily entered into them. Such agreements are fact-specific and do not bind other schools. If a school has questions about an existing resolution agreement, the school may contact the appropriate OCR regional office responsible for the monitoring of its agreement.

Note: The Department has determined that this Q&A is a significant guidance document under the Final Bulletin for Agency Good Guidance Practices of the Office of Management and Budget, 72 Fed. Reg. 3432 (Jan. 25, 2007). This document does not add requirements to applicable law. If you have questions or are interested in commenting on this document, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339).

\(^{30}\) 2001 Guidance at (IX). Under the Clery Act, a postsecondary institution must provide simultaneous notification of the appellate procedure, if one is available, to both parties. 34 C.F.R. § 668.46(k)(2)(v)(B). OCR has previously informed schools that it is permissible to allow an appeal only for the responding party because “he/she is the one who stands to suffer from any penalty imposed and should not be made to be tried twice for the same allegation.” Skidmore College Determination Letter at 5, OCR Complaint No. 02-95-2136 (Feb. 12, 1996); see also Suffolk University Law School Determination Letter at 11, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) (“[A]ppeal rights are not necessarily required by Title IX, whereas an accused student’s appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University.”); University of Cincinnati Determination Letter at 6, OCR Complaint No. 15-05-2041 (Apr. 13, 2006) (“[T]here is no requirement under Title IX that a recipient provide a victim’s right of appeal.”).
Notice of Language Assistance
Dear Colleague Letter on Title IX Coordinators

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: 如果您不懂英語，或者使用英語有困難，您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339)，或電郵：Ed.Language.Assistance@ed.gov。

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영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보센터에 일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로 제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800-USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov으로 연락하시기 바랍니다.


Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.
Dear Colleague:

I write to remind you that all school districts, colleges, and universities receiving Federal financial assistance must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX of the Education Amendments of 1972 (Title IX), which prohibits sex discrimination in education programs and activities.1 These designated employees are generally referred to as Title IX coordinators.

Your Title IX coordinator plays an essential role in helping you ensure that every person affected by the operations of your educational institution—including students, their parents or guardians, employees, and applicants for admission and employment—is aware of the legal rights Title IX affords and that your institution and its officials comply with their legal obligations under Title IX. To be effective, a Title IX coordinator must have the full support of your institution. It is therefore critical that all institutions provide their Title IX coordinators with the appropriate authority and support necessary for them to carry out their duties and use their expertise to help their institutions comply with Title IX.

The U.S. Department of Education’s Office for Civil Rights (OCR) enforces Title IX for institutions that receive funds from the Department (recipients).2 In our enforcement work, OCR has found that some of the most egregious and harmful Title IX violations occur when a recipient fails to designate a Title IX coordinator or when a Title IX coordinator has not been sufficiently trained or given the appropriate level of authority to oversee the recipient’s compliance with Title IX. By contrast, OCR has found that an effective Title IX coordinator often helps a recipient provide equal educational opportunities to all students.

OCR has previously issued guidance documents that include discussions of the responsibilities of a Title IX coordinator, and those documents remain in full force. This letter incorporates that existing OCR guidance on Title IX coordinators and provides additional clarification and recommendations

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1 34 C.F.R. § 106.8(a). Although Title IX applies to any recipient that offers education programs or activities, this letter focuses on Title IX coordinators designated by local educational agencies, schools, colleges, and universities.

2 20 U.S.C. §§ 1681–1688. The Department of Justice shares enforcement authority over Title IX with OCR.
as appropriate. This letter outlines the factors a recipient should consider when designating a Title IX coordinator, then describes the Title IX coordinator’s responsibilities and authority. Next, this letter reminds recipients of the importance of supporting Title IX coordinators by ensuring that the coordinators are visible in their school communities and have the appropriate training.

Also attached is a letter directed to Title IX coordinators that provides more information about their responsibilities and a Title IX resource guide. The resource guide includes an overview of the scope of Title IX, a discussion about Title IX’s administrative requirements, as well as a discussion of other key Title IX issues and references to Federal resources. The discussion of each Title IX issue includes recommended best practices for the Title IX coordinator to help your institution meet its obligations under Title IX. The resource guide also explains your institution’s obligation to report information to the Department that could be relevant to Title IX. The enclosed letter to Title IX coordinators and the resource guide may be useful for you to understand your institution’s obligations under Title IX.

**Designation of a Title IX Coordinator**

Educational institutions that receive Federal financial assistance are prohibited under Title IX from subjecting any person to discrimination on the basis of sex. Title IX authorizes the Department of Education to issue regulations to effectuate Title IX.\(^3\) Under those regulations, a recipient must designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX and the Department’s implementing regulations.\(^4\) This position may not be left vacant; a recipient must have at least one person designated and actually serving as the Title IX coordinator at all times.

In deciding to which senior school official the Title IX coordinator should report and what other functions (if any) that person should perform, recipients are urged to consider the following:\(^5\)

**A. Independence**

The Title IX coordinator’s role should be independent to avoid any potential conflicts of interest and the Title IX coordinator should report directly to the recipient’s senior leadership, such as the district superintendent or the college or university president. Granting the Title IX coordinator this

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\(^4\) 34 C.F.R. § 106.8(a).

\(^5\) Many of the principles in this document also apply generally to employees required to be designated to coordinate compliance with other civil rights laws enforced by OCR against educational institutions, such as Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; 34 C.F.R. § 104.7(a), and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131–12134; 28 C.F.R. § 35.107(a).
independence also ensures that senior school officials are fully informed of any Title IX issues that arise and that the Title IX coordinator has the appropriate authority, both formal and informal, to effectively coordinate the recipient’s compliance with Title IX. Title IX does not categorically exclude particular employees from serving as Title IX coordinators. However, when designating a Title IX coordinator, a recipient should be careful to avoid designating an employee whose other job responsibilities may create a conflict of interest. For example, designating a disciplinary board member, general counsel, dean of students, superintendent, principal, or athletics director as the Title IX coordinator may pose a conflict of interest.

B. Full-Time Title IX Coordinator

Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest and in many cases ensure sufficient time is available to perform all the role’s responsibilities. If a recipient designates one employee to coordinate the recipient’s compliance with Title IX and other related laws, it is critical that the employee has the qualifications, training, authority, and time to address all complaints throughout the institution, including those raising Title IX issues.

C. Multiple Coordinators

Although not required by Title IX, it may be a good practice for some recipients, particularly larger school districts, colleges, and universities, to designate multiple Title IX coordinators. For example, some recipients have found that designating a Title IX coordinator for each building, school, or campus provides students and staff with more familiarity with the Title IX coordinator. This familiarity may result in more effective training of the school community on their rights and obligations under Title IX and improved reporting of incidents under Title IX. A recipient that designates multiple coordinators should designate one lead Title IX coordinator who has ultimate oversight responsibility. A recipient should encourage all of its Title IX coordinators to work together to ensure consistent enforcement of its policies and Title IX.

Responsibilities and Authority of a Title IX Coordinator

The Title IX coordinator’s primary responsibility is to coordinate the recipient’s compliance with Title IX, including the recipient’s grievance procedures for resolving Title IX complaints. Therefore, the Title IX coordinator must have the authority necessary to fulfill this coordination responsibility. The recipient must inform the Title IX coordinator of all reports and complaints raising Title IX issues, even if the complaint was initially filed with another individual or office or the investigation will be conducted by another individual or office. The Title IX coordinator is responsible for coordinating the recipient’s responses to all complaints involving possible sex discrimination. This responsibility includes monitoring outcomes, identifying and addressing any patterns, and assessing effects on the campus climate. Such coordination can help the recipient avoid Title IX violations, particularly violations involving sexual harassment and violence, by preventing incidents
from recurring or becoming systemic problems that affect the wider school community. Title IX does not specify who should determine the outcome of Title IX complaints or the actions the school will take in response to such complaints. The Title IX coordinator could play this role, provided there are no conflicts of interest, but does not have to.

The Title IX coordinator must have knowledge of the recipient’s policies and procedures on sex discrimination and should be involved in the drafting and revision of such policies and procedures to help ensure that they comply with the requirements of Title IX. The Title IX coordinator should also coordinate the collection and analysis of information from an annual climate survey if, as OCR recommends, the school conducts such a survey. In addition, a recipient should provide Title IX coordinators with access to information regarding enrollment in particular subject areas, participation in athletics, administration of school discipline, and incidents of sex-based harassment. Granting Title IX coordinators the appropriate authority will allow them to identify and proactively address issues related to possible sex discrimination as they arise.

Title IX makes it unlawful to retaliate against individuals—including Title IX coordinators—not just when they file a complaint alleging a violation of Title IX, but also when they participate in a Title IX investigation, hearing, or proceeding, or advocate for others’ Title IX rights. Title IX’s broad anti-retaliation provision protects Title IX coordinators from discrimination, intimidation, threats, and coercion for the purpose of interfering with the performance of their job responsibilities. A recipient, therefore, must not interfere with the Title IX coordinator’s participation in complaint investigations and monitoring of the recipient’s efforts to comply with and carry out its responsibilities under Title IX. Rather, a recipient should encourage its Title IX coordinator to help it comply with Title IX and promote gender equity in education.

Support for Title IX Coordinators

Title IX coordinators must have the full support of their institutions to be able to effectively coordinate the recipient’s compliance with Title IX. Such support includes making the role of the Title IX coordinator visible in the school community and ensuring that the Title IX coordinator is sufficiently knowledgeable about Title IX and the recipient’s policies and procedures. Because educational institutions vary in size and educational level, there are a variety of ways in which recipients can ensure that their Title IX coordinators have community-wide visibility and comprehensive knowledge and training.

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6 34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e)).
A. Visibility of Title IX Coordinators

Under the Department’s Title IX regulations, a recipient has specific obligations to make the role of its Title IX coordinator visible to the school community. A recipient must post a notice of nondiscrimination stating that it does not discriminate on the basis of sex and that questions regarding Title IX may be referred to the recipient’s Title IX coordinator or to OCR. The notice must be included in any bulletins, announcements, publications, catalogs, application forms, or recruitment materials distributed to the school community, including all applicants for admission and employment, students and parents or guardians of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient.7

In addition, the recipient must always notify students and employees of the name, office address, telephone number, and email address of the Title IX coordinator, including in its notice of nondiscrimination.8 Because it may be unduly burdensome for a recipient to republish printed materials that include the Title IX coordinator’s name and individual information each time a person leaves the Title IX coordinator position, a recipient may identify its coordinator only through a position title in printed materials and may provide an email address established for the position of the Title IX coordinator, such as TitleIXCoordinator@school.edu, so long as the email is immediately redirected to the employee serving as the Title IX coordinator. However, the recipient’s website must reflect complete and current information about the Title IX coordinator.

Recipients with more than one Title IX coordinator must notify students and employees of the lead Title IX coordinator’s contact information in its notice of nondiscrimination, and should make available the contact information for its other Title IX coordinators as well. In doing so, recipients should include any additional information that would help students and employees identify which Title IX coordinator to contact, such as each Title IX coordinator’s specific geographic region (e.g., a particular elementary school or part of a college campus) or Title IX area of specialization (e.g., gender equity in academic programs or athletics, harassment, or complaints from employees).

The Title IX coordinator’s contact information must be widely distributed and should be easily found on the recipient’s website and in various publications.9 By publicizing the functions and responsibilities of the Title IX coordinator, the recipient demonstrates to the school community its commitment to complying with Title IX and its support of the Title IX coordinator’s efforts.

7 34 C.F.R. § 106.9.
8 34 C.F.R. § 106.8(a).
9 34 C.F.R. § 106.9.
Supporting the Title IX coordinator in the establishment and maintenance of a strong and visible role in the community helps to ensure that members of the school community know and trust that they can reach out to the Title IX coordinator for assistance. OCR encourages recipients to create a page on the recipient’s website that includes the name and contact information of its Title IX coordinator(s), relevant Title IX policies and grievance procedures, and other resources related to Title IX compliance and gender equity. A link to this page should be prominently displayed on the recipient’s homepage.

To supplement the recipient’s notification obligations, the Department collects and publishes information from educational institutions about the employees they designate as Title IX coordinators. OCR’s Civil Rights Data Collection (CRDC) collects information from the nation’s public school districts and elementary and secondary schools, including whether they have civil rights coordinators for discrimination on the basis of sex, race, and disability, and the coordinators’ contact information. The Department’s Office of Postsecondary Education collects information about Title IX coordinators from postsecondary institutions in reports required under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act and the Higher Education Opportunity Act.

**B. Training of Title IX Coordinators**

Recipients must ensure that their Title IX coordinators are appropriately trained and possess comprehensive knowledge in all areas over which they have responsibility in order to effectively carry out those responsibilities, including the recipients’ policies and procedures on sex discrimination and all complaints raising Title IX issues throughout the institution. The resource guide accompanying this letter outlines some of the key issues covered by Title IX and provides references to Federal resources related to those issues. In addition, the coordinators should be knowledgeable about other applicable Federal and State laws, regulations, and policies that overlap with Title IX. In most cases, the recipient will need to provide an employee with training to act as its Title IX coordinator. The training should explain the different facets of Title IX, including regulatory provisions, applicable OCR guidance, and the recipient’s Title IX policies and grievance procedures. Because these laws, regulations, and OCR guidance may be updated, and

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12 See, e.g., the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, and its implementing regulations, 34 C.F.R. Part 99; and the Clery Act, 20 U.S.C. § 1092(f), and its implementing regulations, 34 C.F.R. Part 668. These documents only address an institution’s compliance with Title IX and do not address its obligations under other Federal laws, such as the Clery Act.
recipient policies and procedures may be revised, the best way to ensure Title IX coordinators have
the most current knowledge of Federal and State laws, regulations, and policies relating to Title IX
and gender equity is for a recipient to provide regular training to the Title IX coordinator, as well as
to all employees whose responsibilities may relate to the recipient’s obligations under Title IX.
OCR’s regional offices can provide technical assistance, and opportunities for training may be
available through Equity Assistance Centers, State educational agencies, private organizations,
advocacy groups, and community colleges. A Title IX coordinator may also find it helpful to seek
mentorship from a more experienced Title IX coordinator and to collaborate with other Title IX
coordinators in the region (or who serve similar institutions) to share information, knowledge, and
expertise.

In rare circumstances, an employee’s prior training and experience may sufficiently prepare that
employee to act as the recipient’s Title IX coordinator. For example, the combination of effective
prior training and experience investigating complaints of sex discrimination, together with training
on current Title IX regulations, OCR guidance, and the recipient institution’s policies and grievance
procedures may be sufficient preparation for that employee to effectively carry out the
responsibilities of the Title IX coordinator.

**Conclusion**

Title IX coordinators are invaluable resources to recipients and students at all educational levels.
OCR is committed to helping recipients and Title IX coordinators understand and comply with their
legal obligations under Title IX. If you need technical assistance, please contact the OCR regional
office serving your State or territory by visiting
[http://wdcrrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm](http://wdcrrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm) or call OCR’s Customer Service Team at
1-800-421-3481; TDD 1-800-877-8339.

Thank you for supporting your Title IX coordinators to help ensure that all students have equal
access to educational opportunities, regardless of sex. I look forward to continuing to work with
recipients nationwide to help ensure that each and every recipient has at least one knowledgeable
Title IX coordinator with the authority and support needed to prevent and address sex
discrimination in our nation’s schools.

Sincerely,

/s/
Catherine E. Lhamon
Assistant Secretary for Civil Rights
LEGAL UPDATE

October 7, 2015

To: Superintendents/Presidents/Chancellors, Member Community College Districts

From: Steven P. Reiner, Assistant General Counsel
Mia N. Robertshaw, Assistant General Counsel

Subject: SB 186 – Sexual Assault and Sexual Exploitation
Memo No. 13-2015(CC)

Existing law governing California Community Colleges provides for the removal, suspension, and expulsion of a community college student for “good cause,” as defined by Education Code §76033. In September of 2015, Governor Brown signed Senate Bill 186 which goes into effect on January 1, 2016. The Bill adds “sexual assault” and “sexual exploitation” to the list of offenses that constitute “good cause” for student discipline under Education Code §76033. The Bill also authorizes the governing board of a community college to remove, suspend, or expel a student for sexual assault or sexual exploitation, regardless of the victim’s affiliation with the community college, even if the offense is not related to college activity or attendance.

Education Code §76033, as amended, defines sexual assault and sexual exploitation as follows:

(g) Sexual assault, defined as actual or attempted sexual contact with another person without that person’s consent, regardless of the victim’s affiliation with the community college, including, but not limited to, any of the following:

1) Intentional touching of another person’s intimate parts without that person’s consent or other intentional sexual contact with another person without that person’s consent.

2) Coercing, forcing, or attempting to coerce or force a person to touch another person’s intimate parts without that person’s consent.

3) Rape, which includes penetration, no matter how slight, without the person’s consent, of either of the following:
(A) The vagina or anus of a person by any body part of another person or by an object.

(B) The mouth of a person by a sex organ of another person.

(h) **Sexual exploitation**, defined as a person taking sexual advantage of another person for the benefit of anyone other than that person without that person’s consent, regardless of the victim’s affiliation with the community college, including, but not limited to, any of the following:

1. Prostituting another person.

2. Recording images, including video or photograph, or audio of another person’s sexual activity, intimate body parts, or nakedness without that person’s consent.

3. Distributing images, including video or photograph, or audio of another person’s sexual activity, intimate body parts, or nakedness, if the individual distributing the images or audio knows or should have known that the person depicted in the images or audio did not consent to the disclosure and objected to the disclosure.

4. Viewing another person’s sexual activity, intimate body parts, or nakedness in a place where that person would have a reasonable expectation of privacy, without that person’s consent, and for the purpose of arousing or gratifying sexual desire.

Further, Education Code §76034 currently states that a community college is prohibited from removing, suspending, or expelling a student unless the conduct for which the student is disciplined is related to college activity or attendance.

Senate Bill 186 amends Education Code §76034 to provide an exception for conduct specifically related to sexual assault or sexual exploitation. The law authorizes the governing board of a community college to remove, suspend, or expel a student for sexual assault or sexual exploitation, regardless of the victim’s affiliation with the community college, even if the offense is not related to college activity or attendance.

The purpose of the bill is to align community colleges with that of University of California and California State University campuses by providing community colleges with the means to hold a student accountable for sexual assault or sexual exploitation that the student commits while enrolled, whether the offense occurs on or off campus.

We recommend that community college districts amend their board policies and administrative procedures before this new law takes effect on January 1, 2016.

Please contact our office with questions regarding this Legal Update or any other legal matter.

*The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.*

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REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES

TITLE IX

January 2001

U.S. Department of Education
Office for Civil Rights
PREAMBLE

Summary

The Assistant Secretary for Civil Rights, U.S. Department of Education (Department), issues a new document (revised guidance) that replaces the 1997 document entitled “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” issued by the Office for Civil Rights (OCR) on March 13, 1997 (1997 guidance). We revised the guidance in limited respects in light of subsequent Supreme Court cases relating to sexual harassment in schools.

The revised guidance reaffirms the compliance standards that OCR applies in investigations and administrative enforcement of Title IX of the Education Amendments of 1972 (Title IX) regarding sexual harassment. The revised guidance re-grounds these standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages and clarifying their regulatory basis as distinct from Title VII of the Civil Rights Act of 1964 (Title VII) agency law. In most other respects the revised guidance is identical to the 1997 guidance. Thus, we intend the revised guidance to serve the same purpose as the 1997 guidance. It continues to provide the principles that a school¹ should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance.

Purpose and Scope of the Revised Guidance

In March 1997, we published in the Federal Register “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.” 62 FR 12034. We issued the guidance pursuant to our authority under Title IX, and our Title IX implementing regulations, to eliminate discrimination based on sex in education programs and activities receiving Federal financial assistance. It was grounded in longstanding legal authority establishing that sexual harassment of students can be a form of sex discrimination covered by Title IX. The guidance was the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers. We also made the document available for public comment.

Since the issuance of the 1997 guidance, the Supreme Court (Court) has issued several important decisions in sexual harassment cases, including two decisions specifically addressing sexual harassment of students under Title IX: Gebser v. Lago Vista Independent School District (Gebser), 524 U.S. 274 (1998), and Davis v. Monroe County Board of Education (Davis), 526 U.S. 629 (1999). The Court held in Gebser that a school can be liable for monetary damages if a teacher sexually harasses a student, an

¹ As in the 1997 guidance, the revised guidance uses the term “school” to refer to all schools, colleges, universities, and other educational institutions that receive Federal funds from the Department.
official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment. In Davis, the Court announced that a school also may be liable for monetary damages if one student sexually harasses another student in the school’s program and the conditions of Gebser are met.

The Court was explicit in Gebser and Davis that the liability standards established in those cases are limited to private actions for monetary damages. See, e.g., Gebser, 524 U.S. 283, and Davis, 526 U.S. at 639. The Court acknowledged, by contrast, the power of Federal agencies, such as the Department, to “promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,” even in circumstances that would not give rise to a claim for money damages. See, Gebser, 524 U.S. at 292.

In an August 1998 letter to school superintendents and a January 1999 letter to college and university presidents, the Secretary of Education informed school officials that the Gebser decision did not change a school’s obligations to take reasonable steps under Title IX and the regulations to prevent and eliminate sexual harassment as a condition of its receipt of Federal funding. The Department also determined that, although in most important respects the substance of the 1997 guidance was reaffirmed in Gebser and Davis, certain areas of the 1997 guidance could be strengthened by further clarification and explanation of the Title IX regulatory basis for the guidance.

On November 2, 2000, we published in the Federal Register a notice requesting comments on the proposed revised guidance (62 FR 66092). A detailed explanation of the Gebser and Davis decisions, and an explanation of the proposed changes in the guidance, can be found in the preamble to the proposed revised guidance. In those decisions and a third opinion, Oncale v. Sundowner Offshore Services, Inc. (Oncale), 523 U.S. 75 (1998) (a sexual harassment case decided under Title VII), the Supreme Court confirmed several fundamental principles we articulated in the 1997 guidance. In these areas, no changes in the guidance were necessary. A notice regarding the availability of this final document appeared in the Federal Register on January 19, 2001.

**Enduring Principles from the 1997 Guidance**

It continues to be the case that a significant number of students, both male and female, have experienced sexual harassment, which can interfere with a student’s academic performance and emotional and physical well-being. Preventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn. As with the 1997 guidance, the revised guidance applies to students at every level of education. School personnel who understand their obligations under Title IX, e.g., understand that sexual harassment can be sex discrimination in violation of Title IX, are in the best position to prevent harassment and to lessen the harm to students if, despite their best efforts, harassment occurs.

One of the fundamental aims of both the 1997 guidance and the revised guidance has been to emphasize that, in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.
A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. If harassment has occurred, doing nothing is always the wrong response. However, depending on the circumstances, there may be more than one right way to respond. The important thing is for school employees or officials to pay attention to the school environment and not to hesitate to respond to sexual harassment in the same reasonable, commonsense manner as they would to other types of serious misconduct.

It is also important that schools not overreact to behavior that does not rise to the level of sexual harassment. As the Department stated in the 1997 guidance, a kiss on the cheek by a first grader does not constitute sexual harassment. School personnel should consider the age and maturity of students in responding to allegations of sexual harassment.

Finally, we reiterate the importance of having well-publicized and effective grievance procedures in place to handle complaints of sex discrimination, including sexual harassment complaints. Nondiscrimination policies and procedures are required by the Title IX regulations. In fact, the Supreme Court in Gebser specifically affirmed the Department’s authority to enforce this requirement administratively in order to carry out Title IX’s nondiscrimination mandate. 524 U.S. at 292. Strong policies and effective grievance procedures are essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it.

Analysis of Comments Received Concerning the Proposed Revised Guidance and the Resulting Changes

In response to the Assistant Secretary’s invitation to comment, OCR received approximately 11 comments representing approximately 15 organizations and individuals. Commenters provided specific suggestions regarding how the revised guidance could be clarified. Many of these suggested changes have been incorporated. Significant and recurring issues are grouped by subject and discussed in the following sections:

Distinction Between Administrative Enforcement and Private Litigation for Monetary Damages

In Gebser and Davis, the Supreme Court addressed for the first time the appropriate standards for determining when a school district is liable under Title IX for money damages in a private lawsuit brought by or on behalf of a student who has been sexually harassed. As explained in the preamble to the proposed revised guidance, the Court was explicit in Gebser and Davis that the liability standards established in these cases are limited to private actions for monetary damages. See, e.g., Gebser, 524 U.S. at 283, and Davis, 526 U.S. at 639. The Gebser Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX. In Gebser, the Court was concerned with the possibility of a money damages award against a school for harassment about which it had not known. In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools
aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.

Commenters uniformly agreed with OCR that the Court limited the liability standards established in Gebser and Davis to private actions for monetary damages. See, e.g., Gebser, 524 U.S. 283, and Davis, 526 U.S. at 639. Commenters also agreed that the administrative enforcement standards reflected in the 1997 guidance remain valid in OCR enforcement actions. Finally, commenters agreed that the proposed revisions provided important clarification to schools regarding the standards that OCR will use and that schools should use to determine compliance with Title IX as a condition of the receipt of Federal financial assistance in light of Gebser and Davis.

Harassment by Teachers and Other School Personnel

Most commenters agreed with OCR’s interpretation of its regulations regarding a school’s responsibility for harassment of students by teachers and other school employees. These commenters agreed that Title IX’s prohibitions against discrimination are not limited to official policies and practices governing school programs and activities. A school also engages in sex-based discrimination if its employees, in the context of carrying out their day-to-day job responsibilities for providing aid, benefits, or services to students (such as teaching, counseling, supervising, and advising students) deny or limit a student’s ability to participate in or benefit from the school’s program on the basis of sex. Under the Title IX regulations, the school is responsible for discrimination in these cases, whether or not it knew or should have known about it, because the discrimination occurred as part of the school’s undertaking to provide nondiscriminatory aid, benefits, and services to students. The revised guidance distinguishes these cases from employee harassment that, although taking place in a school’s program, occurs outside of the context of the employee’s provision of aid, benefits, and services to students. In these latter cases, the school’s responsibilities are not triggered until the school knew or should have known about the harassment.

One commenter expressed concern that it was inappropriate ever to find a school out of compliance for harassment about which it knew nothing. We reiterate that, although a school may in some cases be responsible for harassment caused by an employee that occurred before other responsible employees of the school knew or should have known about it, OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation. This is consistent with the Court’s underlying concern in Gebser and Davis.

Most commenters acknowledged that OCR has provided useful factors to determine whether harassing conduct took place “in the context of providing aid, benefits, or services.” However, some commenters stated that additional clarity and examples regarding the issue were needed. Commenters also suggested clarifying

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2 It is the position of the United States that the standards set out in OCR’s guidance for finding a violation and seeking voluntary corrective action also would apply to private actions for injunctive and other equitable relief. See brief of the United States as Amicus Curiae in Davis v. Monroe County.
references to quid pro quo and hostile environment harassment as these two concepts, though useful, do not determine the issue of whether the school itself is considered responsible for the harassment. We agree with these concerns and have made significant revisions to the sections “Harassment that Denies or Limits a Student’s Ability to Participate in or Benefit from the Education Program” and “Harassment by Teachers and Other Employees” to clarify the guidance in these respects.

**Gender-based Harassment, Including Harassment Predicated on Sex-stereotyping**

Several commenters requested that we expand the discussion and include examples of gender-based harassment predicated on sex stereotyping. Some commenters also argued that gender-based harassment should be considered sexual harassment, and that we have “artificially” restricted the guidance only to harassment in the form of conduct of a sexual nature, thus, implying that gender-based harassment is of less concern and should be evaluated differently.

We have not further expanded this section because, while we are also concerned with the important issue of gender-based harassment, we believe that harassment of a sexual nature raises unique and sufficiently important issues that distinguish it from other types of gender-based harassment and warrants its own guidance.

Nevertheless, we have clarified this section of the guidance in several ways. The guidance clarifies that gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim’s failure to conform to stereotyped notions of masculinity and femininity. Although this type of harassment is not covered by the guidance, if it is sufficiently serious, gender-based harassment is a school’s responsibility, and the same standards generally will apply. We have also added an endnote regarding Supreme Court precedent for the proposition that sex stereotyping can constitute sex discrimination.

Several commenters also suggested that we state that sexual and non-sexual (but gender-based) harassment should not be evaluated separately in determining whether a hostile environment exists. We note that both the proposed revised guidance and the final revised guidance indicate in several places that incidents of sexual harassment and non-sexual, gender-based harassment can be combined to determine whether a hostile environment has been created. We also note that sufficiently serious harassment of a sexual nature remains covered by Title IX, as explained in the guidance, even though the hostile environment may also include taunts based on sexual orientation.

**Definition of Harassment**

One commenter urged OCR to provide distinct definitions of sexual harassment to be used in administrative enforcement as distinguished from criteria used to maintain private actions for monetary damages. We disagree. First, as discussed in the preamble to the proposed revised guidance, the definition of hostile environment sexual harassment used by the Court in *Davis* is consistent with the definition found in the proposed guidance. Although the terms used by the Court in *Davis* are in some ways different from
the words used to define hostile environment harassment in the 1997 guidance (see, e.g., 62 FR 12041, “conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment”), the definitions are consistent. Both the Court’s and the Department’s definitions are contextual descriptions intended to capture the same concept — that under Title IX, the conduct must be sufficiently serious that it adversely affects a student’s ability to participate in or benefit from the school’s program. In determining whether harassment is actionable, both Davis and the Department tell schools to look at the “constellation of surrounding circumstances, expectations, and relationships” (526 U.S. at 651 (citing Oncale)), and the Davis Court cited approvingly to the underlying core factors described in the 1997 guidance for evaluating the context of the harassment. Second, schools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose.

Several commenters suggested that we develop a unique Title IX definition of harassment that does not rely on Title VII and that takes into account the special relationship of schools to students. Other commenters, by contrast, commended OCR for recognizing that Gebser and Davis did not alter the definition of hostile environment sexual harassment found in OCR’s 1997 guidance, which derives from Title VII caselaw, and asked us to strengthen the point. While Gebser and Davis made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the Davis Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX. We also believe that the factors described in both the 1997 guidance and the revised guidance to determine whether sexual harassment has occurred provide the necessary flexibility for taking into consideration the age and maturity of the students involved and the nature of the school environment.

Effective Response

One commenter suggested that the change in the guidance from “appropriate response” to “effective response” implies a change in OCR policy that requires omniscience of schools. We disagree. Effectiveness has always been the measure of an adequate response under Title IX. This does not mean a school must overreact out of fear of being judged inadequate. Effectiveness is measured based on a reasonableness standard. Schools do not have to know beforehand that their response will be effective. However, if their initial steps are ineffective in stopping the harassment, reasonableness may require a series of escalating steps.

The Relationship Between FERPA and Title IX

In the development of both the 1997 guidance and the current revisions to the guidance, commenters raised concerns about the interrelation of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and Title IX. The concerns relate to two issues: (1) the harassed student’s right to information about the outcome of a sexual harassment complaint against another student, including information about sanctions imposed on a student found guilty of harassment; and (2) the due process rights of
individuals, including teachers, accused of sexual harassment by a student, to obtain information about the identity of the complainant and the nature of the allegations.

FERPA generally forbids disclosure of information from a student’s “education record” without the consent of the student (or the student’s parent). Thus, FERPA may be relevant when the person found to have engaged in harassment is another student, because written information about the complaint, investigation, and outcome is part of the harassing student’s education record. Title IX is also relevant because it is an important part of taking effective responsive action for the school to inform the harassed student of the results of its investigation and whether it counseled, disciplined, or otherwise sanctioned the harasser. This information can assure the harassed student that the school has taken the student’s complaint seriously and has taken steps to eliminate the hostile environment and prevent the harassment from recurring.

The Department currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim. It has been the Department’s position that there is a potential conflict between FERPA and Title IX regarding disclosure of sanctions, and that FERPA generally prevents a school from disclosing to a student who complained of harassment information about the sanction or discipline imposed upon a student who was found to have engaged in that harassment.³

There is, however, an additional statutory provision that may apply to this situation. In 1994, as part of the Improving America’s Schools Act, Congress amended the General Education Provisions Act (GEPA) — of which FERPA is a part — to state that nothing in GEPA “shall be construed to affect the applicability of … title IX of the Education Amendments of 1972….”⁴ The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. The Department is in the process of developing a consistent approach and specific factors for implementing this provision. OCR and the Department’s Family Policy Compliance Office (FPCO) intend to issue joint guidance, discussing specific areas of potential conflict between FERPA and Title IX.

³ Exceptions include the case of a sanction that directly relates to the person who was harassed (e.g., an order that the harasser stay away from the harassed student), or sanctions related to offenses for which there is a statutory exception, such as crimes of violence or certain sex offenses in postsecondary institutions.

⁴ 20 U.S.C. 1221(d). A similar amendment was originally passed in 1974 but applied only to Title VI of the Civil Rights Act of 1964 (prohibiting race discrimination by recipients). The 1994 amendments also extended 20 U.S.C. 1221(d) to Section 504 of the Rehabilitation Act of 1973 (prohibiting disability-based discrimination by recipients) and to the Age Discrimination Act.
FERPA is also relevant when a student accuses a teacher or other employee of sexual harassment, because written information about the allegations is contained in the student’s education record. The potential conflict arises because, while FERPA protects the privacy of the student accuser, the accused individual may need the name of the accuser and information regarding the nature of the allegations in order to defend against the charges. The 1997 guidance made clear that neither FERPA nor Title IX override any federally protected due process rights of a school employee accused of sexual harassment.

Several commenters urged the Department to expand and strengthen this discussion. They argue that in many instances a school’s failure to provide information about the name of the student accuser and the nature of the allegations seriously undermines the fairness of the investigative and adjudicative process. They also urge the Department to include a discussion of the need for confidentiality as to the identity of the individual accused of harassment because of the significant harm that can be caused by false accusations. We have made several changes to the guidance, including an additional discussion regarding the confidentiality of a person accused of harassment and a new heading entitled “Due Process Rights of the Accused,” to address these concerns.
REVISED SEXUAL HARASSMENT GUIDANCE:
HARASSMENT OF STUDENTS
BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES

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I. Introduction

Title IX of the Education Amendments of 1972 (Title IX) and the Department of Education’s (Department) implementing regulations prohibit discrimination on the basis of sex in federally assisted education programs and activities. The Supreme Court, Congress, and Federal executive departments and agencies, including the Department, have recognized that sexual harassment of students can constitute discrimination prohibited by Title IX. This guidance focuses on a school’s fundamental compliance responsibilities under Title IX and the Title IX regulations to address sexual harassment of students as a condition of continued receipt of Federal funding. It describes the regulatory basis for a school’s compliance responsibilities under Title IX, outlines the circumstances under which sexual harassment may constitute discrimination prohibited by the statute and regulations, and provides information about actions that schools should take to prevent sexual harassment or to address it effectively if it does occur.

II. Sexual Harassment

Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual harassment of a student can deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program. Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance.

It is important to recognize that Title IX’s prohibition against sexual harassment does not extend to legitimate nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher’s consoling hug for a child with a skinned knee will not be considered sexual harassment. Similarly, one student’s demonstration of a sports maneuver or technique requiring contact with another student will not be considered sexual harassment. However, in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher’s repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment.

III. Applicability of Title IX

Title IX applies to all public and private educational institutions that receive Federal funds, i.e., recipients, including, but not limited to, elementary and secondary schools, school districts, proprietary schools, colleges, and universities. The guidance uses the terms “recipients” and “schools” interchangeably to refer to all of those institutions. The “education program or activity” of a school includes all of the school’s operations. This means that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school.
whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

A student may be sexually harassed by a school employee, another student, or a non-employee third party (e.g., a visiting speaker or visiting athletes). Title IX protects any “person” from sex discrimination. Accordingly, both male and female students are protected from sexual harassment engaged in by a school’s employees, other students, or third parties. Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex. An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.

Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance. For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim’s ability to participate in or benefit from the school’s program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student’s sexual orientation (e.g., “gay students are not welcome at this table in the cafeteria”), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.

Though beyond the scope of this guidance, gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student’s ability to participate in or benefit from the educational program. For example, the repeated sabotaging of female graduate students’ laboratory experiments by male students in the class could be the basis of a violation of Title IX. A school must respond to such harassment in accordance with the standards and procedures described in this guidance. In assessing all related circumstances to determine whether a hostile environment exists, incidents of gender-based harassment combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual harassment alone would be sufficient to do so.

IV. Title IX Regulatory Compliance Responsibilities

As a condition of receiving funds from the Department, a school is required to comply with Title IX and the Department’s Title IX regulations, which spell out prohibitions against sex discrimination. The law is clear that sexual harassment may constitute sex discrimination under Title IX.

Recipients specifically agree, as a condition for receiving Federal financial assistance from the Department, to comply with Title IX and the Department’s Title IX regulations. The regulatory provision requiring this agreement, known as an assurance of
compliance, specifies that recipients must agree that education programs or activities operated by the recipient will be operated in compliance with the Title IX regulations, including taking any action necessary to remedy its discrimination or the effects of its discrimination in its programs.21

The regulations set out the basic Title IX responsibilities a recipient undertakes when it accepts Federal financial assistance, including the following specific obligations.22 A recipient agrees that, in providing any aid, benefit, or service to students, it will not, on the basis of sex—

- Treat one student differently from another in determining whether the student satisfies any requirement or condition for the provision of any aid, benefit, or service;23
- Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;24
- Deny any student any such aid, benefit, or service;25
- Subject students to separate or different rules of behavior, sanctions, or other treatment;26
- Aid or perpetuate discrimination against a student by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students;27 and
- Otherwise limit any student in the enjoyment of any right, privilege, advantage, or opportunity.28

For the purposes of brevity and clarity, this guidance generally summarizes this comprehensive list by referring to a school’s obligation to ensure that a student is not denied or limited in the ability to participate in or benefit from the school’s program on the basis of sex.

The regulations also specify that, if a recipient discriminates on the basis of sex, the school must take remedial action to overcome the effects of the discrimination.29

In addition, the regulations establish procedural requirements that are important for the prevention or correction of sex discrimination, including sexual harassment. These requirements include issuance of a policy against sex discrimination30 and adoption and publication of grievance procedures providing for prompt and equitable resolution of complaints of sex discrimination.31 The regulations also require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance.32

To comply with these regulatory requirements, schools need to recognize and respond to sexual harassment of students by teachers and other employees, by other students, and by third parties. This guidance explains how the requirements of the Title IX regulations apply to situations involving sexual harassment of a student and outlines measures that schools should take to ensure compliance.
V. Determining a School’s Responsibilities

In assessing sexually harassing conduct, it is important for schools to recognize that two distinct issues are considered. The first issue is whether, considering the types of harassment discussed in the following section, the conduct denies or limits a student’s ability to participate in or benefit from the program based on sex. If it does, the second issue is the nature of the school’s responsibility to address that conduct. As discussed in a following section, this issue depends in part on the identity of the harasser and the context in which the harassment occurred.

A. Harassment that Denies or Limits a Student’s Ability to Participate in or Benefit from the Education Program

This guidance moves away from specific labels for types of sexual harassment. In each case, the issue is whether the harassment rises to a level that it denies or limits a student’s ability to participate in or benefit from the school’s program based on sex. However, an understanding of the different types of sexual harassment can help schools determine whether or not harassment has occurred that triggers a school’s responsibilities under, or violates, Title IX or its regulations.

The type of harassment traditionally referred to as quid pro quo harassment occurs if a teacher or other employee conditions an educational decision or benefit on the student’s submission to unwelcome sexual conduct. Whether the student resists and suffers the threatened harm or submits and avoids the threatened harm, the student has been treated differently, or the student’s ability to participate in or benefit from the school’s program has been denied or limited, on the basis of sex in violation of the Title IX regulations.

By contrast, sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct. Harassment of this type is generally referred to as hostile environment harassment. This type of harassing conduct requires a further assessment of whether or not the conduct is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex.

Teachers and other employees can engage in either type of harassment. Students and third parties are not generally given responsibility over other students and, thus, generally can only engage in hostile environment harassment.

1. Factors Used to Evaluate Hostile Environment Sexual Harassment

As outlined in the following paragraphs, OCR considers a variety of related factors to determine if a hostile environment has been created, i.e., if sexually harassing conduct by an employee, another student, or a third party is sufficiently serious that it denies or limits a student’s ability to participate in or benefit from the school’s program based on sex. OCR considers the conduct from both a subjective and objective perspective. In evaluating the severity and pervasiveness of the conduct, OCR considers all relevant circumstances, i.e., “the constellation of surrounding circumstances, expectations, and relationships.” Schools should also use these factors to evaluate conduct in order to draw commonsense distinctions between conduct that constitutes
sexual harassment and conduct that does not rise to that level. Relevant factors include the following:

- **The degree to which the conduct affected one or more students’ education.** OCR assesses the effect of the harassment on the student to determine whether it has denied or limited the student’s ability to participate in or benefit from the school’s program. For example, a student’s grades may go down or the student may be forced to withdraw from school because of the harassing behavior. A student may also suffer physical injuries or mental or emotional distress. In another situation, a student may have been able to keep up his or her grades and continue to attend school even though it was very difficult for him or her to do so because of the teacher’s repeated sexual advances. Similarly, a student may be able to remain on a sports team, despite experiencing great difficulty performing at practices and games from the humiliation and anger caused by repeated sexual advances and intimidation by several team members that create a hostile environment. Harassing conduct in these examples would alter a reasonable student’s educational environment and adversely affect the student’s ability to participate in or benefit from the school’s program on the basis of sex.

A hostile environment can occur even if the harassment is not targeted specifically at the individual complainant. For example, if a student, group of students, or a teacher regularly directs sexual comments toward a particular student, a hostile environment may be created not only for the targeted student, but also for others who witness the conduct.

- **The type, frequency, and duration of the conduct.** In most cases, a hostile environment will exist if there is a pattern or practice of harassment, or if the harassment is sustained and nontrivial. For instance, if a young woman is taunted by one or more young men about her breasts or genital area or both, OCR may find that a hostile environment has been created, particularly if the conduct has gone on for some time, or takes place throughout the school, or if the taunts are made by a number of students. The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e.g., attempts to grab a female student’s breasts or attempts to grab any student’s genital area or buttocks, it need not be as persistent to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment. On the other hand, conduct that is not severe will not create a hostile environment, e.g., a comment by one student to another student that she has a nice figure. Indeed, depending on the circumstances, this may not even be conduct of a sexual nature. Similarly, because students date one another, a request for a date or a gift of flowers, even if unwelcome, would not create a hostile environment. However, there may be circumstances in which repeated, unwelcome requests for dates or similar conduct could create a hostile environment. For example, a person, who has been refused previously, may request dates in an intimidating or threatening manner.

- **The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.** A factor to be considered, especially in cases involving allegations of sexual harassment of a student by a school employee, is the identity of
and relationship between the alleged harasser and the subject or subjects of the harassment. For example, due to the power a professor or teacher has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student.\(^{47}\)

- **The number of individuals involved.** Sexual harassment may be committed by an individual or a group. In some cases, verbal comments or other conduct from one person might not be sufficient to create a hostile environment, but could be if done by a group. Similarly, while harassment can be directed toward an individual or a group,\(^{48}\) the effect of the conduct toward a group may vary, depending on the type of conduct and the context. For certain types of conduct, there may be “safety in numbers.” For example, following an individual student and making sexual taunts to him or her may be very intimidating to that student, but, in certain circumstances, less so to a group of students. On the other hand, persistent unwelcome sexual conduct still may create a hostile environment if directed toward a group.

- **The age and sex of the alleged harasser and the subject or subjects of the harassment.** For example, in the case of younger students, sexually harassing conduct is more likely to be intimidating if coming from an older student.\(^{49}\)

- **The size of the school, location of the incidents, and context in which they occurred.** Depending on the circumstances of a particular case, fewer incidents may have a greater effect at a small college than at a large university campus. Harassing conduct occurring on a school bus may be more intimidating than similar conduct on a school playground because the restricted area makes it impossible for students to avoid their harassers.\(^{50}\) Harassing conduct in a personal or secluded area, such as a dormitory room or residence hall, can have a greater effect (e.g., be seen as more threatening) than would similar conduct in a more public area. On the other hand, harassing conduct in a public place may be more humiliating. Each incident must be judged individually.

- **Other incidents at the school.** A series of incidents at the school, not involving the same students, could — taken together — create a hostile environment, even if each by itself would not be sufficient.\(^{51}\)

- **Incidents of gender-based, but nonsexual harassment.** Acts of verbal, nonverbal or physical aggression, intimidation or hostility based on sex, but not involving sexual activity or language, can be combined with incidents of sexual harassment to determine if the incidents of sexual harassment are sufficiently serious to create a sexually hostile environment.\(^{52}\)

It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists. Consequently, in using the factors discussed previously to evaluate incidents of alleged harassment, it is always important to use common sense and reasonable judgement in determining whether a sexually hostile environment has been created.

**2. Welcomeness**

The section entitled “Sexual Harassment” explains that in order for conduct of a sexual nature to be sexual harassment, it must be unwelcome. Conduct is unwelcome if
the student did not request or invite it and “regarded the conduct as undesirable or offensive.”53 Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome.54 For example, a student may decide not to resist sexual advances of another student or may not file a complaint out of fear. In addition, a student may not object to a pattern of demeaning comments directed at him or her by a group of students out of a concern that objections might cause the harassers to make more comments. The fact that a student may have accepted the conduct does not mean that he or she welcomed it.55 Also, the fact that a student willingly participated in conduct on one occasion does not prevent him or her from indicating that the same conduct has become unwelcome on a subsequent occasion. On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that he or she objects, then the evidence generally will not support a conclusion that the conduct was unwelcome.56

If younger children are involved, it may be necessary to determine the degree to which they are able to recognize that certain sexual conduct is conduct to which they can or should reasonably object and the degree to which they can articulate an objection. Accordingly, OCR will consider the age of the student, the nature of the conduct involved, and other relevant factors in determining whether a student had the capacity to welcome sexual conduct.

Schools should be particularly concerned about the issue of welcomeness if the harasser is in a position of authority. For instance, because students may be encouraged to believe that a teacher has absolute authority over the operation of his or her classroom, a student may not object to a teacher’s sexually harassing comments during class; however, this does not necessarily mean that the conduct was welcome. Instead, the student may believe that any objections would be ineffective in stopping the harassment or may fear that by making objections he or she will be singled out for harassing comments or other retaliation.

In addition, OCR must consider particular issues of welcomeness if the alleged harassment relates to alleged “consensual” sexual relationships between a school’s adult employees and its students. If elementary students are involved, welcomeness will not be an issue: OCR will never view sexual conduct between an adult school employee and an elementary school student as consensual. In cases involving secondary students, there will be a strong presumption that sexual conduct between an adult school employee and a student is not consensual. In cases involving older secondary students, subject to the presumption,57 OCR will consider a number of factors in determining whether a school employee’s sexual advances or other sexual conduct could be considered welcome.58 In addition, OCR will consider these factors in all cases involving postsecondary students in making those determinations.59 The factors include the following:

- The nature of the conduct and the relationship of the school employee to the student, including the degree of influence (which could, at least in part, be affected by the student’s age), authority, or control the employee has over the student.

- Whether the student was legally or practically unable to consent to the sexual conduct in question. For example, a student’s age could affect his or her ability to do so. Similarly, certain types of disabilities could affect a student’s ability to do so.
If there is a dispute about whether harassment occurred or whether it was welcome — in a case in which it is appropriate to consider whether the conduct would be welcome — determinations should be made based on the totality of the circumstances. The following types of information may be helpful in resolving the dispute:

- Statements by any witnesses to the alleged incident.
- Evidence about the relative credibility of the allegedly harassed student and the alleged harasser. For example, the level of detail and consistency of each person’s account should be compared in an attempt to determine who is telling the truth. Another way to assess credibility is to see if corroborative evidence is lacking where it should logically exist. However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.
- Evidence that the alleged harasser has been found to have harassed others may support the credibility of the student claiming the harassment; conversely, the student’s claim will be weakened if he or she has been found to have made false allegations against other individuals.
- Evidence of the allegedly harassed student’s reaction or behavior after the alleged harassment. For example, were there witnesses who saw the student immediately after the alleged incident who say that the student appeared to be upset? However, it is important to note that some students may respond to harassment in ways that do not manifest themselves right away, but may surface several days or weeks after the harassment. For example, a student may initially show no signs of having been harassed, but several weeks after the harassment, there may be significant changes in the student’s behavior, including difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school.
- Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the complainant may not be believed rather than that the alleged harassment did not occur.
- Other contemporaneous evidence. For example, did the student claiming harassment write about the conduct and his or her reaction to it soon after it occurred (e.g., in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

B. Nature of the School’s Responsibility to Address Sexual Harassment

A school has a responsibility to respond promptly and effectively to sexual harassment. In the case of harassment by teachers or other employees, the nature of this responsibility depends in part on whether the harassment occurred in the context of the employee’s provision of aid, benefits, or services to students.
1. Harassment by Teachers and Other Employees

Sexual harassment of a student by a teacher or other school employee can be discrimination in violation of Title IX. Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence. A school also may be responsible forremediying the effects of the harassment on the student who was harassed. The extent of a recipient’s responsibilities if an employee sexually harasses a student is determined by whether or not the harassment occurred in the context of the employee’s provision of aid, benefits, or services to students.

A recipient is responsible under the Title IX regulations for the nondiscriminatory provision of aid, benefits, and services to students. Recipients generally provide aid, benefits, and services to students through the responsibilities they give to employees. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment – generally this means harassment that is carried out during an employee’s performance of his or her responsibilities in relation to students, including teaching, counseling, supervising, advising, and transporting students – and the harassment denies or limits a student’s ability to participate in or benefit from a school program on the basis of sex, the recipient is responsible for the discriminatory conduct. The recipient is, therefore, also responsible forremediying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. This is true whether or not the recipient has “notice” of the harassment. (As explained in the section on “Notice of Employee, Peer, or Third Party Harassment,” for purposes of this guidance, a school has notice of harassment if a responsible school employee actually knew or, in the exercise of reasonable care, should have known about the harassment.) Of course, under OCR’s administrative enforcement, recipients always receive actual notice and the opportunity to take appropriate corrective action before any finding of violation or possible loss of federal funds.

Whether or not sexual harassment of a student occurred within the context of an employee’s responsibilities for providing aid, benefits, or services is determined on a case-by-case basis, taking into account a variety of factors. If an employee conditions the provision of an aid, benefit, or service that the employee is responsible for providing on a student’s submission to sexual conduct, i.e., conduct traditionally referred to as quid pro quo harassment, the harassment is clearly taking place in the context of the employee’s responsibilities to provide aid, benefits, or services. In other situations, i.e., when an employee has created a hostile environment, OCR will consider the following factors in determining whether or not the harassment has taken place in this context, including:

• The type and degree of responsibility given to the employee, including both formal and informal authority, to provide aids, benefits, or services to students, to direct and control student conduct, or to discipline students generally;

• the degree of influence the employee has over the particular student involved, including in the circumstances in which the harassment took place;

• where and when the harassment occurred;

• the age and educational level of the student involved; and
as applicable, whether, in light of the student’s age and educational level and the way
the school is run, it would be reasonable for the student to believe that the employee
was in a position of responsibility over the student, even if the employee was not.

These factors are applicable to all recipient educational institutions, including
elementary and secondary schools, colleges, and universities. Elementary and secondary
schools, however, are typically run in a way that gives teachers, school officials, and
other school employees a substantial degree of supervision, control, and disciplinary
authority over the conduct of students. Therefore, in cases involving allegations of
harassment of elementary and secondary school-age students by a teacher or school
administrator during any school activity, consideration of these factors will generally
lead to a conclusion that the harassment occurred in the context of the employee’s
provision of aid, benefits, or services.

For example, a teacher sexually harasses an eighth-grade student in a school
hallway. Even if the student is not in any of the teacher’s classes and even if the teacher
is not designated as a hall monitor, given the age and educational level of the student and
the status and degree of influence of teachers in elementary and secondary schools, it
would be reasonable for the student to believe that the teacher had at least informal
disciplinary authority over students in the hallways. Thus, OCR would consider this an
example of conduct that is occurring in the context of the employee’s responsibilities to
provide aid, benefits, or services.

Other examples of sexual harassment of a student occurring in the context of an
employee’s responsibilities for providing aid, benefits, or services include, but are not
limited to -- a faculty member at a university’s medical school conditions an intern’s
evaluation on submission to his sexual advances and then gives her a poor evaluation for
rejecting the advances; a high school drama instructor does not give a student a part in a
play because she has not responded to sexual overtures from the instructor; a faculty
member withdraws approval of research funds for her assistant because he has rebuffed
her advances; a journalism professor who supervises a college newspaper continually and
inappropriately touches a student editor in a sexual manner, causing the student to resign
from the newspaper staff; and a teacher repeatedly asks a ninth grade student to stay after
class and attempts to engage her in discussions about sex and her personal experiences
while they are alone in the classroom, causing the student to stop coming to class. In
each of these cases, the school is responsible for the discriminatory conduct, including
taking prompt and effective action to end the harassment, prevent it from recurring, and
remedy the effects of the harassment on the victim.

Sometimes harassment of a student by an employee in the school’s program does
not take place in the context of the employee’s provision of aid, benefits, or services, but
nevertheless is sufficiently serious to create a hostile educational environment. An
example of this conduct might occur if a faculty member in the history department at a
university, over the course of several weeks, repeatedly touches and makes sexually
suggestive remarks to a graduate engineering student while waiting at a stop for the
university shuttle bus, riding on the bus, and upon exiting the bus. As a result, the
student stops using the campus shuttle and walks the very long distances between her
classes. In this case, the school is not directly responsible for the harassing conduct
because it did not occur in the context of the employee’s responsibilities for the provision
of aid, benefits, or services to students. However, the conduct is sufficiently serious to
deny or limit the student in her ability to participate in or benefit from the recipient’s
program. Thus, the school has a duty, upon notice of the harassment,\textsuperscript{65} to take prompt
and effective action to stop the harassment and prevent its recurrence.

If the school takes these steps, it has avoided violating Title IX. If the school fails
to take the necessary steps, however, its failure to act has allowed the student to continue
to be subjected to a hostile environment that denies or limits the student’s ability to
participate in or benefit from the school’s program. The school, therefore, has engaged in
its own discrimination. It then becomes responsible, not just for stopping the conduct and
preventing it from happening again, but for remedying the effects of the harassment on
the student that could reasonably have been prevented if the school had responded
promptly and effectively. (For related issues, see the sections on “OCR Case Resolution”
and “Recipient’s Response.”)

2. Harassment by Other Students or Third Parties

If a student sexually harasses another student and the harassing conduct is
sufficiently serious to deny or limit the student’s ability to participate in or benefit from
the program, and if the school knows or reasonably should know\textsuperscript{66} about the harassment,
the school is responsible for taking immediate effective action to eliminate the hostile
environment and prevent its recurrence.\textsuperscript{67} As long as the school, upon notice of the
harassment, responds by taking prompt and effective action to end the harassment and
prevent its recurrence, the school has carried out its responsibility under the Title IX
regulations. On the other hand, if, upon notice, the school fails to take prompt, effective
action, the school’s own inaction has permitted the student to be subjected to a hostile
environment that denies or limits the student’s ability to participate in or benefit from the
school’s program on the basis of sex.\textsuperscript{68} In this case, the school is responsible for taking
effective corrective actions to stop the harassment, prevent its recurrence, and remedy the
effects on the victim that could reasonably have been prevented had it responded
promptly and effectively.

Similarly, sexually harassing conduct by third parties, who are not themselves
employees or students at the school (e.g., a visiting speaker or members of a visiting
athletic team), may also be of a sufficiently serious nature to deny or limit a student’s
ability to participate in or benefit from the education program. As previously outlined in
connection with peer harassment, if the school knows or should know\textsuperscript{69} of the
harassment, the school is responsible for taking prompt and effective action to eliminate
the hostile environment and prevent its recurrence.

The type of appropriate steps that the school should take will differ depending on
the level of control that the school has over the third party harasser.\textsuperscript{70} For example, if
athletes from a visiting team harass the home school’s students, the home school may not
be able to discipline the athletes. However, it could encourage the other school to take
appropriate action to prevent further incidents; if necessary, the home school may choose
not to invite the other school back. (This issue is discussed more fully in the section on
“Recipient’s Response.”)

If, upon notice, the school fails to take prompt and effective corrective action, its
own failure has permitted the student to be subjected to a hostile environment that limits
the student’s ability to participate in or benefit from the education program. In this
case, the school is responsible for taking corrective actions to stop the harassment,
prevent its recurrence, and remedy the effects on the victim that could reasonably have
been prevented had the school responded promptly and effectively.

C. Notice of Employee, Peer, or Third Party Harassment

As described in the section on “Harassment by Teachers and Other Employees,”
schools may be responsible for certain types of employee harassment that occurred before
the school otherwise had notice of the harassment. On the other hand, as described in
that section and the section on “Harassment by Other Students or Third Parties,” in
situations involving certain other types of employee harassment, or harassment by peers
or third parties, a school will be in violation of the Title IX regulations if the school “has
notice” of a sexually hostile environment and fails to take immediate and effective
corrective action.

A school has notice if a responsible employee “knew, or in the exercise of
reasonable care should have known,” about the harassment. A responsible employee
would include any employee who has the authority to take action to redress the
harassment, who has the duty to report to appropriate school officials sexual harassment
or any other misconduct by students or employees, or an individual who a student could
reasonably believe has this authority or responsibility. Accordingly, schools need to
ensure that employees are trained so that those with authority to address harassment
know how to respond appropriately, and other responsible employees know that they are
obligated to report harassment to appropriate school officials. Training for employees
should include practical information about how to identify harassment and, as applicable,
the person to whom it should be reported.

A school can receive notice of harassment in many different ways. A student may
have filed a grievance with the Title IX coordinator or complained to a teacher or other
responsible employee about fellow students harassing him or her. A student, parent, or
other individual may have contacted other appropriate personnel, such as a principal,
campus security, bus driver, teacher, affirmative action officer, or staff in the office of
student affairs. A teacher or other responsible employee of the school may have
witnessed the harassment. The school may receive notice about harassment in an indirect
manner, from sources such as a member of the school staff, a member of the educational
or local community, or the media. The school also may have learned about the
harassment from flyers about the incident distributed at the school or posted around the
school. For the purposes of compliance with the Title IX regulations, a school has a duty
to respond to harassment about which it reasonably should have known, i.e., if it would
have learned of the harassment if it had exercised reasonable care or made a “reasonably
diligent inquiry.”

For example, in some situations if the school knows of incidents of harassment,
the exercise of reasonable care should trigger an investigation that would lead to a
discovery of additional incidents. In other cases, the pervasiveness of the harassment
may be enough to conclude that the school should have known of the hostile environment
— if the harassment is widespread, openly practiced, or well-known to students and staff.
If a school otherwise knows or reasonably should know of a hostile environment and fails to take prompt and effective corrective action, a school has violated Title IX even if the student has failed to use the school’s existing grievance procedures or otherwise inform the school of the harassment.

D. The Role of Grievance Procedures

Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination. These issues are discussed in the section on “Prompt and Equitable Grievance Procedures.” These procedures provide a school with a mechanism for discovering sexual harassment as early as possible and for effectively correcting problems, as required by the Title IX regulations. By having a strong policy against sex discrimination and accessible, effective, and fairly applied grievance procedures, a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.

Without a disseminated policy and procedure, a student does not know either of the school’s policy against and obligation to address this form of discrimination, or how to report harassment so that it can be remedied. If the alleged harassment is sufficiently serious to create a hostile environment and it is the school’s failure to comply with the procedural requirements of the Title IX regulations that hampers early notification and intervention and permits sexual harassment to deny or limit a student’s ability to participate in or benefit from the school’s program on the basis of sex, the school will be responsible under the Title IX regulations, once informed of the harassment, to take corrective action, including stopping the harassment, preventing its recurrence, and remedying the effects of the harassment on the victim that could reasonably have been prevented if the school’s failure to comply with the procedural requirements had not hampered early notification.

VI. OCR Case Resolution

If OCR is asked to investigate or otherwise resolve incidents of sexual harassment of students, including incidents caused by employees, other students, or third parties, OCR will consider whether — (1) the school has a disseminated policy prohibiting sex discrimination under Title IX and effective grievance procedures, (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment, and (3) the school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. (Issues related to appropriate investigative and corrective actions are discussed in detail in the section on “Recipient’s Response.”)

If the school has taken, or agrees to take, each of these steps, OCR will consider the case against the school resolved and will take no further action, other than monitoring compliance with an agreement, if any, between the school and OCR. This is true in cases
in which the school was in violation of the Title IX regulations (e.g., a teacher sexually harassed a student in the context of providing aid, benefits, or services to students), as well as those in which there has been no violation of the regulations (e.g., in a peer sexual harassment situation in which the school took immediate, reasonable steps to end the harassment and prevent its recurrence). This is because, even if OCR identifies a violation, Title IX requires OCR to attempt to secure voluntary compliance. Thus, because a school will have the opportunity to take reasonable corrective action before OCR issues a formal finding of violation, a school does not risk losing its Federal funding solely because discrimination occurred.

VII. Recipient’s Response

Once a school has notice of possible sexual harassment of students — whether carried out by employees, other students, or third parties — it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. These steps are the school’s responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action. As described in the next section, in appropriate circumstances the school will also be responsible for taking steps to remedy the effects of the harassment on the individual student or students who were harassed. What constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances.

A. Response to Student or Parent Reports of Harassment; Response to Direct Observation of Harassment by a Responsible Employee

If a student or the parent of an elementary or secondary student provides information or complains about sexual harassment of the student, the school should initially discuss what actions the student or parent is seeking in response to the harassment. The school should explain the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works. If a responsible school employee has directly observed sexual harassment of a student, the school should contact the student who was harassed (or the parent, depending upon the age of the student), explain that the school is responsible for taking steps to correct the harassment, and provide the same information described in the previous sentence.

Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student’s behalf (including in cases involving direct observation by a responsible employee), the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial. (Requests by the student who

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was harassed for confidentiality or for no action to be taken, responding to notice of harassment from other sources, and the components of a prompt and equitable grievance procedure are discussed in subsequent sections of this guidance.)

It may be appropriate for a school to take interim measures during the investigation of a complaint. For instance, if a student alleges that he or she has been sexually assaulted by another student, the school may decide to place the students immediately in separate classes or in different housing arrangements on a campus, pending the results of the school’s investigation. Similarly, if the alleged harasser is a teacher, allowing the student to transfer to a different class may be appropriate. In cases involving potential criminal conduct, school personnel should determine whether appropriate law enforcement authorities should be notified. In all cases, schools should make every effort to prevent disclosure of the names of all parties involved -- the complainant, the witnesses, and the accused -- except to the extent necessary to carry out an investigation.

If a school determines that sexual harassment has occurred, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. Appropriate steps should be taken to end the harassment. For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment. In some cases, it may be appropriate to further separate the harassed student and the harasser, e.g., by changing housing arrangements or directing the harasser to have no further contact with the harassed student. Responsive measures of this type should be designed to minimize, as much as possible, the burden on the student who was harassed. If the alleged harasser is not a student or employee of the recipient, OCR will consider the level of control the school has over the harasser in determining what response would be appropriate.

Steps should also be taken to eliminate any hostile environment that has been created. For example, if a female student has been subjected to harassment by a group of other students in a class, the school may need to deliver special training or other interventions for that class to repair the educational environment. If the school offers the student the option of withdrawing from a class in which a hostile environment occurred, the school should assist the student in making program or schedule changes and ensure that none of the changes adversely affect the student’s academic record. Other measures may include, if appropriate, directing a harasser to apologize to the harassed student. If a hostile environment has affected an entire school or campus, an effective response may need to include dissemination of information, the issuance of new policy statements, or other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports that conduct.

In some situations, a school may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student. For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances, the school may be required to make arrangements for an independent reassessment of the student’s work, if feasible, and change the grade accordingly; make arrangements for the student to take the course again
with a different instructor; provide tutoring; make tuition adjustments; offer reimbursement for professional counseling; or take other measures that are appropriate to the circumstances. As another example, if a school delays responding or responds inappropriately to information about harassment, such as a case in which the school ignores complaints by a student that he or she is being sexually harassed by a classmate, the school will be required to remedy the effects of the harassment that could have been prevented had the school responded promptly and effectively.

Finally, a school should take steps to prevent any further harassment and to prevent any retaliation against the student who made the complaint (or was the subject of the harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses. At a minimum, this includes making sure that the harassed students and their parents know how to report any subsequent problems and making follow-up inquiries to see if there have been any new incidents or any retaliation. To prevent recurrences, counseling for the harasser may be appropriate to ensure that he or she understands what constitutes harassment and the effects it can have. In addition, depending on how widespread the harassment was and whether there have been any prior incidents, the school may need to provide training for the larger school community to ensure that students, parents, and teachers can recognize harassment if it recurs and know how to respond.

B. Confidentiality

The scope of a reasonable response also may depend upon whether a student, or parent of a minor student, reporting harassment asks that the student’s name not be disclosed to the harasser or that nothing be done about the alleged harassment. In all cases, a school should discuss confidentiality standards and concerns with the complainant initially. The school should inform the student that a confidentiality request may limit the school’s ability to respond. The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint consistent with the student’s request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students.

OCR enforces Title IX consistent with the federally protected due process rights of public school students and employees. Thus, for example, if a student, who was the only student harassed, insists that his or her name not be revealed, and the alleged harasser could not respond to the charges of sexual harassment without that information, in evaluating the school’s response, OCR would not expect disciplinary action against an alleged harasser.

At the same time, a school should evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. The factors that a school may consider in this regard include the seriousness of the alleged harassment, the age of the student harassed, whether there have been other complaints or reports of harassment against the alleged harasser, and the rights of the
accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.  

Similarly, a school should be aware of the confidentiality concerns of an accused employee or student. Publicized accusations of sexual harassment, if ultimately found to be false, may nevertheless irreparably damage the reputation of the accused. The accused individual’s need for confidentiality must, of course, also be evaluated based on the factors discussed in the preceding paragraph in the context of the school’s responsibility to ensure a safe environment for students.

Although a student’s request to have his or her name withheld may limit the school’s ability to respond fully to an individual complaint of harassment, other means may be available to address the harassment. There are steps a recipient can take to limit the effects of the alleged harassment and prevent its recurrence without initiating formal action against the alleged harasser or revealing the identity of the complainant. Examples include conducting sexual harassment training for the school site or academic department where the problem occurred, taking a student survey concerning any problems with harassment, or implementing other systemic measures at the site or department where the alleged harassment has occurred.

In addition, by investigating the complaint to the extent possible — including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX — the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual. In some situations there may be prior reports by former students who now might be willing to come forward and be identified, thus providing a basis for further corrective action. In instances affecting a number of students (for example, a report from a student that an instructor has repeatedly made sexually explicit remarks about his or her personal life in front of an entire class), an individual can be put on notice of allegations of harassing behavior and counseled appropriately without revealing, even indirectly, the identity of the student who notified the school. Those steps can be very effective in preventing further harassment.

C. Response to Other Types of Notice

The previous two sections deal with situations in which a student or parent of a student who was harassed reports or complains of harassment or in which a responsible school employee directly observes sexual harassment of a student. If a school learns of harassment through other means, for example, if information about harassment is received from a third party (such as from a witness to an incident or an anonymous letter or telephone call), different factors will affect the school’s response. These factors include the source and nature of the information; the seriousness of the alleged incident; the specificity of the information; the objectivity and credibility of the source of the report; whether any individuals can be identified who were subjected to the alleged harassment; and whether those individuals want to pursue the matter. If, based on these factors, it is reasonable for the school to investigate and it can confirm the allegations, the considerations described in the previous sections concerning interim measures and appropriate responsive action will apply.
For example, if a parent visiting a school observes a student repeatedly harassing a group of female students and reports this to school officials, school personnel can speak with the female students to confirm whether that conduct has occurred and whether they view it as unwelcome. If the school determines that the conduct created a hostile environment, it can take reasonable, age-appropriate steps to address the situation. If on the other hand, the students in this example were to ask that their names not be disclosed or indicate that they do not want to pursue the matter, the considerations described in the previous section related to requests for confidentiality will shape the school’s response.

In a contrasting example, a student newspaper at a large university may print an anonymous letter claiming that a professor is sexually harassing students in class on a daily basis, but the letter provides no clue as to the identity of the professor or the department in which the conduct is allegedly taking place. Due to the anonymous source and lack of specificity of the information, a school would not reasonably be able to investigate and confirm these allegations. However, in response to the anonymous letter, the school could submit a letter or article to the newspaper reiterating its policy against sexual harassment, encouraging persons who believe that they have been sexually harassed to come forward, and explaining how its grievance procedures work.

VIII. Prevention

A policy specifically prohibiting sexual harassment and separate grievance procedures for violations of that policy can help ensure that all students and employees understand the nature of sexual harassment and that the school will not tolerate it. Indeed, they might even bring conduct of a sexual nature to the school’s attention so that the school can address it before it becomes sufficiently serious as to create a hostile environment. Further, training for administrators, teachers, and staff and age-appropriate classroom information for students can help to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond.

IX. Prompt and Equitable Grievance Procedures

Schools are required by the Title IX regulations to adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex. Accordingly, regardless of whether harassment occurred, a school violates this requirement of the Title IX regulations if it does not have those procedures and policy in place.

A school’s sex discrimination grievance procedures must apply to complaints of sex discrimination in the school’s education programs and activities filed by students against school employees, other students, or third parties. Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, its nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment. Thus, if, because of the lack of a policy or procedure specifically addressing sexual harassment, students are unaware of what kind of conduct constitutes sexual harassment or that such conduct is
prohibited sex discrimination, a school’s general policy and procedures relating to sex discrimination complaints will not be considered effective.\textsuperscript{101}

OCR has identified a number of elements in evaluating whether a school’s grievance procedures are prompt and equitable, including whether the procedures provide for —

- Notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;
- Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- Designated and reasonably prompt timeframes for the major stages of the complaint process;
- Notice to the parties of the outcome of the complaint;\textsuperscript{102} and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.\textsuperscript{103}

Many schools also provide an opportunity to appeal the findings or remedy, or both. In addition, because retaliation is prohibited by Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry.

Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience. In addition, whether complaint resolutions are timely will vary depending on the complexity of the investigation and the severity and extent of the harassment. During the investigation it is a good practice for schools to inform students who have alleged harassment about the status of the investigation on a periodic basis.

A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school’s students, easily understood, and widely disseminated. Distributing the procedures to administrators, or including them in the school’s administrative or policy manual, may not by itself be an effective way of providing notice, as these publications are usually not widely circulated to and understood by all members of the school community. Many schools ensure adequate notice to students by having copies of the procedures available at various locations throughout the school or campus; publishing the procedures as a separate document; including a summary of the procedures in major publications issued by the school, such as handbooks and catalogs for students, parents of elementary and secondary students, faculty, and staff; and identifying individuals who can explain how the procedures work.
A school must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities. The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated. Because it is possible that an employee designated to handle Title IX complaints may himself or herself engage in harassment, a school may want to designate more than one employee to be responsible for handling complaints in order to ensure that students have an effective means of reporting harassment. While a school may choose to have a number of employees responsible for Title IX matters, it is also advisable to give one official responsibility for overall coordination and oversight of all sexual harassment complaints to ensure consistent practices and standards in handling complaints. Coordination of recordkeeping (for instance, in a confidential log maintained by the Title IX coordinator) will also ensure that the school can and will resolve recurring problems and identify students or employees who have multiple complaints filed against them. Finally, the school must make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates.

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so. OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis. Title IX also permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirement of affording a complainant a “prompt and equitable” resolution of the complaint.

In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively. Similarly, schools are cautioned about using the results of insurance company investigations of sexual harassment allegations. The purpose of an insurance investigation is to assess liability under the insurance policy, and the applicable standards may well be different from those under Title IX. In addition, a school is not relieved of its responsibility to respond to a sexual harassment complaint filed under its grievance procedure by the fact that a complaint has been filed with OCR.
X. Due Process Rights of the Accused

A public school’s employees have certain due process rights under the United States Constitution. The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding. Furthermore, the Family Educational Rights and Privacy Act (FERPA) does not override federally protected due process rights of persons accused of sexual harassment. Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions. Of course, schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant. In both public and private schools, additional or separate rights may be created for employees or students by State law, institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements. Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment.

XI. First Amendment

In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved. Free speech rights apply in the classroom (e.g., classroom lectures and discussions) and in all other education programs and activities of public schools (e.g., public meetings and speakers on campus; campus debates, school plays and other cultural events; and student newspapers, journals, and other publications). In addition, First Amendment rights apply to the speech of students and teachers.

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX. In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student’s ability to participate in or benefit from the education program.

Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights. For instance, while the First Amendment may prohibit a school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard. The age of the students involved and the location or forum may affect how the school can respond consistently with the First Amendment. As an example of the application of free speech rights to allegations of sexual harassment, consider the following:

Example 1: In a college level creative writing class, a professor’s required reading list includes excerpts from literary classics that contain descriptions of explicit
sexual conduct, including scenes that depict women in submissive and demeaning roles. The professor also assigns students to write their own materials, which are read in class. Some of the student essays contain sexually derogatory themes about women. Several female students complain to the Dean of Students that the materials and related classroom discussion have created a sexually hostile environment for women in the class. What must the school do in response?

Answer: Academic discourse in this example is protected by the First Amendment even if it is offensive to individuals. Thus, Title IX would not require the school to discipline the professor or to censor the reading list or related class discussion.

Example 2: A group of male students repeatedly targets a female student for harassment during the bus ride home from school, including making explicit sexual comments about her body, passing around drawings that depict her engaging in sexual conduct, and, on several occasions, attempting to follow her home off the bus. The female student and her parents complain to the principal that the male students’ conduct has created a hostile environment for girls on the bus and that they fear for their daughter’s safety. What must a school do in response?

Answer: Threatening and intimidating actions targeted at a particular student or group of students, even though they contain elements of speech, are not protected by the First Amendment. The school must take prompt and effective actions, including disciplinary action if necessary, to stop the harassment and prevent future harassment.
This guidance does not address sexual harassment of employees, although that conduct may be prohibited by Title IX. 20 U.S.C. 1681 et seq.; 34 CFR part 106, subpart E. If employees file Title IX sexual harassment complaints with OCR, the complaints will be processed pursuant to the Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance. 28 CFR 42.604. Employees are also protected from discrimination on the basis of sex, including sexual harassment, by Title VII of the Civil Rights Act of 1964. For information about Title VII and sexual harassment, see the Equal Employment Opportunity Commission’s (EEOC’s) Guidelines on Sexual Harassment, 29 CFR 1604.11, for information about filing a Title VII charge with the EEOC, see 29 CFR 1601.7–1607.13, or see the EEOC’s website at www.eeoc.gov.


As described in the section on “Applicability,” this guidance applies to all levels of education.

5 For practical information about steps that schools can take to prevent and remedy all types of harassment, including sexual harassment, see “Protecting Students from Harassment and Hate Crime, A Guide for Schools,” which we issued jointly with the National Association of Attorneys General. This Guide is available at our web site at: www.ed.gov/pubs/Harassment.

6 See, e.g., Davis, 526 U.S. at 653 (alleged conduct of a sexual nature that would support a sexual harassment claim included verbal harassment and “numerous acts of objectively offensive touching;” Franklin, 503 U.S. at 63 (conduct of a sexual nature found to support a sexual harassment claim under Title IX included kissing, sexual intercourse); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 60-61 (1986) (demands for sexual favors, sexual advances, fondling, indecent exposure, sexual intercourse, rape, sufficient to raise hostile environment claim under Title VII); Ellison v. Brady, 924 F.2d 872, 873-74, 880 (9th Cir. 1991) (allegations sufficient to state sexual harassment claim under Title VII included repeated requests for dates, letters making explicit references to sex and describing the harasser’s feelings for plaintiff); Lipsett v. University of Puerto Rico, 864 F.2d 881, 904-5 (1st Cir. 1988) (sexually derogatory comments, posting of sexually explicit drawing of plaintiff, sexual advances may support sexual harassment claim); Kadiki v. Virginia Commonwealth University, 892 F.Supp. 746, 751 (E.D. Va. 1995)
(professor’s spanking of university student may constitute sexual conduct under Title IX); Doe v. Petaluma, 830 F.Supp. 1560, 1564-65 (N.D. Cal. 1996) (sexually derogatory taunts and innuendo can be the basis of a harassment claim); Denver School Dist. #2, OCR Case No. 08-92-1007 (same to allegations of vulgar language and obscenities, pictures of nude women on office walls and desks, unwelcome touching, sexually offensive jokes, bribery to perform sexual acts, indecent exposure); Nashoba Regional High School, OCR Case No. 01-92-1377 (same as to year-long campaign of derogatory, sexually explicit graffiti and remarks directed at one student.

7 See also Shoreline School Dist., OCR Case No. 10-92-1002 (a teacher’s patting a student on the arm, shoulder, and back, and restraining the student when he was out of control, not conduct of a sexual nature); Dartmouth Public Schools, OCR Case No. 01-90-1058 (same as to contact between high school coach and students); San Francisco State University, OCR Case No. 09-94-2038 (same as to faculty advisor placing her arm around a graduate student’s shoulder in posing for a picture); Analy Union High School Dist., OCR Case No. 09-92-1249 (same as to drama instructor who put his arms around both male and female students who confided in him).

8 20 U.S.C. 1687 (codification of the amendment to Title IX regarding scope of jurisdiction, enacted by the Civil Rights Restoration Act of 1987). See 65 FR 68049 (November 13, 2000) (Department’s amendment of the Title IX regulations to incorporate the statutory definition of “program or activity”).

9 If a school contracts with persons or organizations to provide benefits, services, or opportunities to students as part of the school’s program, and those persons or employees of those organizations sexually harass students, OCR will consider the harassing individual in the same manner that it considers the school’s employees, as described in this guidance. (See section on “Harassment by Teachers and Other Employees.”) See Brown v. Hot, Sexy, and Safer Products, Inc., 68 F.3d 525, 529 (1st Cir. 1995) (Title IX sexual harassment claim brought for school’s role in permitting contract consultant hired by it to create allegedly hostile environment).

In addition, if a student engages in sexual harassment as an employee of the school, OCR will consider the harassment under the standards described for employees. (See section on “Harassment by Teachers and Other Employees.”) For example, OCR would consider it harassment by an employee if a student teaching assistant who is responsible for assigning grades in a course, i.e., for providing aid, benefits, or services to students under the recipient’s program, required a student in his or her class to submit to sexual advances in order to obtain a certain grade in the class.


11 Title IX and the regulations implementing it prohibit discrimination “on the basis of sex;” they do not restrict protection from sexual harassment to those circumstances in
which the harasser only harasses members of the opposite sex. See 34 CFR 106.31. In Oncale v. Sundowner Offshore Services, Inc., the Supreme Court held unanimously that sex discrimination consisting of same-sex sexual harassment can violate Title VII’s prohibition against discrimination because of sex. 523 U.S. 75, 82 (1998). The Supreme Court’s holding in Oncale is consistent with OCR policy, originally stated in its 1997 guidance, that Title IX prohibits sexual harassment regardless of whether the harasser and the person being harassed are members of the same sex. 62 FR 12039. See also Kinman v. Omaha Public School Dist., 94 F.3d 463, 468 (8th Cir. 1996), rev’d on other grounds, 171 F.3d 607 (1999) (female student’s allegation of sexual harassment by female teacher sufficient to raise a claim under Title IX); Doe v. Petaluma, 830 F.Supp. 1560, 1564-65, 1575 (N.D. Cal. 1996) (female junior high student alleging sexual harassment by other students, including both boys and girls, sufficient to raise a claim under Title IX); John Does 1, 884 F.Supp. at 465 (same as to male students’ allegations of sexual harassment and abuse by a male teacher.) It can also occur in certain situations if the harassment is directed at students of both sexes. Chiapuzo v. BLT Operating Corp., 826 F.Supp. 1334, 1337 (D.Wyo. 1993) (court found that if males and females were subject to harassment, but harassment was based on sex, it could violate Title VII); but see Holman v. Indiana, 211 F.3d 399, 405 (7th Cir. 2000) (if male and female both subjected to requests for sex, court found it could not violate Title VII).

In many circumstances, harassing conduct will be on the basis of sex because the student would not have been subjected to it at all had he or she been a member of the opposite sex; e.g., if a female student is repeatedly propositioned by a male student or employee (or, for that matter, if a male student is repeatedly propositioned by a male student or employee.) In other circumstances, harassing conduct will be on the basis of sex if the student would not have been affected by it in the same way or to the same extent had he or she been a member of the opposite sex; e.g., pornography and sexually explicit jokes in a mostly male shop class are likely to affect the few girls in the class more than it will most of the boys.

In yet other circumstances, the conduct will be on the basis of sex in that the student’s sex was a factor in or affected the nature of the harasser’s conduct or both. Thus, in Chiapuzo, a supervisor made demeaning remarks to both partners of a married couple working for him, e.g., as to sexual acts he wanted to engage in with the wife and how he would be a better lover than the husband. In both cases, according to the court, the remarks were based on sex in that they were made with an intent to demean each member of the couple because of his or her respective sex. 826 F.Supp. at 1337. See also Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463-64 (9th Cir. 1994), cert. denied, 115 S.Ct. 733 (1995); but see Holman, 211 F.3d at 405 (finding that if male and female both subjected to requests for sex, Title VII could not be violated).

12 Nashoba Regional High School, OCR Case No. 01-92-1397. In Conejo Valley School Dist., OCR Case No. 09-93-1305, female students allegedly taunted another female student about engaging in sexual activity; OCR found that the alleged comments were sexually explicit and, if true, would be sufficiently severe, persistent, and pervasive to create a hostile environment.
See Williamson v. A.G. Edwards & Sons, Inc., 876 F2d 69, 70 (8th Cir. 1989, cert. denied 493 U.S. 1089 (1990); DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327, 329-30 (9th Cir. 1979)(same); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)(same).

It should be noted that some State and local laws may prohibit discrimination on the basis of sexual orientation. Also, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other Federal legal authority. See Nabozny v. Podlesny, 92 F.3d 446, 460 (7th Cir. 1996) (holding that a gay student could maintain claims alleging discrimination based on both gender and sexual orientation under the Equal Protection Clause of the United States Constitution in a case in which a school district failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student’s gender and sexual orientation).

However, sufficiently serious sexual harassment is covered by Title IX even if the hostile environment also includes taunts based on sexual orientation.

See also, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (where an accounting firm denied partnership to a female candidate, the Supreme Court found Title VII prohibits an employer from evaluating employees by assuming or insisting that they match the stereotype associated with their sex).

See generally Gebser; Davis; See also Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65-66 (1986); Harris v. Forklift Systems Inc., 510 U.S. 14, 22 (1993); see also Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987) (concluding that harassment based on sex may be discrimination whether or not it is sexual in nature); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (physical, but nonsexual, assault could be sex-based harassment if shown to be unequal treatment that would not have taken place but for the employee’s sex); Cline v. General Electric Capital Auto Lease, Inc., 757 F.Supp. 923, 932-33 (N.D. Ill. 1991).

See, e.g., sections on “Harassment by Teachers and Other Employees,” “Harassment by Other Students or Third Parties,” “Notice of Employee, Peer, or Third Party Harassment,” “Factors Used to Evaluate a Hostile Environment,” “Recipient’s Response,” and “Prompt and Equitable Grievance Procedures.”

See Lipsett, 864 F.2d at 903-905 (general antagonism toward women, including stated goal of eliminating women from surgical program, statements that women shouldn’t be in the program, and assignment of menial tasks, combined with overt sexual harassment); Harris, 510 U.S. at 23; Andrews v. City of Philadelphia, 895 F.2d 1469, 1485-86 (3rd Cir. 1990) (court directed trial court to consider sexual conduct as well as theft of female employees’ files and work, destruction of property, and anonymous phone calls in determining if there had been sex discrimination); see also Hall v. Gus Construction Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (affirming that harassment due to the employee’s sex
may be actionable even if the harassment is not sexual in nature); Hicks, 833 F.2d at 1415; Eden Prairie Schools, Dist. #272, OCR Case No. 05-92-1174 (the boys made lewd comments about male anatomy and tormented the girls by pretending to stab them with rubber knives; while the stabbing was not sexual conduct, it was directed at them because of their sex, i.e., because they were girls).

20 Davis, 526 U.S. at 650 (“Having previously determined that ‘sexual harassment’ is ‘discrimination’ in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.”); Franklin, 503 U.S. at 75 (“Unquestionably, Title IX placed on the [school] the duty not to discriminate on the basis of sex, and ‘when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor “discriminate[s]” on the basis of sex.’ … We believe the same rule should apply when a teacher sexually harasses and abuses a student.” (citation omitted)).

OCR’s longstanding interpretation of its regulations is that sexual harassment may constitute a violation. 34 CFR 106.31; See Sexual Harassment Guidance, 62 FR 12034 (1997). When Congress enacted the Civil Rights Restoration Act of 1987 to amend Title IX to restore institution-wide coverage over federally assisted education programs and activities, the legislative history indicated not only that Congress was aware that OCR interpreted its Title IX regulations to prohibit sexual harassment, but also that one of the reasons for passing the Restoration Act was to enable OCR to investigate and resolve cases involving allegations of sexual harassment. S. REP. NO. 64, 100th Cong., 1st Sess. at 12 (1987). The examples of discrimination that Congress intended to be remedied by its statutory change included sexual harassment of students by professors, id. at 14, and these examples demonstrate congressional recognition that discrimination in violation of Title IX can be carried out by school employees who are providing aid, benefits, or services to students. Congress also intended that if discrimination occurred, recipients needed to implement effective remedies. S. REP. NO. 64 at 5.

21 34 CFR 106.4.

22 These are the basic regulatory requirements. 34 CFR 106.31(a)(b). Depending upon the facts, sexual harassment may also be prohibited by more specific regulatory prohibitions. For example, if a college financial aid director told a student that she would not get the student financial assistance for which she qualified unless she slept with him, that also would be covered by the regulatory provision prohibiting discrimination on the basis of sex in financial assistance, 34 CFR 106.37(a).

23 34 CFR 106.31(b)(1).

24 34 CFR 106.31(b)(2).

25 34 CFR 106.31(b)(3).

See Alexander v. Yale University, 459 F.Supp. 1, 4 (D.Conn. 1977), aff’d, 631 F.2d 178 (2nd Cir. 1980)(stating that a claim “that academic advancement was conditioned upon submission to sexual demands constitutes [a claim of] sex discrimination in education...”); Crandell v. New York College, Osteopathic Medicine, 87 F.Supp.2d 304, 318 (S.D.N.Y. 2000) (finding that allegations that a supervisory physician demanded that a student physician spend time with him and have lunch with him or receive a poor evaluation, in light of the totality of his alleged sexual comments and other inappropriate behavior, constituted a claim of quid pro quo harassment); Kadiki, 892 F.Supp. at 752 (reexamination in a course conditioned on college student’s agreeing to be spanked should she not attain a certain grade may constitute quid pro quo harassment).

34 CFR 106.31(b).

Davis, 526 U.S. at 651 (confirming, by citing approvingly both to Title VII cases (Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57,67 (1986) (finding that hostile environment claims are cognizable under Title VII), and Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998)) and OCR’s 1997 guidance, 62 FR at 12041-42, that determinations under Title IX as to what conduct constitutes hostile environment sexual harassment may continue to rely on Title VII caselaw).

37 34 CFR 106.31(b). See Davis, 526 U.S. at 650 (concluding that allegations of student-on-student sexual harassment that is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits” supports a claim for money damages in an implied right of action).

In Harris, the Supreme Court explained the requirement for considering the “subjective perspective” when determining the existence of a hostile environment. The Court stated– “... if the victim does not subjectively perceive the environment to be abusive, the
conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.” 510 U.S. at 21-22.

39 See Davis, 526 U.S. at 650 (conduct must be “objectively offensive” to trigger liability for money damages); Elgamil v. Syracuse University, 2000 U.S. Dist. LEXIS 12598 at 17 (N.D.N.Y. 2000) (citing Harris); Booher v. Board of Regents, 1998 U.S. Dist. LEXIS 11404 at 25 (E.D. Ky. 1998) (same). See Oncale, 523 U.S. at 81, in which the Court “emphasized … that the objective severity of harassment should be judged from the perspective of a reasonable person in the [victim’s] position, considering ‘all the circumstances,’” and citing Harris, 510 U.S. at 20, in which the Court indicated that a “reasonable person” standard should be used to determine whether sexual conduct constituted harassment. This standard has been applied under Title VII to take into account the sex of the subject of the harassment, see, e.g., Ellison, 924 F.2d at 878-79 (applying a “reasonable woman” standard to sexual harassment), and has been adapted to sexual harassment in education under Title IX, Patricia H. v. Berkeley Unified School Dist., 830 F.Supp. 1288, 1296 (N.D. Cal. 1993) (adopting a “reasonable victim” standard and referring to OCR’s use of it).

40 See Davis, 526 U.S. at 651, citing both Oncale, 523 U.S. at 82, and OCR’s 1997 guidance (62 FR 12041-12042).

41 See, e.g., Davis, 526 U.S. at 634 (as a result of the harassment, student’s grades dropped and she wrote a suicide note); Doe v. Petaluma, 830 F. Supp. at 1566 (student so upset about harassment by other students that she was forced to transfer several times, including finally to a private school); Modesto City Schools, OCR Case No. 09-93-1391 (evidence showed that one girl’s grades dropped while the harassment was occurring); Weaverville Elementary School, OCR Case No. 09-91-1116 (students left school due to the harassment). Compare with College of Alameda, OCR Case No. 09-90-2104 (student not in instructor’s class and no evidence of any effect on student’s educational benefits or service, so no hostile environment).


43 See Waltman v. Int’l Paper Co., 875 F.2d 468, 477 (5th Cir. 1989) (holding that although not specifically directed at the plaintiff, sexually explicit graffiti on the walls was “relevant to her claim”); Monteiro v. Tempe Union High School, 158 F.3d 1022, 1033-34 (9th Cir. 1998) (Title VI racial harassment case, citing Waltman; see also Hall, 842 F. 2d at 1015 (evidence of sexual harassment directed at others is relevant to show hostile environment under Title VII).

44 See, e.g., Elgamil 2000 U.S. Dist. LEXIS at 19 (“in order to be actionable, the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive”); Andrews, 895 F.2d at 1484 (“Harassment is pervasive when ‘incidents of harassment occur either in concert or with regularity’”); Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986).
34 CFR 106.31(b). See Vance v. Spencer County Public School District, 231 F.3d 253 (6th Cir. 2000); Doe v. School Admin. Dist. No. 19, 66 F.Supp.2d 57, 62 (D. Me. 1999). See also statement of the U.S. Equal Employment Opportunity Commission (EEOC): “The Commission will presume that the unwelcome, intentional touching of [an employee’s] intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim’s working environment.” EEOC Policy Guidance on Current Issues of Sexual Harassment, 17. Barrett v. Omaha National Bank, 584 F. Supp. 22, 30 (D. Neb. 1983), aff’d, 726 F. 2d 424 (8th Cir. 1984) (finding that hostile environment was created under Title VII by isolated events, i.e., occurring while traveling to and during a two-day conference, including the co-worker’s talking to plaintiff about sexual activities and touching her in an offensive manner while they were inside a vehicle from which she could not escape).

See also Ursuline College, OCR Case No. 05-91-2068 (a single incident of comments on a male student’s muscles arguably not sexual; however, assuming they were, not severe enough to create a hostile environment).

Davis, 526 U.S. at 653 (“The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX’s guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher student harassment.”); Patricia H., 830 F. Supp. at 1297 (stating that the “grave disparity in age and power” between teacher and student contributed to the creation of a hostile environment); Summerfield Schools, OCR Case No. 15-92-1929 (“impact of the ... remarks was heightened by the fact that the coach is an adult in a position of authority”); cf. Doe v. Taylor I.S.D., 15 F.3d 443, 460 (5th Cir. 1994) (Sec. 1983 case; taking into consideration the influence that the teacher had over the student by virtue of his position of authority to find that a sexual relationship between a high school teacher and a student was unlawful).


Cf. Patricia H., 830 F. Supp. at 1297.

See, e.g., Barrett, 584 F. Supp. at 30 (finding harassment occurring in a car from which the victim could not escape particularly severe).

See Hall, 842 F. 2d at 1015 (stating that “evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile environment”) (citing Hicks, 833 F. 2d, 1415-16). Cf. Midwest City-Del City Public Schools, OCR Case No. 06-92-1012 (finding of racially hostile environment based in part on several racial incidents at school shortly before incidents in complaint, a number of which involved the same student involved in the complaint).
In addition, incidents of racial or national origin harassment directed at a particular individual may also be aggregated with incidents of sexual or gender harassment directed at that individual in determining the existence of a hostile environment. Hicks, 833 F.2d at 1416; Jefferies v. Harris County Community Action Ass’n, 615 F.2d 1025, 1032 (5th Cir. 1980).


See Meritor Savings Bank, 477 U.S. at 68. “[T]he fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII.... The correct inquiry is whether [the subject of the harassment] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”

Lipsett, 864 F.2d at 898 (while, in some instances, a person may have the responsibility for telling the harasser “directly” that the conduct is unwelcome, in other cases a “consistent failure to respond to suggestive comments or gestures may be sufficient....”); Danna v. New York Tel. Co., 752 F.Supp. 594, 612 (despite a female employee’s own foul language and participation in graffiti writing, her complaints to management indicated that the harassment was not welcome); see also Carr v. Allison Gas Turbine Div. GMC., 32 F.3d 1007, 1011 (7th Cir. 1994) (finding that cursing and dirty jokes by a female employee did not show that she welcomed the sexual harassment, given her frequent complaints about it: “Even if ... [the employee’s] testimony that she talked and acted as she did [only] in an effort to be one of the boys is ... discounted, her words and conduct cannot be compared to those of the men and used to justify their conduct.... The asymmetry of positions must be considered. She was one woman; they were many men. Her use of [vulgar] terms ... could not be deeply threatening....”).

See Reed v. Shepard, 939 F.2d 484, 486-87, 491-92 (7th Cir. 1991) (no harassment found under Title VII in a case in which a female employee not only tolerated, but also instigated the suggestive joking activities about which she was now complaining); Weinsheimer v. Rockwell Int’l Corp., 754 F.Supp. 1559, 1563-64 (M.D. Fla. 1990) (same, in case in which general shop banter was full of vulgarity and sexual innuendo by men and women alike, and plaintiff contributed her share to this atmosphere.) However, even if a student participates in the sexual banter, OCR may in certain circumstances find that the conduct was nevertheless unwelcome if, for example, a teacher took an active role in the sexual banter and a student reasonably perceived that the teacher expected him or her to participate.

The school bears the burden of rebutting the presumption.

Of course, nothing in Title IX would prohibit a school from implementing policies prohibiting sexual conduct or sexual relationships between students and adult employees.
See note 58.

Gebser, 524 U.S. at 281 ("Franklin ... establishes that a school district can be held liable in damages [in an implied action under Title IX] in cases involving a teacher’s sexual harassment of a student...."; 34 CFR 106.31; See 1997 Sexual Harassment Guidance, 62 FR 12034.

See Davis, 526 U.S. at 653 (stating that harassment of a student by a teacher is more likely than harassment by a fellow student to constitute the type of effective denial of equal access to educational benefits that can breach the requirements of Title IX).

34 CFR 106.31(b). Cf. Gebser, 524 U.S. at 283-84 (Court recognized in an implied right of action for money damages for teacher sexual harassment of a student that the question of whether a violation of Title IX occurred is a separate question from the scope of appropriate remedies for a violation).

Davis, 526 U.S. at 646.

See section on “Applicability of Title IX” for scope of coverage.

See section on “Notice of Employee, Peer, or Third Party Harassment.”

See section on “Notice of Employee, Peer, or Third Party Harassment.”

34 CFR 106.31(b).

34 CFR 106.31(b).

See section on “Notice of Employee, Peer, or Third Party Harassment.”

Cf. Davis, 526 U.S. at 646.

34 CFR 106.31(b).

34 CFR 106.31(b).

Consistent with its obligation under Title IX to protect students, cf. Gebser, 524 U.S. at 287, OCR interprets its regulations to ensure that recipients take reasonable action to address, rather than neglect, reasonably obvious discrimination. Cf. Gebser, 524 U.S. at 287-88; Davis, 526 U.S. at 650 (actual notice standard for obtaining money damages in private lawsuit).

Whether an employee is a responsible employee or whether it would be reasonable for a student to believe the employee is, even if the employee is not, will vary depending on
factors such as the age and education level of the student, the type of position held by the employee, and school practices and procedures, both formal and informal. The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. Gebser, 524 U.S. at 290, and Davis, 526 U.S. at 642. The concept of a “responsible employee” under our guidance is broader. That is, even if a responsible employee does not have the authority to address the discrimination and take corrective action, he or she does have the obligation to report it to appropriate school officials.

75 The Title IX regulations require that recipients designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulations, including complaint investigations. 34 CFR 106.8(a).


77 For example, a substantiated report indicating that a high school coach has engaged in inappropriate physical conduct of a sexual nature in several instances with different students may suggest a pattern of conduct that should trigger an inquiry as to whether other students have been sexually harassed by that coach. See also Doe v. School Administrative Dist. No. 19, 66 F.Supp.2d 57, 63-64 and n.6 (D.Me. 1999) (in a private lawsuit for money damages under Title IX in which a high school principal had notice that a teacher may be engaging in a sexual relationship with one underage student and did not investigate, and then the same teacher allegedly engaged in sexual intercourse with another student, who did not report the incident, the court indicated that the school’s knowledge of the first relationship may be sufficient to serve as actual notice of the second incident).

78 Cf. Katz, 709 F.2d at 256 (finding that the employer “should have been aware of the problem both because of its pervasive character and because of [the employee’s] specific complaints ...”); Smolsky v. Consolidated Rail Corp., 780 F.Supp. 283, 293 (E.D. Pa. 1991), reconsideration denied, 785 F.Supp. 71 (E.D. Pa. 1992) “where the harassment is apparent to all others in the work place, supervisors and coworkers, this may be sufficient to put the employer on notice of the sexual harassment” under Title VII; Jensen v. Eveleth Taconite Co., 824 F.Supp. 847, 887 (D.Minn. 1993); “[s]exual harassment ... was so pervasive that an inference of knowledge arises .... The acts of sexual harassment detailed herein were too common and continuous to have escaped Eveleth Mines had its management been reasonably alert.”); Cummings v. Walsh Construction Co., 561 F.Supp. 872, 878 (S.D. Ga. 1983) (“... allegations not only of the [employee] registering her complaint with her foreman ... but also that sexual harassment was so widespread that defendant had constructive notice of it” under Title VII); but see Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 250-51 (2nd Cir. 1995) (concluding that other students’ knowledge of the conduct was not enough to charge the school with notice, particularly because these students may not have been aware that the conduct was offensive or abusive).
34 CFR 106.9 and 106.8(b).

34 CFR 106.8(b) and 106.31(b).

34 CFR 106.9.

34 CFR 106.8(b).

34 CFR 106.31.

34 CFR 106.31 and 106.3. Gebser, 524 U.S. at 288 (“In the event of a violation, [under OCR’s administrative enforcement scheme] a funding recipient may be required to take ‘such remedial action as [is] deemed necessary to overcome the effects of [the] discrimination.’ §106.3.”).

20 U.S.C. 1682. In the event that OCR determines that voluntary compliance cannot be secured, OCR may take steps that may result in termination of Federal funding through administrative enforcement, or, alternatively, OCR may refer the case to the Department of Justice for judicial enforcement.

Schools have an obligation to ensure that the educational environment is free of discrimination and cannot fulfill this obligation without determining if sexual harassment complaints have merit.

In some situations, for example, if a playground supervisor observes a young student repeatedly engaging in conduct toward other students that is clearly unacceptable under the school’s policies, it may be appropriate for the school to intervene without contacting the other students. It still may be necessary for the school to talk with the students (and parents of elementary and secondary students) afterwards, e.g., to determine the extent of the harassment and how it affected them.

Gebser, 524 U.S. at 288; Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981) (employers should take corrective and preventive measures under Title VII); accord, Jones v. Flagship Int’l, 793 F.2d 714, 719-720 (5th Cir. 1986) (employer should take prompt remedial action under Title VII).

See Doe ex rel. Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380 (5th Cir. 2000) (citing Waltman); Waltman, 875 F.2d at 479 (appropriateness of employer’s remedial action under Title VII will depend on the “severity and persistence of the harassment and the effectiveness of any initial remedial steps”); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309-10 (5th Cir. 1987); holding that a company’s quick decision to remove the harasser from the victim was adequate remedial action).

See Intlekofener v. Turnage, 973 F.2d 773, 779-780 (9th Cir. 1992)(holding that the employer’s response was insufficient and that more severe disciplinary action was
necessary in situations in which counseling, separating the parties, and warnings of possible discipline were ineffective in ending the harassing behavior).

91 Offering assistance in changing living arrangements is one of the actions required of colleges and universities by the Campus Security Act in cases of rape and sexual assault. See 20 U.S.C. 1092(f).

92 See section on “Harassment by Other Students or Third Parties.”

93 University of California at Santa Cruz, OCR Case No. 09-93-2141 (extensive individual and group counseling); Eden Prairie Schools, Dist. #272, OCR Case No. 05-92-1174 (counseling).

94 Even if the harassment stops without the school’s involvement, the school may still need to take steps to prevent or deter any future harassment — to inform the school community that harassment will not be tolerated. Wills v. Brown University, 184 F.3d 20, 28 (1st Cir. 1999) (difficult problems are posed in balancing a student’s request for anonymity or limited disclosure against the need to prevent future harassment); Fuller v. City of Oakland, 47 F.3d 1522, 1528-29 (9th Cir. 1995) (Title VII case).

95 34 CFR 106.8(b) and 106.71, incorporating by reference 34 CFR 100.7(e). The Title IX regulations prohibit intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX.

96 Tacoma School Dist. No. 10, OCR Case No. 10-94-1079 (due to the large number of students harassed by an employee, the extended period of time over which the harassment occurred, and the failure of several of the students to report the harassment, the school committed as part of corrective action plan to providing training for students); Los Medanos College, OCR Case No. 09-84-2092 (as part of corrective action plan, school committed to providing sexual harassment seminar for campus employees); Sacramento City Unified School Dist., OCR Case No. 09-83-1063 (same as to workshops for management and administrative personnel and in-service training for non-management personnel).

97 In addition, if information about the incident is contained in an “education record” of the student alleging the harassment, as defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, the school should consider whether FERPA would prohibit the school from disclosing information without the student’s consent. Id. In evaluating whether FERPA would limit disclosure, the Department does not interpret FERPA to override any federally protected due process rights of a school employee accused of harassment.

98 34 CFR 106.8(b). This requirement has been part of the Title IX regulations since their inception in 1975. Thus, schools have been required to have these procedures in place since that time. At the elementary and secondary level, this responsibility generally lies
with the school district. At the postsecondary level, there may be a procedure for a particular campus or college or for an entire university system.

99 Fenton Community High School Dist. #100, OCR Case 05-92-1104.

100 While a school is required to have a grievance procedure under which complaints of sex discrimination (including sexual harassment) can be filed, the same procedure may also be used to address other forms of discrimination.

101 See generally Meritor, 477 U.S. at 72-73 (holding that “mere existence of a grievance procedure” for discrimination does not shield an employer from a sexual harassment claim).

102 The Family Educational Rights and Privacy Act (FERPA) does not prohibit a student from learning the outcome of her complaint, i.e., whether the complaint was found to be credible and whether harassment was found to have occurred. It is the Department’s current position under FERPA that a school cannot release information to a complainant regarding disciplinary action imposed on a student found guilty of harassment if that information is contained in a student’s education record unless — (1) the information directly relates to the complainant (e.g., an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a postsecondary institution. See note 97. If the alleged harasser is a teacher, administrator, or other non-student employee, FERPA would not limit the school’s ability to inform the complainant of any disciplinary action taken.

103 The section in the guidance on “Recipient’s Response” provides examples of reasonable and appropriate corrective action.

104 34 CFR 106.8(a).

105 Id.

106 See Meritor, 477 U.S. at 72-73.

107 University of California, Santa Cruz, OCR Case No. 09-93-2131. This is true for formal as well as informal complaints. See University of Maine at Machias, OCR Case No. 01-94-6001 (school’s new procedures not found in violation of Title IX in part because they require written records for informal as well as formal resolutions). These records need not be kept in a student’s or employee’s individual file, but instead may be kept in a central confidential location.

108 For example, in Cape Cod Community College, OCR Case No. 01-93-2047, the College was found to have violated Title IX in part because the person identified by the school as the Title IX coordinator was unfamiliar with Title IX, had no training, and did not even realize he was the coordinator.
Indeed, in *University of Maine at Machias*, OCR Case No. 01-94-6001, OCR found the school’s procedures to be inadequate because only formal complaints were investigated. While a school isn’t required to have an established procedure for resolving informal complaints, they nevertheless must be addressed in some way. However, if there are indications that the same individual may be harassing others, then it may not be appropriate to resolve an informal complaint without taking steps to address the entire situation.

Academy School Dist. No 20, OCR Case No. 08-93-1023 (school’s response determined to be insufficient in a case in which it stopped its investigation after complaint filed with police); *Mills Public School Dist.*, OCR Case No. 01-93-1123, (not sufficient for school to wait until end of police investigation).


The First Amendment applies to entities and individuals that are State actors. The receipt of Federal funds by private schools does not directly subject those schools to the U.S. Constitution. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982). However, all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that are not directly subject to the First Amendment.

See, e.g., *George Mason University*, OCR Case No. 03-94-2086 (law professor’s use of a racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment); *Portland School Dist. 1J*, OCR Case No. 10-94-1117 (reading teacher’s choice to substitute a less offensive term for a racial slur when reading an historical novel aloud in class constituted an academic decision on presentation of curriculum, not racial harassment).

See Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386 (4th Cir. 1993) (fraternity skit in which white male student dressed as an offensive caricature of a black female constituted student expression).

See Florida Agricultural and Mechanical University, OCR Case No. 04-92-2054 (no discrimination in case in which campus newspaper, which welcomed individual opinions of all sorts, printed article expressing one student’s viewpoint on white students on campus.)

*Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (neither students nor teachers shed their constitutional rights to freedom of expression at the schoolhouse gates); *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 972 (9th Cir. 1996) (holding that a college professor could not be punished for his longstanding teaching methods, which included discussion of controversial subjects such as obscenity and consensual sex with children, under an unconstitutionally vague sexual harassment policy); *George Mason University*, OCR Case No. 03-94-2086 (law professor’s use of a
racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment.)

117 See, e.g., University of Illinois, OCR Case No. 05-94-2104 (fact that university’s use of Native American symbols was offensive to some Native American students and employees was not dispositive, in and of itself, in assessing a racially hostile environment claim under Title VI.)

118 See Meritor, 477 U.S. at 67 (the “mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee” would not affect the conditions of employment to a sufficient degree to violate Title VII), quoting Henson, 682 F.2d at 904; cf. R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (citing with approval EEOC’s sexual harassment guidelines); Monteiro, 158 F.3d at 1032-34 (9th Cir. 1998) (citing with approval OCR’s racial harassment investigative guidance).

119 Compare Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (Court upheld discipline of high school student for making lewd speech to student assembly, noting that “[t]he undoubted freedom to advocate unpopular and controversial issues in schools must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”), with Iota Xi, 993 F.2d 386 (holding that, notwithstanding a university’s mission to create a culturally diverse learning environment and its substantial interest in maintaining a campus free of discrimination, it could not punish students who engaged in an offensive skit with racist and sexist overtones).
TITLE IX RESOURCE GUIDE

U.S. Department of Education
Office for Civil Rights
April 2015
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Title IX Resource Guide

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A. Scope of Title IX

Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination based on sex in education programs and activities in federally funded schools at all levels. If any part of a school district or college receives any Federal funds for any purpose, all of the operations of the district or college are covered by Title IX.

Title IX protects students, employees, applicants for admission and employment, and other persons from all forms of sex discrimination, including discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity. All students (as well as other persons) at recipient institutions are protected by Title IX—regardless of their sex, sexual orientation, gender identity, part- or full-time status, disability, race, or national origin—in all aspects of a recipient’s educational programs and activities.

As part of their obligations under Title IX, all recipients of Federal financial assistance must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX and must notify all students and employees of that employee’s contact information. This employee is generally referred to as the Title IX coordinator.

The essence of Title IX is that an institution may not exclude, separate, deny benefits to, or otherwise treat differently any person on the basis of sex unless expressly authorized to do so under Title IX or the Department’s implementing regulations. When a recipient is considering relying on one of the exceptions to this general rule (several of which are discussed below), Title IX coordinators should be involved at every stage and work with school officials and legal counsel to help determine whether the exception is applicable and, if so, properly executed.

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1 20 U.S.C. §§ 1681–1688. The Department of Justice shares enforcement authority over Title IX with OCR. The Department of Education’s Title IX regulations, 34 C.F.R. Part 106, are available at http://www.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html. Although Title IX and the Department’s implementing regulations apply to any recipient institution that offers education programs or activities, this resource guide focuses on Title IX coordinators designated by local educational agencies, schools, colleges, and universities.

2 An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

3 34 C.F.R. § 106.8(a).

4 20 U.S.C. § 1681(a); 34 C.F.R. § 106.31.
B. Responsibilities and Authority of a Title IX Coordinator

Although the recipient is ultimately responsible for ensuring that it complies with Title IX and other laws, the Title IX coordinator is an integral part of a recipient’s systematic approach to ensuring nondiscrimination, including a nondiscriminatory environment. Title IX coordinators can be effective agents for ensuring gender equity within their institutions only when they are provided with the appropriate authority and support necessary to coordinate their institution’s Title IX compliance, including access to all of their institution’s relevant information and resources.

One of the most important facets of the Title IX coordinator’s responsibility is helping to ensure the recipient’s compliance with Title IX’s administrative requirements. The Title IX coordinator must have knowledge of the recipient’s policies and procedures on sex discrimination and should be involved in the drafting and revision of such policies and procedures to help to ensure that they comply with the requirements of Title IX.

The coordinator may help the recipient by coordinating the implementation and administration of the recipient’s procedures for resolving Title IX complaints, including educating the school community on how to file a complaint alleging a violation of Title IX, investigating complaints, working with law enforcement when necessary, and ensuring that complaints are resolved promptly and appropriately. The coordinator should also coordinate the recipient’s response to all complaints involving possible sex discrimination to monitor outcomes, identify patterns, and assess effects on the campus climate. Such coordination can help an institution avoid Title IX violations, particularly violations involving sexual harassment and violence, by preventing incidents from recurring or becoming systemic problems. Title IX does not specify who should determine the outcome of Title IX complaints or the actions the school will take in response to such complaints. The Title IX coordinator could play this role, provided there are no conflicts of interest, but does not have to.

The Title IX coordinator should also assist the institution in developing a method to survey the school climate and coordinate the collection and analysis of information from that survey. Further, the coordinator should monitor students’ participation in athletics and across academic fields to identify programs with disproportionate enrollment based on sex and ensure that sex discrimination is not causing any disproportionality or otherwise negatively affecting a student’s access to equal educational opportunities.

The Title IX coordinator should provide training and technical assistance on school policies related to sex discrimination and develop programs, such as assemblies or college trainings, on issues related to Title IX to assist the recipient in making sure that all members of the school community, including students and staff, are aware of their rights and obligations under Title IX. To perform
this responsibility effectively, the coordinator should regularly assess the adequacy of current training opportunities and programs and propose improvements as appropriate.

A recipient can designate more than one Title IX coordinator, which may be particularly helpful in larger school districts, colleges, and universities. It may also be helpful to designate specific employees to coordinate certain Title IX compliance issues (e.g., gender equity in academic programs or athletics, harassment, or complaints from employees). If a recipient has multiple Title IX coordinators, then it should designate one lead Title IX coordinator who has ultimate oversight responsibility.

Because Title IX prohibits discrimination in all aspects of a recipient’s education programs and activities, the Title IX coordinator should work closely with many different members of the school community, such as administrators, counselors, athletic directors, non-professional counselors or advocates, and legal counsel. Although these employees may not be formally designated as Title IX coordinators, the Title IX coordinator may need to work with them because their job responsibilities relate to the recipient’s obligations under Title IX. The recipient should ensure that all employees whose work relates to Title IX communicate with one another and that these employees have the support they need to ensure consistent practices and enforcement of the recipient’s policies and compliance with Title IX. The coordinator should also be available to meet with the school community, including other employees, students, and parents or guardians, as needed to discuss any issues related to Title IX.

For more information about the role of the Title IX coordinator, please review:

- 34 C.F.R. § 106.8(a);
C. Title IX’s Administrative Requirements

The administrative requirements in the Department’s Title IX regulations are the underpinning of both the Title IX coordinator’s job and a recipient’s compliance with Title IX; their purpose is to ensure that a recipient maintains an environment for students and employees that is free from unlawful sex discrimination in all aspects of the educational experience, including academics, extracurricular activities, and athletics. These requirements provide that a recipient must establish a system for the prompt and equitable resolution of complaints. This allows an institution to resolve complaints of discrimination without the need for involvement by outside entities, such as the Federal government. They also provide that a recipient must ensure that members of the school community are aware of their rights under Title IX, have the contact information for the Title IX coordinator, and know how to file a complaint alleging a violation of Title IX.

1. Grievance Procedures

The Department’s Title IX regulations require a recipient to adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints under Title IX. These procedures provide an institution with a mechanism for discovering incidents of discrimination or harassment as early as possible and for effectively correcting individual and systemic problems. The procedures that each school uses to resolve Title IX complaints may vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements, and what it has learned from past experiences.

There are several ways in which a Title IX coordinator can coordinate the recipient’s compliance with the Title IX regulatory requirement regarding grievance procedures.

- First, the Title IX coordinator should work with the recipient to help make sure that the grievance procedures are written in language appropriate for the age of the audience (such as elementary, middle school, high school, or postsecondary students), and that they are easily understood and widely disseminated.

- Second, the Title IX coordinator should review the grievance procedures to help determine whether they incorporate all of the elements required for the prompt and equitable resolution of student and employee complaints under Title IX, consistent with the Title IX regulatory requirement and OCR guidance.

- Third, the Title IX coordinator should communicate with students, parents or guardians, and school employees to help them understand the recipient’s grievance procedures; train employees and students about how Title IX protects against sex discrimination; and provide consultation and information regarding Title IX requirements to potential complainants.
• Fourth, the Title IX coordinator is responsible for coordinating the grievance process and making certain that individual complaints are handled properly. This coordination responsibility may include informing all parties regarding the process, notifying all parties regarding grievance decisions and of the right to and procedures for appeal, if any; monitoring compliance with all of the requirements and timelines specified in the grievance procedures; and maintaining grievance and compliance records and files.

• Finally, the Title IX coordinator should work with the recipient to help ensure that its grievance procedures are accessible to English language learners\(^5\) and students with disabilities.\(^6\)

For more information about grievance procedures, please review:

• 34 C.F.R. § 106.8(b);


• Dear Colleague Letter: Title IX Grievance Procedures, Elementary and Secondary Education (April 26, 2004), available at http://www.ed.gov/ocr/responsibilities_ix.html; and


\(^5\) Public schools and State educational agencies must take affirmative steps to ensure that students with limited English proficiency can meaningfully participate in their educational programs and services under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to d-7, and the Equal Educational Opportunities Act, 20 U.S.C. § 1703(f) (1974).

\(^6\) See 28 C.F.R. § 35.130(a) and (b); 34 C.F.R. § 104.4.
2. Notice of Nondiscrimination and Contact Information for the Title IX Coordinator

The Department’s Title IX regulations require a recipient to publish a statement that it does not discriminate on the basis of sex in the education programs or activities it operates and that it is required by Title IX not to discriminate in such a manner. The notice must also state that questions regarding Title IX may be referred to the recipient’s Title IX coordinator or to OCR.

The notice must be widely distributed to all applicants for admission and employment, students and parents or guardians of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient. The notice should be prominently posted on the recipient’s website, at various locations on campus, and in electronic and printed publications for general distribution. In addition, the notice must be included in any bulletins, announcements, publications, catalogs, application forms, or recruitment materials.

A recipient must notify all students and employees of the name or title, office address, telephone number, and email address of the Title IX coordinator, including in its notice of nondiscrimination. The notice should also state any other job title that the Title IX coordinator might have. Recipients must notify students and employees of the Title IX coordinator’s contact information in its notice of nondiscrimination. Recipients with more than one Title IX coordinator must notify the school community of the lead Title IX coordinator’s contact information in its notice of nondiscrimination, and should also make available the contact information for its other Title IX coordinators as well to ensure consistent practices and standards in handling complaints. In doing so, recipients should include any additional information that would help students and employees identify which Title IX coordinator to contact, such as each Title IX coordinator’s specific geographic region (e.g., a particular elementary school or part of a college campus) or area of specialization within Title IX (e.g., gender equity in academic programs or athletics, harassment, or complaints from employees). Because social media are now widespread means for students and other members of the school community to communicate, a recipient should also make the Title IX coordinator’s contact information available on social media to the extent that they are supported or used by the recipient.

The content of the notice must be complete and include current information. The Title IX coordinator should work with the recipient to make sure the text of the notice complies with all applicable requirements, that the notice is published and properly displayed, and the content of the notice remains accurate. One potentially low-cost way to help ensure that a recipient’s notice is properly disseminated and current on the recipient’s website is to create a page on the website that includes the name and contact information of the recipient’s Title IX coordinator(s), relevant Title IX policies and grievance procedures, and other resources related to Title IX compliance and gender equity. A link to this page should be prominently displayed on the recipient’s homepage.
For more information on notices of nondiscrimination, please review:

- 34 C.F.R. §§ 106.8(a), 106.9;
- Dear Colleague Letter: Title IX Grievance Procedures, Postsecondary Education (August 4, 2004), available at http://www.ed.gov/ocr/responsibilities_ix_ps.html; and
D. Application of Title IX to Various Issues

Below is a summary of some of the key issues covered by Title IX, as well as some general information on the legal requirements applicable to each issue area, including citations to the relevant Departmental regulatory provisions and references to OCR’s guidance that address the issue. The discussion of each Title IX issue includes recommended best practices to help a recipient meet its obligations under Title IX.

1. Recruitment, Admissions, and Counseling

Title IX prohibits recipient institutions of vocational education, professional education, graduate higher education, and public colleges and universities from discriminating on the basis of sex in the recruitment or admission of students.\(^7\) The Title IX coordinator at these recipient institutions should help the recipient to ensure that it does not discriminate on the basis of sex in recruitment and admissions by reviewing the recipient’s recruitment materials, admission forms, and policies and practices in these areas.

The Department’s Title IX regulations also prohibit all recipients from discriminating on the basis of sex in counseling or guiding students or applicants for admission. The Title IX coordinator should review any materials used for counseling students in terms of class or career selection, or for counseling applicants for admission, to ensure that the recipient does not use different materials for students based on sex or use materials that permit or require different treatment of students based on sex.

At all types of recipient institutions covered by Title IX, the Title IX coordinator should also work with school officials to help remind the school community that all students must have equal access to all programs. Many fields of study continue to be affected by sex-based disparities in enrollment; these are typically called nontraditional fields. For example, some fields of study in science, technology, engineering, and mathematics or career and technical education are often affected by disproportionate enrollment of students based on sex, which triggers a duty of inquiry on the part of the recipient. Title IX coordinators can help ensure that such disparities are not the result of discrimination on the basis of sex by reviewing enrollment data and working with other employees of the recipient to review counseling practices and counseling or appraisal materials. Under certain circumstances, recipients might encourage students to explore nontraditional fields to address underrepresentation of students of that sex in those fields.

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\(^7\) 20 U.S.C. §1681(a)(1). The Department’s Title IX regulations regarding admissions do not apply to private institutions of undergraduate higher education or to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex. 34 C.F.R. § 106.15.
For more information about sex discrimination in recruiting, admissions, and counseling, please review:

- 34 C.F.R. §§ 106.3(b), 106.15, 106.36, and 34 C.F.R. Part 106, Subpart C; and

2. Financial Assistance

Generally, a recipient may not: (a) provide different amounts or types of financial assistance, limit eligibility for such assistance, apply different criteria or otherwise discriminate on the basis of sex in administering such assistance; or (b) assist any agency, organization, or person which offers sex-restricted student aid.

The Department’s Title IX regulations provide three exceptions to these general prohibitions. Recipients are permitted to administer or assist in the administration of scholarships, fellowships, or other awards that are restricted to members of one sex if the award is: (a) created by certain legal instruments, including wills or trusts, or by acts of a foreign government, provided the overall effect is nondiscriminatory; (b) for study at foreign institutions if the recipient provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex; or (c) athletic financial assistance. The Department’s Title IX regulatory requirements regarding athletic financial assistance are discussed in the Athletics section, below.

To help the recipient ensure its compliance with these requirements, the Title IX coordinator should help the recipient develop, and subsequently monitor, the procedures and practices for awarding financial assistance and for administering or aiding any foundation, trust, agency, organization, person, or foreign government in awarding financial assistance to its students.

For more information about sex discrimination in financial assistance, please review:

- 34 C.F.R. §§ 106.31(c) and 106.37.
3. Athletics

The Department’s Title IX regulations prohibit sex discrimination in interscholastic, intercollegiate, club, or intramural athletics offered by a recipient institution, including with respect to (a) student interests and abilities; (b) athletic benefits and opportunities; and (c) athletic financial assistance.

(a) Student Interests and Abilities

Under the Department’s Title IX regulations, an institution must provide equal athletic opportunities for members of both sexes and effectively accommodate students’ athletic interests and abilities. OCR uses a three-part test to determine whether an institution is providing nondiscriminatory athletic participation opportunities in compliance with the Title IX regulation. The test provides the following three compliance options:

1. Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

2. Where the members of one sex have been and are underrepresented among athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

3. Where the members of one sex are underrepresented among athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

The three-part test is intended to allow institutions to maintain flexibility and control over their athletic programs consistent with Title IX’s nondiscrimination requirements. The three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

To coordinate the institution’s compliance with this requirement, the Title IX coordinator should compare its enrollment data to the number of athletic participation opportunities it offers; review the institution’s history of expanding participation opportunities for students of the underrepresented sex; and evaluate whether there is unmet interest in a particular sport, whether there is sufficient ability to sustain a team in the sport, and whether there is a reasonable expectation of competition for the team.
For more information about the obligation to provide equal athletic opportunities and to effectively accommodate students’ athletic interests and abilities, please review:

- 34 C.F.R. § 106.41(c)(1);
(b) Athletic Benefits and Opportunities

The Department’s Title IX regulations and OCR guidance require that recipients that operate or sponsor interscholastic, intercollegiate, club or intramural athletics provide equal athletic opportunities for members of both sexes. In determining whether an institution is providing equal opportunity in athletics, the regulations require the Department to consider, among others, the following factors: (1) the provision of equipment and supplies; (2) scheduling of games and practice time; (3) travel and per diem allowances; (4) opportunity for coaching and academic tutoring; (5) assignment and compensation of coaches and tutors; (6) provision of locker rooms, and practice and competitive facilities; (7) provision of medical and training facilities and services; (8) housing and dining services; (9) publicity; (10) recruitment; and (11) support services. These factors are sometimes referred to as the laundry list.

As part of the recipient’s obligation to provide equal athletic opportunity to its students, OCR encourages Title IX coordinators to work with the recipient to periodically review and compare the distribution of athletic benefits and opportunities by sex in each of these areas, including financial expenditures on male and female athletic teams.

For more information about each of these areas, please review:

- 34 C.F.R. § 106.41(c)(2)–(10); and
(c) Athletic Financial Assistance

The Department’s Title IX regulations specify that if a recipient awards athletic financial assistance, including athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in substantial proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics. Separate athletic financial assistance for members of each sex may be provided as part of separate athletic teams for members of each sex.

The Title IX coordinator should help coordinate the recipient’s efforts to ensure that the athletic financial assistance awarded by the recipient complies with these provisions by working with the institution and its athletics department.

For more information about a recipient’s obligations regarding awards of athletic financial assistance, please review:

- 34 C.F.R. § 106.37(c);
- Title IX Policy Interpretation: Intercollegiate Athletics (December 11, 1979), available at http://www.ed.gov/ocr/docs/t9interp.html; and
4. Sex-Based Harassment

In order to best perform academically and to have equal access to all aspects of a recipient’s educational programs and activities, students must not be subjected to unlawful harassment, either in the classroom or while participating in other education programs or activities.\(^8\)

Title IX prohibits sex-based harassment by peers, employees, or third parties that is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the recipient’s education programs and activities (i.e., creates a hostile environment). When a recipient knows or reasonably should know of possible sex-based harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. If an investigation reveals that the harassment created a hostile environment, the recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent the harassment from recurring, and, as appropriate, remedy its effects.

Title IX prohibits several types of sex-based harassment. Sexual harassment is unwelcome conduct of a sexual nature, such as unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment and refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent (e.g., due to the student’s age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Gender-based harassment is another form of sex-based harassment and refers to unwelcome conduct based on an individual’s actual or perceived sex, including harassment based on gender identity or nonconformity with sex stereotypes, and not necessarily involving conduct of a sexual nature. All of these types of sex-based harassment are forms of sex discrimination prohibited by Title IX.

Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.

Title IX protects all students from sex-based harassment, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to

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\(^8\) A Title IX coordinator may receive reports of sex-based harassment of any member of the school community. It is the Title IX coordinator’s responsibility to help make sure that such complaints are processed appropriately.
conform to stereotypical notions of masculinity or femininity, and a recipient must accept and appropriately respond to all complaints of sex discrimination. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a recipient’s obligations. A recipient should investigate and resolve allegations of sexual or gender-based harassment of lesbian, gay, bisexual, and transgender students using the same procedures and standards that it uses in all complaints involving sex-based harassment. The fact that an incident of sex-based harassment may be accompanied by anti-gay comments or be partly based on a student’s actual or perceived sexual orientation does not relieve a recipient of its obligation under Title IX to investigate and remedy such an incident.

The Title IX coordinator must coordinate the recipient’s efforts to accept and appropriately respond to all complaints of sex discrimination and should work with the recipient to prevent sexual and gender-based harassment.

- First, the Title IX coordinator should assist in any training the recipient provides to the school community, including all employees, as to what conduct constitutes sexual and gender-based harassment and how to respond appropriately when it occurs.

- Second, the Title IX coordinator should help the recipient develop a method appropriate to their institution to survey the campus climate, evaluate whether any discriminatory attitudes pervade the school culture, and determine whether any harassment or other problematic behaviors are occurring, where they happen, which students are responsible, which students are targeted, and how those conditions may be best remedied.

- Third, because the Title IX coordinator must have knowledge of all Title IX reports and complaints at the recipient institution, the Title IX coordinator is generally in the best position to evaluate confidentiality requests from complainants in the context of providing a safe, nondiscriminatory environment for all students.

- Fourth, the Title IX coordinator should coordinate recordkeeping (for instance, in a confidential log maintained by the Title IX coordinator), monitor incidents to help identify students or employees who have multiple complaints filed against them or who have been repeated targets, and address any patterns or systemic problems that arise, including making school officials aware of these patterns or systemic problems as appropriate.

- Fifth, the Title IX coordinator should recommend, as necessary, that the recipient increase safety measures, such as monitoring, supervision, or security at locations or activities where harassment has occurred.
Finally, the Title IX coordinator should regularly review the effectiveness of the recipient’s efforts to ensure that the recipient institution is free from sexual and gender-based harassment, and use that information to recommend future proactive steps that the recipient can take to comply with Title IX and protect the school community.

For more information about a recipient’s obligation to address sexual and gender-based harassment, please review:

- Revised Sexual Harassment Guidance (January 19, 2001), available at http://www.ed.gov/ocr/docs/shguide.pdf; and
5. Pregnant and Parenting Students

Under the Department’s Title IX regulations, recipients are prohibited from: (a) applying any rule concerning parental, family, or marital status that treats persons differently on the basis of sex; or (b) discriminating against or excluding any student from its education program or activity, including any class or extracurricular activity on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. Institutions of vocational education, professional education, graduate higher education, and public colleges and universities are prohibited from making pre-admission inquiries as to the marital status of an applicant for admission.

The Title IX coordinator should work with the recipient on its obligation not to discriminate against students based on their parental, family, or marital status, or exclude pregnant or parenting students from participating in any educational program, including extracurricular activities. The Title IX coordinator is responsible for coordinating the recipient’s response to complaints of discrimination against pregnant and parenting students. In addition, the Title IX coordinator should provide training to students so they know that Title IX prohibits discrimination against pregnant and parenting students, provide workshops to administrators, teachers, and other staff on the Department’s Title IX regulations and OCR guidance related to pregnant and parenting students, and assist the recipient in helping to meet the unique educational, child care, and health care needs of pregnant and parenting students.

For more information about a recipient’s obligations regarding pregnant and parenting students, please review:

- 34 C.F.R. §§ 106.21(c), 106.31, 106.40;
- Supporting the Academic Success of Pregnant and Parenting Students (June 2013), available at http://www.ed.gov/ocr/docs/pregnancy.pdf;
6. Discipline

The Department’s Title IX regulations prohibit a recipient from subjecting any person to separate or different rules of behavior, sanctions, or other treatment, such as discriminatory discipline, based on sex.

The Title IX coordinator should review the recipient’s discipline policies to help make sure they are not discriminatory. In addition, the Title IX coordinator should work with other coordinators or school employees to help the recipient keep and maintain accurate and complete records regarding its disciplinary incidents and monitor the recipient’s administration of its discipline policies to ensure that they are not administered in a discriminatory manner. For example, the Title IX coordinator should review the recipient’s disciplinary records and data to ensure that similarly situated students are not being disciplined differently based on sex for the same offense and that the recipient’s discipline policies do not have an unlawful disparate impact on students based on sex. The Title IX coordinator should also help the recipient to ensure that students are not disciplined based on their gender identity or for failing to conform to stereotypical notions of masculinity or femininity in their behavior or appearance.

For more information about a recipient’s obligations regarding nondiscriminatory administration of discipline, please review:

- 34 C.F.R. § 106.31(b)(4); and
7. Single-Sex Education

A recipient is generally prohibited from providing any of its education programs or activities separately on the basis of sex, or requiring or refusing participation by students on the basis of sex unless expressly authorized to do so under Title IX or the Department’s implementing regulations. There are some limited exceptions, the most significant of which are outlined below.

(a) Schools

A recipient generally may offer a single-sex nonvocational elementary or secondary school under Title IX only if it offers a substantially equal school to students of the other sex.9 The substantially equal school may be either single-sex or coeducational. The Department’s Title IX regulations include a non-exhaustive list of factors that are relevant to determining whether a school is substantially equal to a single-sex school. The factors include the admission criteria and policies; the educational benefits provided, including the quality, range, and content of curriculum and other services, and the quality and availability of books, instructional materials, and technology; the qualifications of faculty and staff; geographic accessibility; the quality and range of extracurricular offerings; the quality, accessibility, and availability of facilities and resources provided; and intangible features, such as reputation of faculty. Although the schools do not need to be identical with respect to each factor, they need to be substantially equal. This means that if one school is significantly superior with respect to one factor, or slightly superior with respect to many factors, the schools are likely not substantially equal.

If the recipient offers a single-sex school, then the district’s Title IX coordinator should be involved in assessing the recipient’s compliance with Title IX by helping to ensure that the recipient offers a substantially equal single-sex school or coeducational school.

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9 Title IX does not prohibit the operation of a single-sex nonvocational private elementary or secondary school or a single-sex nonvocational private institution of undergraduate higher education. 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d). Title IX permits the operation of a nonvocational public charter school that is a single-school local educational agency under State law without requiring the operation of a substantially equal school for the excluded sex.
(b) Classes and Extracurricular Activities

The Department’s Title IX regulations do not prohibit recipients from grouping students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex or using requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

The Department’s Title IX regulations identify the following categories for which a recipient may intentionally separate students by sex: (a) contact sports in physical education classes; (b) classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality; and (c) nonvocational classes and extracurricular activities within a coeducational, nonvocational elementary or secondary school if certain criteria are met.

With respect to the third category, a recipient may offer a single-sex nonvocational class or extracurricular activity in a coeducational, nonvocational elementary or secondary school if the class is based on one of two important objectives: to improve its students’ educational achievement through its overall established policy to provide diverse educational opportunities or to meet the particular, identified educational needs of its students. The single-sex nature of each class must be substantially related to achievement of the important objective and the recipient must implement its important objective in an evenhanded manner. In addition, enrollment in a single-sex class must be completely voluntary and the recipient must provide a substantially equal coeducational class in the same subject to all students, and may be required to provide a substantially equal single-sex class for students of the excluded sex. The factors that are relevant to determining whether a single-sex class and a coeducational class are substantially equal are similar to those used to determine whether schools are substantially equal. If a recipient provides a single-sex class under this regulatory exception, it is also required to conduct a periodic evaluation of the class and the original justification behind the class at least every two years. The periodic evaluation must ensure that each single-sex class is based upon a genuine justification and does not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex, and that each single-sex class or extracurricular activity is substantially related to the achievement of the important objective for the class.

If the recipient offers a single-sex class, then the Title IX coordinator should be involved in assessing the recipient’s compliance with Title IX, both when determining whether and how single-sex classes can be offered and during the recipient’s periodic review of single-sex offerings. The Title IX coordinator’s role may include assisting with the preparation and review of the required periodic evaluations, tracking and reviewing complaints involving single-sex classes, confirming that student enrollment in any single-sex class is completely voluntary, and helping to ensure that the recipient offers a substantially equal coeducational class and, as appropriate, substantially equal single-sex class, for each single-sex class offered. The Title IX coordinator should also help ensure that
transgender students are treated consistent with their gender identity in the context of single-sex classes.

For more information about single-sex schools, classes, and extracurricular activities, please review:

- 34 C.F.R. § 106.34;
8. Employment

Under the Department’s Title IX regulations, a recipient is generally prohibited from discriminating on the basis of sex in any employment or recruitment, consideration or selection for employment, whether full-time or part-time. This includes employment actions such as recruitment, hiring, promotion, compensation, grants of leave, and benefits. A recipient must make employment decisions in a nondiscriminatory manner, and may not enter into contracts, including those with employment agencies or unions, that have the direct or indirect effect of subjecting employees or students to discrimination based on sex. Additionally, Title IX’s employment provisions protect against discrimination based on an applicant’s or employee’s pregnancy or marital or parental status. Finally, a recipient may not employ students in a way that discriminates against one sex, or provide services to any other organization that does so.

The Title IX coordinator should help the recipient in making sure school employees are aware that the Title IX coordinator is available to help employees as well as students. The Title IX coordinator should be familiar with the recipient’s employment policies and procedures, and train the appropriate human resource employees regarding the recipient’s obligations under Title IX.

For more information about employment discrimination, please review:


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10 Employees are also protected from discrimination on the basis of sex, including sexual harassment, by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. OCR does not enforce Title VII. For information about Title VII, see the Equal Employment Opportunity Commission’s website at http://www.eeoc.gov.
9. Retaliation

A recipient cannot retaliate against an individual, including a Title IX coordinator, for the purpose of interfering with any right or privilege secured by Title IX. Retaliation against an individual because the individual filed a complaint alleging a violation of Title IX; participated in a Title IX investigation, hearing, or proceeding; or advocated for others’ Title IX rights is also prohibited. The recipient should ensure that individuals are not intimidated, threatened, coerced, or discriminated against for engaging in such activity.

For more information about the prohibition against retaliation, please review:

- 34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e)); and
E. Information Collection and Reporting

The Department requires recipients to report information about Title IX and other civil rights issues that may be useful to the work of Title IX coordinators. In addition, Title IX coordinators can play a helpful role in helping to ensure that their institutions’ information is accurate, comprehensive, and effectively used to cure civil rights violations or prevent them from occurring.

OCR administers the Civil Rights Data Collection (CRDC), which collects information on key education and civil rights issues from public local educational agencies (LEAs) and schools, including juvenile justice facilities, charter schools, alternative schools, and schools serving students with disabilities. The information is used by OCR in its enforcement efforts, by other Department offices and Federal agencies, and by the public, including policymakers and researchers.

The CRDC collects information on several key issue areas under Title IX that might help inform the Title IX coordinator’s work, including harassment or bullying, discipline, and participation in various academic classes and programs, single-sex classes and activities, and interscholastic athletics. In addition, the CRDC asks LEAs to report whether they have civil rights coordinators, including Title IX coordinators and to provide each coordinator’s contact information. For Title IX coordinators at elementary and secondary schools, the CRDC may be a useful tool to monitor trends within their districts and schools to determine whether there are patterns or systemic problems under Title IX. Additionally, the CRDC and other information collections at the State and local levels can help recipients and their Title IX coordinators identify patterns of disproportionality that may be rooted in sex discrimination. For example, the CRDC’s information about student enrollment in particular courses of study (e.g., science, technology, engineering, and mathematics courses) may help a Title IX coordinator determine whether a particular sex is underrepresented in such courses. If so, the coordinator should investigate the possible causes of the disproportionality and then recommend measures for reaching greater proportionality, as appropriate.

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11 The CRDC collects information on allegations of harassment or bullying, students reported as harassed or bullied, and students disciplined for harassment or bullying, based on sex, race/color/national origin, and disability. For allegations of harassment or bullying, data are also collected based on religion and sexual orientation. As a best practice, OCR recommends that Title IX coordinators assist the recipient in training relevant staff about how information on sex-based harassment should be reported under the CRDC. For example, relevant staff should be knowledgeable about the ways in which harassment based on sex and sexual orientation overlap, and informed that if an incident has multiple bases (e.g., an incident in which a student was harassed both based on gender nonconformity (sex) and sexual orientation), the LEA should report all relevant bases under the CRDC. In addition, the recipient should remind staff who collect, maintain, and report information to the Department of these requirements and of the district’s obligations, including keeping personally identifiable information private.
The Department’s Office of Postsecondary Education also collects information about Title IX coordinators from postsecondary institutions in reports required under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act and the Higher Education Opportunity Act.¹² Title IX coordinators in postsecondary settings should assist the institution’s officials in accurately reporting the required information.

For more information about data collection and reporting, please review:

- CRDC webpage, available at [http://www.ed.gov/ocr/data.html](http://www.ed.gov/ocr/data.html); and

¹² 20 U.S.C. § 1092(f). The Department will begin collecting this information in 2015.
March 10, 2017

To: Superintendents/Presidents/Chancellors, Member Community College Districts

From: Ellie R. Austin
Schools Legal Counsel

Subject: U.S. Department of Education and U.S. Department of Justice Withdraw Guidance on Transgender Students
Memo No. 08-2017(CC) - REVISED


Both documents took the position that Title IX of the Education Amendments of 1972 (“Title IX”), which prohibits sex discrimination in educational programs and activities, required transgender students to be able to access sex-segregated facilities, including restrooms and locker rooms, based on their gender identity. The February 22, 2017 Dear Colleague Letter is attached.

The letter provided that the withdrawal of this interpretation “does not leave students without protections from discrimination, bullying, or harassment,” and that “schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment.”

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2 Available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
3 20 U.S.C. § 1681 et seq.
4 See 34 C.F.R. § 106.33.
5 It is also available for download at https://www.justice.gov/opa/press-release/file/941551/download.
Notwithstanding this federal action, California law⁶ affords equal rights and opportunities to students in postsecondary educational institutions without regard to, and prohibits discrimination on the basis of, gender, gender identity, or gender expression.⁷ This includes the right to participate in the educational process free from discrimination and harassment on the basis of real or perceived personal characteristics, including gender, gender identity, or gender expression.⁸

It is the recommendation of this office that community college districts permit transgender students access to sex-segregated facilities consistent with their gender identity.

In addition, community college districts are requested to designate an employee at each campus as a point of contact for the needs of LGBT faculty, staff, and students, and publish the employee’s name and contact information on the campus website and in any campus directories.⁹

Meanwhile, the Gloucester County School Board v. G.G. case previously pending before the Supreme Court has been thrown into legal limbo. The G.G. case addresses whether a transgender high school student can use the boys’ restroom consistent with his gender identity. On March 6, 2017, the Supreme Court issued a one-sentence order vacating the Fourth Circuit Court of Appeal’s ruling in favor of the transgender teen and remanding the case back to the Fourth Circuit. The Court of Appeals must now decide whether Title IX’s prohibition on sex discrimination extends to gender identity in the absence of federal guidance on the issue.

Please contact our office with questions regarding this Legal Update or any other legal matter.

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The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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⁶ Education Code §§ 66251; 66270.
⁷ “Gender” means sex, and includes a person’s gender identity and gender expression. “Gender expression” means a person’s gender-related appearance and behavior, whether or not stereotypically associated with the person’s sex assigned at birth. Education Code § 66260.7.
⁸ Education Code §§ 66252; 66260.6.
⁹ Education Code § 66271.2.
Dear Colleague:

The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in:

- Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and
- Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016.

These guidance documents take the position that the prohibitions on discrimination “on the basis of sex” in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.

This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that the term “sex” in the regulations is ambiguous and deferred to what the court characterized as the “novel” interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term “sex” unambiguously refers to biological sex and that, in any event, the guidance was “legislative and substantive” and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.

In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.

In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them.
Dear Colleague Letter

Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.

This guidance does not add requirements to applicable law. If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339); or the Department of Justice at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Sincerely,

/s/
Sandra Battle
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
T.E. Wheeler, II
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice
OCR Instructions to the Field re Complaints Involving Transgender Students

Regional Directors:

I am writing to explain the effects of developments on the enforcement of Title IX by the Office for Civil Rights. The recent developments include the following:

- On February 22, 2017, the U.S. Departments of Education and Justice issued a letter withdrawing the statements of policy and guidance reflected in the May 13, 2016 Dear Colleague Letter (DCL) on OCR’s enforcement of Title IX with respect to transgender students based on gender identity, as well as a related January 2015 letter, “in order to further and more completely consider the legal issues involved.”

- On March 3, 2017, the U.S. District Court for the Northern District of Texas dismissed without prejudice the multi-state lawsuit challenging the May 2016 DCL and dissolved the preliminary injunction (as clarified in October 2016) that had restricted OCR’s enforcement of Title IX with respect to transgender individuals’ access to “intimate” facilities.

- On March 6, 2017, the U.S. Supreme Court vacated and remanded Gloucester County School Board v. G.G., a case involving Title IX as it relates to transgender students’ access to restrooms. The Court said it was remanding the case to the U.S. Court of Appeals for the Fourth Circuit for further consideration “in light of the guidance document issued by the [Departments] on February 22, 2017” (i.e., the letter withdrawing the May 2016 DCL discussed above).

Thus, OCR may not rely on the policy set forth in the May 2016 DCL or the January 7, 2015 letter to a private individual as the sole basis for resolving a complaint. However, as was stated in the February 22, 2017, letter, “withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment.” Rather, OCR should rely on Title IX and its implementing regulations, as interpreted in decisions of federal courts and OCR guidance documents that remain in effect, in evaluating complaints of sex discrimination against individuals whether or not the individual is transgender.

OCR may assert subject matter jurisdiction over and open for investigation the following allegations if other jurisdictional requirements have been established (see CPM sections 104-106):

- failure to promptly and equitably resolve a transgender student’s complaint of sex discrimination (34 C.F.R. § 106.8(b));

- failure to assess whether sexual harassment (i.e., unwelcome conduct of a sexual nature) or gender-based harassment (i.e., based on sex stereotyping, such as acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, such as refusing to use a transgender student’s preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward
people who do not conform to sex stereotypes) of a transgender student created a hostile environment;

- failure to take steps reasonably calculated to address sexual or gender-based harassment that creates a hostile environment;
- retaliation against a transgender student after concerns about possible sex discrimination were brought to the recipient’s attention (34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e))); and
- different treatment based on sex stereotyping (e.g., based on a student’s failure to conform to stereotyped notions of masculinity or femininity) (34 C.F.R. § 106.31(b)).

It is the goal and desire of this Department that OCR approach each of these cases with great care and individualized attention before reaching a dismissal conclusion. Please evaluate each allegation separately, searching for a permissible jurisdictional basis for OCR to retain and pursue the complaint. It is permissible, for example, for one allegation in a complaint (such as harassment based on gender stereotypes) to go forward while another allegation (such as denial of access to restrooms based on gender identity) is dismissed.

As always, other requirements in evaluating complaints, as explained in OCR’s Case Processing Manual (CPM) apply, including CPM Sections 101, 105 and 106. For example, in establishing whether an allegation includes sufficient information to proceed to investigation, OCR will, consistent with CPM Section 108, “assist the complainant in understanding the information that OCR requires in order to proceed to the investigation of the complainant’s allegation(s). This will include explaining OCR’s investigation process and the rights of the complainant under the statutes and regulations enforced by OCR. OCR will also specifically identify the information necessary for OCR to proceed to investigation.” I also encourage you to contact the Program Legal Group’s Title IX team if you have any questions about whether OCR has jurisdiction over a case involving a transgender student or alleged discrimination based on gender identity.

When a complaint or case is dismissed, an appropriate text for a letter of dismissal could be:

On February 22, 2017, OCR and the U.S. Department of Justice (DOJ) issued a letter withdrawing their joint Dear Colleague Letter on Transgender Students, issued on May 13, 2016. OCR and DOJ stated that they were withdrawing the 2016 guidance in order to further and more completely consider the legal issues involved. OCR is therefore dismissing this [complaint/allegation/monitoring] under Sections 104 and 108 of OCR’s Case Processing Manual. We remind you however, that there are other statutes and legal provisions that bar discrimination. Additionally, as Betsy DeVos, Secretary of the U.S. Department of Education has stated, each school has a responsibility to protect every student in America and ensure that they have the freedom to learn and thrive in a safe environment. Some States and school districts have found adopted policies and practices that protect all students, including transgender students. The Department’s Examples of Policies and Emerging Practices for Supporting Transgender Students, available at www.ed.gov/osee/oshs/emergingpractices.pdf, features some of those policies and practices.
Thank you for your continued dedication to OCR’s core mission. As Secretary DeVos stated on February 22, 2017, OCR remains committed to investigating all claims of discrimination, bullying and harassment against those who are most vulnerable in our schools. I trust you will apply these instructions in line with the attitude and approach we are proud to foster here in OCR: that OCR exists to robustly enforce the civil rights laws under our jurisdiction, and we will do so in a neutral, impartial manner and as efficiently as possible.

If you have any questions about these instructions, please contact your Enforcement Director, and always feel free to reach out to PLG for assistance in brainstorming how to process a particular complaint.

Sincerely,

/s/
Candice Jackson
Acting Assistant Secretary for Civil Rights
Office for Civil Rights
Department of Education
The Office of the General Counsel (OGC) has received various questions regarding a topic that has received national media attention: facilities for transgender students. In the wake of North Carolina’s House Bill 2 which bans individuals from using a public restroom or locker-room that is inconsistent with the biological sex stated on the individual’s birth certificate, the U.S. Department of Education (DOE) and Department of Justice (DOJ) issued a “Dear Colleague Letter” as guidance on the rights of transgender students in May of 2016. The OGC recently consulted with the Office of Civil Rights (OCR) at the DOE on the key points of the letter, along with a discussion of how the directive affects our California community colleges.

The OCR has made it clear that the authority for enforcement of the directive is linked to federal funding. If a public school is a recipient of federal funds, the school must follow Title IX, the federal law that prevents sex-based discrimination in educational institutions, or run the risk of losing funding. In the state of California, all but two exempt colleges (excluding private and parochial schools) receive federal funds. The list of federal fund recipients includes California community colleges.

The directive indicates that transgender students should be afforded broad civil rights protections under Title IX. The DOE and DOJ interpret Title IX to require schools to treat students consistent with the student’s gender identity once the school receives notice that the student will begin asserting a gender identity different from their education record. Notice of a gender change can come from the student or the parent/guardian of a minor and a medical diagnosis or treatment is not required.

It is important to note that California law currently prevents gender discrimination. California Education Code section 220 states that “No person shall be subjected to discrimination on the basis of... gender,

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1 http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf
2 The OCR directive discusses multiple issues concerning transgender students, including: educational records, Family Educational Rights and Privacy Act (FERPA), single-sex schools, etc. This memo is limited to the discussion of facilities.
gender identity, gender expression... in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.”

In light of the federal guidance and California law, if a California community college is notified that a student is asserting a gender different from the gender listed on their education record, the college must allow the transgender student to access facilities, such as restrooms and locker rooms, consistent with their gender identity.

When providing facilities, community colleges must not treat transgender students any differently than non-transgender students. Colleges must ensure that transgender students do not feel isolated or discriminated against by requiring the transgender students to use facilities inconsistent with his/her gender identity or requiring use of individual facilities when other students are not required to do so.

Colleges may still provide separate facilities based on sex – that is, having separate restrooms for male and female students, but the OCR has clearly indicated that colleges are not required to create new or separate “transgender restrooms” strictly for transgender students. Such a policy would treat transgender students differently and would segregate them from other students. Colleges may have unisex restrooms or family restrooms available if the transgender student voluntarily chooses to use such facilities with the requirement that the facility is open to everyone and not limited to transgender students.

It is also important to remember that providing a safe and nondiscriminatory environment under Title IX extends to all students, including students who do not identify as transgender. Accordingly, when providing accommodations to transgender students, colleges should also be aware of non-transgender students who may seek additional privacy or alternative facilities as a result of the accommodation.

To help colleges facilitate and provide support to all students, the DOE also issued a document titled “Examples of Policies and Emerging Policies.” This document was intended to help schools provide a safe, supportive, and nondiscriminatory environment for all students. Some of the policies include making individual-user restrooms available to all students who voluntarily seek additional privacy or providing access to an alternative restroom or changing area to any student who wants increased privacy. Again, these practices should be afforded to all students to create a nondiscriminatory environment.

With the recent changes, the OCR has seen an influx of cases involving transgender students and facilities within the past year. Although numerous states across the country have joined in a lawsuit against the DOJ for issuance of the guidance, California law and the recent directive by the DOE and DOJ make it clear that discrimination based on sex or gender is strictly prohibited. The Office of the General Counsel suggests that colleges consult with their local counsel if they have any questions about the federal directive, Title IX, California law and/or implementing best practices to support community college students of all genders.

JHK/pvk

3 http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf
Dear Colleague:

Title IX of the Education Amendments of 1972\(^1\) (Title IX) prohibits discrimination on the basis of sex in education programs and activities by recipients of Federal financial assistance, which include schools, colleges and universities. Since its passage, Title IX has dramatically increased academic, athletic and employment opportunities for women and girls. Title IX stands for the proposition that equality of opportunity in America is not rhetoric, but rather a guiding principle.

Although there has been indisputable progress since Title IX was enacted, notably in interscholastic and intercollegiate athletic programs, sex discrimination unfortunately continues to exist in many education programs and activities. I am committed to the vigorous enforcement of Title IX to resolve this discrimination and to provide clear policy guidance to assist a recipient institution (institution) in making the promise of Title IX a reality for all.

To that end, on behalf of the Office for Civil Rights (OCR) of the U.S. Department of Education (Department), it is my pleasure to provide you with this “Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three.” With this letter, the Department is withdrawing the “Additional Clarification of Intercollegiate Athletics Policy: Three Part Test – Part Three” (2005 Additional Clarification) and all related documents accompanying it, including the “User’s Guide to Student Interest Surveys under Title IX” (User’s Guide) and related technical report, that were issued by the Department on March 17, 2005.

OCR enforces Title IX and its implementing regulation.\(^2\) The regulation contains specific provisions governing athletic programs\(^3\) and the awarding of athletic scholarships.\(^4\) Specifically, the Title IX regulation provides that if an institution operates or sponsors an athletic program, it must provide equal athletic opportunities for members of both sexes.\(^5\) In determining whether equal athletic opportunities are available, the regulation requires OCR to consider whether an institution is effectively accommodating the athletic interests and abilities of students of both sexes.\(^6\)

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\(^1\) 20 U.S.C. § 1681 et seq.  
\(^2\) 34 C.F.R. Part 106.  
\(^3\) 34 C.F.R. § 106.41.  
\(^4\) 34 C.F.R. § 106.37(c).  
\(^5\) 34 C.F.R. § 106.41(c).  
\(^6\) 34 C.F.R. § 106.41(c)(1). The Title IX regulation at 34 C.F.R. § 106.41(c) provides that OCR also will consider other factors when determining whether equal athletic opportunity is available at an institution. This Dear Colleague
The “Intercollegiate Athletics Policy Interpretation”\(^7\) (1979 Policy Interpretation), published on December 11, 1979, provides additional guidance on the Title IX intercollegiate athletic regulatory requirements.\(^8\) The 1979 Policy Interpretation sets out a three-part test that OCR uses to assess whether an institution is effectively accommodating the athletic interests and abilities of its students to the extent necessary to provide equal athletic opportunity.\(^9\) On January 16, 1996, OCR issued the “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test” (1996 Clarification) to provide additional clarification on all parts of the three-part test, including the specific factors that OCR uses to evaluate compliance under the third part of the three-part test (Part Three).\(^10\)

In 2005, OCR issued the Additional Clarification regarding application of the indicators in the 1996 Clarification that guided OCR’s analysis of Part Three. The accompanying User’s Guide included a prototype survey instrument (model survey) that institutions could use to measure student interest in participating in intercollegiate athletics and included specific guidance on its implementation. The Additional Clarification and User’s Guide changed OCR’s approach from an analysis of multiple indicators to a reliance on a single survey instrument to demonstrate that an institution is accommodating student interests and abilities in compliance with Part Three. After careful review, OCR has determined that the 2005 Additional Clarification and the User’s Guide are inconsistent with the nondiscriminatory methods of assessment set forth in the 1979 Policy Interpretation and the 1996 Clarification and do not provide the appropriate and necessary clarity regarding nondiscriminatory assessment methods, including surveys, under Part Three. Accordingly, the Department is withdrawing the 2005 Additional Clarification and User’s Guide, including the model survey. All other Department policies on Part Three remain in effect and provide the applicable standards for evaluating Part Three compliance.

Given the resource limitations faced by institutions throughout the nation and the effect on institutions’ athletics programs, I recognize the importance of assisting institutions in developing their own assessment methods that retain the flexibility to meet their unique circumstances, but are consistent with the nondiscrimination requirements of the Title IX regulation. Therefore, this Dear Colleague letter reaffirms, and provides additional clarification

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\(^7\) 44 Fed. Reg. 71413 (1979). The 1979 Policy Interpretation was published by the former Department of Health, Education, and Welfare, and was adopted by the Department of Education when it was established in 1980.

\(^8\) Although the 1979 Policy Interpretation is designed for intercollegiate athletics, its general principles, and those of this letter, often will apply to interscholastic, club, and intramural athletic programs. 44 Fed. Reg. at 71413. Furthermore, the Title IX regulation requires institutions to provide equal athletic opportunities in intercollegiate, interscholastic, club, and intramural athletics. 34 C.F.R. § 106.41(c).

\(^9\) As discussed in the 1979 Policy Interpretation, OCR also consider the quality of competitive opportunities offered to members of both sexes in determining whether an institution effectively accommodates the athletic interests and abilities of its students. 44 Fed. Reg. at 71418.

\(^10\) OCR’s “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance,” which was issued as a Dear Colleague letter on July 11, 2003, also reincorporated the 1996 Clarification’s broad range of specific factors and illustrative examples.
on, the multiple indicators discussed in the 1996 Clarification that guide OCR’s analysis of whether institutions are in compliance with Part Three, as well as the nondiscriminatory implementation of a survey as one assessment technique.

**The Three-Part Test**

As discussed above, OCR uses the three-part test to determine whether an institution is providing nondiscriminatory athletic participation opportunities in compliance with the Title IX regulation. The test provides the following three compliance options:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.\(^{11}\)

The three-part test is intended to allow institutions to maintain flexibility and control over their athletic programs consistent with Title IX’s nondiscrimination requirements. As stated in the 1996 Clarification, “[T]he three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.”

**Part Three of the Three-Part Test — Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex**

This letter focuses on Part Three — whether an institution is fully and effectively accommodating the athletic interests and abilities of the underrepresented sex. As the 1996 Clarification indicates, while disproportionately high athletic participation rates by an institution’s students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy Part Three if it can show that the underrepresented sex is not being denied opportunities, i.e., that the interests and abilities of

\(^{11}\) 44 Fed. Reg. at 71418.
the underrepresented sex are fully and effectively accommodated. This letter provides information that guides OCR in its evaluation of compliance with Part Three and the nondiscriminatory implementation of assessments of students' athletic interests and abilities under it.

Under Part Three, the focus is on full and effective accommodation of the interests and abilities of the institution's students who are members of the underrepresented sex — including students who are admitted to the institution though not yet enrolled. As stated in the 1996 Clarification, and as further discussed below, in determining compliance with Part Three, OCR considers all of the following three questions:

1. Is there unmet interest in a particular sport?
2. Is there sufficient ability to sustain a team in the sport?
3. Is there a reasonable expectation of competition for the team?

If the answer to all three questions is "Yes," OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three.

A. Unmet Interest and Ability — OCR Evaluation Criteria

In determining whether an institution has unmet interest and ability to support an intercollegiate team in a particular sport, OCR evaluates a broad range of indicators, including:

- whether an institution uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students;
- whether a viable team for the underrepresented sex recently was eliminated;
- multiple indicators of interest;
- multiple indicators of ability; and
- frequency of conducting assessments.

Each of these five criteria is described below. Following the discussion of these criteria, this section provides technical assistance recommendations for effective assessment procedures and the nondiscriminatory implementation of a survey as one component of assessing the interests and abilities of students of the underrepresented sex. This section concludes with a discussion of the multiple indicators OCR evaluates to determine whether there are a sufficient number of students with unmet interest and ability to sustain a new intercollegiate team.

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12 OCR examines an institution's recruitment practices under another part of the 1979 Policy Interpretation. See 44 Fed. Reg. at 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that its women's teams are provided with substantially equal opportunities to recruit potential student athletes.
1. Nondiscriminatory Methods of Assessment

Under Part Three, OCR evaluates whether an institution uses processes and methods for assessing the athletic interests and abilities of its students of the underrepresented sex that are consistent with the nondiscrimination standards set forth in the 1979 Policy Interpretation. The 1979 Policy Interpretation states that institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.  

An institution should document its assessment of students' interests and abilities.

2. Assessments Not Used To Eliminate Viable Teams

As discussed in the 1996 Clarification, if an institution recently has eliminated a viable team for the underrepresented sex from the intercollegiate athletics program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport and thus there would be a presumption that the institution is not in compliance with Part Three. This presumption can be overcome if the institution can provide strong evidence that interest, ability, or competition no longer exists.

Accordingly, OCR does not consider the failure by students to express interest during a survey under Part Three as evidence sufficient to justify the elimination of a current and viable intercollegiate team for the underrepresented sex. In other words, students participating on a viable intercollegiate team have expressed interest by active participation, and OCR does not use survey results to nullify that expressed interest.

3. Multiple Indicators Evaluated to Assess Interest

OCR considers a broad range of indicators to assess whether there is unmet athletic interest among the underrepresented sex. These indicators guide OCR in determining whether the institution has measured the interests of students of the underrepresented sex using nondiscriminatory methods consistent with the 1979 Policy Interpretation. As discussed in the

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1996 Clarification, OCR evaluates the interests of the underrepresented sex by examining the following list of non-exhaustive indicators:

- requests by students and admitted students that a particular sport be added;
- requests for the elevation of an existing club sport to intercollegiate status;
- participation in club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interests in particular sports;
- results of surveys or questionnaires of students and admitted students regarding interests in particular sports;\(^{14}\)
- participation in interscholastic sports by admitted students; and
- participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students.\(^{15}\)

In accordance with the 1996 Clarification, OCR also will consider the likely interest\(^{16}\) of the underrepresented sex by looking at participation in intercollegiate sports in the institution’s normal competitive regions.

4. Multiple Indicators Evaluated to Assess Ability

As discussed in the 1996 Clarification, OCR considers a range of indicators to assess whether there is sufficient ability among interested students of the underrepresented sex to sustain a team in the sport. When making this determination, OCR examines indicators such as:

- the athletic experience and accomplishments — in interscholastic, club or intramural competition — of underrepresented students and admitted students interested in playing the sport;

\(^{14}\) OCR evaluates all of the indicators discussed here so OCR does not consider survey results alone as sufficient evidence of lack of interest under Part Three.

\(^{15}\) As discussed in the 1996 Clarification, this indicator may be helpful to OCR in ascertaining likely interest of an institution’s students and admitted students in particular sports, especially in the absence of more direct indicia. However, in conducting its investigations, OCR determines whether an institution is meeting the actual interests and abilities of its students and admitted students.

An institution’s evaluation should take into account sports played in the high schools and communities from which it draws its students, both as an indication of possible interest at the institution, and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex. For example, if OCR’s investigation finds that a substantial number of high schools from the relevant region offer a particular sport that the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR also may interview students, admitted students, coaches, and others regarding interest in that sport.

\(^{16}\) See Footnote 15 above.
• opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain an intercollegiate team; and
• if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Additionally, because OCR recognizes that students may have a broad range of athletic experiences and abilities, OCR also examines other indications of ability such as:

• participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered; and
• tryouts or other direct observations of participation in the particular sport in which there is interest.

As the 1996 Clarification indicated, neither a poor competitive record, nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution’s other athletes, is conclusive evidence of lack of ability. For the purposes of assessing ability, it is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

5. Frequency of Assessments

As discussed in the 1996 Clarification, OCR evaluates whether an institution assesses interest and ability periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. There are several factors OCR considers when determining the rate of frequency for conducting an assessment. These factors include, but are not limited to:

• the degree to which the previous assessment captured the interests and abilities of the institution’s students and admitted students of the underrepresented sex;
• changes in demographics or student population at the institution;\footnote{17} and
• whether there have been complaints from the underrepresented sex with regard to a lack of athletic opportunities or requests for the addition of new teams.

Further, OCR will consider whether an institution conducts more frequent assessments if a previous assessment detected levels of student interest and ability in any sport that were close to the minimum number of players required to sustain a team.

\footnote{17} For example, in a typical four-year institution, the student body population will change substantially each year, by approximately 25 percent annually.
6. Effective Procedures for Evaluating Requests to Add Teams and Assessing Participation

An institution has a continuing obligation to comply with Title IX's nondiscrimination requirements; thus, OCR recommends that institutions have effective ongoing procedures for collecting, maintaining, and analyzing information on the interests and abilities of students of the underrepresented sex, including easily understood policies and procedures for receiving and responding to requests for additional teams, and wide dissemination of such policies and procedures to existing and newly admitted students, as well as to coaches and other employees.

OCR also recommends that institutions develop procedures for, and maintain documentation from, routine monitoring of participation of the underrepresented sex in club and intramural sports as part of their assessment of student interests and abilities. OCR further recommends that institutions develop procedures for, and maintain documentation from, evaluations of the participation of the underrepresented sex in high school athletic programs, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students. This is the type of documentation that may be needed in order for an institution to demonstrate that it is assessing interests and abilities in compliance with Part Three.

The Title IX regulation requires institutions to designate at least one employee to coordinate their efforts to comply with and carry out their Title IX responsibilities.\textsuperscript{18} Therefore, institutions may wish to consider whether the monitoring and documentation of participation in club, intramural, and interscholastic sports and the processing of requests for the addition or elevation of athletic teams should be part of the responsibilities of their Title IX coordinators in conjunction with their athletic departments. Another option an institution may wish to consider is to create a Title IX committee to carry out these functions. If an institution chooses to form such a committee, it should include the Title IX coordinator as part of the committee and provide appropriate training on the Title IX requirements for committee members.

7. Survey May Assist in Capturing Information on Students’ Interests and Abilities

As discussed in the 1996 Clarification, institutions may use a variety of techniques to identify students’ interests and abilities. OCR recognizes that a properly designed and implemented survey is one tool that can assist an institution in capturing information on students’ interests and abilities. OCR evaluates a survey as one component of an institution’s overall assessment under Part Three and will not accept an institution’s reliance on a survey alone, regardless of the response rate, to determine whether it is fully and effectively accommodating the interests and abilities of its underrepresented students. If an institution conducts a survey as part of its assessment, OCR examines the content, implementation and response rates of the survey, as well as an institution’s other methods of measuring interest and ability.

\textsuperscript{18} 34 C.F.R. § 106.8(a).
Under Part Three, OCR evaluates the overall weight it will accord the conclusions drawn by an institution from the results of a survey by examining the following factors, among others:

- content of the survey;
- target population surveyed;
- response rates and treatment of non-responses;
- confidentiality protections; and
- frequency of conducting the survey.

OCR also considers whether a survey is implemented in such a way as to maximize the possibility of obtaining accurate information and facilitating responses. A properly designed survey should effectively capture information on interest and ability\(^{19}\) across multiple sports, without complicating responses with superfluous or confusing questions.

OCR has not endorsed or sanctioned any particular survey; however, for technical assistance purposes, this letter contains information that an institution may wish to consider in developing its own survey.

a. **Content of the Survey**

   i. **Purpose**

   To ensure students understand the importance of responding to the survey, OCR evaluates whether a survey clearly states its purpose. For technical assistance purposes, an example of a purpose statement might be:

   **Purpose:** This data collection is being conducted for evaluation, research, and planning purposes and may be used along with other information to determine whether [institution] is effectively accommodating the athletic interests and abilities of its students, including whether to add additional teams.

   ii. **Collect information regarding all sports**

   In addition, OCR evaluates whether the survey lists all sports for the underrepresented sex recognized by the three primary national intercollegiate athletic associations,\(^{20}\) and contains an open-ended inquiry for other sports to allow students to write in any sports that are not

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\(^{19}\) Experience in sports generally is one indicator of ability.

\(^{20}\) These associations are the National Collegiate Athletic Association, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association. A current list of these sports for both sexes is: baseball, basketball, bowling, cross country, fencing, field hockey, football, golf, gymnastics, ice hockey, lacrosse, rifle, rowing, skiing, soccer, softball, swimming and diving, tennis, indoor track and field, outdoor track and field, volleyball, water polo, and wrestling.
listed. OCR considers whether the survey allows students to identify their interest in future or current participation in all of the sports they identify and general athletic experience. OCR also considers whether the survey allows students to provide additional information or comments about their interest, experience, and ability. For technical assistance purposes, the types of questions an institution could ask regarding interest in future participation, current participation, and prior athletic experience might be:

<table>
<thead>
<tr>
<th>Sport</th>
<th>Interest in Future Participation: At what level do you wish to participate in this sport at [Institution]?</th>
<th>Current Participation: At what level are you participating in this sport?</th>
<th>Prior Experience: At what level did you participate in this sport or any other relevant sport in high school, college, or in another capacity?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basketball</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational □ Other __________</td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other __________</td>
</tr>
<tr>
<td>Lacrosse</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational □ Other __________</td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other __________</td>
</tr>
<tr>
<td>Other sport</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational □ Other __________</td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other __________</td>
</tr>
<tr>
<td>identified by</td>
<td></td>
<td></td>
<td>High School □ Varsity □ Junior Varsity □ Club □ Intramural □ Recreational □ Other __________</td>
</tr>
<tr>
<td>student</td>
<td></td>
<td></td>
<td>High School □ Varsity □ Junior Varsity □ Club □ Intramural □ Recreational □ Other __________</td>
</tr>
</tbody>
</table>

iii. **Contact Information**

OCR also looks at whether an institution requests contact information, to allow the institution to follow-up with students who wish to be contacted regarding their interests and abilities.

b. **Target Population Surveyed**

OCR considers the target population surveyed at the institution. Under Part Three, OCR evaluates whether the survey is administered as a census to all full-time undergraduate...
students of the underrepresented sex and admitted students of the underrepresented sex. Using a census of all students can avoid several issues associated with sample surveys including, but not limited to: selection of the sampling mechanism, selection of the sample size, calculation of sampling error, and using sample estimates. If an institution intends to administer a survey to a sample population to gauge an estimate of interests and abilities, the larger the sample, the more weight OCR will accord the estimate.

c. Responses: Rates and Treatment of Non-Responses

OCR evaluates whether the survey is administered in a manner designed to generate high response rates and how institutions treat responses and non-responses.

OCR looks at whether institutions provide the survey in a context that encourages high response rates, and whether institutions widely publicize the survey; give students, including those participating in club or intramural sports, advance notice of the survey; and provide students adequate time to respond. Generally, OCR accords more weight to a survey with a higher response rate than a survey with a lower response rate, and institutions may want to distribute the survey through multiple mechanisms to increase the response rate.

For example, for enrolled students, an institution may want to administer the survey as part of a mandatory activity, such as during course registration. If administered as part of a mandatory activity, students also should have the option of completing the survey at a later date in order to ensure that they have adequate time to respond. Students who indicate that they wish to complete the survey at a later time should be given the opportunity to provide their contact information to enable the institution to take steps to ensure that they complete the survey. An institution should follow-up with those students who indicate that they wish to respond in the future.

An institution also may choose to send an email to the entire target population that includes a link to the survey. If an institution’s assessment process includes email, OCR considers whether the institution takes appropriate cautionary measures, such as ensuring that it has accurate email addresses and that the target population has access to email. OCR also expects institutions to take additional steps to follow-up with those who do not respond, including sending widely publicized reminder notices.

If institutions administer the survey through a web-based distribution system, students who indicate that they have no current interest in athletic participation should be asked to confirm their lack of interest before they exit the system. If response rates using the methods described

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23 For example, institutions may distribute surveys to all admitted students of the underrepresented sex with acceptance letters.

24 OCR also evaluates whether the survey is administered in a manner designed to ensure the accurate identity of the respondent and to protect against multiple responses by the same individual.

25 Students may have, or may be unaware of whether they will have, a future interest in athletic participation.
above are low, an institution should consider administering the survey in another manner to obtain higher response rates.

OCR does not consider non-responses to surveys as evidence of lack of interest or ability in athletics. As discussed above, regardless of whether students respond to a survey, OCR also evaluates whether students’ interest and abilities are assessed using the multiple indicators described above.

d. **Confidentiality Protections**

OCR also looks at whether institutions notify students that all responses as well as any personally identifiable information they provide will be kept confidential, although the aggregate survey information will be shared with athletic directors, coaches, and other staff, as appropriate. When requesting any personal or personally identifiable data, protecting the respondents’ confidentiality helps to ensure that institutions obtain high-quality data and high response rates. If a student has expressed interest in being contacted when responding to the survey, an institution should continue to maintain the student’s confidentiality except to the extent needed to follow-up with the student.

e. **Frequency of Conducting the Survey**

As discussed above, OCR evaluates whether an institution periodically conducts an assessment of interest and abilities. In addition to the factors OCR considers when determining the rate of frequency for conducting an assessment, OCR also will consider factors such as the size of the previously assessed survey population and the rate of response to the immediately preceding survey(s) conducted by the institution, if any.

8. Multiple Indicators Evaluated to Assess Sufficient Number of Interested and Able Students to Sustain a Team

Under Part Three, institutions are not required to create an intercollegiate team or elevate a club team to intercollegiate status unless there are a sufficient number of interested and able students to sustain a team. When OCR evaluates whether there are a sufficient number of students, OCR considers such indicators as the:

- minimum number of participants needed for a particular sport;
- opinions of athletic directors and coaches concerning the abilities required to field an intercollegiate team; and
- size of a team in a particular sport at institutions in the governing athletic association or conference to which the institution belongs or in the institution’s competitive regions.

When evaluating the minimum number of athletes needed, OCR may consider factors such as the:
• rate of substitutions necessitated by factors such as length of competitions, intensity of play, or injury;
• variety of skill sets required for competition; and
• minimum number of athletes needed to conduct effective practices for skill development.

B. Reasonable Expectation of Competition — OCR Evaluation Criteria

Lastly, as indicated in the 1996 Clarification, OCR evaluates whether there is a reasonable expectation of intercollegiate competition for the team in the institution's normal competitive regions. In evaluating available competition, OCR considers available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

• competitive opportunities offered by other schools against which the institution competes; and
• competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.\(^{26}\)

If the information or documentation compiled by the institution during the assessment process shows that there is sufficient interest and ability to support a new intercollegiate team and a reasonable expectation of intercollegiate competition in the institution's normal competitive region for the team, the institution is under an obligation to create an intercollegiate team within a reasonable period of time in order to comply with Part Three.

Conclusion

The three-part test gives institutions flexibility and affords them control over their athletics programs. This flexibility, however, must be used consistent with Title IX's nondiscrimination requirements. OCR will continue to work with institutions to assist them in finding ways to address their particular circumstances and comply with Title IX. For technical assistance, please contact the OCR enforcement office that serves your area, found at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm.

Sincerely,

Russlynn Ali
Assistant Secretary for Civil Rights

\(^{26}\) Under the 1979 Policy Interpretation, an institution also may be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex. 44 Fed. Reg. at 71418.
Occidental College (the College) and the U.S. Department of Education, Office for Civil Rights (OCR) enter into this Resolution Agreement (Agreement) in connection with the above-referenced complaint. OCR makes no finding of noncompliance, and the College makes no admission of noncompliance. Nevertheless, to ensure continuing compliance with Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106, the College hereby voluntarily agrees to the following.

A. Training

1. Within 45 days of the execution of this Agreement, and with technical assistance from OCR, the College will develop mandatory annual training for all regular staff and faculty regarding retaliation under Title IX and its implementing regulations and the grievance process available to respond to allegations of retaliation, with a specific focus on the definition of protected activity. This mandatory training may be a part of the College’s annual Title IX training programs.

Reporting Requirements

1. Within 60 days of the execution of this Agreement, the College will provide for OCR review and approval the training materials to be used for the training required in A(1) and the name and qualifications of the trainer.

2. Upon approval of the training materials and trainer by the OCR, and starting in the fall of the 2016-17 school year, the College will conduct the training and provide OCR with documentation showing that it has done so, including the list of attendees and materials provided.

3. The College also agrees to perform this training in the fall of the 2017-18 and 2018-19 school years. The College will provide documentation that the training in (A)(1) has been offered by no later than December 31, 2016, December 31, 2017, and December 31, 2018.

B. Climate Survey and Ongoing Process of Review and Revision

1. The College will continue to perform, during the term of this Agreement, an annual student survey to assess whether a hostile environment, based on issues arising out of sexual misconduct, exists on the College campus and to assess students’ understanding about what sexual harassment is and how to prevent it, and the process for reporting and investigating sexual harassment on campus. A survey similar to the climate survey utilized in 2015 will be provided for OCR review and approval. The College will use the results of the student survey to consider revisions to policy, training, education, and outreach for students, faculty, and staff and to determine whether any additional measures are needed to (a) ensure a climate where students
feel safe and supported, (b) provide a prompt and equitable response to reports and complaints of sexual harassment and violence, and (c) prevent sexual harassment and violence or its recurrence and remedy any effects.

2. The College will develop and initiate an annual survey for faculty and staff to assess whether a hostile environment, based on issues arising out of sexual misconduct, exists on the College campus between the College’s employees and students, and to assess whether faculty and staff understand what sexual harassment is and how to prevent it, their responsibilities related to implementation of the Policy, and the process for reporting and investigating sexual harassment on campus. The College will use the results of the survey to consider revisions to policy, training, education, and outreach for students, faculty, and staff and to determine whether any additional measures are needed to (a) ensure a climate where students feel safe and supported, (b) provide a prompt and equitable response to reports and complaints of sexual harassment and violence, and (c) prevent sexual harassment and violence or its recurrence and remedy any effects.

**Reporting Requirements**

1. By September 15, 2016, the College will provide OCR with a draft of the proposed annual student, faculty and staff surveys for review and approval. After approval of the surveys by the OCR, the College will distribute the surveys to its community for response. The surveys will be distributed each year, while this Agreement is in effect, by November 30th.

2. By March 1st, and by the same date in each year thereafter while this Agreement is in effect, the College will provide OCR with documentation showing that it has administered the annual surveys and has considered revisions to policy, training, education, and outreach for students, faculty, and staff, and any additional measures necessary to (a) ensure a climate where students feel safe and supported; (b) provide a prompt and equitable response to reports and complaints of sexual harassment and violence; and (c) prevent sexual harassment, including sexual violence. Such documentation shall include the aggregate results of the survey, any meeting minutes or notes taken by the Title IX Coordinator (or her designee) related to a discussion of the results with staff, faculty, students and College community members, and any changes to the College’s plan for policy, training, education and other prevention measures. Any revisions to the College’s Policy or plans for training, education, or other prevention measures will be provided to OCR for review and approval.

3. By May 1, 2017, May 1, 2018, and May 1, 2019, the College will provide the aggregate results of the annual surveys to staff, faculty, students and the College community in an accessible format along with any proposals for changes to policy, training, education and other measures, as approved by OCR.
C. Process for Ensuring Prompt Resolution of Complaints

During the 2016-17, 2017-18, 2018-2019 school years, the College will conduct an annual review of complaints/reports of sexual harassment, including sexual violence, and the timeline for resolution of such complaints, including the timeline for each of the stages in the process, which currently include the initial meeting, first and second threshold determinations, investigation, sanctions and appeal, and review the results to determine whether any changes to policy or practice are needed to ensure a prompt and effective resolution of the complaints/reports.

Reporting Requirement

By June 30, 2017, June 30, 2018, and June 30, 2019, the College will provide OCR with a summary of the results of the annual review, including its assessment of whether the resolution process was prompt and the complaint files that the College reviewed in creating the summary. The College will provide any proposals for addressing concerns identified as a result of the annual review to OCR for review and approval.

D. General Requirements

If OCR has any objections to the documents, recommendations or other items required to be submitted for review and approval by OCR under this Agreement, OCR will notify the College in writing of its objections after receiving the draft documents.

The College understands that OCR will not close the monitoring of this Agreement until OCR determines that the University has fulfilled the terms of this Agreement and is in compliance with the regulation implementing Title IX, at 34 C.F.R. §§ 106.8, 106.9, and 106.31, which were at issue in this case.

The College understands that by signing this Agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this Agreement. Further, the College understands that during the monitoring of this Agreement, if necessary, OCR may visit the College, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the College has fulfilled the terms of this Agreement and is in compliance with regulation implementing Title IX, at 34 C.F.R. §§ 106.8, 106.9, and 106.31, which were at issue in this case.

The College understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce this Agreement, OCR will give the College written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

_________________________ /s/_________________________     06/08/2016
Jonathan Veitch, President                               Date
OCR Instructions to the Field re Scope of Complaints

Regional Directors:

These Instructions set forth new internal guidance regarding the scope of the investigation of all OCR cases. This guidance is effective immediately and applies to all complaints currently in evaluation or investigation, as well as newly-filed complaints. These Instructions shall be applied consistently with OCR’s Case Processing Manual (CPM), and if any questions arise about how to apply these Instructions consistently with the CPM, please contact your designated Enforcement Director for clarification.

Effective immediately, there is no mandate that any one type of complaint is automatically treated differently than any other type of complaint with respect to the scope of the investigation, the type or amount of data needed to conduct the investigation, or the amount or type of review or oversight needed over the investigation by Headquarters. There is no longer a “sensitive case” or “call home” list; rather, Headquarters and the Regional Offices (Regional Director) will consult regularly to determine on a case-by-case basis whether complex or problematic investigations require Headquarters review or intervention and when trends emerge that require Headquarters oversight or direction. Cases are retroactive and can/will be returned to the respective Regional Office if the RD feels a case can be adjudicated at the regional level.

In particular, OCR will no longer follow the existing investigative rule of obtaining three (3) years of past complaint data/files in order to assess a recipient’s compliance, which rule had been stated in OCR’s Approach to Title IX PSE Sexual Violence Complaints (January 2014) (for internal discussion), OCR’s Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints (February 12, 2014) (Draft for internal discussion), and other related internal policy documents. For example, if a discipline complaint requires analysis of whether a facially-neutral suspension policy was applied differently against a particular student based on a prohibited classification such as race, the investigative team (supervised by their Team Leader and Regional Director) is empowered to determine what comparative data (CRDC or otherwise) are necessary to, e.g., determine if other similarly-situated students of a different race were, in fact, treated differently from the student on whose behalf the complaint was filed.

The scope of the investigation of all complaints, including ESE discipline and PSE sexual violence complaints, is determined by the statutes and regulations, OCR’s published guidance, and the legal theory(ies) applicable to the allegation(s) stated by the complainant. There is no longer a “one size fits all” approach to the investigation of any category of complaints. Based on the investigative requirements set forth in the statutes and regulations, published guidance, and the legal theory(ies) applicable to the allegation(s) stated by the complainant, it is the investigative team’s responsibility (under appropriate supervision by Team Leaders and other Regional Office supervisors) to determine on a case-by-case basis the type and scope of evidence that is necessary to support a legally sound investigation and determination, with the understanding that all OCR investigations are to be framed in their scope by the allegations of each particular complaint.

For the sake of clarity, these Instructions mean that OCR will only apply a “systemic” or “class-action” approach where the individual complaint allegations themselves raise systemic or class-wide issues or the investigative team determines a systemic approach is warranted through conversations with the complainant.
Please apply the instructions in this document with the understanding that OCR’s goal is to swiftly address compliance issues raised by individual complaint allegations, reach reasonable resolution agreements with defined, enforceable obligations placed upon recipients directly responsive to addressing the concerns raised in the individual complaint being resolved, and encourage voluntary settlements wherever possible.

I trust you will apply these instructions in line with the attitude and approach we are proud to foster here in OCR: that OCR exists to robustly enforce the civil rights laws under our jurisdiction, and we will do so in a neutral, impartial manner and as efficiently as possible. These instructions in particular are designed to empower our investigative staff to clear case backlogs and resolve complaints within a reasonable time-frame, thus providing effective resolution and justice to complainants and recipients.

Thank you for your continued dedicated to OCR’s core mission to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation’s schools. If you have any questions about these instructions, please contact your Enforcement Director. You may also contact me if further clarification is needed.

Candice Jackson
OCR Acting Assistant Secretary for Civil Rights
Hypothetical Scenario

You are the Title IX Coordinator at your community college. Your campus has a bookstore, which employs both students and non-students.

A number of students made a report to the bookstore manager (a non-student) that another bookstore employee, Jason, who has been employed by the bookstore for 5 years, holds his cellphone under the skirts and shorts of female student customers to secretly take their pictures and/or video tape them. The students also alleged that Jason would stand near female students and pretend to either stock items on the shelves or kneel down to tie his shoelaces and hold his cellphone under the skirts and shorts of female students to take their pictures. One student stated that Jason used his cellphone to take pictures under the skirts of foreign language students who were as young as nine to 13 years old.

Some of the female students also reported that they were scared and nervous around Jason because he touched them inappropriately (on the thigh, pulling bra straps, touching their bare skin and hair). The students also stated that they warned new female student employees not to wear skirts, shorts or tank tops when they come to work. The students further stated that they were not comfortable being around Jason and that it was stressful trying to find ways to avoid him during their shift at the bookstore.

Some of the female students, who reported being inappropriately touched by Jason, told the bookstore manager that they did not know that Jason’s behavior was sexual harassment, only that what he did shocked them, made them feel uncomfortable and scared.

The bookstore manager did not report the complaints, because he and Jason are friends.

Months after the employees made the report to the bookstore manager, you, the Title IX Coordinator, receive an email from one of the female student’s boyfriends, explaining that the student could not get out of bed to go to class and go to work because she is suffering from such bad anxiety on account of Jason.

What do you do?

Adapted from: Citrus Community College, OCR Case No. 09-16-2079