Sonoma County Office of Education

TITLE IX PART II - CONDUCTING TITLE IX INVESTIGATIONS
K-12

October 2, 2018

Presented by:

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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.
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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.

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)

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Title IX Part II:
Conducting Title IX Investigations
October 2, 2018

Agenda

- Workshop series
- Brief overview of Title IX
- Conducting impartial investigations
- Appropriate remedies and sanctions
- Legally compliant investigation reports
- Next steps

Fall 2018
Title IX Workshop Series at SCOE

- Part 1 – Title IX Coordinator Essentials, September 19, 2018
- Part 3 – Nuts and Bolts of the Title IX Coordinator’s Role, November 14, 2018
- Part 4 – CCD Only – Additional Title IX Challenges for Community Colleges, December 11, 2018
I. Brief Overview of 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.”


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 harassment;
  - Who has been given the duty of reporting incidents of sexual harassment 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. Conducting Impartial Investigations
What is an Investigation?

- An investigation includes both the fact-finding and decision-making processes (excluding appeals)
- It is the process by which school determines:
  - Whether or not the conduct occurred
  - If it did occur, whether the conduct is sufficiently serious
  - If it is, what actions are necessary to:
    - end the discrimination,
    - eliminate the hostile environment, and
    - prevent its recurrence

Legal Requirements Under Title IX

- A Title IX investigation must be:
  - Prompt
  - Thorough
  - Impartial
- It may, but is not required to, include a hearing
- It must include the opportunity for both the complainant and the respondent to offer evidence
- No fixed time frame – follow your grievance procedures
- School must make a “good faith effort” to conduct a “fair, impartial investigation” in a “timely manner”

Investigations Will Vary by Institution

- The specific steps in a recipient’s Title IX investigation will vary depending on:
  - Nature of the allegation(s)
  - Source of the complaint
  - Age of student(s) involved
  - Size and administrative structure of school
  - State or local legal requirements (such as mandatory reporting or Title 5 regulations)
  - Lessons learned from past experiences
Investigations Will Vary by Institution

• Investigations may include:
  • Conducting interviews
    • Complainant
    • Respondent*
    • Other witnesses
  • Reviewing student and personnel files
  • Reviewing law enforcement documents, if applicable
  • Gathering and examining other relevant documents or evidence
  • Hiring an outside investigator

Investigation Fundamentals:
First Steps
1. Review the applicable procedure
  • Enter the case into a complaint log
  • Map out the steps and timeline for the investigation based on the procedure
  • Make sure required notices are sent, including copies of the applicable procedure and other information required by the procedure
2. Develop an investigative strategy
  • Outline scope and breadth of investigation
  • Determine who should be interviewed and what information should be reviewed

Investigation Fundamentals:
Next Steps
3. Determine who will be part of the investigation team
  • District employees
  • Outside investigators
4. Conduct the investigation
  • Begin promptly
  • Determine who should be interviewed, and in what order
  • Begin interviews with core people and broaden as needed
  • Before interviewing, outline interview questions, including elements of a particular complaint
  • Before interviewing, review related documents/records
Investigation Fundamentals, cont’d.

4. Conduct the investigation, cont’d
   • Prepare for interviews by identifying the following elements:
     • Identity of interviewer
     • Identity of person to be interviewed
     • Location, date, and time of interview
     • Conduct interview in confidential setting
     • Make arrangements to record interviews, if possible
       • California law requires informed consent of witness (632 P.C.)
       • Once recorder is on, state date, time & place of interview, name of participants and have witness confirm on tape his/her knowledge of & consent of the recording

   • Should be looking for each element of the type of discrimination at issue
   • Did unlawful conduct occur?
   • Was each prong of the allegation met?
     • Unlawful discrimination -
       (1) Unwelcome conduct that is
       (2) sufficiently severe or pervasive to
       (3) (a) significantly interfere with the employee/student’s job/academic performance OR
           (b) create an intimidating, hostile or abusive working/academic environment

   • Title IX Investigation Procedures: Standards of Evidence
     • 2017 Title IX guidance gives districts the ability to choose between two standards:
       • Preponderance of the Evidence (50.1%)
         • More likely than not
       • Clear and Convincing Evidence (~75%)
         • Substantially more likely than not
## Notice of Investigation

- Once a school decides to investigate conduct that may lead to disciplinary action, school must provide written notice to respondent, including:
  - Allegations constituting a potential violation of school policy
  - Sufficient details of allegations:
    - Identity of the parties involved
    - Date(s) and location(s) of alleged incident(s)
    - Section(s) of the code allegedly violated
    - The precise conduct allegedly constituting the potential violation
  - Must be provided a sufficient time in advance of the interview to allow respondent to prepare a response

## Interviews

- Make appropriate disclosures (e.g., who you are, who you represent, why you are there)
- Explain that district is required to investigate allegations of [sexual harassment, sexual violence, sex discrimination] and take appropriate action
- State that no conclusions have been made and retaliation is prohibited
- Try to put interviewee at ease (use trauma-informed guidelines)
- Emphasize the expectation of best recollection and truthful answers
- Start with broad/overview questions

- Have interviewee describe the incident(s)/conduct in his/her own words
- 5 W’s – who, what, when, where, why
- Ask if interviewee has told interviewer everything he/she can remember
- After each answer, ask: “is there anything else?”
- Ask follow up questions, including questions to confirm chronology of events, to fill in any gaps in the 5 W’s
- Don’t offer information or provide answers
- Ask about knowledge of any relationships between complainant & alleged wrong-doer or possible motivations for complaint or conduct at issue
Interviews

- Ask about and for copies of any relevant documents, texts, emails, photos, social media posts, etc.
- At the end of the interview:
  - Ask whether there is anyone else the interviewee thinks should be interviewed about the incident/conduct
  - Provide your contact information and advise the interviewee to contact you with any additional information
  - Give the interviewee a copy of the relevant procedure
  - Caution against retaliation
  - Remind the interviewee to maintain confidentiality
  - Advise interviewee you may need to follow-up with him/her as investigation proceeds

Interviews

- Be an active listener & critical thinker
  - “Does this make sense?”
  - “Do I understand exactly what happened?”
  - “Will the person reading my report understand exactly what happened?”
- Use your timeline to identify discrepancies between witness’ own story & that of others - challenge facts

Interviews

- Clarify basis for witness’ knowledge of a “fact”
  - How do they know?
    - Saw it? Heard it? Was involved in it?
    - Distinguish between “no” & “I cannot recall.”
  - Document carefully for later review
Interviews: Assessing Credibility

- Investigators should take into account all relevant evidence in determining witnesses’ credibility.
- Should not rely solely on eye-witness accounts, tangible physical evidence, or an admission to corroborate either party’s story.

Factors to consider:
- Changes in behavior of the complainant
- Complainant telling another person about the discrimination
- Other complaints against same respondent
- Witnesses’ conduct during interviews, including body language, eye contact, tone, nervous behaviors, sweating
- Consistent/inconsistent information
- Corroboration by other witnesses, documents, or other evidence
- How much detail did witness offer?

Factors that aren’t as relevant: a delay in reporting, minor inconsistencies in story, that complainant and respondent once had a consensual relationship.

Hot Seat

1. Respondent says, “She was asking for it. Just look at what she was wearing!”
2. The complainant drops out of sports and drama club and starts missing school frequently.
3. Respondent’s witness says, “He’s such a good kid. I know he could never do what she’s accusing him of.” [sexual harassment investigation]
4. Respondent says, “It was an accident. I didn’t do it on purpose.” after putting his hand on a male student’s crotch.
5. Complainant writes in her journal after the assault about how the assault has impacted her.
6. Complainant tells his best friend that he’s been harassed by a football player for the past 3 months.
7. Respondent says, “We used to date. I know he’s okay with us fooling around.”
8. You’re the investigator. You diligently try to contact complainant to set up a time to interview her. She does not reply to your many overtures. When you try to approach her personally, she avoids you. When you finally get in touch with her, she says she doesn’t want to be involved.

Which of the following is appropriate to consider in a credibility determination?
### Interviewing the Complainant

- Must be provided sufficient written notice in advance of any interview to prepare for meaningful participation
- Ask complainant specifically:
  - Has anything like this ever happened before? Use 5 W’s
  - The nature and past history of any relationship between complainant and respondent
  - Whether complainant has previously complained about the respondent, and if so, to whom
  - Whether anyone else knew of or joined in conduct complained of
  - Whether complainant is aware of other incidents by respondent toward other individuals
  - Whether any documents exist to support the allegations

### Interviewing the Respondent

- Must be provided sufficient written notice (including the specific allegations) in advance of any interview to prepare for meaningful participation
- Verify that no determinations of wrongdoing have been made and that he/she will have a full opportunity to provide information
- Caution against retaliation
- The respondent (and complainant) should be allowed to have a representative present

### Interviewing the Respondent, cont’d.

- Provide respondent a copy of applicable complaint procedures and explain district’s obligation to investigate complaints
- Ascertain:
  - Whether respondent agrees with statements/allegations of complainant and other witnesses already interviewed
  - Whether any witnesses or other evidence exists that could corroborate respondent’s version of events
  - The nature and past history of any relationship between complainant and respondent
  - Whether respondent knows if complainant has previously made complaints of a similar nature about respondent or others
Interviewing Other Witnesses

• Advise witness to keep matter confidential
• Discuss prohibition against retaliation
• If witness is a minor, notify parent/guardian of need to interview minor
• Identify the relation of witnesses to the complainant and/or respondent
• Questions may include:
  • Ask them to describe event in own words
  • Does witness know of similar incidents/conduct
  • Identity of any other witnesses

Hot Seat

• Flip to Case Study
• Please work in groups to identify:
  • Any issues you see with how the district handled this investigation
  • How you would conduct this investigation in compliance with Title IX

Interview Documentation

• Take and keep notes of interviews and the entire investigation (telephone conversations, meetings)
• Include date, time, and place of interview
• Include who attended the interview, and how long it lasted
• Note information provided by witnesses, and if it is consistent/inconsistent with information provided by other witnesses
• Note any documents/evidence provided during interview
• Note names of any potential witnesses provided by interviewee
**Preserve Evidence**

- Take note of when, where, and from whom an item was taken
- Store all evidence in a secure location
- If any items are surrendered to law enforcement, take a picture of the item and note when, where, and to whom it was surrendered
- Photograph physical injuries and promptly arrange for appropriate first aid/medical attention
- Title IX regulations require institutions to keep records to send to OCR for compliance reviews
- Certain records must be sent to CDE/Chancellor’s Office

**Findings of Fact and Conclusions**

- Some evidence may not be in dispute
- Some evidence can be corroborated by the investigator
- Information from complainant or respondent may be corroborated by witnesses
- When information received from complainant and respondent differs on important points, make credibility determinations
- State what facts are determined to be true/untrue and what areas could not be determined (if any)

**Findings of Fact and Conclusions, cont’d.**

- Based on the facts and analysis, reach a conclusion:
  - The complaint lacks merit
  - The evidence was not conclusive and cannot support a determination as to the merits of the complaint
  - The alleged conduct occurred, but did not violate policy, applicable standards (whatever else the complaint process addresses)
  - The conduct occurred and violated a standard of conduct or a standard of policy
  - Prepare a report
**Report Requirements**

- **K-12 Report** must include:
  - Findings of fact based on the evidence
  - Conclusions of law
  - Disposition of the complaint
  - Rationale for the disposition
  - Corrective actions, if any
  - Notice of appeal rights, if any
  - Relevant exculpatory and inculpatory evidence

- **CCD Report** must include:
  - Description of circumstances giving rise to complaint
  - Summary of testimony provided by each witness
  - Analysis of relevant data and other evidence collected
  - Specific finding as to whether there is probable cause for each allegation
  - Any other information deemed appropriate
  - Relevant exculpatory and inculpatory evidence

**Investigator Qualifications**

- An equitable investigation requires a trained investigator to:
  - Analyze and document available evidence
  - Develop reliable decisions
  - Objectively evaluate the credibility of parties and witnesses
  - Synthesize all available evidence
  - Take into account unique and complex circumstances of each case
  - Investigator may not rely on sex stereotypes or generalizations in conducting investigation or reaching conclusions

**Balancing Act**

- The most defensible investigations will balance the rights of complainant and respondent

- Essentially, parties must be treated equally, including:
  - Equal opportunity to present witnesses and other relevant evidence
  - Same meaningful access to information used during any disciplinary meetings/hearings
  - Opportunity to respond to the investigation report in writing in advance of any decision of responsibility
Balancing Act

- The most defensible investigations will balance the rights of complainant and respondent
- Essentially, parties must be treated equally, including:
  - Restrictions on ability to use lawyers must be applied equally
  - Both parties must be notified concurrently in writing of the outcome of the complaint and any appeal rights
  - School may use either preponderance of the evidence standard (50.1%) or clear and convincing evidence standard (~75%)
  - Interim measures must be considered for respondent as well as complainant

Next Steps

- Determine action to be taken
- Communicate outcome of investigation
- Document the investigation
  - Summary of steps taken
  - List of witnesses interviews
  - Findings of fact and analysis
  - Conclusion
  - Statement as to recommended corrective action
- Recordkeeping

Confidentiality

- A complainant may make a request for confidentiality in the course of an investigation
- The school should inform the complainant that its ability to investigate/respond may be limited
- Requests for confidentiality must be evaluated in light of the school’s responsibility to provide a safe and nondiscriminatory environment for all students
- School should inform the complainant if it cannot ensure confidentiality
Retaliation

- Schools need to be cognizant of the possibility of retaliation against complainants and witnesses
- Schools must have procedures in place to protect against retaliatory harassment
- Complainants and their parents/guardians, as appropriate, should be advised how to report subsequent problems
- Any retaliation experienced by a complainant constitutes a separate Title IX violation

Hot Seat

Please work in groups to identify the issues and discuss how you would respond to this situation.

1. Complainant, Chris, tells Rocky Community College that he would like certain witnesses interviewed as part of the College’s investigation into his sexual assault. The witnesses refuse to be interviewed. College has strong reason to believe they were pressured not to participate in the investigation.

2. The alleged assailant is a star on the College’s football team. The College hires an attorney to preside over the Title IX hearing. The attorney is a former football player for the College and a regular donor to the football program.

Parallel Criminal Investigations

- A criminal investigation does not alleviate schools of their duty to conduct an independent Title IX investigation or respond promptly and effectively to complaints
- Police investigations and reports are not necessarily determinative of whether harassment occurred under Title IX
- School should not delay its investigation until the outcome of a criminal investigation or the filing of charges
Parallel Investigations – Coordinating with Law Enforcement

• A school should coordinate with any other ongoing school or criminal investigations
  • Establish fact-finding roles for each investigator
  • Consider whether information can be shared among investigators to limit re-traumatizing victim
  • If applicable, consult with forensic expert to ensure evidence is correctly interpreted by school officials
  • Consider a memorandum of understanding with local law enforcement and local prosecutor’s office

Respondents’ Due Process Rights

• Districts must provide due process to the respondent.
• The complaint procedure and investigation must be fair and impartial.
• The respondent may have a right under FERPA to inspect and review portions of the complaint that directly relate to him/her.
  • The school must redact complainant’s name and other identifying information before allowing respondent to inspect and review sections of complaint that relate to him/her.

Respondents’ Due Process Rights

• Courts have added additional protections for respondents
  • In sexual misconduct cases where the outcome depends on a credibility assessment, respondent has right to cross-examine the accuser and adverse witnesses
  • Burden on complainant can be lessened by:
    • Use of videoconference or similar technology (Cal. Ct. App.)
    • Decisionmaker asking complainant questions posed by respondent (Cal. Ct. App.)
    • Use of a witness screen or other physical separation of the parties (6th Circuit)
Policies, Policies, Policies

- In some instances, the same offense may give rise to separate violations
- For instance, an act of sexual assault may be investigated as (1) sexual harassment, and (2) sexual violence
- If the school has different investigatory procedures for sexual harassment than it does for sexual violence, there are some important considerations
- School should have a policy regarding coordination of investigations by separate bodies, if applicable

Pop Quiz

A college informed the respondent only that she was being investigated for “numerous nonconsensual interactions with the victim” over a 2 year period.

What issues do you see?

A Word on FERPA

- The Family Educational Rights and Privacy Act (“FERPA”) prohibits educational institutions from disclosing information “maintained” in a student’s “education record”
- FERPA is implicated in two situations in the Title IX context
- Consult legal counsel with specific facts/questions
Hearings

• A school may, but is not required to, use a hearing process to determine responsibility for acts of sex discrimination (including harassment and sexual assault)
• Your institution’s procedures will guide any hearing process
• OCR mandates that whatever is afforded to one party in the hearing context is afforded to the other party (e.g., representation by an attorney, opportunity to cross-examine witnesses*)
• Real or perceived conflicts of interest should be disclosed

Hearings, cont’d.

• If a hearing is utilized, fact finding must make findings as to each allegation of misconduct
• Both parties must have meaningful access to any information that will be used during a disciplinary hearing
• Both parties should be notified in writing in advance of any hearing to allow sufficient time to prepare
• Schools must maintain documentation of all proceedings, including written findings, transcripts or audio recordings

Pop Quiz

School engaged an attorney to investigate and prosecute the charges against the respondent. Neither the respondent nor the victim were permitted an attorney during the hearing process.

What issues do you see?
Appeals

• Title IX does not require an appeals process*

• California law at both the K-12 and the community college levels do require an appeals process under Title 5

• Specific appeals process is within discretion of school, subject to Title 5 regulations

Pop Quiz

A school’s Title IX process – including investigation, prosecution, and decisionmaking functions – is vested in a single individual.

What issues do you see with this approach?

III. Appropriate Remedies & Sanctions
Interim Remedies

- Available to both parties prior to an investigation or when an investigation is pending
- Should be individualized
- What is appropriate will depend on the facts of each case
- Schools should take into account:
  - Specific need(s) expressed by complainant
  - Age of student(s) involved
  - Severity or pervasiveness of allegations
  - Continuing effects on complainant
  - Any ongoing contact between complainant and respondent (residence halls, dining hall, class, transportation, job location)
  - Whether other judicial measures are in place (protective order)

Remedies

- Appropriate remedies will depend on the specific factual scenario, and may include:
  - Counseling services
  - Extensions of time or other course-related adjustments
  - Modifications to 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

Hot Seat

Please work in groups to identify any issues and discuss what interim remedies, if any, you would implement in this situation.

1. Complainant, Jamie, tells Ocean Community College that Chris recorded a video of her in class with his iPhone, and then posted the video on his Facebook page with the caption: “I’d like to do her.”
2. Jamie and Chris are in the same biology class and both participate in science club, an extracurricular activity.
3. Finals are in two weeks.
Additional Clery Requirements

• The Clery Act requires postsecondary institutions to develop and distribute a statement of policy that informs students of their options to:
  • notify proper law enforcement authorities, including campus and local police,
  • be assisted by campus personnel in notifying such authorities.
• The policy also must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community.

Additional Clery Requirements

• Community colleges must provide simultaneous written notification to both parties of:
  • results of disciplinary proceeding,
  • notification of the institution’s appeal procedures, and
  • any changes to the result when it becomes final.
• 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.

Case Study – What Not To Do

• Respondent filed an OCR complaint against his school
• He was expelled after livestreaming a video of himself and a female student engaged in a sexual act without the female student’s knowledge or consent
• OCR found the school violated the respondent’s rights by:
  • Not interviewing him as part of investigation
  • Suspending him without an opportunity to be heard
  • Completing the whole investigation in 10 days
  • Deleting recordings of the hearing 10 days after conclusion of the appeal*
  • Not allowing the respondent to “cross-examine” the complainant*
IV. Legally Compliant Investigation Reports

Notice of Outcome of Investigation

• Both parties must be notified of the outcome of the investigation and any appeal rights
• Notice to complainant should include:
  • Whether investigation substantiated that the conduct occurred
  • Remedies offered or provided to complainant
  • Sanctions imposed on the perpetrator that directly relate to the complainant
  • Other steps the school has taken to eliminate the hostile environment
• The respondent should not be notified of the individual remedies offered or provided to the complainant

Additional Clery Requirement

• For community college districts, the Clery Act also requires districts to inform the complainant as to:
  • any final determination of the disciplinary investigation, and
  • any disciplinary sanctions imposed on the perpetrator.
• This requirement is limited to cases involving sexual assault, dating violence, domestic violence, or stalking
• Includes all sanctions imposed on the perpetrator, not just those directly related to complainant
Another Word on FERPA

- FERPA permits a school to disclose to the complainant any information about the sanction imposed upon the perpetrator when the sanction directly relates to the complainant.
  - Stay away order
  - Harasser is prohibited from attending school for a period of time
  - Perpetrator was transferred to another class, campus, or residence hall
- FERPA also permits community colleges to disclose to the complainant the final results of a disciplinary proceeding in certain instances*.

Hot Seat

Please work in groups to identify the issues and discuss how you would respond to this situation.

1. Fantasy School District disciplined Janet for groping Ruth in math class. At the time, same-sex sexual harassment was not prohibited by the student code of conduct. However, by the time the District investigated Ruth’s complaint, the District had added same-sex sexual harassment to the list of prohibited conduct.
2. When its investigation was complete, Fantasy School District sent the same notice of outcome of investigation to both Janet and Ruth.

Investigation Reports

- Follow your institution’s grievance procedures, and any applicable policies
- We recommend that it contain the following elements:
  - Parties
  - Incident – when was it reported, to whom; when did it take place
  - Alleged Violations – code of conduct, district policy, etc.
  - Interviews with parties
  - Additional information provided by parties
  - Summary of information provided by witnesses
  - Credibility determination
  - Findings of fact
  - Conclusion – “I conclude it is/is not more likely than not that respondent…”
Title 5 Requirements – K-12

• Written decision required “based on the evidence”
• Decision should include:
  (1) the findings of fact based on the evidence gathered;
  (2) conclusion of law;
  (3) disposition of the complaint;
  (4) the rationale for such disposition;
  (5) corrective actions, if they are warranted;
  (6) notice of the complainant’s right to appeal the LEA Decision to the CDE; and
  (7) procedures to be followed for initiating an appeal to the CDE.

Title 5 Requirements – CCD

• Written report required under Title 5 regulations
• Report must include:
  (a) a description of the circumstances giving rise to the complaint;
  (b) a summary of the testimony provided by each witness, including the complainant and any viable witnesses identified by the complainant in the complaint;
  (c) an analysis of any relevant data or other evidence collected during the course of the investigation;
  (d) a specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint; and
  (e) any other information deemed appropriate by the district.

The Language of Sexual Violence

• How you write your report creates the narrative of the case
• Be careful to avoid language that:
  • victim-blames (“she was passed out”)
  • deflects responsibility from the perpetrator (“the rape”)
  • talks about the act without an agent (“battered woman”)
  • makes the victim the subject of the sentence (“Chris was raped by Jamie” vs. “Jamie raped Chris”)
  • eroticizes, romanticizes, or describes sexual violence in an affectionate way (“Morgan caressed Taylor’s breasts”)
  • uses language of consensual sex (“he had sex with her” or “she performed oral sex on him”)
Mirror the Victim

• Take your cues from the victim/survivor
• How does she describe herself?
• He or she might use victim-blaming language themselves – they are a reflection of our victim-blaming culture
• When using the victim’s language, use quotations
• Do not edit the language of the victim – but think about why you would hear that language from a recipient of harassment/violence

Hot Seat

1. The rape occurred on Saturday, September 12 at approximately 1:15 am.
2. Robin is a rape victim.
3. This disciplinary action will impact Jordan [the harasser] for the rest of her life.
4. The allegation of sex-based harassment is sustained.
5. This is a classic “he said, she said” case.
6. The victim’s story is that the respondent drugged his drink.
7. The victim was date raped.

How could you change the following statements to use more accountable language?

V. Next Steps
Next Steps

• Our office is here to help!
• Attend our in-depth trainings on Title IX issues in fall 2018, with content specifically tailored to K-12 and community college districts.

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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LEGAL UPDATE 22-2017: OCR WITHDRAWS SIGNIFICANT TITLE IX GUIDANCE; ISSUES NEW DEAR COLLEAGUE LETTER AND Q&A ON TITLE IX, OCTOBER 2017
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](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,8 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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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.
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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).
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

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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.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.
9 See 2001 Guidance at (VII)(A).
It may be appropriate for a school to take interim measures during the investigation of a complaint.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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?

\textsuperscript{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).

\textsuperscript{11} 34 C.F.R. § 106.8(b); 2001 Guidance at (V)(D); \textit{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”).

\textsuperscript{12} 2001 Guidance at (IX); \textit{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).

\textsuperscript{13} 2001 Guidance at (IX); \textit{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.\(^\text{14}\)

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.

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\(^{14}\) 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).

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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. 01-05-2041 (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.”).
OCR REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, JANUARY 2001

ATTACHMENT 2
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

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.2 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.3 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 occurs.5

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.6 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.7 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.8 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—

\begin{itemize}
\item 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}
\item Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;\textsuperscript{24}
\item Deny any student any such aid, benefit, or service;\textsuperscript{25}
\item Subject students to separate or different rules of behavior, sanctions, or other treatment;\textsuperscript{26}
\item 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
\item Otherwise limit any student in the enjoyment of any right, privilege, advantage, or opportunity.\textsuperscript{28}
\end{itemize}

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.  

- 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, 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.  

- 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. 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.  

- 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.

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.” Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome. 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. 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.

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, OCR will consider a number of factors in determining whether a school employee’s sexual advances or other sexual conduct could be considered welcome. In addition, OCR will consider these factors in all cases involving postsecondary students in making those determinations. 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 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,\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.”)

\textbf{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.
(such as sexual harassment occurring in the hallways, graffiti in public areas, or harassment occurring during recess under a teacher’s supervision.)

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.\textsuperscript{85} 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.\textsuperscript{86} 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),\textsuperscript{87} 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.97

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.

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.

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.
13 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).

14 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).

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

16 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).

17 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).

18 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.”

19 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).

See 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).

38 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 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).
79 34 CFR 106.9 and 106.8(b).

80 34 CFR 106.8(b) and 106.31(b).

81 34 CFR 106.9.

82 34 CFR 106.8(b).

83 34 CFR 106.31.

84 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.”).

85 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.

86 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.

87 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.

88 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).

89 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).

90 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).
SAMPLE UNIFORM COMPLAINT PROCEDURES CASE LOG

ATTACHMENT 3
## Uniform Complaint Procedures (UCP), Online Self-Certification Process

SAMPLE COMPLAINT CASE LOG FOR UCP 3

School Year: ________________

<table>
<thead>
<tr>
<th>Case #</th>
<th>Complainant(s)</th>
<th>Initials</th>
<th>Title</th>
<th>Allegation</th>
<th>School</th>
<th>Date Rec'd</th>
<th>Due Date-60 days</th>
<th>Date Closed</th>
<th>Appeal</th>
</tr>
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<tbody>
<tr>
<td>UCP 001</td>
<td></td>
<td>ND</td>
<td>Parent</td>
<td>Discrimination, Aggressive and unprofessional behavior of teacher</td>
<td>Jones</td>
<td>07/01/10</td>
<td>9/01/10</td>
<td>11/03/10</td>
<td></td>
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<tr>
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<td>EH</td>
<td>Parent</td>
<td>Not a UCP – Parent request retaining teacher at Smith ES</td>
<td>Smith</td>
<td>07/09/10</td>
<td>n/a</td>
<td>07/23/10</td>
<td></td>
</tr>
<tr>
<td>UCP 003</td>
<td></td>
<td>MA</td>
<td>Community member</td>
<td>Multiple allegations regarding ELAC meeting held on 04/06/10</td>
<td>Smith</td>
<td>07/09/10</td>
<td>9/9/10</td>
<td>10/13/10</td>
<td>Appeal to CDE 11/30/10 Appeal denied</td>
</tr>
</tbody>
</table>

*Evidence of proper implementation of the investigation process

*Complaints in accordance with CCR, Title 5, Section 4610(b). Upload a completed log in CAIS, at any time during the upload period and prior to the last day of the review. Districts are not required to upload complaint documents in CAIS, as part of the self-certification. LEAs are not required to use this sample. Please see additional instructions for this process on the “LEA Self-Certification Form and Instructions for Completion of an Online Review for UCP 3.”

January 2012
INVESTIGATION TRACKING DOCUMENT
Investigation Tracking Document

Administrator to fill in information and initial each category upon completion.

1. Date Complaint Received:

2. Identify Applicable Policy/Procedure:

3. What type of investigation needs to take place?

4. Due date for completion:

5. Witnesses interviewed:

6. Factual findings:

7. Conclusions:

8. Action Taken:

9. Is follow-up necessary?
   a. If so, what?

10. Is documentation in employee file? In student records?

Process completed: _________________________

Administrator Signature	Date

Investigation file
EEOC ENFORCEMENT GUIDANCE

ATTACHMENT 5
FROM: EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

- Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?
• How did you react? What response did you make when the incident(s) occurred or afterwards?
• How did the harassment affect you? Has your job been affected in any way?
• Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
• Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
• Are there any notes, physical evidence, or other documentation regarding the incident(s)?
• How would you like to see the situation resolved?
• Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

• What is your response to the allegations?
• If the harasser claims that the allegations are false, ask why the complainant might lie.
• Are there any persons who have relevant information?
• Are there any notes, physical evidence, or other documentation regarding the incident(s)?
• Do you know of any other relevant information?

Questions to Ask Third Parties:

• What did you see or hear? When did this occur? Describe the alleged harasser’s behavior toward the complainant and toward others in the workplace.
• What did the complainant tell you? When did s/he tell you this?
• Do you know of any other relevant information?
• Are there other persons who have relevant information?

Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party’s credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

• **Inherent plausibility**: Is the testimony believable on its face? Does it make sense?
• **Demeanor**: Did the person seem to be telling the truth or lying?
• **Motive to falsify**: Did the person have a reason to lie?
- **Corroboration**: Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party’s testimony?

- **Past record**: Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant’s credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

### Reaching a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator’s report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.
5 CCR § 4631 - RESPONSIBILITIES OF THE LEA
§ 4631. Responsibilities of the LEA.

(a) Except for complaints regarding instructional materials, emergency or urgent facilities conditions that pose a threat to the health or safety of pupils or staff, and teacher vacancies or misassignments, which must be processed in accordance with sections 4680-4687, within 60 days from the date of the receipt of the complaint, the LEA person responsible for the investigation of the complaints or his or her designee shall conduct and complete an investigation of the complaint in accordance with the local procedures adopted pursuant to section 4621 and prepare a written LEA Decision. This time period may be extended by written agreement of the complainant.

(b) The investigation shall include an opportunity for the complainant, or the complainant's representative, or both, to present the complaint(s) and evidence or information leading to evidence to support the allegations of non-compliance with state and federal laws and/or regulations.

(c) Refusal by the complainant to provide the investigator with documents or other evidence related to the allegations in the complaint, or to otherwise fail or refuse to cooperate in the investigation or engage in any other obstruction of the investigation, may result in the dismissal of the complaint because of a lack of evidence to support the allegations.

(d) Refusal by the LEA to provide the investigator with access to records and/or other information related to the allegation in the complaint, or to otherwise fail or refuse to cooperate in the investigation or engage in any other obstruction of the investigation, may result in a finding based on evidence collected that a violation has occurred and may result in the imposition of a remedy in favor of the complainant.

(e) The LEA should issue a Decision (the Decision) based on the evidence. The Decision shall be in writing and sent to the complainant within 60 days from receipt of the complaint by the LEA. The Decision should contain:

   (1) the findings of fact based on the evidence gathered,

   (2) conclusion of law,

   (3) disposition of the complaint,

   (4) the rationale for such disposition,
(5) corrective actions, if they are warranted, including, with respect to a pupil fee complaint, a remedy that comports with Education Code section 49013(d) and section 4600(u).

(6) notice of the complainant's right to appeal the LEA Decision to the CDE, and

(7) procedures to be followed for initiating an appeal to the CDE.

(f) Nothing in this chapter shall prohibit the parties from utilizing alternative methods to resolve the allegations in the complaint, including, but not limited to, mediation.

(g) Nothing in this chapter shall prohibit an LEA from resolving complaints prior to the formal filing of a written complaint.

Note: Authority cited: Sections 221.1 and 33031, Education Code; and Section 11138, Government Code. Reference: Sections 200, 220 and 49013, Education Code; Sections 11135, 11136 and 11138, Government Code; and 34 C.F.R. Section 106.8.

HISTORY

1. New section filed 8-26-91; operative 9-25-91 (Register 92, No. 3).


3. Amendment of section heading, section and Note filed 9-17-2013; operative 1-1-2014 (Register 2013, No. 38).

This database is current through 8/18/17 Register 2017, No. 33

5 CCR § 4631, 5 CA ADC § 4631
5 CCR § 4964 - CONFIDENTIALITY
§ 4964. Confidentiality.

5 CCR § 4964

§ 4964. Confidentiality.

All complaints or allegations of discrimination or sexual harassment will be kept confidential during any informal and/or formal complaint procedures except when disclosure is necessary during the course of an investigation, in order to take subsequent remedial action and to conduct ongoing monitoring.

Note: Authority cited: Sections 221.1 and 33031, Education Code; and Section 11138, Government Code. Reference: Section 212.5, Education Code; Sections 11135 and 12940(h), Government Code; Section 1681, Title 20, U.S. Code; Section 2000d, Title 42, U.S. Code; and Section 106, Title 34, Code of Federal Regulations.

HISTORY


This database is current through 8/18/17 Register 2017, No. 33

5 CCR § 4964. 5 CA ADC § 4964
CASE STUDY
Case Study

District became aware that on ~16 occasions during a school year, there was graffiti in the girl’s bathroom calling a female student as a “slut,” a “whore” and on at least one occasion, stating “[she] should kill herself and no one would miss her.”

Vice Principal investigated by going into the bathroom to see the writings and by once interviewing a male student whom he described as a “kid who never gets in trouble” to inquire if he’d seen anything. The VP interviewed the victim about the incidents but did not interview any other witnesses who reported the graffiti. VP investigated which students had been assigned bathroom passes to try to determine perpetrator(s), even though there was evidence that the graffiti was written during recess, lunch, and other breaks where students were not required to have a bathroom pass. VP ended his investigation.

The next school year, the victim approached the District with a list of all the perpetrators and all the instances where graffiti referring to her had been written on the bathroom wall. It was at this time the District implemented interim remedies. However, the District told her it could not “go back” to the last year and instead needed to focus on how to support the victim moving forward.

Following this, while OCR was at the campus investigating, it noted at least one instance of graffiti in the bathroom identifying the victim and calling her a “slut” and a “whore.” OCR notified the District.

What issues do you see?
5 CCR § 4963 - PROHIBITIONS
§ 4963. Prohibitions.

(a) No person from or in the educational or work environment of a local agency shall retaliate against a complainant, witness, or other person who supports or participates in a sexual harassment investigation.

(b) Any attempt to penalize anyone from or in the educational or employment environment for initiating a complaint through any form of retaliation shall be treated as a separate allegation of discrimination.

Note: Authority cited: Sections 221.1 and 33031 Education Code; and Section 11138, Government Code. Reference: Section 212.5, Education Code; Sections 11135 and 12940(h), Government Code; Section 1681, Title 20, U.S. Code; Section 2000d, Title 42, U.S. Code; and Section 106, Title 34, Code of Federal Regulations.

HISTORY

1. New article 8 (sections 4963-4965) and section filed 6-13-2001; operative 7-13-2001 (Register 2001, No. 24).

This database is current through 8/18/17 Register 2017, No. 33

5 CCR § 4963, 5 CA ADC § 4963
INVESTIGATION NOTICE FORM
INVESTIGATION NOTICE FORM

To:

From:

Date:

Re: Investigation of Possible Violation of District Policy

I am investigating a possible violation of District policy. As part of the investigation, I will be interviewing you today. The purpose of this notice is to provide some important information about what the district expects from you during the investigation.

The district appreciates your participation in this process. We expect you to cooperate fully in the investigation by, for example, answering all questions completely and honestly, providing any documents that are relevant to the investigation, and making yourself available for follow-up interviews, if necessary. You will be excused from your usual work duties for interviews and any other activities necessary to the investigation.

Retaliation against anyone involved in the investigation is strictly prohibited. If you retaliate against anyone involved in this investigation, you will be subject to discipline. If you believe you have been mistreated or otherwise retaliated against because of your participation in this investigation, please tell me immediately.

We will maintain the confidentiality of the investigation to the extent possible, revealing information only on a need-to-know basis or as otherwise required by law.

I encourage you to contact me after our interview today if you remember additional information or if you would like to change or add to your statement for any other reason.

Your signature indicates that you have received and read this notice.

Signed: ____________________________

Name: ____________________________

Date: ____________________________
Sonoma County Office of Education

TITLE IX PART II - CONDUCTING TITLE IX INVESTIGATIONS
COMMUNITY COLLEGE

October 2, 2018

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.
Ellie R. Austin  
Associate General Counsel  
eaustin@sclscal.org

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.

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 II – Conducting Title IX Investigations
Community College

October 2, 2018

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Title IX Part II:
Conducting Title IX Investigations
October 2, 2018

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

Agenda
• Workshop series
• Brief overview of Title IX
• Conducting impartial investigations
• Appropriate remedies and sanctions
• Legally compliant investigation reports
• Next steps

Fall 2018
Title IX Workshop Series at SCOE
• Part 1 – Title IX Coordinator Essentials, September 19, 2018
• Part 3 – Nuts and Bolts of the Title IX Coordinator’s Role, November 14, 2018
• Part 4 – CCD Only – Additional Title IX Challenges for Community Colleges, December 11, 2018
I. Brief Overview of 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.”


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 harassment;
  - Who has been given the duty of reporting incidents of sexual harassment 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. Conducting Impartial Investigations
What is an Investigation?

• An investigation includes both the fact-finding and decision-making processes (excluding appeals)
• It is the process by which school determines:
  • Whether or not the conduct occurred
  • If it did occur, whether the conduct is sufficiently serious
  • If it is, what actions are necessary to:
    • end the discrimination,
    • eliminate the hostile environment, and
    • prevent its recurrence

Legal Requirements Under Title IX

• A Title IX investigation must be:
  • Prompt
  • Thorough
  • Impartial
  • It may, but is not required to, include a hearing
  • It must include the opportunity for both the complainant and the respondent to offer evidence
  • No fixed time frame – follow your grievance procedures
  • School must make a “good faith effort” to conduct a “fair, impartial investigation” in a “timely manner”

Investigations Will Vary by Institution

• The specific steps in a recipient’s Title IX investigation will vary depending on:
  • Nature of the allegation(s)
  • Source of the complaint
  • Age of student(s) involved
  • Size and administrative structure of school
  • State or local legal requirements (such as mandatory reporting or Title 5 regulations)
  • Lessons learned from past experiences
Investigations Will Vary by Institution

- Investigations may include:
  - Conducting interviews
    - Complainant
    - Respondent*
    - Other witnesses
  - Reviewing student and personnel files
  - Reviewing law enforcement documents, if applicable
  - Gathering and examining other relevant documents or evidence
  - Hiring an outside investigator

Investigation Fundamentals: First Steps

1. Review the applicable procedure
   - Enter the case into a complaint log
   - Map out the steps and timeline for the investigation based on the procedure
   - Make sure required notices are sent, including copies of the applicable procedure and other information required by the procedure

2. Develop an investigative strategy
   - Outline scope and breadth of investigation
   - Determine who should be interviewed and what information should be reviewed

Investigation Fundamentals: Next Steps

3. Determine who will be part of the investigation team
   - District employees
   - Outside investigators

4. Conduct the investigation
   - Begin promptly
   - Determine who should be interviewed, and in what order
   - Begin interviews with core people and broaden as needed
   - Before interviewing, outline interview questions, including elements of a particular complaint
   - Before interviewing, review related documents/records
Investigation Fundamentals, cont’d.

4. Conduct the investigation, cont’d
   • Prepare for interviews by identifying the following elements:
     - Identity of interviewer
     - Identity of person to be interviewed
     - Location, date, and time of interview
   • Conduct interview in confidential setting
   • Make arrangements to record interviews, if possible
     - California law requires informed consent of witness (632 P.C.)
     - Once recorder is on, state date, time & place of interview, name of participants and have witness confirm on tape his/her knowledge of & consent of the recording
   • Should be looking for each element of the type of discrimination at issue
   • Did unlawful conduct occur?
   • Was each prong of the allegation met?
     - Unlawful discrimination -
       (1) Unwelcome conduct that is
       (2) sufficiently severe or pervasive to
       (3) (a) significantly interfere with the employee’s/student’s job/academic performance OR
             (b) create an intimidating, hostile or abusive working/academic environment

Title IX Investigation Procedures:
Standards of Evidence

• 2017 Title IX guidance gives districts the ability to choose between two standards:
  • Preponderance of the Evidence (50.1%)
    - More likely than not
  • Clear and Convincing Evidence (~75%)
    - Substantially more likely than not
Notice of Investigation

- Once a school decides to investigate conduct that may lead to disciplinary action, school must provide written notice to respondent, including:
  - Allegations constituting a potential violation of school policy
  - Sufficient details of allegations:
    - Identity of the parties involved
    - Date(s) and location(s) of alleged incident(s)
    - Section(s) of the code allegedly violated
    - The precise conduct allegedly constituting the potential violation
  - Must be provided a sufficient time in advance of the interview to allow respondent to prepare a response

Interviews

- Make appropriate disclosures (e.g., who you are, who you represent, why you are there)
- Explain that district is required to investigate allegations of [sexual harassment, sexual violence, sex discrimination] and take appropriate action
- State that no conclusions have been made and retaliation is prohibited
- Try to put interviewee at ease (use trauma-informed guidelines)
- Emphasize the expectation of best recollection and truthful answers
- Start with broad/overview questions

- Have interviewee describe the incident(s)/conduct in his/her own words
  - 5 W’s – who, what, when, where, why
  - Ask if interviewee has told interviewer everything he/she can remember
  - After each answer, ask: “is there anything else?”
  - Ask follow up questions, including questions to confirm chronology of events, to fill in any gaps in the 5 W’s
  - Don’t offer information or provide answers
  - Ask about knowledge of any relationships between complainant & alleged wrong-doer or possible motivations for complaint or conduct at issue
Interviews

• Ask about and for copies of any relevant documents, texts, emails, photos, social media posts, etc.

• At the end of the interview:
  • Ask whether there is anyone else the interviewee thinks should be interviewed about the incident/conduct
  • Provide your contact information and advise the interviewee to contact you with any additional information
  • Give the interviewee a copy of the relevant procedure
  • Caution against retaliation
  • Remind the interviewee to maintain confidentiality
  • Advise interviewee you may need to follow-up with him/her as investigation proceeds

Interviews

• Be an active listener & critical thinker
  • “Does this make sense?”
  • “Do I understand exactly what happened?”
  • “Will the person reading my report understand exactly what happened?”

• Use your time line to identify discrepancies between witness’ own story & that of others - challenge facts

Interviews

• Clarify basis for witness’ knowledge of a “fact”
  • How do they know?
    • Saw it? Heard it? Was involved in it?
    • Distinguish between “no” & “I cannot recall.”
  • Document carefully for later review
Interviews: Assessing Credibility

• Investigators should take into account all relevant evidence in determining witnesses’ credibility

• Should not rely solely on eye-witness accounts, tangible physical evidence, or an admission to corroborate either party’s story

Factors to consider:

• Changes in behavior of the complainant
• Complainant telling another person about the discrimination
• Other complaints against same respondent
• Witnesses’ conduct during interviews, including body language, eye contact, tone, nervous behaviors, sweating
• Consistent/inconsistent information
• Corroboration by other witnesses, documents, or other evidence
• How much detail did witness offer?

Factors that aren’t as relevant: a delay in reporting, minor inconsistencies in story, that complainant and respondent once had a consensual relationship

Hot Seat

Which of the following is appropriate to consider in a credibility determination?

1. Respondent says, “She was asking for it. Just look at what she was wearing!”
2. The complainant drops out of sports and drama club and starts missing school frequently.
3. Respondent’s witness says, “He’s such a good kid. I know he could never do what she’s accusing him of.” [sexual harassment investigation]
4. Respondent says, “It was an accident. I didn’t do it on purpose.” after putting his hand on a male student’s crotch.
5. Complainant writes in her journal after the assault about how the assault has impacted her.
6. Complainant tells his best friend that he’s been harassed by a football player for the past 3 months.
7. Respondent says, “We used to date. I know he’s okay with us fooling around.”
8. You’re the investigator. You diligently try to contact complainant to set up a time to interview her. She does not reply to your many overtures. When you try to approach her personally, she avoids you. When you finally get in touch with her, she says she doesn’t want to be involved.
Interviewing the Complainant

• Must be provided sufficient written notice in advance of any interview to prepare for meaningful participation
• Ask complainant specifically:
  • Has anything like this ever happened before? Use 5 W’s
  • The nature and past history of any relationship between complainant and respondent
  • Whether complainant has previously complained about the respondent, and if so, to whom
  • Whether anyone else knew of or joined in conduct complained of
  • Whether complainant is aware of other incidents by respondent toward other individuals
  • Whether any documents exist to support the allegations

Interviewing the Respondent

• Must be provided sufficient written notice (including the specific allegations) in advance of any interview to prepare for meaningful participation
• Verify that no determinations of wrongdoing have been made and that he/she will have a full opportunity to provide information
• Caution against retaliation
• The respondent (and complainant) should be allowed to have a representative present

Interviewing the Respondent, cont’d.

• Provide respondent a copy of applicable complaint procedures and explain district’s obligation to investigate complaints
• Ascertain:
  • Whether respondent agrees with statements/allegations of complainant and other witnesses already interviewed
  • Whether any witnesses or other evidence exists that could corroborate respondent’s version of events
  • The nature and past history of any relationship between complainant and respondent
  • Whether respondent knows if complainant has previously made complaints of a similar nature about respondent or others
Interviewing Other Witnesses

- Advise witness to keep matter confidential
- Discuss prohibition against retaliation
- If witness is a minor, notify parent/guardian of need to interview minor
- Identify the relation of witnesses to the complainant and/or respondent
- Questions may include:
  - Ask them to describe event in own words
  - Does witness know of similar incidents/conduct
  - Identity of any other witnesses

Hot Seat

- Flip to Case Study
- Please work in groups to identify:
  - Any issues you see with how the district handled this investigation
  - How you would conduct this investigation in compliance with Title IX

Interview Documentation

- Take and keep notes of interviews and the entire investigation (telephone conversations, meetings)
- Include date, time, and place of interview
- Include who attended the interview, and how long it lasted
- Note information provided by witnesses, and if it is consistent/inconsistent with information provided by other witnesses
- Note any documents/evidence provided during interview
- Note names of any potential witnesses provided by interviewee
Preserve Evidence

- Take note of when, where, and from whom an item was taken
- Store all evidence in a secure location
- If any items are surrendered to law enforcement, take a picture of the item and note when, where, and to whom it was surrendered
- Photograph physical injuries and promptly arrange for appropriate first aid/medical attention
- Title IX regulations require institutions to keep records to send to OCR for compliance reviews
- Certain records must be sent to CDE/Chancellor’s Office

Findings of Fact and Conclusions

- Some evidence may not be in dispute
- Some evidence can be corroborated by the investigator
- Information from complainant or respondent may be corroborated by witnesses
- When information received from complainant and respondent differs on important points, make credibility determinations
- State what facts are determined to be true/untrue and what areas could not be determined (if any)

Findings of Fact and Conclusions, cont’d.

- Based on the facts and analysis, reach a conclusion:
  - The complaint lacks merit
  - The evidence was not conclusive and cannot support a determination as to the merits of the complaint
  - The alleged conduct occurred, but did not violate policy, applicable standards (whatever else the complaint process addresses)
  - The conduct occurred and violated a standard of conduct or a standard of policy
  - Prepare a report
Report Requirements

- **K-12 Report** must include:
  - Findings of fact based on the evidence
  - Conclusions of law
  - Disposition of the complaint
  - Rationale for the disposition
  - Corrective actions, if any
  - Notice of appeal rights, if any
  - Relevant exculpatory and inculpatory evidence

- **CCD Report** must include:
  - Description of circumstances giving rise to complaint
  - Summary of testimony provided by each witness
  - Analysis of relevant data and other evidence collected
  - Specific finding as to whether there is probable cause for each allegation
  - Any other information deemed appropriate
  - Relevant exculpatory and inculpatory evidence

Investigator Qualifications

- An equitable investigation requires a trained investigator to:
  - Analyze and document available evidence
  - Develop reliable decisions
  - Objectively evaluate the credibility of parties and witnesses
  - Synthesize all available evidence
  - Take into account unique and complex circumstances of each case
  - Investigator may not rely on sex stereotypes or generalizations in conducting investigation or reaching conclusions

Balancing Act

- The most defensible investigations will balance the rights of complainant and respondent

- Essentially, parties must be treated equally, including:
  - Equal opportunity to present witnesses and other relevant evidence
  - Same meaningful access to information used during any disciplinary meetings/hearings
  - Opportunity to respond to the investigation report in writing in advance of any decision of responsibility
Balancing Act

- The most defensible investigations will balance the rights of complainant and respondent
- Essentially, parties must be treated equally, including:
  - Restrictions on ability to use lawyers must be applied equally
  - Both parties must be notified concurrently in writing of the outcome of the complaint and any appeal rights
  - School may use either preponderance of the evidence standard (50.1%) or clear and convincing evidence standard (~75%)
  - Interim measures must be considered for respondent as well as complainant

Next Steps

- Determine action to be taken
- Communicate outcome of investigation
- Document the investigation
  - Summary of steps taken
  - List of witnesses interviews
  - Findings of fact and analysis
  - Conclusion
  - Statement as to recommended corrective action
- Recordkeeping

Confidentiality

- A complainant may make a request for confidentiality in the course of an investigation
- The school should inform the complainant that its ability to investigate/respond may be limited
- Requests for confidentiality must be evaluated in light of the school’s responsibility to provide a safe and nondiscriminatory environment for all students
- School should inform the complainant if it cannot ensure confidentiality
Retaliation

- Schools need to be cognizant of the possibility of retaliation against complainants and witnesses
- Schools must have procedures in place to protect against retaliatory harassment
  - Complainants and their parents/guardians, as appropriate, should be advised how to report subsequent problems
  - Any retaliation experienced by a complainant constitutes a separate Title IX violation

Hot Seat

Please work in groups to identify the issues and discuss how you would respond to this situation.

1. Complainant, Chris, tells Rocky Community College that he would like certain witnesses interviewed as part of the College's investigation into his sexual assault. The witnesses refuse to be interviewed. College has strong reason to believe they were pressured not to participate in the investigation.
2. The alleged assailant is a star on the College's football team. The College hires an attorney to preside over the Title IX hearing. The attorney is a former football player for the College and a regular donor to the football program.

Parallel Criminal Investigations

- A criminal investigation does not alleviate schools of their duty to conduct an independent Title IX investigation or respond promptly and effectively to complaints
- Police investigations and reports are not necessarily determinative of whether harassment occurred under Title IX
- School should not delay its investigation until the outcome of a criminal investigation or the filing of charges
Parallel Investigations – Coordinating with Law Enforcement

- A school should coordinate with any other ongoing school or criminal investigations
- Establish fact-finding roles for each investigator
- Consider whether information can be shared among investigators to limit re-traumatizing victim
- If applicable, consult with forensic expert to ensure evidence is correctly interpreted by school officials
- Consider a memorandum of understanding with local law enforcement and local prosecutor’s office

Respondents’ Due Process Rights

- Districts must provide due process to the respondent.
- The complaint procedure and investigation must be fair and impartial.
- The respondent may have a right under FERPA to inspect and review portions of the complaint that directly relate to him/her.
- The school must redact complainant’s name and other identifying information before allowing respondent to inspect and review sections of complaint that relate to him/her.

Respondents’ Due Process Rights

- Courts have added additional protections for respondents
- In sexual misconduct cases where the outcome depends on a credibility assessment, respondent has right to cross-examine the accuser and adverse witnesses
- Burden on complainant can be lessened by:
  - Use of videoconference or similar technology (Cal. Ct. App.)
  - Decisionmaker asking complainant questions posed by respondent (Cal. Ct. App.)
  - Use of a witness screen or other physical separation of the parties (6th Circuit)
Policies, Policies, Policies

- In some instances, the same offense may give rise to separate violations
- For instance, an act of sexual assault may be investigated as (1) sexual harassment, and (2) sexual violence
- If the school has different investigatory procedures for sexual harassment than it does for sexual violence, there are some important considerations
- School should have a policy regarding coordination of investigations by separate bodies, if applicable

Pop Quiz

A college informed the respondent only that she was being investigated for “numerous nonconsensual interactions with the victim” over a 2 year period.

What issues do you see?

A Word on FERPA

- The Family Educational Rights and Privacy Act (“FERPA”) prohibits educational institutions from disclosing information “maintained” in a student’s “education record”
- FERPA is implicated in two situations in the Title IX context
- Consult legal counsel with specific facts/questions
Hearings

- A school may, but is not required to, use a hearing process to determine responsibility for acts of sex discrimination (including harassment and sexual assault)
- Your institution’s procedures will guide any hearing process
- OCR mandates that whatever is afforded to one party in the hearing context is afforded to the other party (e.g., representation by an attorney, opportunity to cross-examine witnesses*)
- Real or perceived conflicts of interest should be disclosed

Hearings, cont’d.

- If a hearing is utilized, fact finding must make findings as to each allegation of misconduct
- Both parties must have meaningful access to any information that will be used during a disciplinary hearing
- Both parties should be notified in writing in advance of any hearing to allow sufficient time to prepare
- Schools must maintain documentation of all proceedings, including written findings, transcripts or audio recordings

Pop Quiz

School engaged an attorney to investigate and prosecute the charges against the respondent. Neither the respondent nor the victim were permitted an attorney during the hearing process.

What issues do you see?
Appeals

• Title IX does not require an appeals process*

• California law at both the K-12 and the community college levels do require an appeals process under Title 5

• Specific appeals process is within discretion of school, subject to Title 5 regulations

Pop Quiz

A school’s Title IX process – including investigation, prosecution, and decisionmaking functions – is vested in a single individual.

What issues do you see with this approach?

III. Appropriate Remedies & Sanctions
Interim Remedies

- Available to both parties prior to an investigation or when an investigation is pending
- Should be individualized
- What is appropriate will depend on the facts of each case
- Schools should take into account:
  - Specific need(s) expressed by complainant
  - Age of student(s) involved
  - Severity or pervasiveness of allegations
  - Continuing effects on complainant
  - Any ongoing contact between complainant and respondent (residence halls, dining hall, class, transportation, job location)
  - Whether other judicial measures are in place (protective order)

Remedies

- Appropriate remedies will depend on the specific factual scenario, and may include:
  - Counseling services
  - Extensions of time or other course-related adjustments
  - Modifications to 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

Hot Seat

Please work in groups to identify any issues and discuss what interim remedies, if any, you would implement in this situation.

1. Complainant, Jamie, tells Ocean Community College that Chris recorded a video of her in class with his iPhone, and then posted the video on his Facebook page with the caption: “I’d like to do her.”
2. Jamie and Chris are in the same biology class and both participate in science club, an extracurricular activity.
3. Finals are in two weeks.
Additional Clery Requirements

- The Clery Act requires postsecondary institutions to develop and distribute a statement of policy that informs students of their options to:
  - notify proper law enforcement authorities, including campus and local police,
  - be assisted by campus personnel in notifying such authorities.
- The policy also must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community.

Additional Clery Requirements

- Community colleges must provide simultaneous written notification to both parties of:
  - results of disciplinary proceeding,
  - notification of the institution’s appeal procedures, and
  - any changes to the result when it becomes final.
- 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.

Case Study – What Not To Do

- Respondent filed an OCR complaint against his school
- He was expelled after livestreaming a video of himself and a female student engaged in a sexual act without the female student’s knowledge or consent
- OCR found the school violated the respondent’s rights by:
  - Not interviewing him as part of investigation
  - Suspending him without an opportunity to be heard
  - Completing the whole investigation in 10 days
  - Deleting recordings of the hearing 10 days after conclusion of the appeal*
  - Not allowing the respondent to “cross-examine” the complainant*
IV. Legally Compliant Investigation Reports

Notice of Outcome of Investigation
- Both parties must be notified of the outcome of the investigation and any appeal rights
- Notice to complainant should include:
  - Whether investigation substantiated that the conduct occurred
  - Remedies offered or provided to complainant
  - Sanctions imposed on the perpetrator that directly relate to the complainant
  - Other steps the school has taken to eliminate the hostile environment
- The respondent should not be notified of the individual remedies offered or provided to the complainant

Additional Clery Requirement
- For community college districts, the Clery Act also requires districts to inform the complainant as to:
  - any final determination of the disciplinary investigation, and
  - any disciplinary sanctions imposed on the perpetrator.
- This requirement is limited to cases involving sexual assault, dating violence, domestic violence, or stalking
- Includes all sanctions imposed on the perpetrator, not just those directly related to complainant
Another Word on FERPA

- FERPA permits a school to disclose to the complainant any information about the sanction imposed upon the perpetrator when the sanction directly relates to the complainant.
  - Stay away order
  - Harasser is prohibited from attending school for a period of time
  - Perpetrator was transferred to another class, campus, or residence hall
- FERPA also permits community colleges to disclose to the complainant the final results of a disciplinary proceeding in certain instances.*

Hot Seat

Please work in groups to identify the issues and discuss how you would respond to this situation.

1. Fantasy School District disciplined Janet for groping Ruth in math class. At the time, same-sex sexual harassment was not prohibited by the student code of conduct. However, by the time the District investigated Ruth’s complaint, the District had added same-sex sexual harassment to the list of prohibited conduct.
2. When its investigation was complete, Fantasy School District sent the same notice of outcome of investigation to both Janet and Ruth.

Investigation Reports

- Follow your institution’s grievance procedures, and any applicable policies
- We recommend that it contain the following elements:
  - Parties
  - Incident – when was it reported, to whom; when did it take place
  - Alleged Violations – code of conduct, district policy, etc.
  - Interviews with parties
  - Additional information provided by parties
  - Summary of information provided by witnesses
  - Credibility determination
  - Findings of fact
  - Conclusion – “I conclude it is/is not more likely than not that respondent…”
Title 5 Requirements – K-12

- Written decision required “based on the evidence”
- Decision should include:
  1. the findings of fact based on the evidence gathered;
  2. conclusion of law;
  3. disposition of the complaint;
  4. the rationale for such disposition;
  5. corrective actions, if they are warranted;
  6. notice of the complainant’s right to appeal the LEA Decision to the CDE; and
  7. procedures to be followed for initiating an appeal to the CDE.

Title 5 Requirements – CCD

- Written report required under Title 5 regulations
- Report must include:
  a. a description of the circumstances giving rise to the complaint;
  b. a summary of the testimony provided by each witness, including the complainant and any viable witnesses identified by the complainant in the complaint;
  c. an analysis of any relevant data or other evidence collected during the course of the investigation;
  d. a specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint; and
  e. any other information deemed appropriate by the district.

The Language of Sexual Violence

- How you write your report creates the narrative of the case
- Be careful to avoid language that:
  - victim-blames (“she was passed out”)
  - deflects responsibility from the perpetrator (“the rape”)
  - talks about the act without an agent (“battered woman”)
  - makes the victim the subject of the sentence (“Chris was raped by Jamie” vs. “Jamie raped Chris”)
  - eroticizes, romanticizes, or describes sexual violence in an affectionate way (“Morgan caressed Taylor’s breasts”)
  - uses language of consensual sex (“he had sex with her” or “she performed oral sex on him”)
Mirror the Victim

- Take your cues from the victim/survivor
- How does she describe herself?
- He or she might use victim-blaming language themselves – they are a reflection of our victim-blaming culture
- When using the victim’s language, use quotations
- Do not edit the language of the victim – but think about why you would hear that language from a recipient of harassment/violence

Hot Seat

1. The rape occurred on Saturday, September 12 at approximately 1:15 am.
2. Robin is a rape victim.
3. This disciplinary action will impact Jordan [the harasser] for the rest of her life.
4. The allegation of sex-based harassment is sustained.
5. This is a classic “he said, she said” case.
6. The victim’s story is that the respondent drugged his drink.
7. The victim was date raped.

How could you change the following statements to use more accountable language?

V. Next Steps
Next Steps

• Our office is here to help!
• Attend our in-depth trainings on Title IX issues in fall 2018, with content specifically tailored to K-12 and community college districts.

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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LEGAL UPDATE 20-2017(CC): OCR WITHDRAWS SIGNIFICANT TITLE IX GUIDANCE; ISSUES NEW DEAR COLLEAGUE LETTER AND Q&A ON TITLE IX, OCTOBER 2017

ATTACHMENT 1
LEGAL UPDATE

October 4, 2017

To: Superintendents/Presidents/Chancellors, Member Community College Districts

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 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 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 Harassment\(^8\) 
(“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 
violece, 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.

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\(^5\) Available at [https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html](https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html)

\(^6\) These reporting requirements are unaffected by the 2017 Dear Colleague Letter.

\(^7\) 2001 Guidance, V.B.; 2006 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, 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.

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.
Notice of Language Assistance

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.


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:

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.” 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.”

The 2011 and 2014 guidance documents may have been well-intentioned, but those documents have been criticized for placing improper pressure on universities to adopt procedures that do not afford fundamental fairness. 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.
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

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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.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.

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. 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?

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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).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{18}

\textbf{INFORMAL RESOLUTIONS OF COMPLAINTS}

\textbf{Question 7:}

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

\textbf{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.

\textsuperscript{14} 2001 Guidance at (V)(A)(1)-(2); see also 34 C.F.R. § 668.46(k)(2)(ii).
\textsuperscript{15} 2001 Guidance at (X).
\textsuperscript{16} 34 C.F.R. § 106.31(a).
\textsuperscript{17} 2001 Guidance at (VII)(B).
\textsuperscript{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.

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. 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.

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. 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. 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. 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.

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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).

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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.”).
OCR REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, JANUARY 2001
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, \(^9\) 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\(^{10}\) 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.\(^{11}\) An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.\(^{12}\)

Although Title IX does not prohibit discrimination on the basis of sexual orientation,\(^{13}\) 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.\(^{14}\) 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.\(^{15}\)

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,\(^{16}\) 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.\(^{17}\) 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.\(^{18}\) 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.\(^{19}\)

**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.\(^{20}\)

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.” Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome. 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. 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.

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, OCR will consider a number of factors in determining whether a school employee’s sexual advances or other sexual conduct could be considered welcome. In addition, OCR will consider these factors in all cases involving postsecondary students in making those determinations.

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.60 Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence. A school also may be responsible for remediating 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,61 the recipient is responsible for the discriminatory conduct.62 The recipient is, therefore, also responsible for remediating 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.\textsuperscript{63} Therefore, in cases involving allegations of harassment of elementary and secondary school-age students by a teacher or school administrator during any school activity,\textsuperscript{64} 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.
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, 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 remediating 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 about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. 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. 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 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. 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.
(such as sexual harassment occurring in the hallways, graffiti in public areas, or harassment occurring during recess under a teacher’s supervision.)

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, 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.\textsuperscript{97}

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.
Endnotes

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 subject 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 subject 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.
13 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).

14 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).

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

16 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).

17 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).

18 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.”

19 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).

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).

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).

38 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 191-92 (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. 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).
79 34 CFR 106.9 and 106.8(b).

80 34 CFR 106.8(b) and 106.31(b).

81 34 CFR 106.9.

82 34 CFR 106.8(b).

83 34 CFR 106.31.

84 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.”).

85 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.

86 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.

87 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.

88 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).

89 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).

90 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).

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).

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

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).

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).

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.

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).

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.

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 a 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).
SAMPLE UNIFORM COMPLAINT PROCEDURES CASE LOG

ATTACHMENT 3
## SAMPLE COMPLAINT CASE LOG

**Academic Year:** ______________________


**Name of Community College District**


**Address**


**Phone number of Contact Person**


<table>
<thead>
<tr>
<th>Case #</th>
<th>Complainant(s)</th>
<th>Initials</th>
<th>Title</th>
<th>Allegation</th>
<th>Campus</th>
<th>Date Rec'd</th>
<th>Due Date-60 days</th>
<th>Date Closed</th>
<th>Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>001</td>
<td></td>
<td>ND</td>
<td>Student</td>
<td>Discrimination, aggressive and unprofessional behavior of faculty member</td>
<td>Jones</td>
<td>07/01/17</td>
<td>9/01/17</td>
<td>11/03/17</td>
<td></td>
</tr>
<tr>
<td>002</td>
<td></td>
<td>EH</td>
<td>Student</td>
<td>Stalking in parking lot by former bf (not a student)</td>
<td>Smith</td>
<td>07/09/17</td>
<td>9/01/17</td>
<td>07/23/17</td>
<td></td>
</tr>
<tr>
<td>003</td>
<td></td>
<td>MA</td>
<td>Faculty member</td>
<td>Multiple allegations regarding harassing conduct by dean at academic senate meeting held on 04/06/17</td>
<td>Smith</td>
<td>07/09/17</td>
<td>9/09/17</td>
<td>10/13/17</td>
<td>Appeal to Chancellor's Office 11/30/17</td>
</tr>
</tbody>
</table>
INVESTIGATION TRACKING DOCUMENT

ATTACHMENT 4
Investigation Tracking Document

Administrator to fill in information and initial each category upon completion.

1. Date Complaint Received:

2. Identify Applicable Policy/Procedure:

3. What type of investigation needs to take place?

4. Due date for completion:

5. Witnesses interviewed:

6. Factual findings:

7. Conclusions:

8. Action Taken:

9. Is follow-up necessary?
   a. If so, what?

10. Is documentation in employee file? In student records?

Process completed: _________________________

Administrator Signature Date

c: Investigation file
5 CCR § 59324 - RESPONSIBLE DISTRICT OFFICER
§ 59324. Responsible District Officer.

Each community college district shall identify to the Chancellor and to the public a single person as the district officer responsible for receiving complaints filed pursuant to section 59328 and for coordinating their investigation. Informal charges of unlawful discrimination should be brought to the attention of the responsible district officer, who shall oversee the informal resolution process pursuant to section 59327. The actual investigation of complaints may be assigned to other staff or to outside persons or organizations under contract with the district. Such procedures shall be used whenever the officer designated to receive complaints is named in the complaint or is implicated by the allegations in the complaint.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and Section 11135, Government Code.

HISTORY

1. Amendment filed 3-26-92; operative 4-24-92 (Register 92, No. 17).


3. Change without regulatory effect amending section and Note filed 3-15-2006 pursuant to section 100, title 1, California Code of Regulations. Submitted to OAL for printing only pursuant to Education Code section 70901.5 (Register 2006, No. 17).

4. Amendment of section and Note filed 8-5-2008; operative 9-4-2008. Submitted to OAL for printing only pursuant to Education Code section 70901.5 (Register 2008, No. 34).

This database is current through 8/25/17 Register 2017, No. 34
FROM: EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

- Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?
• How did you react? What response did you make when the incident(s) occurred or afterwards?

• How did the harassment affect you? Has your job been affected in any way?

• Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?

• Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?

• Are there any notes, physical evidence, or other documentation regarding the incident(s)?

• How would you like to see the situation resolved?

• Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

• What is your response to the allegations?

• If the harasser claims that the allegations are false, ask why the complainant might lie.

• Are there any persons who have relevant information?

• Are there any notes, physical evidence, or other documentation regarding the incident(s)?

• Do you know of any other relevant information?

Questions to Ask Third Parties:

• What did you see or hear? When did this occur? Describe the alleged harasser’s behavior toward the complainant and toward others in the workplace.

• What did the complainant tell you? When did s/he tell you this?

• Do you know of any other relevant information?

• Are there other persons who have relevant information?

Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party’s credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

• Inherent plausibility: Is the testimony believable on its face? Does it make sense?

• Demeanor: Did the person seem to be telling the truth or lying?

• Motive to falsify: Did the person have a reason to lie?
- **Corroboration**: Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party’s testimony?

- **Past record**: Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant’s credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

**Reaching a Determination**

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator’s report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.
§ 59334. District Investigation.

Upon receiving a complaint that is properly filed in accordance with section 59328, the district will commence an impartial fact-finding investigation of that complaint and notify the complainant and Chancellor that it is doing so. The results of the investigation shall be set forth in a written report that shall include at least all of the following:

(a) a description of the circumstances giving rise to the complaint;

(b) a summary of the testimony provided by each witness, including the complainant and any viable witnesses identified by the complainant in the complaint;

(c) an analysis of any relevant data or other evidence collected during the course of the investigation;

(d) a specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint; and

(e) any other information deemed appropriate by the district.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

HISTORY

1. Amendment of existing paragraph and NOTEand adoption of subsections (a)-(e) filed 3-26-92; operative 4-24-92 (Register 92, No. 17).


3. Change without regulatory effect amendingNote filed 3-15-2006 pursuant to section 100, title 1, California Code of Regulations. Submitted to OAL for printing only pursuant to Education Code section 70901.5 (Register 2006, No. 17).
This database is current through 8/18/17 Register 2017, No. 33

5 CCR § 59334, 5 CA ADC § 59334
5 CCR § 4963 - PROHIBITIONS
§ 4963. Prohibitions.

(a) No person from or in the educational or work environment of a local agency shall retaliate against a complainant, witness, or other person who supports or participates in a sexual harassment investigation.

(b) Any attempt to penalize anyone from or in the educational or employment environment for initiating a complaint through any form of retaliation shall be treated as a separate allegation of discrimination.

HISTORY

1. New article 8 (sections 4963-4965) and section filed 6-13-2001; operative 7-13-2001 (Register 2001, No. 24).
CASE STUDY
Hypothetical Scenario 1

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
EDUCATION CODE § 67381.1 - WRITTEN AGREEMENTS WITH LOCAL LAW ENFORCEMENT AGENCIES
§ 67381.1. Police or security services; governing board of each community college district; rules for entering into written agreements with local law enforcement agencies for investigations of violent crime; written agreement conditions and requirements

(a) The Legislature reaffirms that campus law enforcement agencies have the primary authority for providing police or security services, including the investigation of criminal activity, to their campuses.

(b) The governing board of each community college district shall adopt rules requiring each of their respective campuses to enter into written agreements with local law enforcement agencies that clarify operational responsibilities for investigations of Part 1 violent crimes occurring on each campus.

(c) Local law enforcement agencies shall enter into written agreements with community college campus law enforcement agencies if there are community college campuses located in the jurisdictions of the local law enforcement agencies.

(d) Each written agreement entered into pursuant to this section shall designate which law enforcement agency shall have operational responsibility for the investigation of each Part 1 violent crime and delineate the specific geographical boundaries of each agency's operational responsibility, including maps as necessary.

(e) Written agreements regarding community college law enforcement agencies entered into pursuant to this section or pursuant to Section 67381 as that section read before January 1, 2016, shall be available for public viewing.

(f) Each agency shall be responsible for its own costs of investigation unless otherwise specified in a written agreement.

(g) Nothing in this section shall affect existing written agreements between community college campus law enforcement agencies and local law enforcement agencies that otherwise meet the standards contained in subdivision (d) or any existing mutual aid procedures established pursuant to state or federal law.

(h) Nothing in this section shall be construed to limit the authority of community college campus law enforcement agencies to provide police services to their campuses.
(i) As used in this section, the following terms have the following meanings:

(1) “Local law enforcement agencies” means city or county law enforcement agencies with operational responsibilities for police services in the community in which a campus is located.

(2) “Part 1 violent crimes” means willful homicide, forcible rape, robbery, and aggravated assault, as defined in the Uniform Crime Reporting Handbook of the Federal Bureau of Investigation.

(j) It is the intent of the Legislature by enacting this section to provide the public with clear information regarding the operational responsibilities for the investigation of crimes occurring on community college campuses by setting minimum standards for written agreements to be entered into by community college campus law enforcement agencies and local law enforcement agencies.

(k)(1) Upon the governing board of a community college district adopting a rule requiring each of its campuses to update an agreement entered into pursuant to this section or pursuant to Section 67381 as that section read before January 1, 2016, the governing board of the community college district shall be treated as a governing entity specified in subdivision (b) of Section 67381 and the community college district and its campuses shall be subject to the requirements of Section 67381 instead of this section.

(2) The Legislature encourages the governing board of each community college district to adopt a rule requiring each of its respective campuses to update these agreements.

Credits
(Added by Stats.2015, c. 701 (A.B.913), § 2, eff. Jan. 1, 2016.)
EDUCATION CODE § 67386 - ADOPTION OF POLICY CONCERNING SEXUAL ASSAULT DOMESTIC VIOLENCE, DATING VIOLENCE, AND STALKING
§ 67386. Adoption of policy concerning sexual assault, domestic violence, dating violence, and stalking; receipt of state funds; contents of policy

Effective: January 1, 2016

Currentness

(a) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall adopt a policy concerning sexual assault, domestic violence, dating violence, and stalking, as defined in the federal Higher Education Act of 1965 (20 U.S.C. Sec. 1092(f)), involving a student, both on and off campus. The policy shall include all of the following:

(1) An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. “Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.

(2) A policy that, in the evaluation of complaints in any disciplinary process, it shall not be a valid excuse to alleged lack of affirmative consent that the accused believed that the complainant consented to the sexual activity under either of the following circumstances:

(A) The accused's belief in affirmative consent arose from the intoxication or recklessness of the accused.

(B) The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented.

(3) A policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.

(4) A policy that, in the evaluation of complaints in the disciplinary process, it shall not be a valid excuse that the accused believed that the complainant affirmatively consented to the sexual activity if the accused knew or reasonably should have known that the complainant was unable to consent to the sexual activity under any of the following circumstances:
(A) The complainant was asleep or unconscious.

(B) The complainant was incapacitated due to the influence of drugs, alcohol, or medication, so that the complainant could not understand the fact, nature, or extent of the sexual activity.

(C) The complainant was unable to communicate due to a mental or physical condition.

(b) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall adopt detailed and victim-centered policies and protocols regarding sexual assault, domestic violence, dating violence, and stalking involving a student that comport with best practices and current professional standards. At a minimum, the policies and protocols shall cover all of the following:

(1) A policy statement on how the institution will provide appropriate protections for the privacy of individuals involved, including confidentiality.

(2) Initial response by the institution's personnel to a report of an incident, including requirements specific to assisting the victim, providing information in writing about the importance of preserving evidence, and the identification and location of witnesses.

(3) Response to stranger and nonstranger sexual assault.

(4) The preliminary victim interview, including the development of a victim interview protocol, and a comprehensive followup victim interview, as appropriate.

(5) Contacting and interviewing the accused.

(6) Seeking the identification and location of witnesses.

(7) Providing written notification to the victim about the availability of, and contact information for, on- and off-campus resources and services, and coordination with law enforcement, as appropriate.

(8) Participation of victim advocates and other supporting people.

(9) Investigating allegations that alcohol or drugs were involved in the incident.

(10) Providing that an individual who participates as a complainant or witness in an investigation of sexual assault, domestic violence, dating violence, or stalking will not be subject to disciplinary sanctions for a violation of the
§ 67386. Adoption of policy concerning sexual assault, domestic..., CA EDUC § 67386

institutions' student conduct policy at or near the time of the incident, unless the institution determines that the violation was egregious, including, but not limited to, an action that places the health or safety of any other person at risk or involves plagiarism, cheating, or academic dishonesty.

(11) The role of the institutional staff supervision.

(12) A comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and stalking cases.

(13) Procedures for confidential reporting by victims and third parties.

(c) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall, to the extent feasible, enter into memoranda of understanding, agreements, or collaborative partnerships with existing on-campus and community-based organizations, including rape crisis centers, to refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, and legal assistance, and including resources for the accused.

(d) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall implement comprehensive prevention and outreach programs addressing sexual violence, domestic violence, dating violence, and stalking. A comprehensive prevention program shall include a range of prevention strategies, including, but not limited to, empowerment programming for victim prevention, awareness raising campaigns, primary prevention, bystander intervention, and risk reduction. Outreach programs shall be provided to make students aware of the institution's policy on sexual assault, domestic violence, dating violence, and stalking. At a minimum, an outreach program shall include a process for contacting and informing the student body, campus organizations, athletic programs, and student groups about the institution's overall sexual assault policy, the practical implications of an affirmative consent standard, and the rights and responsibilities of students under the policy.

(e) Outreach programming shall be included as part of every incoming student's orientation.

Credits

Current with urgency legislation through Ch. 181 of 2017 Reg.Sess
Date: May 18, 2016

To: District Officers for Unlawful Discrimination Complaints
    Chief Human Resources Officers
    Equal Employment Opportunity Officers
    Community College Attorneys

From: Thuy Thi Nguyen
    Interim General Counsel/Vice Chancellor

Re: Student and Employment Discrimination Complaint Procedures
    Legal Opinion 16-03

The Chancellor’s Office handles appeals of unlawful discrimination complaints under California Code of Regulations, title 5 sections 59300 et seq.¹ The purpose of this legal opinion is to explain the discrimination process and describe how the Chancellor’s Office handles appeals. This legal opinion will serve as a guide on the steps that local districts need to follow to ensure compliance with the pertinent regulations. The opinion will point out the differences between employment and non-employment (student) matters and provide clarity on the role of the district, local governing board, and the Chancellor’s Office throughout the process.

This legal opinion incorporates the previous advisory, Legal Advisory 11-01 on certain discrimination complaint issues, but addresses the unlawful discrimination process in chronological order and opines on certain legal areas. The opinion is organized in the following manner:

I. General Overview (page 2)
II. Investigation, Extension Requests, and Administrative Determination (page 5)
III. Appeal Rights in Employment and Student Matters (page 8)
IV. Student Appeals to the Chancellor’s Office (page 10)
V. Resolution (page 11)
VI. Frequently Asked Questions (page 12)

¹ All regulatory references are to Title 5 of the California Code of Regulations unless otherwise noted.
I. General Overview

Under state regulations, California community college districts must follow the procedures outlined in Sections 59300 et seq. when responding to both student and employment discrimination complaints on the basis of actual or perceived ethnic group identification, national origin, religion, age, sex or gender, race, color, ancestry, sexual orientation, or physical or mental disability, or on the basis of an individual’s association with a person or group with one or more of these actual or perceived characteristics.

Responsible district officer’s role and informal resolution

Section 59324 requires that each district identify a single person serving as the district officer responsible for receiving complaints. The responsible district officer’s information shall be made public on the college and district’s website. Additionally, Section 59324 charges the responsible district officer with the duty of overseeing the informal resolution process.

The informal resolution regulations are set forth in Section 59327. This section requires that the district officer attempt to informally resolve matters and advise the complainant of its right to file with other agencies if the unlawful discrimination allegations are brought informally - that is, not filed on the unlawful discrimination form created by the Chancellor’s Office. This situation can arise when the complainant verbally tells the responsible officer about a problem and seeks a quick resolution.

One important distinction to note is that the effect of informally resolving complaints that lack a prescribed form is contrary to the requirements of the Office of Civil Rights (OCR). OCR does not require that complainants file a complaint on a specific form as required by Section 59328(c). OCR advises that any complaint of unlawful discrimination shall be investigated pursuant to federal law. This would effectively rule out the informal resolution requirements of the responsible district officer to resolve matters informally if the complaint is not on the prescribed form.

Complaints filed with the district or Chancellor’s Office

Student and employee complainants may file an unlawful discrimination complaint with the Chancellor’s Office and/or the responsible district officer (Cal. Code Regs., tit. 5 § 59328(b)). The Complainant has the option. The regulations require that the Chancellor’s Office and the district immediately forward a copy of the complaint to the other upon receipt. Thus, districts must send a copy of the complaint along with an acknowledgement letter to the Chancellor’s Office immediately. If a complaint is filed with the Chancellor’s Office, the same procedure will take place – that is, an acknowledgment letter and copy of the complaint will be forwarded to the district’s responsible officer.
When forwarding the complaint, the Chancellor’s Office recommends sending a corresponding copy of the acknowledgement letter and complaint to the complainant for record keeping purposes, and to notify the complainant that the complaint has been received.

Complainants may also send the same complaint to both the Chancellor’s Office and the district at the same time. When this occurs, the Chancellor’s Office and the district should continue to forward a copy of the complaint as required under the regulations.

A unique situation may arise when complainants send an initial complaint to the district and a second amended complaint regarding the same matter, but with additional information, to the Chancellor’s Office, or vice versa. In such situations, following the forwarding procedures set forth in the regulations ensures that both the district and Chancellor’s Office are in possession of the most recent correspondence and any important amendments. Additionally, the district and Chancellor’s Office should send a corresponding copy of any forwarded letter to the complainant.

Advising complainant of his/her right to file with other entities

Districts are required to notify the complainant of the right to file an additional complaint with certain entities, depending on the type of complaint. The district should send an acknowledgement letter to the complainant upon receipt of a new complaint, notifying the complainant the receipt, that a copy of the complaint was forwarded to the Chancellor’s Office, an investigation and determination will be rendered within the given time period, and that the complainant has rights to pursue other claims.

Under Section 59328(f), any complainant alleging employment discrimination shall be notified that he or she may file the same complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and/or the Department of Fair Employment and Housing (DFEH). If the complainant has filed such a complaint with the EEOC or DFEH, the district should forward a copy of the complaint to the Chancellor’s Office immediately.

For student matters, Section 59327(4) requires that the complainant be advised that he or she may file the same complaint with the Office of Civil Rights (OCR) where such a complaint is within the jurisdiction of that agency.

Regulatory timeline

The regulatory timelines for discrimination complaints differ depending on the type of alleged discrimination. The timelines for filing are set forth in Section 59328.

Section 59328(e) requires that employment complaints “shall be filed within 180 days of the date the alleged unlawful discrimination occurred.” This period shall be extended by 90 days following the expiration of the 180 days if the complainant first obtained knowledge of the facts of the alleged discrimination after the 180 days. It is important to note that employment
complaints are not limited to discriminatory practices in hiring, but include all facets of employment, including but not limited to: harassment by a supervisor or fellow employee, failure to provide reasonable accommodations, or discrimination in awarding compensation and benefits.

For student complaints, Section 59328(d) requires that complaints “shall be filed within one year of the date of alleged unlawful discrimination or within one year of the date on which the complainant knew or should have known of the facts...”

A complainant may often file more than one complaint regarding the same matter which may pose procedural issues. For example, a complainant may file an initial complaint, then file a second amended complaint with additional information two months later. In such situations, all subsequent or amended complaints involving the same matter must be filed within the timelines set forth above unless the subsequent complaints involve new allegations.

3rd party standing

Section 59328(a) requires that the complaint be filed by the person who suffered unlawful discrimination or by a faculty member or administrator who has learned of such discrimination through his or her official capacity.

It is important to note that Legal Advisory 11-01 also clarifies OCR’s stance on complaints filed by individuals who have not personally suffered unlawful discrimination. OCR requires districts to investigate 3rd party complaints under federal regulations and allows the district to follow the Title 5 procedures and timelines. However, complainants that lack standing under Title 5 do not have appeal rights to the Chancellor’s Office.

Defective complaints

In light of the procedural timelines set forth in the regulations, Section 59332 requires the district to immediately notify the complainant and the Chancellor’s Office of any complaint that was not filed within the applicable regulatory timelines.

As previously mentioned, 3rd party complaints (except for discrimination complaints made by faculty or administrators) and complaints lacking a prescribed form may be deemed defective; however, OCR still requires the district to investigate the matter under federal regulations.
II. Investigation, Extension Requests, and Administrative Determination

This aspect of the unlawful discrimination process requires the most attention, as districts often fail to follow these regulations after a complaint has been filed.

District investigation

A properly filed complaint triggers a district investigation under Section 59334. This section requires the district to commence an impartial fact-finding investigation and the completion of an investigative report that includes all of the following elements:

1. A factual description of the matter,
2. A summary of the testimony provided by each witness, including testimony made by the complainant, respondent, and any “viable witnesses,”
3. An analysis of the data or evidence collected during the investigation,
4. A probable cause determination on whether the alleged discrimination occurred with respect to each allegation in the complaint, and
5. Any other appropriate information.

A common question regarding this section is whether the Title 5 regulations require an outside investigator to meet the “impartial fact finding investigation” standard. The regulations do not require that the district hire an outside investigator; thus a district employee may be designated to investigate, so long as the investigation is impartial and fair, and all parties are interviewed pursuant to Section 59334(b).

Since the regulations require that all parties and witnesses be interviewed, a best practice is to document every attempt to interview throughout the investigation and highlighting the failed attempts in the investigative report. This is essential because investigations may involve witnesses that are protected by Family Education Rights and Privacy Act (FERPA), collective bargaining laws or witnesses bound by rules of non-disclosure such as the Health Insurance Portability and Accountability Act (HIPAA). In such situations, witnesses may be unavailable. Nonetheless, at the onset, if the witness is deemed “viable,” the investigator must make an effort to interview and document every attempt. When conducting interviews, the investigator must afford each witness the opportunity to present their testimony and/or any evidence regarding the allegations.

In addition to interviews, an investigation should properly document and analyze any correspondence regarding the matter. This documentation should include the original complaint, any corresponding documents such as letters and e-mails to and from the district and the complainant and/or the respondent, and any investigative notes. Such documentation is critical in formulating a complete administrative determination, and allows for a thorough review of the record in the event of an appeal.
Lastly, Section 59334 requires that the district complete its investigation within ninety (90) days of receiving a complaint unless the district is granted an extension. Completion of the investigation requires that the district issue an administrative determination along with an investigative report to both the complainant and the Chancellor’s Office within 90 calendar days.

**Title IX investigations**

Title IX of the Education Amendments of 1972 (“Title IX”) is a federal civil rights law that prohibits sex/gender discrimination in federally funded education programs and activities. The Office of Civil Rights at the U.S. Department of Education has issued guidelines on the requirements and standards of such claims. For purposes of our Title 5 discrimination process, there may be situations when a Title 5 investigation overlaps with a Title IX investigation. This situation can occur when a district encounters a sex/gender discrimination, harassment or sexual violence claim that falls under both sets of laws.

The U.S. Department of Education has made it clear that when investigating incidents that fall within Title IX, districts should coordinate with other ongoing school or criminal investigations, including any unlawful discrimination claims. In doing so, districts should consider whether certain information may be shared to expedite the process and to prevent complainants from unnecessarily providing multiple statements about the allegations.

The U.S. Department of Education emphasizes that a district does not need to conduct two separate investigations – that is, a Title 5 investigation and a Title IX investigation, if a district’s own procedures to resolve sex/gender discrimination complaints meets all of the Title IX obligations. These obligations include: responding promptly and effectively to the discrimination, ending the discrimination, eliminating any hostile environment, and preventing future discrimination.

In regards to timeliness of the investigation, the Office of Civil Rights has indicated in their “Dear Colleague Letter” and “Questions and Answers on Title IX and Sexual Violence” that a typical Title IX investigation should be concluded within 60 calendar days. This is shorter than the 90-day requirement under Title 5 because Title IX claims, especially sexual violence allegations, may require immediate attention and resolution for the safety and protection of the complainants. The Chancellor’s Office does not evaluate whether a Title 5 investigation meets the requirements of Title IX on appeal.

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2 This Legal Opinion does not discuss every requirement of Title IX in detail. Districts should consult with legal counsel and/or Title IX coordinator regarding the requirements not mentioned in this opinion.
3 The U.S. Department of Education’s “Revised Sexual Harassment Guidance” can be found at: http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf
4 http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf
5 http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf
**Extension requests**

A district may request up to a 90-day extension from the Chancellor’s Office to submit an administrative determination (Cal. Code Regs., tit. 5 § 59342). The district must send a written request to the Chancellor’s Office no later than ten (10) days prior to the expiration of the original deadline. Additionally, the extension request must contain the following:

1. The reason why an extension is necessary,
2. The date by which the district expects the determination to be completed,
3. Notice that a corresponding copy was sent to the complainant,
4. Notice to the complainant that he or she has the right to send a written objection to the Chancellor’s Office within five (5) days of receipt.

Failure to include any of the four aspects above will result in a denial of the extension. The Chancellor’s Office may grant the extension unless any delay would be prejudicial to the investigation (Cal. Code Regs., tit. 5 § 59342(c)). Examples of prejudice may include loss of witness testimony through delay or utilizing an extension to prevent the complainant from seeking remedies through other outlets in a timely manner.

**Administrative determination**

Within 90 days of the complaint (unless an extension has been granted), a copy or summary of the investigative report and an administrative determination must be forwarded to the complainant and the Chancellor’s Office. The administrative determination letter should attach the investigative report (or a summary of the report) and both documents are required to be sent by the district within 90 days.

The administrative determination letter shall include all the pertinent information listed in Section 59336, including:

1. The ultimate determination on probable cause,
2. A description of any actions taken to prevent similar allegations in the future (if applicable),
3. The proposed resolution of the complaint (if any), and
4. The complainant’s right to appeal.

The complainant’s right to appeal hinges on whether the matter involves employment or non-employment allegations. Both are discussed in detail below.
III. Appeal Rights in Employment and Student Matters

Every administrative determination letter, regardless of the alleged discrimination, must contain the information mentioned above. However, Section 59336 requires that the determination must also advise the complainant of certain appeal rights. The appeal rights of employment versus student matters differ and districts must correctly advise complainants of their appeal options.

Employment complaints

Section 59336(b) requires that in cases involving alleged employment discrimination, the district shall notify the complainant of its right to appeal to the district’s local governing board and/or to file the same complaint with the Department of Fair Employment and Housing (DFEH). This notice must be in the administrative determination letter.

Any appeal to the local governing board must be filed within fifteen (15) days from the date of the district’s administrative determination. The governing board shall review the original complaint, the investigative report, the administrative determination and the appeal, before issuing a final district decision within forty-five (45) days of receiving the appeal.

Additionally, the district is required to promptly forward a copy of the final district decision rendered by the local governing board to the complainant and notify the complainant of his or her right to file a complaint with DFEH. Please be aware that the Title 5 regulations do not afford employment complainants the right to appeal to the Chancellor’s Office. Section 59339 (“Appeal to the Chancellor”) explicitly states that cases involving employment discrimination may be filed with DFEH where the complaint is within the jurisdiction of that agency, but does not grant appeal rights to the Chancellor’s Office.

Appeals to the Chancellor’s Office are strictly reserved for student complaints. As such, the Chancellor’s Office is not in a position to render any decisions on employment appeals. When an employment appeal is sent to the Chancellor’s Office, the appeal will be sent back to the complainant with instructions to file with the appropriate federal entities.

Student complaints

For student complaints, the district is required to apprise the complainant that he or she may appeal the administrative determination to the local governing board and the Chancellor’s Office (Cal. Code Regs., tit. 5 § 59336(a)). The time limitation for student appeals to the local governing board is the same as in employment matters. The complainant is allowed fifteen (15) days from the date of the determination to appeal to the local governing board, and the board shall review all pertinent documents and render a final decision within forty-five (45) days after receiving an appeal.
After the board’s final decision, a copy of the decision shall be forwarded to the complainant and the Chancellor, along with notice that the complainant may now directly appeal the district’s decision to the Chancellor’s Office within thirty (30) days from the date the governing board issues the final decision or from the date the district provides notice to the complainant of such a decision (Cal. Code Regs., tit. 5 § 59339(a)).

An appeal to the Chancellor’s Office must be accompanied by a copy of the local governing board’s decision or evidence that the complainant filed an appeal with the governing board and that no response was received within forty-five (45) days.
IV. Student Appeals to the Chancellor’s Office

The Title 5 regulations only authorize the Chancellor’s Office to review student (non-employment) matters. Pursuant to Section 59350, once a student appeal reaches the Chancellor’s Office, the appeal will be reviewed to determine if there is reasonable cause to believe the district has violated any requirements of Title 5. If there is evidence of a violation, then the Chancellor’s Office will launch its own probable cause investigation to determine the validity of the allegations.

Reasonable cause review

A timely appeal to the Chancellor’s Office initiates a reasonable cause review to examine the complainant’s issues raised on appeal. This review is limited to an examination of the district’s actions to determine if the procedures were adequately followed. Such a review does not look at the substance of the allegations, but instead focuses on the district’s role throughout the process. In the event the complainant raises new facts or issues on appeal, Section 59351 allows the Chancellor’s Office to remand new issues to the district to provide the district a reasonable opportunity to respond.

The Chancellor’s Office will provide a reasonable cause determination after reviewing all the pertinent documents. The determination will provide a review of the applicable Title 5 requirements and an analysis of the district’s actions, along with an ultimate decision on whether every applicable regulation was followed. If a violation of a procedure occurred, then the Chancellor’s Office will launch its own probable cause investigation to determine the validity and merits of the allegations.

Probable cause investigation

Section 59352 requires that “if the Chancellor finds there is reasonable cause to believe a violation has occurred, the Chancellor shall investigate to determine whether there is probable cause to believe a violation has occurred.” A probable cause investigation requires the Chancellor’s Office to look at the allegations and interview all parties, including the complainant, respondent(s), and any witnesses concerning the matter. The Chancellor’s Office will reach out to the responsible district officer to gather any information regard the parties before conducting separate interviews.
V. Resolution

A probable cause violation may be resolved through informal resolution with a written conciliation agreement or through formal resolution via a probable cause determination.

Informal resolution

Section 59354 allows the Chancellor’s Office the option of informally resolving the alleged violation(s) if possible. When attempting to informally resolve the matter, the “resolution shall be set forth in a written conciliation agreement” and “a copy of the written agreement shall be sent to the complainant.”

Informal resolution may occur when there is a probable cause violation (i.e. a finding that the discrimination allegations did occur) and the proposed remedy may be easily awarded without contest. Such situations may include providing confirmation of a violation to a student who has already obtained what they initially sought in the complaint, or allowing the district an opportunity to resolve the complaint if the factual circumstances have changed since the original filing.

Formal resolution

If informal resolution is not an option, then Section 59356 requires that the Chancellor’s Office complete its probable cause investigation within 120 days of the reasonable cause finding by notifying the district and the complainant.

Section 59356(a) allows the district to acquiesce to the findings prior to the Chancellor’s Office filing an accusation against the district, should the complainant’s allegations be found to have merit. In such situations, the Chancellor’s Office will send a written notice to the district that it has violated certain regulations and allow the district a reasonable time to respond to the findings. Should the district fail to acquiesce to the probable cause finding, the Title 5 regulations provide the Chancellor’s Office with the authority to hold a hearing pursuant to the Government Code to determine if the violation did occur (Cal. Code Regs., tit. 5 § 59358).

Enforcement

Section 59360 provides the Chancellor’s Office with enforcement tools to ensure that the districts follow the Title 5 regulations. These means to effect compliance include:

1. Withholding all or part of the district’s state support;
2. Making eligibility for future state support conditioned on compliance with specific conditions regarding the violations; or
3. Proceeding in a court of competent jurisdiction for an appropriate order to compel compliance.
VI. Frequently Asked Questions

Multiple complaints

**Q:** A Complainant has filed numerous complaints regarding the same matter, but different incidents. Typically, the latter complaints just provide new facts and allegations. Should I treat all the complaints as one complaint? Or should every complaint be treated as its own separate complaint?

**A:** Generally, if all the complaints involve the same matter – that is, facts that relate to the same underlying type of discrimination or facts that stem from the initial allegation, then the complaints may be treated as one complaint. This may occur when a complainant files subsequent complaints due to ongoing discrimination from the first incident.

However, if the subsequent complaints involve a different type of discrimination that is separate from the initial allegation, then the complaints should be treated separately. The key here is whether an investigation of the complaints as one matter would be appropriate. If the answer is no, then the complaints should be separated so each matter should be properly investigated and resolved individually.

Employee v. non-employee/student complaints

**Q:** An employee has filed an unlawful discrimination complaint against another fellow employee. Would this be a non-employment complaint since it doesn’t involve discrimination in the hiring, compensation/benefits or post-hiring process?

**A:** No, any employment complaint, including those brought by employees against a fellow employee, should be treated as an employment complaint. The Title 5 regulations require that the district notify employment complainants of the right to file the same complaint with the Department of Fair Employment and Housing (DFEH). If the complaint is a matter that the DFEH would normally handle, such as workplace hostility or harassment, then the matter should be considered as an employment complaint.

Multiple extension requests

**Q:** Can a district request multiple extensions to complete an investigation and render the administrative determination?

**A:** Yes, a district may request for multiple extensions because the Title 5 regulations do not expressly limit the number of extension requests a district may make. However, when presented with a second 90-day extension request, the Chancellor’s Office must review the
reasoning for the request to determine if a second extension would be prejudicial to the investigation.

Interviewing witnesses

Q: Will the Chancellor’s Office find a reasonable cause violation if a witness is not interviewed?

A: Possibly, depending on whether the witness is viable. The regulations require that a district interview all “viable witnesses” during its investigation. In determining whether this requirement is met, the Chancellor’s Office will look at the witnesses mentioned in the complaint and determine whether each witnesses would be deemed viable – that is, would the witness be able available and willing to provide substantive and valuable information on the matter, and would it be practical to interview the witness?

The viability analysis is threefold. First, the district must ask whether a witness is available to provide testimony. Is the district privy to the witness’ information and can the witness be located to give testimony? If a witness cannot be located, then the witness is unavailable and thus not viable.

Secondly, if the witness is available, would the witness be able to provide relevant and material information? If the answer is no, then districts should not be required to interview the witness because investigations should be prompt and help promote resolution.

Lastly, investigators need to determine if it is practical to interview the witness. As previously mentioned, witnesses may be protected by certain employment or non-disclosure laws. When dealing with a protected witness, the Title 5 regulations do not grant districts subpoena power, nor do the regulations require districts to invoke the judicial process to comply with this requirement.

Districts should list all witnesses in their investigative report and notate if the witnesses were interviewed or not, along with the justification for not interviewing a particular witness.

Local governing board’s decision

Q: Does the local governing board need to give a justification for its acceptance or denial of the district’s administrative determination?

A: No, the local governing board’s role is to review all the necessary documents regarding the matter and render a decision to either uphold or reverse the district’s determination. Title 5 does not require the board to provide its justification or reasoning.

TTN/PVK
INVESTIGATION NOTICE FORM
INVESTIGATION NOTICE FORM

To:

From:

Date:

Re: Investigation of Possible Violation of District Policy

I am investigating a possible violation of _______________ District policy. As part of the investigation, I will be interviewing you today. The purpose of this notice is to provide some important information about what the district expects from you during the investigation.

The district appreciates your participation in this process. We expect you to cooperate fully in the investigation by, for example, answering all questions completely and honestly, providing any documents that are relevant to the investigation, and making yourself available for follow-up interviews, if necessary. You will be excused from your usual work duties for interviews and any other activities necessary to the investigation.

Retaliation against anyone involved in the investigation is strictly prohibited. If you retaliate against anyone involved in this investigation, you will be subject to discipline. If you believe you have been mistreated or otherwise retaliated against because of your participation in this investigation, please tell me immediately.

We will maintain the confidentiality of the investigation to the extent possible, revealing information only on a need-to-know basis or as otherwise required by law.

I encourage you to contact me after our interview today if you remember additional information or if you would like to change or add to your statement for any other reason.

Your signature indicates that you have received and read this notice.

Signed: ____________________________

Name: ____________________________

Date: _____________________________