

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK and
THE BOARD OF EDUCATION FOR THE
CITY SCHOOL DISTRICT OF THE CITY
OF NEW YORK,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
EDUCATION and ELISABETH DEVOS,
*in her official capacity as the Secretary of
Education,*

Defendants.

No. 1:20-cv-04260-JGK

DECLARATION OF JOSEPH WARDENSKI

I, Joseph Wardenski, declare the following:

I am an attorney with the Office of the New York State Attorney General and counsel to Plaintiffs in this action. I submit this Declaration in support of Plaintiffs' motion for a preliminary injunction.

Attached to this Declaration are true and correct copies of the following exhibits:

Ex. 1 – American Council on Education, *Statement of ACE President Ted Mitchell on Final Title IX Regulations* (May 6, 2020), <https://www.acenet.edu/News-Room/Pages/Statement-by-ACE-President-Ted-Mitchell-on-Final-Title-IX-Regulations.aspx#:~:text=The%20regulations%20will%20undermine%20college,the%20worst%20in%20regulatory%20overreach.>

Ex. 2 – Letter from J. Shapiro *et al.* to Secretary Elisabeth DeVos *et al.* (Mar. 27, 2020).

Ex. 3 – Mark Keierleber, *DeVos releases Title IX campus sexual assault rule, courting controversy amid coronavirus pandemic*, LA School Report (May 6, 2020),

<http://laschoolreport.com/devos-releases-title-ix-campus-sexual-assault-rule-courtng-controversy-amid-coronavirus-pandemic/>.

Ex. 4 – U.S. Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 2001).

Ex. 5 – U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Harassment Issues* (Jan. 25, 2006).

Ex. 6 – U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010).

Ex. 7 – U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011) (withdrawn).

Ex. 8 – U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014) (withdrawn).

Ex. 9 – U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Campus Sexual Misconduct* (Sept. 22, 2017).

Ex. 10 – U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Prohibited Disability Harassment* (July 25, 2000).

Ex. 11 – Declaration of Laura Brantley, Executive Director of the Office of Equal Opportunity and Diversity Management, Board of Education for the City School District of the City of New York (a/k/a New York City Department of Education) (June 25, 2020).

Ex. 12 – Redline Showing the Final Rule’s Amendments to the Department of Education’s Title IX Regulations. I prepared this redline using the “Compare” feature in Microsoft Word for Office 365, comparing the full text of 34 C.F.R. pt. 106 currently in effect

with the full text of the regulations, as amended by the Final Rule, set to take effect on August 14, 2020.

Ex. 13 – Declaration of Joseph Storch, Associate Counsel/Chair of the Office of General Counsel Student Affairs Practice Group, The State University of New York (June 17, 2020).

Ex. 14 – Declaration of Rodney L. Pepe-Souvenir, University Title IX Director, City University of New York (June 18, 2020).

Ex. 15 – Declaration of Andrea Stagg, Deputy General Counsel, Barnard College (June 17, 2020).

Ex. 16 – AASA, The School Superintendents Association, *Report of Initial Findings: COVID Survey 2 Impact on Public Schools* (June 12, 2020), [https://aasa.org/uploadedFiles/AASA_Blog\(1\)/COVID19%20and%20Schools%20Detailing%20the%20Continued%20Impact_Intial%20Findings_6_16_2020_FN.pdf](https://aasa.org/uploadedFiles/AASA_Blog(1)/COVID19%20and%20Schools%20Detailing%20the%20Continued%20Impact_Intial%20Findings_6_16_2020_FN.pdf).

Ex. 17 – Declaration of Victoria A. Ajibade, Assistant Vice President of Diversity and Inclusion/Chief Diversity Officer, SUNY Downstate Health Sciences University (June 19, 2020).

Ex. 18 – Declaration of Mary Haviland, Executive Director, New York City Alliance Against Sexual Assault (June 18, 2020).

Under 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 25, 2020

By: /s/ Joseph Wardenski
Joseph Wardenski, *Senior Trial Counsel*
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Attorney for Plaintiff the State of New York

Exhibit 1

6/25/2020

Statement by ACE President Ted Mitchell on Final Title IX Regulations

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Statement by ACE President Ted Mitchell on Final Title IX Regulations

May 06, 2020

"The Department of Education is not living in the real world. As a result of the pandemic, virtually every college and university in the country is closed. Choosing this moment to impose the most complex and challenging regulations the agency has ever issued reflects appallingly poor judgment.

We pleaded with the department to hold off issuing these regulations at a time when campuses across America are shuttered until further notice. Faculty, staff, and students are doing their best to adjust teaching, learning, and research to a new world without any personal interaction. It is a time of high stress, heroic efforts, and extraordinary adaptation.

Today's release of these regulations, with an incomprehensible mandate to fully implement them by August 14 is as cruel as it is counter-productive. The department certainly knows how involved and complicated these regulations will be for our colleges and universities because it has taken it nearly three years to develop them. Typically, the Department of Education gives colleges and universities at least eight months to implement new regulations. But in this case the department expects colleges and universities to implement them in just over three months, and when the institutions are closed. This is irrational, unrealistic, and completely at odds with the Trump administration's oft-repeated statement to tread lightly when imposing complex new regulations.

We urgently implore the department to re-think this. If it does nothing else, the department should postpone the effective date to the summer of 2021 to enable sensible planning and adoption of campus processes and procedures.

Even in normal times, implementing these Title IX regulations was sure to be enormously complex and burdensome. There is no magic wand that will enable campuses to put these new regulations into effect. Doing it effectively requires coordinated, intensive, in-person effort across multiple campus departments and constituencies, including students, to identify, review, and change existing policies and procedures in a considered and sensible manner. But this is practically impossible right now, and surely will remain so into the summer.

As for the substance of the regulations, we are disappointed that they fail to address serious concerns expressed by ACE and our member institutions who must implement them. The regulations will undermine college and university efforts to effectively, fairly, and compassionately combat sexual harassment and treat both parties equitably when investigating and resolving campus sexual harassment and assault cases.

This package of mandates represents the worst in regulatory overreach. The department's extraordinary micromanagement is likely to heighten confusion and concern, discourage survivors from coming forward, and impose on every campus in America a "one size fits all," court-like framework that is antithetical to the campus educational environment and institutional disciplinary processes.

[↑ TOP](#)



SUMMIT

June 22, 2020

Race and Crisis at a Crossroads



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Exhibit 2



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO
ATTORNEY GENERAL

1600 ARCH ST., SUITE 300
PHILADELPHIA, PA 19103
(215) 560-2402

March 27, 2020

The Honorable Elisabeth DeVos
Secretary
United States Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

The Honorable Russell T. Vought
Acting Director
The Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

The Honorable Kenneth L. Marcus
Assistant Secretary for Civil Rights
Office for Civil Rights
United States Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

The Honorable Paul Ray
Administrator, Office of Information and
Regulatory Affairs
The Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Dear Secretary DeVos, Acting Director Vought, Assistant Secretary Marcus, and Administrator Ray:

On behalf of Pennsylvania, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawai'i, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Rhode Island, Vermont, and Virginia, we urge the Department of Education (the Department) and the Office of Management and Budget (OMB) to suspend the rulemaking process for the proposed regulations implementing Title IX of the Education Amendments of 1972 (Title IX) entitled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (RIN 1870-AA14). We ask that this rulemaking remain suspended while our nation's educational institutions respond to the national emergency caused by the novel coronavirus (COVID-19)¹ and until both K-12 schools and institutions of higher education resume normal operations. Doing so would be consistent

¹ *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

with the Acting Director Vought's recent directive requiring agencies to "prioritize all resources to slow the transmission of COVID-19."²

The COVID-19 pandemic has dramatically disrupted most aspects of daily American life. The United States has the most confirmed coronavirus cases of any other country, surpassing Italy and China, and is currently considered the epicenter of COVID-19.³ To minimize the spread of the virus, individuals must avoid contact with others and remain at home as much as possible. The Centers for Disease Control and Prevention and the White House have discouraged gatherings of more than ten people and urged everyone who can to work or engage in schooling from home.⁴ The White House has encouraged states and localities to close schools in affected areas to limit community transmission because school operations "can accelerate the spread of the coronavirus."⁵

Some states have taken additional steps to protect their citizens by requiring all non-essential workers to remain at home. For example, Pennsylvania has ordered the closure of all non-life sustaining businesses.⁶ California's Governor has ordered all individuals to stay at home or at their place of residence, except as needed to maintain continuity of operations of the federal

² Memorandum for the Heads of Departments and Agencies from Russell T. Vought, Acting Director, OMB, *Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19* (Mar. 17, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf>.

³ L.A. Times, Newsletter, *The Epicenter is Now the U.S.* (Mar. 27, 2020), <https://www.latimes.com/world-nation/newsletter/2020-03-27/coronavirus-cases-united-states-newsletter-todays-headlines>.

⁴ *The President's Coronavirus Guidelines for America* (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf; Ctrs. for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19), How to Protect Yourself* (Mar. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>.

⁵ *The President's Coronavirus Guidelines for America* (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

⁶ Gov. Wolf, *Secretary Levine Provide Updated Guidance, Stress Need for Compliance as Cases Rise* (Mar. 20, 2020), <https://www.governor.pa.gov/newsroom/gov-wolf-secretary-levine-provide-updated-guidance-stress-need-for-compliance-as-cases-rise/>

critical infrastructure sectors.⁷ In total, twenty-two states and many localities have issued stay-at-home orders.⁸

In response to this extraordinary national public health emergency, schools across the country have taken drastic measures to protect their students, faculty, and staff. Forty-seven states and many localities have decided to shut down all of their K-12 schools at least temporarily, with most states extending closures into April.⁹ As a result, at least 124,000 public and private schools—representing over 93% of all K-12 institutions—are closed or will be closing, affecting 55.1 million students.¹⁰ While some of these closures are currently temporary, it is likely that many schools will remain closed indefinitely.¹¹ Several states have ordered their K-12 schools to close and end in-person instruction through the end of the school year,¹² and other states may soon follow suit.¹³

In addition, more than 1,140 colleges and universities are temporarily closed and transitioning to remote learning, affecting more than 14.5 million students.¹⁴ Many of these

⁷ Executive Order, N-33-20 (Mar. 19, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/EO-N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-002.pdf>.

⁸ Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. Times (updated Mar. 27, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

⁹ Educ. Week, *Map: Coronavirus and School Closures* (updated Mar. 26, 2020), <https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; see, e.g., KSHB, *Kansas City, Kansas Governor Orders Schools to Close for Rest of Academic Year due to COVID-19* (Mar. 17, 2020), <https://www.kshb.com/news/coronavirus/kansas-governor-orders-schools-to-close-for-rest-of-academic-year-due-to-covid-19>; Wavy, *Coronavirus Monday Updates: Va. Schools Closed Through End of Academic Year, NC Schools Closed Through May 15* (Mar. 23, 2020), <https://www.wavy.com/news/virginia/coronavirus-monday-updates-virginia-now-has-254-cases-6-deaths-reported/>.

¹³ E.g., David Nagel, *Updated List of Statewide School Closures with Closure Dates*, The Journal (updated Mar. 26, 2020), <https://thejournal.com/articles/2020/03/17/list-of-states-shutting-down-all-their-schools-grows-to-36.aspx>; Caitlin Okane, *Some Schools will Remain Closed for the Rest of the School Year. Here's what to Expect if it Happens in Your District*, CBS News (Mar. 18, 2020), <https://www.cbsnews.com/news/coronavirus-schools-closed-remainder-of-year-childcare-work-from-home-emergency-kids-covid-19-outbreak/>.

¹⁴ Entangled Solutions, *COVID-19: Higher Education Resource Center* (updated Mar. 26, 2020), <https://www.entangled.solutions/coronavirus-he/>.

higher education institutions have also required students to vacate on-campus housing,¹⁵ while faculty and staff in many states are now encouraged or required to practice social distancing by working and teaching from home.¹⁶

This unprecedented pandemic—and the necessary steps our country is taking to mitigate and minimize its harms—has placed a significant strain on our schools and our students. With school resources already stretched thin, now is not the time to require school administrators, faculty, and staff to review new, complex Title IX regulations, revise their schools’ policies in response, and communicate these changes to students and parents. The changes outlined in the proposed rule would take a great deal of an institution’s time, resources, and effort in the best of circumstances. But in the midst of a national health emergency, the burden placed on schools would be untenable and ultimately counterproductive to student safety. Instead, educational resources should be preserved at this time to focus on providing education and other critical services for our students.

Finalizing the proposed rule now would also cause significant confusion about ongoing Title IX complaints and investigations, which have already been disrupted by the sudden closures and social distancing requirements. During this crisis, schools will need the flexibility to fashion and revise investigation, resolution, and grievance procedures on an ongoing basis, in order to carry out Title IX’s mandate in the manner that best addresses the impact of the pandemic and the needs of their school populations and communities. And if the regulations are finalized as proposed, then some new legal obligations—such as the proposed requirement for all higher education institutions to hold live hearings with all parties and witnesses present—would be both impossible and unsafe.

¹⁵ Abigail Hess, *How coronavirus dramatically changed college for over 14 million students*, CNBC (Mar. 26, 2020), <https://www.cnbc.com/2020/03/26/how-coronavirus-changed-college-for-over-14-million-students.html>.

¹⁶ Inside Higher Ed, *Will Shift to Remote Teaching Be Boon or Bane for Online Learning?* (Mar. 18, 2020), <https://www.insidehighered.com/digital-learning/article/2020/03/18/most-teaching-going-remote-will-help-or-hurt-online-learning>.

With everything our schools and students are facing right now, we strongly urge you not to impose further substantial regulatory burdens. To ensure that our schools can focus on serving our communities, we ask the Department and OMB to announce that they are suspending the rulemaking process for the proposed Title IX regulations until the national emergency has ended and our schools have resumed their regular operations.

Sincerely,



JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania



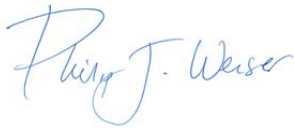
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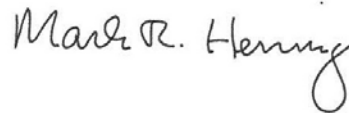
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Commonwealth of Virginia

Exhibit 3

**EXPLORE:***Accountability**Charter Schools**Parent Voices**School Board**Teacher Spotlight***NEWS**

DeVos releases Title IX campus sexual assault rule, courting controversy amid coronavirus pandemic

Mark Keierleber | May 6, 2020



Getty Images

Education Secretary Betsy DeVos released a new rule Wednesday on how K-12 schools and colleges must address campus sexual misconduct, bolstering protections for accused students as the department seeks to combat abuse “without abandoning fairness.”

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Teacher Spotlight:
Alexandra Chavez on helping create a first-of-its-kind social and gender equity magnet school, focusing on whole child learning and striving to be patient

Education groups rejoice as Supreme Court blocks

The regulations, which go into effect in August, make wide-ranging changes to schools' obligations under Title IX, the federal law prohibiting sex discrimination in education. Among them, institutions will be allowed to choose the legal standard that officials should use while investigating complaints. The rule, first proposed in November 2018, generally requires more evidence to determine whether sexual misconduct occurred and limits the situations in which institutions are required to act. The changes also narrow the definition of sexual harassment, requiring schools to intervene only if an incident is "so severe, pervasive and objectively offensive" that it denies a student access to an education.

The changes recognize that "we can continue to combat sexual misconduct without abandoning our values," DeVos said on a call with reporters. Though sexual assault is often seen as primarily a higher education issue, DeVos emphasized the rule's importance to K-12 students and its role in combating incidents involving school staff. "We are making sure our youngest students — who often get overlooked in discussions of this topic — are no more forgotten."

Though the rule has stirred a fierce debate among policymakers and advocates for more than a year, the timing of its release — while campuses nationwide are closed due to the coronavirus pandemic — has been criticized by Democrats and women's rights groups. But DeVos, who called COVID-19 the "invisible viral enemy," said the time for change is now, while students are away from campuses.

"Civil rights really can't wait, and students' cases continue to be decided" despite the campus closures, she said. "We've been working on this for more than two years so it's not a surprise to institutions that it was coming."

But Reps. Bobby Scott and Jerrold Nadler, both Democrats, accused the department of pushing through the rule "instead of focusing on helping students, educators and institutions cope" with the pandemic. Meanwhile, the rule "creates new barriers to justice" for survivors while creating a burden of proof that is more stringent than is standard for civil rights laws "and will be particularly difficult to meet given the nature of many sexual misconduct cases." Scott is chairman of the House Committee on Education and Labor, and Nadler serves as House Judiciary Committee chairman.

Trump efforts to end DACA program, but warn decision is merely 'first step'

Sullivan: Unless we act now, the students most disadvantaged by school closures will be even more so when schools reopen

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The new rule has been a top priority for DeVos since she took the helm at the department and could become a defining part of her legacy as education secretary. In 2017, DeVos rescinded Obama-era guidance on the issue, which called on schools to better investigate sexual violence reports and required educators to use a “preponderance of the evidence” standard in investigations, rather than a higher “clear and convincing” standard. The news comes less than a week after Joe Biden, the presumptive Democratic nominee for president and vice president during the Obama administration, denied allegations that he sexually assaulted a former Senate staffer in the early 1990s, saying that the alleged attack “never happened.” More than two dozen women have accused President Donald Trump of sexual misconduct dating back to the 1970s — allegations he denies.

Under the new rule, schools are allowed to choose between the two evidentiary standards so long as the approach is applied across all cases. It also requires colleges to hold live hearings where students accused of misconduct are allowed to submit, cross-examine and challenge evidence. Such hearings aren’t required at the K-12 level. While women’s rights groups argue the rule could stifle victims’ willingness to come forward with complaints, DeVos has highlighted a need to protect the due-process rights of those accused of misconduct.

The Obama-era guidance “simply was not working,” DeVos said. “It was a failed approach, we had kangaroo courts and an unreliable process.”

Though the new rule is largely unchanged from draft regulations proposed in late 2018, DeVos said officials made several modifications that reflect public feedback. After the proposed regulations were released, the department received more than 120,000 formal comments.

Under the final rule, K-12 school officials are required to respond if any school employee is given notice of sexual harassment. That’s a critical departure from the draft regulations, which sought to narrow the group of school officials responsible for responding to misconduct allegations. Responding to questions from The 74, DeVos said it was important for the department to consider the role age plays in how students report misconduct to school officials. Kenneth Marcus, the department’s assistant secretary for civil rights, elaborated on the

point, noting that younger children “may not know who to go to” with complaints.

“We want to make it clear that if a student or a parent reports a problem of this sort to any elementary or secondary school employee, this will be considered notice to the school as a whole,” Marcus said. “That includes teachers as well as principals. It includes bus drivers and cafeteria workers and guidance counselors.”

Among those who cheered the rule was Republican Sen. Lamar Alexander, the Senate education committee chairman, who said the rule will help schools better understand their responsibilities under the law. They also offer a fair approach for victims and students accused of misconduct, he said in a statement.

“The rule ensures victims get the support they need to change classes or dorms if they allege they have been sexually assaulted or sexually harassed and the rule ensures the victim and the accused get a fair hearing to resolve such allegations,” Alexander said.

Robert Shibley, executive director of the Foundation for Individual Rights in Education, said in a statement that the rule is a victory for free speech and due process rights because it offers students a presumption of innocence.

Advocates for sexual misconduct survivors, however, were quick to attack the final regulations.

Arthur Evans, CEO of the American Psychological Association, said in a statement that the rule “lacks the foundation of psychological research and science needed to address acts of sexual misconduct.” Evans took aim at the department for creating an “adversarial system of resolving complaints similar to legal proceedings,” and for making school officials responsible only for complaints that occur on their property or during school events like field trips and academic conferences.

The nonprofit Stop Sexual Assault in Schools announced a plan to “undertake a court challenge to ensure that K-12 students have fair and effective Title IX guidance.” The group has been critical of the regulations since the draft rule was first released. The new rule could make it more difficult for students to come forward and report allegations to school officials, the group said in a news release. The National Women’s Law Center also threatened a lawsuit, accusing DeVos of being “dead set

on making schools more dangerous for everyone — even during a global pandemic.”

But DeVos said the new rule offers a level playing field for everyone.

“I’m a mother and a grandmother, of girls and of boys,” she said. “My insistence as we went through this process was that we develop a rule that meaningfully addresses sexual misconduct and treats all students fairly.”

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Exhibit 4

REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES

TITLE IX



January 2001

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

PREAMBLE

Summary

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

The revised guidance reaffirms the compliance standards that OCR applies in investigations and administrative enforcement of Title IX of the Education Amendments of 1972 (Title IX) regarding sexual harassment. The revised guidance re-grounds these standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages and clarifying their regulatory basis as distinct from Title VII of the Civil Rights Act of 1964 (Title VII) agency law. In most other respects the revised guidance is identical to the 1997 guidance. Thus, we intend the revised guidance to serve the same purpose as the 1997 guidance. It continues to provide the principles that a school¹ should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance.

Purpose and Scope of the Revised Guidance

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

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

¹ As in the 1997 guidance, the revised guidance uses the term “school” to refer to all schools, colleges, universities, and other educational institutions that receive Federal funds from the Department.

official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment. In Davis, the Court announced that a school also may be liable for monetary damages if one student sexually harasses another student in the school's program and the conditions of Gebser are met.

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

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

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

Enduring Principles from the 1997 Guidance

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

One of the fundamental aims of both the 1997 guidance and the revised guidance has been to emphasize that, in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.

A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. If harassment has occurred, doing nothing is always the wrong response. However, depending on the circumstances, there may be more than one right way to respond. The important thing is for school employees or officials to pay attention to the school environment and not to hesitate to respond to sexual harassment in the same reasonable, commonsense manner as they would to other types of serious misconduct.

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

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

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

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

Distinction Between Administrative Enforcement and Private Litigation for Monetary Damages

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

aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.

Commenters uniformly agreed with OCR that the Court limited the liability standards established in Gebser and Davis to private actions for monetary damages. See, e.g., Gebser, 524 U.S. 283, and Davis, 526 U.S. at 639. Commenters also agreed that the administrative enforcement standards reflected in the 1997 guidance remain valid in OCR enforcement actions.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 schools 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 STUDENTS¹
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's⁴ 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.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,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 harassment¹⁰ 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.²¹

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

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

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

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

In addition, the regulations establish procedural requirements that are important for the prevention or correction of sex discrimination, including sexual harassment. These requirements include issuance of a policy against sex discrimination³⁰ and adoption and publication of grievance procedures providing for prompt and equitable resolution of complaints of sex discrimination.³¹ The regulations also require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance.³²

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

V. Determining a School's Responsibilities

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

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

This guidance moves away from specific labels for types of sexual harassment.³³ 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.³⁴ 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.³⁵

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.³⁶ 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.³⁷

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 subjective³⁸ and objective³⁹ 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."⁴⁰ 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.⁴¹ A student may also suffer physical injuries or mental or emotional distress.⁴² 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.⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶ Similarly, because students date one another, a request for a date or a gift of flowers, even if unwelcome, would not create a hostile environment. However, there may be circumstances in which repeated, unwelcome requests for dates or similar conduct could create a hostile environment. For example, a person, who has been refused previously, may request dates in an intimidating or threatening manner.
- The identity of and relationship between the alleged harasser and the subject or subjects of the harassment. A factor to be considered, especially in cases involving allegations of sexual harassment of a student by a school employee, is the identity of

and relationship between the alleged harasser and the subject or subjects of the harassment. For example, due to the power a professor or teacher has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student.⁴⁷

- The number of individuals involved. Sexual harassment may be committed by an individual or a group. In some cases, verbal comments or other conduct from one person might not be sufficient to create a hostile environment, but could be if done by a group. Similarly, while harassment can be directed toward an individual or a group,⁴⁸ the effect of the conduct toward a group may vary, depending on the type of conduct and the context. For certain types of conduct, there may be “safety in numbers.” For example, following an individual student and making sexual taunts to him or her may be very intimidating to that student, but, in certain circumstances, less so to a group of students. On the other hand, persistent unwelcome sexual conduct still may create a hostile environment if directed toward a group.
- The age and sex of the alleged harasser and the subject or subjects of the harassment. For example, in the case of younger students, sexually harassing conduct is more likely to be intimidating if coming from an older student.⁴⁹
- The size of the school, location of the incidents, and context in which they occurred. Depending on the circumstances of a particular case, fewer incidents may have a greater effect at a small college than at a large university campus. Harassing conduct occurring on a school bus may be more intimidating than similar conduct on a school playground because the restricted area makes it impossible for students to avoid their harassers.⁵⁰ Harassing conduct in a personal or secluded area, such as a dormitory room or residence hall, can have a greater effect (e.g., be seen as more threatening) than would similar conduct in a more public area. On the other hand, harassing conduct in a public place may be more humiliating. Each incident must be judged individually.
- Other incidents at the school. A series of incidents at the school, not involving the same students, could — taken together — create a hostile environment, even if each by itself would not be sufficient.⁵¹
- Incidents of gender-based, but nonsexual harassment. Acts of verbal, nonverbal or physical aggression, intimidation or hostility based on sex, but not involving sexual activity or language, can be combined with incidents of sexual harassment to determine if the incidents of sexual harassment are sufficiently serious to create a sexually hostile environment.⁵²

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

2. Welcomeness

The section entitled “Sexual Harassment” explains that in order for conduct of a sexual nature to be sexual harassment, it must be unwelcome. Conduct is unwelcome if

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

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

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

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

- The nature of the conduct and the relationship of the school employee to the student, including the degree of influence (which could, at least in part, be affected by the student’s age), authority, or control the employee has over the student.
- Whether the student was legally or practically unable to consent to the sexual conduct in question. For example, a student’s age could affect his or her ability to do so. Similarly, certain types of disabilities could affect a student’s ability to do so.

If there is a dispute about whether harassment occurred or whether it was welcome — in a case in which it is appropriate to consider whether the conduct would be welcome — determinations should be made based on the totality of the circumstances. The following types of information may be helpful in resolving the dispute:

- Statements by any witnesses to the alleged incident.
- Evidence about the relative credibility of the allegedly harassed student and the alleged harasser. For example, the level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth. Another way to assess credibility is to see if corroborative evidence is lacking where it should logically exist. However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.
- Evidence that the alleged harasser has been found to have harassed others may support the credibility of the student claiming the harassment; conversely, the student's claim will be weakened if he or she has been found to have made false allegations against other individuals.
- Evidence of the allegedly harassed student's reaction or behavior after the alleged harassment. For example, were there witnesses who saw the student immediately after the alleged incident who say that the student appeared to be upset? However, it is important to note that some students may respond to harassment in ways that do not manifest themselves right away, but may surface several days or weeks after the harassment. For example, a student may initially show no signs of having been harassed, but several weeks after the harassment, there may be significant changes in the student's behavior, including difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school.
- Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the complainant may not be believed rather than that the alleged harassment did not occur.
- Other contemporaneous evidence. For example, did the student claiming harassment write about the conduct and his or her reaction to it soon after it occurred (e.g., in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

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

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

1. Harassment by Teachers and Other Employees

Sexual harassment of a student by a teacher or other school employee can be discrimination in violation of Title IX.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 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,⁶¹ the recipient is responsible for the discriminatory conduct.⁶² 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.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,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 to students. However, the conduct is sufficiently serious to deny or limit the student in her ability to participate in or benefit from the recipient's program. Thus, the school has a duty, upon notice of the harassment,⁶⁵ to take prompt and effective action to stop the harassment and prevent its recurrence.

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

2. Harassment by Other Students or Third Parties

If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or reasonably should know⁶⁶ about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.⁶⁷ As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations. On the other hand, if, upon notice, the school fails to take prompt, effective action, the school's own inaction has permitted the student to be subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program on the basis of sex.⁶⁸ In this case, the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.

Similarly, sexually harassing conduct by third parties, who are not themselves employees or students at the school (e.g., a visiting speaker or members of a visiting athletic team), may also be of a sufficiently serious nature to deny or limit a student's ability to participate in or benefit from the education program. As previously outlined in connection with peer harassment, if the school knows or should know⁶⁹ of the harassment, the school is responsible for taking prompt and effective action to eliminate the hostile environment and prevent its recurrence.

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

If, upon notice, the school fails to take prompt and effective corrective action, its own failure has permitted the student to be subjected to a hostile environment that limits

the student's ability to participate in or benefit from the education program.⁷¹ 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.⁷²

A school has notice if a responsible employee "knew, or in the exercise of reasonable care should have known," about the harassment.⁷³ 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.⁷⁴ 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 coordinator⁷⁵ 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."⁷⁶

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.⁷⁷ 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.)⁷⁸

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.⁷⁹ (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,⁸⁰ 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 IX⁸¹ and effective grievance procedures;⁸² (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment;⁸³ 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.⁸⁴ (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.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.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),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.⁸⁸ 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.⁸⁹ A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.⁹⁰ In some cases, it may be appropriate to further separate the harassed student and the harasser, e.g., by changing housing arrangements⁹¹ 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.⁹²

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.⁹³ 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 harassment⁹⁴ 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.⁹⁵ 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.⁹⁶

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.⁹⁸ 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.⁹⁹

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.¹⁰⁰ 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.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;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.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.¹⁰⁴ The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹

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.¹¹² Free speech rights apply in the classroom (e.g., classroom lectures and discussions)¹¹³ 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 events¹¹⁴; and student newspapers, journals, and other publications¹¹⁵). In addition, First Amendment rights apply to the speech of students and teachers.¹¹⁶

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.¹¹⁷ 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.¹¹⁸

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.¹¹⁹ 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.

² 20 U.S.C. 1681; 34 CFR part 106.

³ See, e.g., Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 649-50 (1999); Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 281 (1998); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992); S. REP. NO. 100-64, 100th Cong., 1st Sess. 14 (1987); Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (1997 guidance), 62 FR 12034 (1997).

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); Analay 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.

¹⁰ Cf. John Does 1 v. Covington County Sch. Bd., 884 F.Supp. 462, 464-65 (M.D. Ala. 1995) (male students alleging that a teacher sexually harassed and abused them stated cause of action under Title IX).

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 F.2d 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).

²⁶ 34 CFR 106.31(b)(4).

²⁷ 34 CFR 106.31(b)(6).

²⁸ 34 CFR 106.31(b)(7).

²⁹ 34 CFR 106.3(a).

³⁰ 34 CFR 106.9.

³¹ 34 CFR 106.8(b).

³² 34 CFR 106.8(a).

³³ The 1997 guidance referred to quid pro quo harassment and hostile environment harassment. 62 FR 12038–40.

³⁴ 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).

³⁵ 34 CFR 106.31(b).

³⁶ 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).

⁴² Doe v. Petaluma, 830 F.Supp. at 1566.

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., Elgmil 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).

⁴⁵ 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).

⁴⁶ 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).

⁴⁷ 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).

⁴⁸ See, e.g., McKinney, 765 F.2d at 1138-49; Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991).

⁴⁹ Cf. Patricia H., 830 F. Supp. at 1297.

⁵⁰ See, e.g., Barrett, 584 F. Supp. at 30 (finding harassment occurring in a car from which the victim could not escape particularly severe).

⁵¹ 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).

⁵² 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).

⁵³ Does v. Covington Sch. Bd. of Educ., 930 F.Supp. 554, 569 (M.D. Ala. 1996); Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

⁵⁴ 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.”

⁵⁵ 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....”).

⁵⁶ 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.

⁵⁷ The school bears the burden of rebutting the presumption.

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

⁵⁹ See note 58.

⁶⁰ 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.

⁶¹ 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).

⁶² 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).

⁶³ Davis, 526 U.S. at 646.

⁶⁴ See section on “Applicability of Title IX” for scope of coverage.

⁶⁵ See section on “Notice of Employee, Peer, or Third Party Harassment.”

⁶⁶ See section on “Notice of Employee, Peer, or Third Party Harassment.”

⁶⁷ 34 CFR 106.31(b).

⁶⁸ 34 CFR 106.31(b).

⁶⁹ See section on “Notice of Employee, Peer, or Third Party Harassment.”

⁷⁰ Cf. Davis, 526 U.S. at 646.

⁷¹ 34 CFR 106.31(b).

⁷² 34 CFR 106.31(b).

⁷³ 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).

⁷⁴ 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).

⁷⁶ 34 CFR 106.31. See Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987); Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983).

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.

¹⁰⁹ 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.

¹¹⁰ 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).

¹¹¹ Cf. EEOC v. Board of Governors of State Colleges and Universities, 957 F.2d 424 (7th Cir. 1992), cert. denied, 506 U.S. 906 (1992).

¹¹² 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.

¹¹³ 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).

¹¹⁴ 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).

¹¹⁵ 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.)

¹¹⁶ 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).

Exhibit 5



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

ASSISTANT SECRETARY

JAN 25 2006

Dear Colleague:

My purpose in writing to you is to increase awareness of an important issue affecting students — sexual harassment — and to remind you of the principles that a school should use to recognize and effectively respond to the sexual harassment of students in its programs and activities. As you know, the Office for Civil Rights (OCR) in the U.S. Department of Education (Department) is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX) and the Department's implementing regulations at 34 C.F.R. Part 106, which prohibit sex discrimination in education programs and activities operated by educational institutions that receive Federal financial assistance.

Longstanding legal authority establishes that harassment of students can be a form of sex discrimination covered by Title IX. I want to commend the efforts many of you have made to ensure that all students have a safe and secure educational environment that affords them equal educational opportunities regardless of their sex. Unfortunately, a significant number of students are still subjected to sexual harassment, which can interfere with a student's education as well as his or her emotional and physical well-being. Preventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn.

I am enclosing the Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties issued by OCR in January 2001. The guidance explains an educational institution's responsibility, as a condition of receiving Federal financial assistance, to take immediate and effective steps to end sexual harassment when it occurs, prevent its recurrence, and remedy its effects.

You should be aware that the guidance outlines standards applicable to OCR's enforcement of compliance in cases raising sexual harassment issues. It does not purport to discuss standards applicable to private Title IX lawsuits for monetary damages. You will also note that the guidance sometimes cites OCR resolution letters. These letters are fact-specific statements of the investigative findings and dispositions in individual cases and are not formal statements of OCR policy.

I am committed to the vigorous enforcement of Title IX and to ensuring equal opportunities in education for all students. In furtherance of that commitment, OCR plans to conduct compliance reviews related to sexual harassment in schools. OCR remains willing to support you in your voluntary efforts to comply with Title IX. If you need additional information about Title IX, have questions regarding the Department's policies, or seek guidance, please contact the OCR

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enforcement office that serves your state or territory for further assistance. I have enclosed the addresses and telephone numbers of those offices.

Thank you for your attention to this matter of vital importance to maintaining a safe environment for all students.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephanie Monroe". The signature is fluid and cursive, with the first name "Stephanie" written in a larger, more prominent script than the last name "Monroe".

Stephanie Monroe
Assistant Secretary
for Civil Rights

Enclosure(s)

Exhibit 6



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

October 26, 2010

Dear Colleague:

In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education (Department) fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools' appreciation of their important responsibility to maintain a safe learning environment for all students. I am writing to remind you, however, that some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department's Office for Civil Rights (OCR). As discussed in more detail below, by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment.

The statutes that OCR enforces include Title VI of the Civil Rights Act of 1964¹ (Title VI), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972² (Title IX), which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973³ (Section 504); and Title II of the Americans with Disabilities Act of 1990⁴ (Title II). Section 504 and Title II prohibit discrimination on the basis of disability.⁵ School districts may violate these civil rights statutes and the Department's implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.⁶ School personnel who understand their legal obligations to address harassment under these laws are in the best position to prevent it from occurring and to respond appropriately when it does. Although this letter focuses on the elementary and secondary school context, the legal principles also apply to postsecondary institutions covered by the laws and regulations enforced by OCR.

Some school anti-bullying policies already may list classes or traits on which bases bullying or harassment is specifically prohibited. Indeed, many schools have adopted anti-bullying policies that go beyond prohibiting bullying on the basis of traits expressly protected by the federal civil

¹ 42 U.S.C. § 2000d *et seq.*

² 20 U.S.C. § 1681 *et seq.*

³ 29 U.S.C. § 794.

⁴ 42 U.S.C. § 12131 *et seq.*

⁵ OCR also enforces the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, and the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905. This letter does not specifically address those statutes.

⁶ The Department's regulations implementing these statutes are in 34 C.F.R. parts 100, 104, and 106. Under these federal civil rights laws and regulations, students are protected from harassment by school employees, other students, and third parties. This guidance focuses on peer harassment, and articulates the legal standards that apply in administrative enforcement and in court cases where plaintiffs are seeking injunctive relief.

rights laws enforced by OCR—race, color, national origin, sex, and disability—to include such bases as sexual orientation and religion. While this letter concerns your legal obligations under the laws enforced by OCR, other federal, state, and local laws impose additional obligations on schools.⁷ And, of course, even when bullying or harassment is not a civil rights violation, schools should still seek to prevent it in order to protect students from the physical and emotional harms that it may cause.

Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.⁸

A school is responsible for addressing harassment incidents about which it knows or reasonably should have known.⁹ In some situations, harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice. In other situations, the school may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment. In all cases, schools should have well-publicized policies prohibiting harassment and procedures for reporting and resolving complaints that will alert the school to incidents of harassment.¹⁰

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's 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. In all cases, however, the inquiry should be prompt, thorough, and impartial.

If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile

⁷ For instance, the U.S. Department of Justice (DOJ) has jurisdiction over Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c (Title IV), which prohibits discrimination on the basis of race, color, sex, religion, or national origin by public elementary and secondary schools and public institutions of higher learning. State laws also provide additional civil rights protections, so districts should review these statutes to determine what protections they afford (e.g., some state laws specifically prohibit discrimination on the basis of sexual orientation).

⁸ Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression. For more information on the First Amendment's application to harassment, see the discussions in OCR's Dear Colleague Letter: First Amendment (July 28, 2003), available at <http://www.ed.gov/about/offices/list/ocr/firstamend.html>, and OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 19, 2001) (*Sexual Harassment Guidance*), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁹ A school has notice of harassment if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment. For a discussion of what a "responsible employee" is, see OCR's *Sexual Harassment Guidance*.

¹⁰ Districts must adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex and disability discrimination complaints, and must notify students, parents, employees, applicants, and other interested parties that the district does not discriminate on the basis of sex or disability. See 28 C.F.R. § 35.106; 28 C.F.R. § 35.107(b); 34 C.F.R. § 104.7(b); 34 C.F.R. § 104.8; 34 C.F.R. § 106.8(b); 34 C.F.R. § 106.9.

environment and its effects, and prevent the harassment from recurring. These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target's educational program (*e.g.*, not requiring the target to change his or her class schedule).

In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. A school also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district's Title IX and Section 504/Title II coordinators.¹¹

Finally, a school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. At a minimum, the school's responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.

When responding to incidents of misconduct, schools should keep in mind the following:

- The label used to describe an incident (*e.g.*, bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.
- When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school's responsibility is to eliminate the

¹¹ Districts must designate persons responsible for coordinating compliance with Title IX, Section 504, and Title II, including the investigation of any complaints of sexual, gender-based, or disability harassment. See 28 C.F.R. § 35.107(a); 34 C.F.R. § 104.7(a); 34 C.F.R. § 106.8(a).

hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.

Below, I provide hypothetical examples of how a school's failure to recognize student misconduct as discriminatory harassment violates students' civil rights.¹² In each of the examples, the school was on notice of the harassment because either the school or a responsible employee knew or should have known of misconduct that constituted harassment. The examples describe how the school should have responded in each circumstance.

Title VI: Race, Color, or National Origin Harassment

- *Some students anonymously inserted offensive notes into African-American students' lockers and notebooks, used racial slurs, and threatened African-American students who tried to sit near them in the cafeteria. Some African-American students told school officials that they did not feel safe at school. The school investigated and responded to individual instances of misconduct by assigning detention to the few student perpetrators it could identify. However, racial tensions in the school continued to escalate to the point that several fights broke out between the school's racial groups.*

In this example, school officials failed to acknowledge the pattern of harassment as indicative of a racially hostile environment in violation of Title VI. Misconduct need not be directed at a particular student to constitute discriminatory harassment and foster a racially hostile environment. Here, the harassing conduct included overtly racist behavior (*e.g.*, racial slurs) and also targeted students on the basis of their race (*e.g.*, notes directed at African-American students). The nature of the harassment, the number of incidents, and the students' safety concerns demonstrate that there was a racially hostile environment that interfered with the students' ability to participate in the school's education programs and activities.

Had the school recognized that a racially hostile environment had been created, it would have realized that it needed to do more than just discipline the few individuals whom it could identify as having been involved. By failing to acknowledge the racially hostile environment, the school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate. A more effective response would have included, in addition to punishing the perpetrators, such steps as reaffirming the school's policy against discrimination (including racial harassment), publicizing the means to report allegations of racial harassment, training faculty on constructive responses to racial conflict, hosting class discussions about racial harassment and sensitivity to students of other races, and conducting outreach to involve parents and students in an effort to identify problems and improve the school climate. Finally, had school officials responded appropriately

¹² Each of these hypothetical examples contains elements taken from actual cases.

and aggressively to the racial harassment when they first became aware of it, the school might have prevented the escalation of violence that occurred.¹³

- *Over the course of a school year, school employees at a junior high school received reports of several incidents of anti-Semitic conduct at the school. Anti-Semitic graffiti, including swastikas, was scrawled on the stalls of the school bathroom. When custodians discovered the graffiti and reported it to school administrators, the administrators ordered the graffiti removed but took no further action. At the same school, a teacher caught two ninth-graders trying to force two seventh-graders to give them money. The ninth-graders told the seventh-graders, "You Jews have all of the money, give us some." When school administrators investigated the incident, they determined that the seventh-graders were not actually Jewish. The school suspended the perpetrators for a week because of the serious nature of their misconduct. After that incident, younger Jewish students started avoiding the school library and computer lab because they were located in the corridor housing the lockers of the ninth-graders. At the same school, a group of eighth-grade students repeatedly called a Jewish student "Drew the dirty Jew." The responsible eighth-graders were reprimanded for teasing the Jewish student.*

The school administrators failed to recognize that anti-Semitic harassment can trigger responsibilities under Title VI. While Title VI does not cover discrimination based solely on religion,¹⁴ groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (e.g., Muslims or Sikhs). Thus, harassment against students who are members of any religious group triggers a school's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices. A school also has responsibilities under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.¹⁵

In this example, school administrators should have recognized that the harassment was based on the students' actual or perceived shared ancestry or ethnic identity as Jews (rather than on the students' religious practices). The school was not relieved of its responsibilities under Title VI because the targets of one of the incidents were not actually Jewish. The harassment was still based on the perceived ancestry or ethnic characteristics of the targeted students. Furthermore, the harassment negatively affected the ability and willingness of Jewish students to participate fully in the school's

¹³ More information about the applicable legal standards and OCR's approach to investigating allegations of harassment on the basis of race, color, or national origin is included in *Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance*, 59 Fed. Reg. 11,448 (Mar. 10, 1994), available at <http://www.ed.gov/about/offices/list/ocr/docs/race394.html>.

¹⁴ As noted in footnote seven, DOJ has the authority to remedy discrimination based solely on religion under Title IV.

¹⁵ More information about the applicable legal standards and OCR's approach to investigating complaints of discrimination against members of religious groups is included in OCR's Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), available at <http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

education programs and activities (e.g., by causing some Jewish students to avoid the library and computer lab). Therefore, although the discipline that the school imposed on the perpetrators was an important part of the school's response, discipline alone was likely insufficient to remedy a hostile environment. Similarly, removing the graffiti, while a necessary and important step, did not fully satisfy the school's responsibilities. As discussed above, misconduct that is not directed at a particular student, like the graffiti in the bathroom, can still constitute discriminatory harassment and foster a hostile environment. Finally, the fact that school officials considered one of the incidents "teasing" is irrelevant for determining whether it contributed to a hostile environment.

Because the school failed to recognize that the incidents created a hostile environment, it addressed each only in isolation, and therefore failed to take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence. In addition to disciplining the perpetrators, remedial steps could have included counseling the perpetrators about the hurtful effect of their conduct, publicly labeling the incidents as anti-Semitic, reaffirming the school's policy against discrimination, and publicizing the means by which students may report harassment. Providing teachers with training to recognize and address anti-Semitic incidents also would have increased the effectiveness of the school's response. The school could also have created an age-appropriate program to educate its students about the history and dangers of anti-Semitism, and could have conducted outreach to involve parents and community groups in preventing future anti-Semitic harassment.

Title IX: Sexual Harassment

- *Shortly after enrolling at a new high school, a female student had a brief romance with another student. After the couple broke up, other male and female students began routinely calling the new student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages and e-mails. One of the student's teachers and an athletic coach witnessed the name calling and heard the rumors, but identified it as "hazing" that new students often experience. They also noticed the new student's anxiety and declining class participation. The school attempted to resolve the situation by requiring the student to work the problem out directly with her harassers.*

Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Thus, sexual harassment prohibited by Title IX can include conduct such as touching of a sexual nature; making sexual comments, jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Web sites of a sexual nature.

In this example, the school employees failed to recognize that the “hazing” constituted sexual harassment. The school did not comply with its Title IX obligations when it failed to investigate or remedy the sexual harassment. The conduct was clearly unwelcome, sexual (e.g., sexual rumors and name calling), and sufficiently serious that it limited the student’s ability to participate in and benefit from the school’s education program (e.g., anxiety and declining class participation).

The school should have trained its employees on the type of misconduct that constitutes sexual harassment. The school also should have made clear to its employees that they could not require the student to confront her harassers. Schools may use informal mechanisms for addressing harassment, but only if the parties agree to do so on a voluntary basis. Had the school addressed the harassment consistent with Title IX, the school would have, for example, conducted a thorough investigation and taken interim measures to separate the student from the accused harassers. An effective response also might have included training students and employees on the school’s policies related to harassment, instituting new procedures by which employees should report allegations of harassment, and more widely distributing the contact information for the district’s Title IX coordinator. The school also might have offered the targeted student tutoring, other academic assistance, or counseling as necessary to remedy the effects of the harassment.¹⁶

Title IX: Gender-Based Harassment

- *Over the course of a school year, a gay high school student was called names (including anti-gay slurs and sexual comments) both to his face and on social networking sites, physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear (e.g., effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices). As a result, the student dropped out of the drama club to avoid further harassment. Based on the student’s self-identification as gay and the homophobic nature of some of the harassment, the school did not recognize that the misconduct included discrimination covered by Title IX. The school responded to complaints from the student by reprimanding the perpetrators consistent with its anti-bullying policy. The reprimands of the identified perpetrators stopped the harassment by those individuals. It did not, however, stop others from undertaking similar harassment of the student.*

As noted in the example, the school failed to recognize the pattern of misconduct as a form of sex discrimination under Title IX. Title IX prohibits harassment of both male and female students regardless of the sex of the harasser—i.e., even if the harasser and target are members of the same sex. It also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their

¹⁶ More information about the applicable legal standards and OCR’s approach to investigating allegations of sexual harassment is included in OCR’s *Sexual Harassment Guidance*, available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

sex, or for failing to conform to stereotypical notions of masculinity and femininity. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.

Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also, as this example illustrates, be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment. In this example, the harassing conduct was based in part on the student's failure to act as some of his peers believed a boy should act. The harassment created a hostile environment that limited the student's ability to participate in the school's education program (e.g., access to the drama club). Finally, even though the student did not identify the harassment as sex discrimination, the school should have recognized that the student had been subjected to gender-based harassment covered by Title IX.

In this example, the school had an obligation to take immediate and effective action to eliminate the hostile environment. By responding to individual incidents of misconduct on an *ad hoc* basis only, the school failed to confront and prevent a hostile environment from continuing. Had the school recognized the conduct as a form of sex discrimination, it could have employed the full range of sanctions (including progressive discipline) and remedies designed to eliminate the hostile environment. For example, this approach would have included a more comprehensive response to the situation that involved notice to the student's teachers so that they could ensure the student was not subjected to any further harassment, more aggressive monitoring by staff of the places where harassment occurred, increased training on the scope of the school's harassment and discrimination policies, notice to the target and harassers of available counseling services and resources, and educating the entire school community on civil rights and expectations of tolerance, specifically as they apply to gender stereotypes. The school also should have taken steps to clearly communicate the message that the school does not tolerate harassment and will be responsive to any information about such conduct.¹⁷

Section 504 and Title II: Disability Harassment

- *Several classmates repeatedly called a student with a learning disability "stupid," "idiot," and "retard" while in school and on the school bus. On one occasion, these students tackled him, hit him with a school binder, and threw his personal items into the garbage. The student complained to his teachers and guidance counselor that he was continually being taunted and teased. School officials offered him counseling services and a*

¹⁷ Guidance on gender-based harassment is also included in OCR's *Sexual Harassment Guidance*, available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

psychiatric evaluation, but did not discipline the offending students. As a result, the harassment continued. The student, who had been performing well academically, became angry, frustrated, and depressed, and often refused to go to school to avoid the harassment.

In this example, the school failed to recognize the misconduct as disability harassment under Section 504 and Title II. The harassing conduct included behavior based on the student's disability, and limited the student's ability to benefit fully from the school's education program (e.g., absenteeism). In failing to investigate and remedy the misconduct, the school did not comply with its obligations under Section 504 and Title II.

Counseling may be a helpful component of a remedy for harassment. In this example, however, since the school failed to recognize the behavior as disability harassment, the school did not adopt a comprehensive approach to eliminating the hostile environment. Such steps should have at least included disciplinary action against the harassers, consultation with the district's Section 504/Title II coordinator to ensure a comprehensive and effective response, special training for staff on recognizing and effectively responding to harassment of students with disabilities, and monitoring to ensure that the harassment did not resume.¹⁸

I encourage you to reevaluate the policies and practices your school uses to address bullying¹⁹ and harassment to ensure that they comply with the mandates of the federal civil rights laws. For your convenience, the following is a list of online resources that further discuss the obligations of districts to respond to harassment prohibited under the federal antidiscrimination laws enforced by OCR:

- *Sexual Harassment: It's Not Academic* (Revised 2008):
<http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html>
- *Dear Colleague Letter: Sexual Harassment Issues* (2006):
<http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>
- *Dear Colleague Letter: Religious Discrimination* (2004):
<http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>
- *Dear Colleague Letter: First Amendment* (2003):
<http://www.ed.gov/about/offices/list/ocr/firstamend.html>

¹⁸ More information about the applicable legal standards and OCR's approach to investigating allegations of disability harassment is included in OCR's Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000), available at <http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>.

¹⁹ For resources on preventing and addressing bullying, please visit <http://www.bullyinginfo.org>, a Web site established by a federal Interagency Working Group on Youth Programs. For information on the Department's bullying prevention resources, please visit the Office of Safe and Drug-Free Schools' Web site at <http://www.ed.gov/offices/OESE/SDFS>. For information on regional Equity Assistance Centers that assist schools in developing and implementing policies and practices to address issues regarding race, sex, or national origin discrimination, please visit <http://www.ed.gov/programs/equitycenters>.

- *Sexual Harassment Guidance* (Revised 2001):
<http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>
- *Dear Colleague Letter: Prohibited Disability Harassment* (2000):
<http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>
- *Racial Incidents and Harassment Against Students* (1994):
<http://www.ed.gov/about/offices/list/ocr/docs/race394.html>

Please also note that OCR has added new data items to be collected through its Civil Rights Data Collection (CRDC), which surveys school districts in a variety of areas related to civil rights in education. The CRDC now requires districts to collect and report information on allegations of harassment, policies regarding harassment, and discipline imposed for harassment. In 2009-10, the CRDC covered nearly 7,000 school districts, including all districts with more than 3,000 students. For more information about the CRDC data items, please visit <http://www2.ed.gov/about/offices/list/ocr/whatsnew.html>.

OCR is committed to working with schools, students, students' families, community and advocacy organizations, and other interested parties to ensure that students are not subjected to harassment. Please do not hesitate to contact OCR if we can provide assistance in your efforts to address harassment or if you have other civil rights concerns.

For the OCR regional office serving your state, please visit: <http://wdcrobcop01.ed.gov/CFAPPS/OCR/contactus.cfm>, or call OCR's Customer Service Team at 1-800-421-3481.

I look forward to continuing our work together to ensure equal access to education, and to promote safe and respectful school climates for America's students.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights

Exhibit 7

Archived Information



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter "schools" or "recipients") in meeting these obligations, this letter¹ explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.² Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape,

¹ The Department has determined that this Dear Colleague Letter is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at*:

http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf.

OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202.

² Use of the term "sexual harassment" throughout this document includes sexual violence unless otherwise noted. Sexual harassment also may violate Title IV of the Civil Rights Act of 1964 (42 U.S.C. § 2000c), which prohibits public school districts and colleges from discriminating against students on the basis of sex, among other bases. The U.S. Department of Justice enforces Title IV.

sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college.³ The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.⁴ According to data collected under the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f), in 2009, college campuses reported nearly 3,300 forcible sex offenses as defined by the Clery Act.⁵ This problem is not limited to college. During the 2007-2008 school year, there were 800 reported incidents of rape and attempted rape and 3,800 reported incidents of other sexual batteries at public high schools.⁶ Additionally, the likelihood that a woman with intellectual disabilities will be sexually assaulted is estimated to be significantly higher than the general population.⁷ The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school's programs and activities.

This letter begins with a discussion of Title IX's requirements related to student-on-student sexual harassment, including sexual violence, and explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence. These requirements are discussed in detail in OCR's *Revised Sexual Harassment Guidance* issued in 2001 (*2001 Guidance*).⁸ This letter supplements the *2001 Guidance* by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence. This letter concludes by discussing the proactive efforts schools can take to prevent sexual harassment and violence, and by providing examples of remedies that schools and OCR may use to end such conduct, prevent its recurrence, and address its effects. Although some examples contained in this letter are applicable only in the postsecondary context, sexual

³ CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT xiii (Nat'l Criminal Justice Reference Serv., Oct. 2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>. This study also found that the majority of campus sexual assaults occur when women are incapacitated, primarily by alcohol. *Id.* at xviii.

⁴ *Id.* at 5-5.

⁵ U.S. Department of Education, Office of Postsecondary Education, Summary Crime Statistics (data compiled from reports submitted in compliance with the Clery Act), available at <http://www2.ed.gov/admins/lead/safety/criminal2007-09.pdf>. Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person, forcibly and/or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. 34 C.F.R. Part 668, Subpt. D, App. A.

⁶ SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2010 at 104 (U.S. Dep't of Educ. & U.S. Dep't of Justice, Nov. 2010), available at <http://nces.ed.gov/pubs2011/2011002.pdf>.

⁷ ERIKA HARRELL & MICHAEL R. RAND, CRIME AGAINST PEOPLE WITH DISABILITIES, 2008 (Bureau of Justice Statistics, U.S. Dep't of Justice, Dec. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/capd08.pdf>.

⁸ The *2001 Guidance* is available on the Department's Web site at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. This letter focuses on peer sexual harassment and violence. Schools' obligations and the appropriate response to sexual harassment and violence committed by employees may be different from those described in this letter. Recipients should refer to the *2001 Guidance* for further information about employee harassment of students.

harassment and violence also are concerns for school districts. The Title IX obligations discussed in this letter apply equally to school districts unless otherwise noted.

Title IX Requirements Related to Sexual Harassment and Sexual Violence

Schools' Obligations to Respond to Sexual Harassment and Sexual Violence

Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.⁹

As explained in OCR's *2001 Guidance*, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.¹⁰

Title IX protects students from sexual harassment in a school's education programs and activities. This means that Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program

⁹ Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the *2001 Guidance*, and in the 2010 Dear Colleague letter on Harassment and Bullying, which is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

¹⁰ See, e.g., *Jennings v. Univ. of N.C.*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006) (acknowledging that while not an issue in this case, a single incident of sexual assault or rape could be sufficient to raise a jury question about whether a hostile environment exists, and noting that courts look to Title VII cases for guidance in analyzing Title IX sexual harassment claims); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 n.4 (6th Cir. 2000) ("[w]ithin the context of Title IX, a student's claim of hostile environment can arise from a single incident" (quoting *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999))); *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (explaining that rape and sexual abuse "obviously qualify[] as...severe, pervasive, and objectively offensive sexual harassment"); see also *Berry v. Chi. Transit Auth.*, 618 F.3d 688, 692 (7th Cir. 2010) (in the Title VII context, "a single act can create a hostile environment if it is severe enough, and instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment"); *Turner v. Saloon, Ltd.*, 595 F.3d 679, 686 (7th Cir. 2010) (noting that "[o]ne instance of conduct that is sufficiently severe may be enough," which is "especially true when the touching is of an intimate body part" (quoting *Jackson v. Cnty. of Racine*, 474 F.3d 493, 499 (7th Cir. 2007))); *McKinnis v. Crescent Guardian, Inc.*, 189 F. App'x 307, 310 (5th Cir. 2006) (holding that "the deliberate and unwanted touching of [a plaintiff's] intimate body parts can constitute severe sexual harassment" in Title VII cases (quoting *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005))).

sponsored by the school at another location, or elsewhere. For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip.¹¹

If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.¹² Schools also are required to publish a notice of nondiscrimination and to adopt and publish grievance procedures. Because of these requirements, which are discussed in greater detail in the following section, schools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly. Training for employees should include practical information about how to identify and report sexual harassment and violence. OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.

Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.

Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school's grievance procedures or otherwise requests action on the student's behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. As discussed later in this letter, the school's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct. The specific steps in a school's

¹¹ Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities. For example, Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall. Title IX also protects employees of a recipient from sexual harassment. For further information about harassment of employees, see *2001 Guidance* at n.1.

¹² This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. See *2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. See *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 643, 648 (1999).

investigation will vary depending upon the nature of the allegations, the age of the student or students involved (particularly in elementary and secondary schools), the size and administrative structure of the school, and other factors. Yet as discussed in more detail below, the school's inquiry must in all cases be prompt, thorough, and impartial. In cases involving potential criminal conduct, school personnel must determine, consistent with State and local law, whether appropriate law enforcement or other authorities should be notified.¹³

Schools also should inform and obtain consent from the complainant (or the complainant's parents if the complainant is under 18 and does not attend a postsecondary institution) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited.¹⁴ The school also should tell the complainant that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.

As discussed in the *2001 Guidance*, if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.¹⁵ The school should inform the complainant if it cannot ensure confidentiality. Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence. Examples of such steps are discussed later in this letter.

Compliance with Title IX, such as publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures, can serve as preventive measures against harassment. Combined with education and training programs, these measures can help ensure that all students and employees recognize the

¹³ In states with mandatory reporting laws, schools may be required to report certain incidents to local law enforcement or child protection agencies.

¹⁴ Schools should refer to the *2001 Guidance* for additional information on confidentiality and the alleged perpetrator's due process rights.

¹⁵ For example, the alleged harasser may have a right under FERPA to inspect and review portions of the complaint that directly relate to him or her. In that case, the school must redact the complainant's name and other identifying information before allowing the alleged harasser to inspect and review the sections of the complaint that relate to him or her. In some cases, such as those where the school is required to report the incident to local law enforcement or other officials, the school may not be able to maintain the complainant's confidentiality.

nature of sexual harassment and violence, and understand that the school will not tolerate such conduct. Indeed, these measures may bring potentially problematic conduct to the school's attention before it becomes serious enough to create a hostile environment. Training for administrators, teachers, staff, and students also can help ensure that they understand what types of conduct constitute sexual harassment or violence, can identify warning signals that may need attention, and know how to respond. More detailed information and examples of education and other preventive measures are provided later in this letter.

Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence

Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations. Specifically, a recipient must:

- (A) Disseminate a notice of nondiscrimination;¹⁶
- (B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;¹⁷ and
- (C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.¹⁸

These requirements apply to all forms of sexual harassment, including sexual violence, and are important for preventing and effectively responding to sex discrimination. They are discussed in greater detail below. OCR advises recipients to examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in this letter and the *2001 Guidance*. Recipients should then implement changes as needed.

(A) Notice of Nondiscrimination

The Title IX regulations require that each recipient publish a notice of nondiscrimination stating that the recipient does not discriminate on the basis of sex in its education programs and activities, and that Title IX requires it not to discriminate in such a manner.¹⁹ The notice must state that inquiries concerning the application of Title IX may be referred to the recipient's Title IX coordinator or to OCR. It should include the name or title, office address, telephone number, and e-mail address for the recipient's designated Title IX coordinator.

The notice must be widely distributed to all students, parents of elementary and secondary students, employees, applicants for admission and employment, and other relevant persons. OCR recommends that the notice be prominently posted on school Web sites and at various

¹⁶ 34 C.F.R. § 106.9.

¹⁷ *Id.* § 106.8(a).

¹⁸ *Id.* § 106.8(b).

¹⁹ *Id.* § 106.9(a).

locations throughout the school or campus and published in electronic and printed publications of general distribution that provide information to students and employees about the school's services and policies. The notice should be available and easily accessible on an ongoing basis.

Title IX does not require a recipient to adopt a policy specifically prohibiting sexual harassment or sexual violence. As noted in the *2001 Guidance*, however, a recipient's general policy prohibiting sex discrimination will not be considered effective and would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination. OCR therefore recommends that a recipient's nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers.

(B) *Title IX Coordinator*

The Title IX regulations require a recipient to notify all students and employees of the name or title and contact information of the person designated to coordinate the recipient's compliance with Title IX.²⁰ The coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The Title IX coordinator or designee should be available to meet with students as needed. If a recipient designates more than one Title IX coordinator, the notice should describe each coordinator's responsibilities (e.g., who will handle complaints by students, faculty, and other employees). The recipient should designate one coordinator as having ultimate oversight responsibility, and the other coordinators should have titles clearly showing that they are in a deputy or supporting role to the senior coordinator. The Title IX coordinators should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest.

Recipients must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient's grievance procedures operate. Because sexual violence complaints often are filed with the school's law enforcement unit, all school law enforcement unit employees should receive training on the school's Title IX grievance procedures and any other procedures used for investigating reports of sexual violence. In addition, these employees should receive copies of the school's Title IX policies. Schools should instruct law enforcement unit employees both to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint, and to report incidents of sexual violence to the Title IX coordinator if the complainant consents. The school's Title IX coordinator or designee should be available to provide assistance to school law enforcement unit employees regarding how to respond appropriately to reports of sexual violence. The Title IX coordinator also should be given access to school law enforcement unit investigation notes

²⁰ *Id.* § 106.8(a).

and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation.

(C) Grievance Procedures

The Title IX regulations require all recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints.²¹ The grievance procedures must apply to sex discrimination complaints filed by students against school employees, other students, or third parties.

Title IX does not require a recipient to provide separate grievance procedures for sexual harassment and sexual violence complaints. Therefore, a recipient may use student disciplinary procedures or other separate procedures to resolve such complaints. Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures, however, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.²² These requirements are discussed in greater detail below. If the recipient relies on disciplinary procedures for Title IX compliance, the Title IX coordinator should review the recipient's disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX.²³

Grievance procedures generally may include voluntary informal mechanisms (*e.g.*, mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (*e.g.*, participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the *2001 Guidance*, 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. Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.

²¹ *Id.* § 106.8(b). Title IX also requires recipients to adopt and publish grievance procedures for employee complaints of sex discrimination.

²² These procedures must apply to all students, including athletes. If a complaint of sexual violence involves a student athlete, the school must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures. Additionally, if an alleged perpetrator is an elementary or secondary student with a disability, schools must follow the procedural safeguards in the Individuals with Disabilities Education Act (at 20 U.S.C. § 1415 and 34 C.F.R. §§ 300.500-300.519, 300.530-300.537) as well as the requirements of Section 504 of the Rehabilitation Act of 1973 (at 34 C.F.R. §§ 104.35-104.36) when conducting the investigation and hearing.

²³ A school may not absolve itself of its Title IX obligations to investigate and resolve complaints of sexual harassment or violence by delegating, whether through express contractual agreement or other less formal arrangement, the responsibility to administer school discipline to school resource officers or "contract" law enforcement officers. See 34 C.F.R. § 106.4.

Prompt and Equitable Requirements

As stated in the *2001 Guidance*, OCR has identified a number of elements in evaluating whether a school's grievance procedures provide for prompt and equitable resolution of sexual harassment complaints. These elements also apply to sexual violence complaints because, as explained above, sexual violence is a form of sexual harassment. OCR will review all aspects of a school's grievance procedures, including the following elements that are critical to achieve compliance with Title IX:

- Notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- Application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process;
- Notice to parties of the outcome of the complaint;²⁴ 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.

As noted in the *2001 Guidance*, procedures adopted by schools will vary in detail, specificity, and components, reflecting differences in the age of students, school sizes and administrative structures, State or local legal requirements, and past experiences. Although OCR examines whether all applicable elements are addressed when investigating sexual harassment complaints, this letter focuses on those elements where our work indicates that more clarification and explanation are needed, including:

(A) *Notice of the grievance procedures*

The procedures for resolving complaints of sex discrimination, including sexual harassment, should be written in language appropriate to the age of the school's students, easily understood, easily located, and widely distributed. OCR recommends that the grievance procedures be prominently posted on school Web sites; sent electronically to all members of the school community; available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school, such as handbooks, codes of conduct, and catalogs for students, parents of elementary and secondary students, faculty, and staff.

(B) *Adequate, Reliable, and Impartial Investigation of Complaints*

OCR's work indicates that a number of issues related to an adequate, reliable, and impartial investigation arise in sexual harassment and violence complaints. In some cases, the conduct

²⁴ "Outcome" does not refer to information about disciplinary sanctions unless otherwise noted. Notice of the outcome is discussed in greater detail in Section D below.

may constitute both sexual harassment under Title IX and criminal activity. Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation. In addition, a criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.

A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school's internal Title IX investigation. For instance, if a complainant wants to file a police report, the school should not tell the complainant that it is working toward a solution and instruct, or ask, the complainant to wait to file the report.

Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting. For example, a school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.²⁵ Moreover, nothing in an MOU or the criminal investigation itself should prevent a school from notifying complainants of their Title IX rights and the school's grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency's fact-gathering is in progress. OCR also recommends that a school's MOU include clear policies on when a school will refer a matter to local law enforcement.

As noted above, the Title IX regulation requires schools to provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred. In addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints. The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Like Title IX,

²⁵ In one recent OCR sexual violence case, the prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances.

Title VII prohibits discrimination on the basis of sex.²⁶ OCR also uses a preponderance of the evidence standard when it resolves complaints against recipients. For instance, OCR’s Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX.²⁷ OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings.²⁸ Thus, in order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred). The “clear and convincing” standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

Throughout a school’s Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.²⁹ For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant’s

²⁶ See, e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (noting that under the “conventional rule of civil litigation,” the preponderance of the evidence standard generally applies in cases under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55 (1989) (approving preponderance standard in Title VII sex discrimination case) (plurality opinion); *id.* at 260 (White, J., concurring in the judgment); *id.* at 261 (O’Connor, J., concurring in the judgment). The 2001 *Guidance* noted (on page vi) that “[w]hile *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.” See also *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”).

²⁷ OCR’s Case Processing Manual is available on the Department’s Web site, at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.html>.

²⁸ The Title IX regulations adopt the procedural provisions applicable to Title VI of the Civil Rights Act of 1964. See 34 C.F.R. § 106.71 (“The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference.”). The Title VI regulations apply the Administrative Procedure Act to administrative hearings required prior to termination of Federal financial assistance and require that termination decisions be “supported by and in accordance with the reliable, probative and substantial evidence.” 5 U.S.C. § 556(d). The Supreme Court has interpreted “reliable, probative and substantial evidence” as a direction to use the preponderance standard. See *Steadman v. SEC*, 450 U.S. 91, 98-102 (1981).

²⁹ Access to this information must be provided consistent with FERPA. For example, if a school introduces an alleged perpetrator’s prior disciplinary records to support a tougher disciplinary penalty, the complainant would not be allowed access to those records. Additionally, access should not be given to privileged or confidential information. For example, the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant’s sexual history.

statement without also allowing the complainant to review the alleged perpetrator's statement.

While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally. OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment. OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties. Schools must maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings.

All persons involved in implementing a recipient's grievance procedures (*e.g.*, Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, and in the recipient's grievance procedures. The training also should include applicable confidentiality requirements. In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence.³⁰ Additionally, a school's investigation and hearing processes cannot be equitable unless they are impartial. Therefore, any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.

Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.

(C) *Designated and Reasonably Prompt Time Frames*

OCR will evaluate whether a school's grievance procedures specify the time frames for all major stages of the procedures, as well as the process for extending timelines. Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment. For example, the resolution of a complaint involving multiple incidents with multiple complainants likely would take longer than one involving a single incident that

³⁰ For instance, if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.

occurred in a classroom during school hours with a single complainant.

(D) Notice of Outcome

Both parties must be notified, in writing, about the outcome of both the complaint and any appeal,³¹ *i.e.*, whether harassment was found to have occurred. OCR recommends that schools provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently. Title IX does not require the school to notify the alleged perpetrator of the outcome before it notifies the complainant.

Due to the intersection of Title IX and FERPA requirements, OCR recognizes that there may be confusion regarding what information a school may disclose to the complainant.³² FERPA generally prohibits the nonconsensual disclosure of personally identifiable information from a student's "education record." However, as stated in the *2001 Guidance*, FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student. This includes an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall.³³ Disclosure of other information in the student's "education record," including information about sanctions that do not relate to the harassed student, may result in a violation of FERPA.

Further, when the conduct involves a crime of violence or a non-forcible sex offense,³⁴ FERPA permits a postsecondary institution to disclose to the alleged victim the final results of a

³¹ As noted previously, "outcome" does not refer to information about disciplinary sanctions unless otherwise noted.

³² In 1994, 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 VI of the Civil Rights Act of 1964, title IX of Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program." 20 U.S.C. § 1221(d). 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 the requirements of FERPA and the 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. *See 2001 Guidance* at vii.

³³ This information directly relates to the complainant and is particularly important in sexual harassment cases because it affects whether a hostile environment has been eliminated. Because seeing the perpetrator may be traumatic, a complainant in a sexual harassment case may continue to be subject to a hostile environment if he or she does not know when the perpetrator will return to school or whether he or she will continue to share classes or a residence hall with the perpetrator. This information also directly affects a complainant's decision regarding how to work with the school to eliminate the hostile environment and prevent its recurrence. For instance, if a complainant knows that the perpetrator will not be at school or will be transferred to other classes or another residence hall for the rest of the year, the complainant may be less likely to want to transfer to another school or change classes, but if the perpetrator will be returning to school after a few days or weeks, or remaining in the complainant's classes or residence hall, the complainant may want to transfer schools or change classes to avoid contact. Thus, the complainant cannot make an informed decision about how best to respond without this information.

³⁴ Under the FERPA regulations, crimes of violence include arson; assault offenses (aggravated assault, simple assault, intimidation); burglary; criminal homicide (manslaughter by negligence); criminal homicide (murder and

disciplinary proceeding against the alleged perpetrator, regardless of whether the institution concluded that a violation was committed.³⁵ Additionally, a postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution’s rules or policies.³⁶

Postsecondary institutions also are subject to additional rules under the Clery Act. This law, which applies to postsecondary institutions that participate in Federal student financial aid programs, requires that “both the accuser and the accused must be informed of the outcome³⁷ of any institutional disciplinary proceeding brought alleging a sex offense.”³⁸ Compliance with this requirement does not constitute a violation of FERPA. Furthermore, the FERPA limitations on redisclosure of information do not apply to information that postsecondary institutions are required to disclose under the Clery Act.³⁹ Accordingly, postsecondary institutions may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information.

Steps to Prevent Sexual Harassment and Sexual Violence and Correct its Discriminatory Effects on the Complainant and Others

Education and Prevention

In addition to ensuring full compliance with Title IX, schools should take proactive measures to prevent sexual harassment and violence. OCR recommends that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available. Schools may want to include these education programs in their (1) orientation programs for new students, faculty, staff, and employees; (2) training for students who serve as advisors in residence halls; (3) training for student athletes and coaches; and (4) school assemblies and “back to school nights.” These programs should include a

non-negligent manslaughter); destruction, damage or vandalism of property; kidnapping/abduction; robbery; and forcible sex offenses. Forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person’s will, or not forcibly or against the person’s will where the victim is incapable of giving consent. Forcible sex offenses include rape, sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses are incest and statutory rape. 34 C.F.R. Part 99, App. A.

³⁵ 34 C.F.R. § 99.31(a)(13). For purposes of 34 C.F.R. §§ 99.31(a)(13)-(14), disclosure of “final results” is limited to the name of the alleged perpetrator, any violation found to have been committed, and any sanction imposed against the perpetrator by the school. 34 C.F.R. § 99.39.

³⁶ 34 C.F.R. § 99.31(a)(14).

³⁷ For purposes of the Clery Act, “outcome” means the institution’s final determination with respect to the alleged sex offense and any sanctions imposed against the accused. 34 C.F.R. § 668.46(b)(11)(vi)(B).

³⁸ 34 C.F.R. § 668.46(b)(11)(vi)(B). Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person’s will, or not forcibly or against the person’s will where the person is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses include incest and statutory rape. 34 C.F.R. Part 668, Subpt. D, App. A.

³⁹ 34 C.F.R. § 99.33(c).

discussion of what constitutes sexual harassment and sexual violence, the school's policies and disciplinary procedures, and the consequences of violating these policies.

The education programs also should include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities. Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved.⁴⁰ As a result, schools should consider whether their disciplinary policies have a chilling effect on victims' or other students' reporting of sexual violence offenses. For example, OCR recommends that schools inform students that the schools' primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence.

OCR also recommends that schools develop specific sexual violence materials that include the schools' policies, rules, and resources for students, faculty, coaches, and administrators. Schools also should include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive. These materials should include where and to whom students should go if they are victims of sexual violence. These materials also should tell students and school employees what to do if they learn of an incident of sexual violence. Schools also should assess student activities regularly to ensure that the practices and behavior of students do not violate the schools' policies against sexual harassment and sexual violence.

Remedies and Enforcement

As discussed above, if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the school's overall services or policies. Examples of these actions are discussed in greater detail below.

Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. The school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. For instance, the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school's investigation. When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the

⁴⁰ The Department's Higher Education Center for Alcohol, Drug Abuse, and Violence Prevention (HEC) helps campuses and communities address problems of alcohol, other drugs, and violence by identifying effective strategies and programs based upon the best prevention science. Information on HEC resources and technical assistance can be found at www.higheredcenter.org.

complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain. In addition, schools should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement.⁴¹

Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates. For instance, friends of the alleged perpetrator may subject the complainant to name-calling and taunting. As part of their Title IX obligations, schools must have policies and procedures in place to protect against retaliatory harassment. At a minimum, schools must ensure that complainants and their parents, if appropriate, know how to report any subsequent problems, and should follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

When OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population. When conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation.

Schools should proactively consider the following remedies when determining how to respond to sexual harassment or violence. These are the same types of remedies that OCR would seek in its cases.

Depending on the specific nature of the problem, remedies for the complainant might include, but are not limited to:⁴²

- providing an escort to ensure that the complainant can move safely between classes and activities;
- ensuring that the complainant and alleged perpetrator do not attend the same classes;
- moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- providing counseling services;
- providing medical services;
- providing academic support services, such as tutoring;

⁴¹ 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, and the option to 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. 20 U.S.C. §§ 1092(f)(8)(B)(v)-(vi).

⁴² Some of these remedies also can be used as interim measures before the school's investigation is complete.

- arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant's academic record; and
- reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.⁴³

Remedies for the broader student population might include, but are not limited to:

Counseling and Training

- offering counseling, health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community counseling, health, mental health, and other student services;
- designating an individual from the school's counseling center to be "on call" to assist victims of sexual harassment or violence whenever needed;
- training the Title IX coordinator and any other employees who are involved in processing, investigating, or resolving complaints of sexual harassment or sexual violence, including providing training on:
 - the school's Title IX responsibilities to address allegations of sexual harassment or violence
 - how to conduct Title IX investigations
 - information on the link between alcohol and drug abuse and sexual harassment or violence and best practices to address that link;
- training all school law enforcement unit personnel on the school's Title IX responsibilities and handling of sexual harassment or violence complaints;
- training all employees who interact with students regularly on recognizing and appropriately addressing allegations of sexual harassment or violence under Title IX; and
- informing students of their options to notify proper law enforcement authorities, including school and local police, and the option to be assisted by school employees in notifying those authorities.

Development of Materials and Implementation of Policies and Procedures

- developing materials on sexual harassment and violence, which should be distributed to students during orientation and upon receipt of complaints, as well as widely posted throughout school buildings and residence halls, and which should include:
 - what constitutes sexual harassment or violence
 - what to do if a student has been the victim of sexual harassment or violence
 - contact information for counseling and victim services on and off school grounds
 - how to file a complaint with the school
 - how to contact the school's Title IX coordinator

⁴³ For example, if the complainant was disciplined for skipping a class in which the harasser was enrolled, the school should review the incident to determine if the complainant skipped the class to avoid contact with the harasser.

- what the school will do to respond to allegations of sexual harassment or violence, including the interim measures that can be taken
- requiring the Title IX coordinator to communicate regularly with the school's law enforcement unit investigating cases and to provide information to law enforcement unit personnel regarding Title IX requirements;⁴⁴
- requiring the Title IX coordinator to review all evidence in a sexual harassment or sexual violence case brought before the school's disciplinary committee to determine whether the complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee;⁴⁵
- requiring the school to create a committee of students and school officials to identify strategies for ensuring that students:
 - know the school's prohibition against sex discrimination, including sexual harassment and violence
 - recognize sex discrimination, sexual harassment, and sexual violence when they occur
 - understand how and to whom to report any incidents
 - know the connection between alcohol and drug abuse and sexual harassment or violence
 - feel comfortable that school officials will respond promptly and equitably to reports of sexual harassment or violence;
- issuing new policy statements or other steps that clearly communicate that the school does not tolerate sexual harassment and violence and will respond to any incidents and to any student who reports such incidents; and
- revising grievance procedures used to handle sexual harassment and violence complaints to ensure that they are prompt and equitable, as required by Title IX.

School Investigations and Reports to OCR

- conducting periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school's policies against sexual harassment and violence;
- investigating whether any other students also may have been subjected to sexual harassment or violence;
- investigating whether school employees with knowledge of allegations of sexual harassment or violence failed to carry out their duties in responding to those allegations;
- conducting, in conjunction with student leaders, a school or campus "climate check" to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and using the resulting information to inform future proactive steps that will be taken by the school; and

⁴⁴ Any personally identifiable information from a student's education record that the Title IX coordinator provides to the school's law enforcement unit is subject to FERPA's nondisclosure requirements.

⁴⁵ For example, the disciplinary committee may lack the power to implement changes to the complainant's class schedule or living situation so that he or she does not come in contact with the alleged perpetrator.

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- submitting to OCR copies of all grievances filed by students alleging sexual harassment or violence, and providing OCR with documentation related to the investigation of each complaint, such as witness interviews, investigator notes, evidence submitted by the parties, investigative reports and summaries, any final disposition letters, disciplinary records, and documentation regarding any appeals.

Conclusion

The Department is committed to ensuring that all students feel safe and have the opportunity to benefit fully from their schools' education programs and activities. As part of this commitment, OCR provides technical assistance to assist recipients in achieving voluntary compliance with Title IX.

If you need additional information about Title IX, have questions regarding OCR's policies, or seek technical assistance, please contact the OCR enforcement office that serves your state or territory. The list of offices is available at <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>. Additional information about addressing sexual violence, including victim resources and information for schools, is available from the U.S. Department of Justice's Office on Violence Against Women (OVW) at <http://www.ovw.usdoj.gov/>.⁴⁶

Thank you for your prompt attention to this matter. I look forward to continuing our work together to ensure that all students have an equal opportunity to learn in a safe and respectful school climate.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights

⁴⁶ OVW also administers the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus Program. This Federal funding is designed to encourage institutions of higher education to adopt comprehensive, coordinated responses to domestic violence, dating violence, sexual assault, and stalking. Under this competitive grant program, campuses, in partnership with community-based nonprofit victim advocacy organizations and local criminal justice or civil legal agencies, must adopt protocols and policies to treat these crimes as serious offenses and develop victim service programs and campus policies that ensure victim safety, offender accountability, and the prevention of such crimes. OVW recently released the first solicitation for the Services, Training, Education, and Policies to Reduce Domestic Violence, Dating Violence, Sexual Assault and Stalking in Secondary Schools Grant Program. This innovative grant program will support a broad range of activities, including training for school administrators, faculty, and staff; development of policies and procedures for responding to these crimes; holistic and appropriate victim services; development of effective prevention strategies; and collaborations with mentoring organizations to support middle and high school student victims.

Exhibit 8

Archived Information



UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Questions and Answers on Title IX and Sexual Violence¹

Title IX of the Education Amendments of 1972 ("Title IX")² is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.³

On April 4, 2011, the Office for Civil Rights (OCR) in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence ("DCL").⁴ The DCL explains a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX.⁵ Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as a school's independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.

¹ The Department has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202.

² 20 U.S.C. § 1681 *et seq.*

³ Throughout this document the term "schools" refers to recipients of federal financial assistance that operate educational programs or activities. For Title IX purposes, at the elementary and secondary school level, the recipient generally is the school district; and at the postsecondary level, the recipient is the individual institution of higher education. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that the law's requirements conflict with the organization's religious tenets. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

⁴ Available at <http://www.ed.gov/ocr/letters/colleague-201104.html>.

⁵ Although this document and the DCL focus on sexual violence, the legal principles generally also apply to other forms of sexual harassment.

- Provides guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.
- Discusses proactive efforts schools can take to prevent sexual violence.
- Discusses the interplay between Title IX, the Family Educational Rights and Privacy Act (“FERPA”),⁶ and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (“Clery Act”)⁷ as it relates to a complainant’s right to know the outcome of his or her complaint, including relevant sanctions imposed on the perpetrator.
- Provides examples of remedies and enforcement strategies that schools and OCR may use to respond to sexual violence.

The DCL supplements OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, issued in 2001 (*2001 Guidance*).⁸ The *2001 Guidance* discusses in detail the Title IX requirements related to sexual harassment of students by school employees, other students, or third parties. The DCL and the *2001 Guidance* remain in full force and we recommend reading these Questions and Answers in conjunction with these documents.

In responding to requests for technical assistance, OCR has determined that elementary and secondary schools and postsecondary institutions would benefit from additional guidance concerning their obligations under Title IX to address sexual violence as a form of sexual harassment. The following questions and answers further clarify the legal requirements and guidance articulated in the DCL and the *2001 Guidance* and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects. In order to gain a complete understanding of these legal requirements and recommendations, this document should be read in full.

Authorized by

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights

April 29, 2014

⁶ 20 U.S.C. §1232g; 34 C.F.R. Part 99.

⁷ 20 U.S.C. §1092(f).

⁸ Available at <http://www.ed.gov/ocr/docs/shguide.html>.

Notice of Language Assistance Questions and Answers on Title IX and Sexual Violence

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.

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A. A School's Obligation to Respond to Sexual Violence

A-1. What is sexual violence?

Answer: Sexual violence, as that term is used in this document and prior OCR guidance, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (*e.g.*, due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Sexual violence can be carried out by school employees, other students, or third parties. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.

A-2. How does Title IX apply to student-on-student sexual violence?

Answer: Under Title IX, federally funded schools must ensure that students of all ages are not denied or limited in their ability to participate in or benefit from the school's educational programs or activities on the basis of sex. A school violates a student's rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program, *i.e.* creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.⁹

A-3. How does OCR determine if a hostile environment has been created?

Answer: As discussed more fully in OCR's *2001 Guidance*, OCR considers a variety of related factors to determine if a hostile environment has been created; and also considers the conduct in question from both a subjective and an objective perspective. Specifically, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.

⁹ This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. *See 2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629, 643 (1999).

A-4. When does OCR consider a school to have notice of student-on-student sexual violence?

Answer: OCR deems a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence. See question D-2 regarding who is a responsible employee.

A school can receive notice of sexual violence in many different ways. Some examples of notice include: a student may have filed a grievance with or otherwise informed the school's Title IX coordinator; a student, parent, friend, or other individual may have reported an incident to a teacher, principal, campus law enforcement, staff in the office of student affairs, or other responsible employee; or a teacher or dean may have witnessed the sexual violence.

The school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media. In some situations, if the school knows of incidents of sexual violence, the exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents. For example, if school officials receive a credible report that a student has perpetrated several acts of sexual violence against different students, that pattern of conduct should trigger an inquiry as to whether other students have been subjected to sexual violence by that student. In other cases, the pervasiveness of the sexual violence may be widespread, openly practiced, or well-known among students or employees. In those cases, OCR may conclude that the school should have known of the hostile environment. In other words, if the school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry. A school's failure to take prompt and effective corrective action in such cases (as described in questions G-1 to G-3 and H-1 to H-3) would violate Title IX even if the student did not use the school's grievance procedures or otherwise inform the school of the sexual violence.

A-5. What are a school's basic responsibilities to address student-on-student sexual violence?

Answer: When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E). If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its

effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation.¹⁰ The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary. The school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. For additional information on interim measures, see questions G-1 to G-3.

If a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately. For example, if a school's ignoring of a student's complaints of sexual assault by a fellow student results in the complaining student having to remain in classes with the other student for several weeks and the complaining student's grades suffer because he or she was unable to concentrate in these classes, the school may need to permit the complaining student to retake the classes without an academic or financial penalty (in addition to any other remedies) in order to address the effects of the sexual violence.

A-6. Does Title IX cover employee-on-student sexual violence, such as sexual abuse of children?

Answer: Yes. Although this document and the DCL focus on student-on-student sexual violence, Title IX also protects students from other forms of sexual harassment (including sexual violence and sexual abuse), such as sexual harassment carried out by school employees. Sexual harassment by school employees can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature, including but not limited to sexual activity. Title IX's prohibition against

¹⁰ Throughout this document, unless otherwise noted, the term "complainant" refers to the student who allegedly experienced the sexual violence.

sexual harassment generally does not extend to legitimate nonsexual touching or other nonsexual conduct. But in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment. Early signs of inappropriate behavior with a child can be the key to identifying and preventing sexual abuse by school personnel.

A school's Title IX obligations regarding sexual harassment by employees can, in some instances, be greater than those described in this document and the DCL. Recipients should refer to OCR's *2001 Guidance* for further information about Title IX obligations regarding harassment of students by school employees. In addition, many state and local laws have mandatory reporting requirements for schools working with minors. Recipients should be careful to satisfy their state and local legal obligations in addition to their Title IX obligations, including training to ensure that school employees are aware of their obligations under such state and local laws and the consequences for failing to satisfy those obligations.

With respect to sexual activity in particular, OCR will always view as unwelcome and nonconsensual sexual activity between an adult school employee and an elementary school student or any student below the legal age of consent in his or her state. In cases involving a student who meets the legal age of consent in his or her state, there will still be a strong presumption that sexual activity between an adult school employee and a student is unwelcome and nonconsensual. When a school is on notice that a school employee has sexually harassed a student, it is responsible for taking prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects. Indeed, even if a school was not on notice, the school is nonetheless responsible for remedying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when the employee engaged in the sexual activity in the context of the employee's provision of aid, benefits, or services to students (*e.g.*, teaching, counseling, supervising, advising, or transporting students).

A school should take steps to protect its students from sexual abuse by its employees. It is therefore imperative for a school to develop policies prohibiting inappropriate conduct by school personnel and procedures for identifying and responding to such conduct. For example, this could include implementing codes of conduct, which might address what is commonly known as grooming – a desensitization strategy common in adult educator sexual misconduct. Such policies and procedures can ensure that students, parents, and

school personnel have clear guidelines on what are appropriate and inappropriate interactions between adults and students in a school setting or in school-sponsored activities. Additionally, a school should provide training for administrators, teachers, staff, parents, and age-appropriate classroom information for students to ensure that everyone understands what types of conduct are prohibited and knows how to respond when problems arise.¹¹

B. Students Protected by Title IX

B-1. Does Title IX protect all students from sexual violence?

Answer: Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.

B-2. How should a school handle sexual violence complaints in which the complainant and the alleged perpetrator are members of the same sex?

Answer: A school's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved. Title IX protects all students from sexual violence, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. A school must investigate and resolve allegations of sexual violence involving parties of the same sex using the same procedures and standards that it uses in all complaints involving sexual violence.

Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it

¹¹ For additional informational on training please see the Department of Education's Resource and Emergency Management for Schools Technical Assistance Center – Adult Sexual Misconduct in Schools: Prevention and Management Training, available at http://rem.ed.gov/Docs/ASM_Marketing_Flyer.pdf.

uses in all complaints involving sexual violence. The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.

If a school's policies related to sexual violence include examples of particular types of conduct that violate the school's prohibition on sexual violence, the school should consider including examples of same-sex conduct. In addition, a school should ensure that staff are capable of providing culturally competent counseling to all complainants. Thus, a school should ensure that its counselors and other staff who are responsible for receiving and responding to complaints of sexual violence, including investigators and hearing board members, receive appropriate training about working with LGBT and gender-nonconforming students and same-sex sexual violence. See questions J-1 to J-4 for additional information regarding training.

Gay-straight alliances and similar student-initiated groups can also play an important role in creating safer school environments for LGBT students. On June 14, 2011, the Department issued guidance about the rights of student-initiated groups in public secondary schools under the Equal Access Act. That guidance is available at <http://www2.ed.gov/policy/elsec/guid/secletter/110607.html>.

B-3. What issues may arise with respect to students with disabilities who experience sexual violence?

Answer: When students with disabilities experience sexual violence, federal civil rights laws other than Title IX may also be relevant to a school's responsibility to investigate and address such incidents.¹² Certain students require additional assistance and support. For example, students with intellectual disabilities may need additional help in learning about sexual violence, including a school's sexual violence education and prevention programs, what constitutes sexual violence and how students can report incidents of sexual

¹² OCR enforces two civil rights laws that prohibit disability discrimination. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits disability discrimination by public or private entities that receive federal financial assistance, and Title II of the American with Disabilities Act of 1990 (Title II) prohibits disability discrimination by all state and local public entities, regardless of whether they receive federal funding. See 29 U.S.C. § 794 and 34 C.F.R. part 104; 42 U.S.C. § 12131 *et seq.* and 28 C.F.R. part 35. OCR and the U.S. Department of Justice (DOJ) share the responsibility of enforcing Title II in the educational context. The Department of Education's Office of Special Education Programs in the Office of Special Education and Rehabilitative Services administers Part B of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1400 *et seq.* and 34 C.F.R. part 300. IDEA provides financial assistance to states, and through them to local educational agencies, to assist in providing special education and related services to eligible children with disabilities ages three through twenty-one, inclusive.

violence. In addition, students with disabilities who experience sexual violence may require additional services and supports, including psychological services and counseling services. Postsecondary students who need these additional services and supports can seek assistance from the institution's disability resource office.

A student who has not been previously determined to have a disability may, as a result of experiencing sexual violence, develop a mental health-related disability that could cause the student to need special education and related services. At the elementary and secondary education level, this may trigger a school's child find obligations under IDEA and the evaluation and placement requirements under Section 504, which together require a school to evaluate a student suspected of having a disability to determine if he or she has a disability that requires special education or related aids and services.¹³

A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner that is accessible to students and employees with disabilities, for example, by providing electronically-accessible versions of paper forms to individuals with print disabilities, or by providing a sign language interpreter to a deaf individual attending a training. See question J-4 for more detailed information on student training.

B-4. What issues arise with respect to international students and undocumented students who experience sexual violence?

Answer: Title IX protects all students at recipient institutions in the United States regardless of national origin, immigration status, or citizenship status.¹⁴ A school should ensure that all students regardless of their immigration status, including undocumented students and international students, are aware of their rights under Title IX. A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner accessible to students who are English language learners. OCR recommends that a school coordinate with its international office and its undocumented student program coordinator, if applicable, to help communicate information about Title IX in languages that are accessible to these groups of students. OCR also encourages schools to provide foreign national complainants with information about the U nonimmigrant status and the T nonimmigrant status. The U nonimmigrant status is set

¹³ See 34 C.F.R. §§ 300.8; 300.111; 300.201; 300.300-300.311 (IDEA); 34 C.F.R. §§ 104.3(j) and 104.35 (Section 504). Schools must comply with applicable consent requirements with respect to evaluations. See 34 C.F.R. § 300.300.

¹⁴ OCR enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal financial assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d.

aside for victims of certain crimes who have suffered substantial mental or physical abuse as a result of the crime and are helpful to law enforcement agency in the investigation or prosecution of the qualifying criminal activity.¹⁵ The T nonimmigrant status is available for victims of severe forms of human trafficking who generally comply with a law enforcement agency in the investigation or prosecution of the human trafficking and who would suffer extreme hardship involving unusual and severe harm if they were removed from the United States.¹⁶

A school should be mindful that unique issues may arise when a foreign student on a student visa experiences sexual violence. For example, certain student visas require the student to maintain a full-time course load (generally at least 12 academic credit hours per term), but a student may need to take a reduced course load while recovering from the immediate effects of the sexual violence. OCR recommends that a school take steps to ensure that international students on student visas understand that they must typically seek prior approval of the designated school official (DSO) for student visas to drop below a full-time course load. A school may also want to encourage its employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence to approach the DSO on the student's behalf if the student wishes to drop below a full-time course load. OCR recommends that a school take steps to ensure that its employees who work with international students, including the school's DSO, are trained on the school's sexual violence policies and that employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence are aware of the special issues that international students may encounter. See questions J-1 to J-4 for additional information regarding training.

A school should also be aware that threatening students with deportation or invoking a student's immigration status in an attempt to intimidate or deter a student from filing a Title IX complaint would violate Title IX's protections against retaliation. For more information on retaliation see question K-1.

¹⁵ For more information on the U nonimmigrant status, see <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/questions-answers-victims-criminal-activity-u-nonimmigrant-status>.

¹⁶ For more information on the T nonimmigrant status, see <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>.

B-5. How should a school respond to sexual violence when the alleged perpetrator is not affiliated with the school?

Answer: The appropriate response will differ depending on the level of control the school has over the alleged perpetrator. For example, if an athlete or band member from a visiting school sexually assaults a student at the home school, the home school may not be able to discipline or take other direct action against the visiting athlete or band member. However (and subject to the confidentiality provisions discussed in Section E), it should conduct an inquiry into what occurred and should report the incident to the visiting school and encourage the visiting school to take appropriate action to prevent further sexual violence. The home school should also notify the student of any right to file a complaint with the alleged perpetrator's school or local law enforcement. The home school may also decide not to invite the visiting school back to its campus.

Even though a school's ability to take direct action against a particular perpetrator may be limited, the school must still take steps to provide appropriate remedies for the complainant and, where appropriate, the broader school population. This may include providing support services for the complainant, and issuing new policy statements making it clear that the school does not tolerate sexual violence and will respond to any reports about such incidents. For additional information on interim measures see questions G-1 to G-3.

C. Title IX Procedural Requirements**Overview****C-1. What procedures must a school have in place to prevent sexual violence and resolve complaints?**

Answer: The Title IX regulations outline three key procedural requirements. Each school must:

- (1) disseminate a notice of nondiscrimination (see question C-2);¹⁷
- (2) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX (see questions C-3 to C-4);¹⁸ and

¹⁷ 34 C.F.R. § 106.9.

¹⁸ *Id.* § 106.8(a).

(3) adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints (see questions C-5 to C-6).¹⁹

These requirements apply to all forms of sex discrimination and are particularly important for preventing and effectively responding to sexual violence.

Procedural requirements under other federal laws may also apply to complaints of sexual violence, including the requirements of the Clery Act.²⁰ For additional information about the procedural requirements in the Clery Act, please see <http://www2.ed.gov/admins/lead/safety/campus.html>.

Notice of Nondiscrimination

C-2. What information must be included in a school's notice of nondiscrimination?

Answer: The notice of nondiscrimination must state that the school does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. The notice must state that questions regarding Title IX may be referred to the school's Title IX coordinator or to OCR. The school must notify all of its students and employees of the name or title, office address, telephone number, and email address of the school's designated Title IX coordinator.²¹

Title IX Coordinator

C-3. What are a Title IX coordinator's responsibilities?

Answer: A Title IX coordinator's core responsibilities include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX coordinator must have knowledge of the requirements of Title IX, of the school's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. To accomplish this, subject to the exemption for school counseling employees discussed in question E-3, the Title IX coordinator must be informed of all

¹⁹ *Id.* § 106.8(b).

²⁰ All postsecondary institutions participating in the Higher Education Act's Title IV student financial assistance programs must comply with the Clery Act.

²¹ For more information on notices of nondiscrimination, please see OCR's Notice of Nondiscrimination (August 2010), available at <http://www.ed.gov/ocr/docs/nondisc.pdf>.

reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office or if the investigation will be conducted by another individual or office. The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

Because the Title IX coordinator must have knowledge of all Title IX reports and complaints at the school, this individual (when properly trained) is generally in the best position to evaluate a student's request for confidentiality in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students. A school may determine, however, that another individual should perform this role. For additional information on confidentiality requests, see questions E-1 to E-4. If a school relies in part on its disciplinary procedures to meet its Title IX obligations, the Title IX coordinator should review the disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX as discussed in question C-5.

In addition to these core responsibilities, a school may decide to give its Title IX coordinator additional responsibilities, such as: providing training to students, faculty, and staff on Title IX issues; conducting Title IX investigations, including investigating facts relevant to a complaint, and determining appropriate sanctions against the perpetrator and remedies for the complainant; determining appropriate interim measures for a complainant upon learning of a report or complaint of sexual violence; and ensuring that appropriate policies and procedures are in place for working with local law enforcement and coordinating services with local victim advocacy organizations and service providers, including rape crisis centers. A school must ensure that its Title IX coordinator is appropriately trained in all areas over which he or she has responsibility. The Title IX coordinator or designee should also be available to meet with students as needed.

If a school designates more than one Title IX coordinator, the school's notice of nondiscrimination and Title IX grievance procedures should describe each coordinator's responsibilities, and one coordinator should be designated as having ultimate oversight responsibility.

C-4. Are there any employees who should not serve as the Title IX coordinator?

Answer: Title IX does not categorically preclude particular employees from serving as Title IX coordinators. However, Title IX coordinators should not have other job responsibilities that may create a conflict of interest. Because some complaints may raise issues as to whether or how well the school has met its Title IX obligations, designating

the same employee to serve both as the Title IX coordinator and the general counsel (which could include representing the school in legal claims alleging Title IX violations) poses a serious risk of a conflict of interest. Other employees whose job responsibilities may conflict with a Title IX coordinator's responsibilities include Directors of Athletics, Deans of Students, and any employee who serves on the judicial/hearing board or to whom an appeal might be made. Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest.

Grievance Procedures

C-5. Under Title IX, what elements should be included in a school's procedures for responding to complaints of sexual violence?

Answer: Title IX requires that a school adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination, including sexual violence. In evaluating whether a school's grievance procedures satisfy this requirement, OCR will review all aspects of a school's policies and practices, including the following elements that are critical to achieve compliance with Title IX:

- (1) notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- (2) application of the grievance procedures to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties;
- (3) provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;
- (4) designated and reasonably prompt time frames for the major stages of the complaint process (see question F-8);
- (5) written notice to the complainant and alleged perpetrator of the outcome of the complaint (see question H-3); and
- (6) assurance that the school will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.

To ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the school processes complaints, a school's Title IX grievance procedures should also explicitly include the following in writing, some of which themselves are mandatory obligations under Title IX:

- (1) a statement of the school's jurisdiction over Title IX complaints;
- (2) adequate definitions of sexual harassment (which includes sexual violence) and an explanation as to when such conduct creates a hostile environment;
- (3) reporting policies and protocols, including provisions for confidential reporting;
- (4) identification of the employee or employees responsible for evaluating requests for confidentiality;
- (5) notice that Title IX prohibits retaliation;
- (6) notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;
- (7) notice of available interim measures that may be taken to protect the student in the educational setting;
- (8) the evidentiary standard that must be used (preponderance of the evidence) (*i.e.*, more likely than not that sexual violence occurred) in resolving a complaint;
- (9) notice of potential remedies for students;
- (10) notice of potential sanctions against perpetrators; and
- (11) sources of counseling, advocacy, and support.

For more information on interim measures, see questions G-1 to G-3.

The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights. Procedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions. Of course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.

A school's procedures and practices will vary in detail, specificity, and components, reflecting differences in the age of its students, school size and administrative structure, state or local legal requirements (e.g., mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

C-6. Is a school required to use separate grievance procedures for sexual violence complaints?

Answer: No. Under Title IX, a school may use student disciplinary procedures, general Title IX grievance procedures, sexual harassment procedures, or separate procedures to resolve sexual violence complaints. However, any procedures used for sexual violence complaints, including disciplinary procedures, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution (as discussed in question C-5), including applying the preponderance of the evidence standard of review. As discussed in question C-3, the Title IX coordinator should review any process used to resolve complaints of sexual violence to ensure it complies with requirements for prompt and equitable resolution of these complaints. When using disciplinary procedures, which are often focused on the alleged perpetrator and can take considerable time, a school should be mindful of its obligation to provide interim measures to protect the complainant in the educational setting. For more information on timeframes and interim measures, see questions F-8 and G-1 to G-3.

D. Responsible Employees and Reporting²²

D-1. Which school employees are obligated to report incidents of possible sexual violence to school officials?

Answer: Under Title IX, whether an individual is obligated to report incidents of alleged sexual violence generally depends on whether the individual is a responsible employee of the school. A responsible employee must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee, subject to the exemption for school counseling employees discussed in question E-3. This is because, as discussed in question A-4, a school is obligated to address sexual violence about which a responsible employee knew or should have known. As explained in question C-3, the Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or

²² This document addresses only Title IX's reporting requirements. It does not address requirements under the Clery Act or other federal, state, or local laws, or an individual school's code of conduct.

complaint was initially filed with another individual or office, subject to the exemption for school counseling employees discussed in question E-3.

D-2. Who is a “responsible employee”?

Answer: According to OCR’s *2001 Guidance*, a responsible employee includes any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.²³

A school must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees. A school must also inform all employees of their own reporting responsibilities and the importance of informing complainants of: the reporting obligations of responsible employees; complainants’ option to request confidentiality and available confidential advocacy, counseling, or other support services; and complainants’ right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

Whether an employee is a responsible employee will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.

As noted in response to question A-4, when a responsible employee knows or reasonably should know of possible sexual violence, OCR deems a school to have notice of the sexual violence. The school must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E), and, if the school determines that sexual violence created a hostile environment, the school must then take appropriate steps to address the situation. The

²³ 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 v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998), and *Davis*, 524 U.S. at 642. The concept of a “responsible employee” under OCR’s guidance for administrative enforcement of Title IX is broader.

school has this obligation regardless of whether the student, student's parent, or a third party files a formal complaint. For additional information on a school's responsibilities to address student-on-student sexual violence, see question A-5. For additional information on training for school employees, see questions J-1 to J-3.

D-3. What information is a responsible employee obligated to report about an incident of possible student-on-student sexual violence?

Answer: Subject to the exemption for school counseling employees discussed in question E-3, a responsible employee must report to the school's Title IX coordinator, or other appropriate school designee, all relevant details about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation. This includes the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location. A school must make clear to its responsible employees to whom they should report an incident of alleged sexual violence.

To ensure compliance with these reporting obligations, it is important for a school to train its responsible employees on Title IX and the school's sexual violence policies and procedures. For more information on appropriate training for school employees, see question J-1 to J-3.

D-4. What should a responsible employee tell a student who discloses an incident of sexual violence?

Answer: Before a student reveals information that he or she may wish to keep confidential, a responsible employee should make every effort to ensure that the student understands: (i) the employee's obligation to report the names of the alleged perpetrator and student involved in the alleged sexual violence, as well as relevant facts regarding the alleged incident (including the date, time, and location), to the Title IX coordinator or other appropriate school officials, (ii) the student's option to request that the school maintain his or her confidentiality, which the school (*e.g.*, Title IX coordinator) will consider, and (iii) the student's ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services (*e.g.*, sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers). As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request

and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

D-5. If a student informs a resident assistant/advisor (RA) that he or she was subjected to sexual violence by a fellow student, is the RA obligated under Title IX to report the incident to school officials?

Answer: As discussed in questions D-1 and D-2, for Title IX purposes, whether an individual is obligated under Title IX to report alleged sexual violence to the school's Title IX coordinator or other appropriate school designee generally depends on whether the individual is a responsible employee.

The duties and responsibilities of RAs vary among schools, and, therefore, a school should consider its own policies and procedures to determine whether its RAs are responsible employees who must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee.²⁴ When making this determination, a school should consider if its RAs have the general authority to take action to redress misconduct or the duty to report misconduct to appropriate school officials, as well as whether students could reasonably believe that RAs have this authority or duty. A school should also consider whether it has determined and clearly informed students that RAs are generally available for confidential discussions and do not have the authority or responsibility to take action to redress any misconduct or to report any misconduct to the Title IX coordinator or other appropriate school officials. A school should pay particular attention to its RAs' obligations to report other student violations of school policy (e.g., drug and alcohol violations or physical assault). If an RA is required to report other misconduct that violates school policy, then the RA would be considered a responsible employee obligated to report incidents of sexual violence that violate school policy.

If an RA is a responsible employee, the RA should make every effort to ensure that *before* the student reveals information that he or she may wish to keep confidential, the student understands the RA's reporting obligation and the student's option to request that the school maintain confidentiality. It is therefore important that schools widely disseminate policies and provide regular training clearly identifying the places where students can seek confidential support services so that students are aware of this information. The RA

²⁴ Postsecondary institutions should be aware that, regardless of whether an RA is a responsible employee under Title IX, RAs are considered "campus security authorities" under the Clery Act. A school's responsibilities in regard to crimes reported to campus security authorities are discussed in the Department's regulations on the Clery Act at 34 C.F.R. § 668.46.

should also explain to the student (again, before the student reveals information that he or she may wish to keep confidential) that, although the RA must report the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location to the Title IX coordinator or other appropriate school designee, the school will protect the student's confidentiality to the greatest extent possible. Prior to providing information about the incident to the Title IX coordinator or other appropriate school designee, the RA should consult with the student about how to protect his or her safety and the details of what will be shared with the Title IX coordinator. The RA should explain to the student that reporting this information to the Title IX coordinator or other appropriate school designee does not necessarily mean that a formal complaint or investigation under the school's Title IX grievance procedure must be initiated if the student requests confidentiality. As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. If a student discloses sexual violence to an RA who is a responsible employee, the school will be deemed to have notice of the sexual violence even if the student does not file a Title IX complaint. Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.

E. Confidentiality and a School's Obligation to Respond to Sexual Violence

E-1. How should a school respond to a student's request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address the alleged sexual violence?

Answer: Students, or parents of minor students, reporting incidents of sexual violence sometimes ask that the students' names not be disclosed to the alleged perpetrators or that no investigation or disciplinary action be pursued to address the alleged sexual violence. OCR strongly supports a student's interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student's request

for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school's response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. In the case of minors, state mandatory reporting laws may require disclosure, but can generally be followed without disclosing information to school personnel who are not responsible for handling the school's response to incidents of sexual violence.²⁵

Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school's response. To improve trust in the process for investigating sexual violence complaints, a school should notify students of the information that will be disclosed, to whom it will be disclosed, and why. Regardless of whether a student complainant requests confidentiality, a school must take steps to protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. For additional information on interim measures see questions G-1 to G-3.

For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator. The school should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate

²⁵ The school should be aware of the alleged student perpetrator's right under the Family Educational Rights and Privacy Act ("FERPA") to request to inspect and review information about the allegations if the information directly relates to the alleged student perpetrator and the information is maintained by the school as an education record. In such a case, the school must either redact the complainant's name and all identifying information before allowing the alleged perpetrator to inspect and review the sections of the complaint that relate to him or her, or must inform the alleged perpetrator of the specific information in the complaint that are about the alleged perpetrator. See 34 C.F.R. § 99.12(a) The school should also make complainants aware of this right and explain how it might affect the school's ability to maintain complete confidentiality.

and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary. See question K-1 regarding retaliation.

If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. As discussed in question C-3, the Title IX coordinator is generally in the best position to evaluate confidentiality requests. Because schools vary widely in size and administrative structure, OCR recognizes that a school may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests. Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention, and a school should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them. For example, if a school has a sexual assault response coordinator, that person should be consulted in evaluating requests for confidentiality. The school should identify in its Title IX policies and procedures the employee or employees responsible for making such determinations.

If the school determines that it can respect the student's request not to disclose his or her identity to the alleged perpetrator, it should take all reasonable steps to respond to the complaint consistent with the request. Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence. There are steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school's policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests.

E-2. What factors should a school consider in weighing a student's request for confidentiality?

Answer: When weighing a student's request for confidentiality that could preclude a meaningful investigation or potential discipline of the alleged perpetrator, a school should consider a range of factors.

These factors include circumstances that suggest there is an increased risk of the alleged perpetrator committing additional acts of sexual violence or other violence (e.g., whether there have been other sexual violence complaints about the same alleged perpetrator, whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence, whether the alleged perpetrator threatened further sexual violence or other violence against the student or others, and whether the sexual violence was committed by multiple perpetrators). These factors also include circumstances that suggest there is an increased risk of future acts of sexual violence under similar circumstances (e.g., whether the student's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group). Other factors that should be considered in assessing a student's request for confidentiality include whether the sexual violence was perpetrated with a weapon; the age of the student subjected to the sexual violence; and whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).

A school should take requests for confidentiality seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. For example, if the school has credible information that the alleged perpetrator has committed one or more prior rapes, the balance of factors would compel the school to investigate the allegation of sexual violence, and if appropriate, pursue disciplinary action in a manner that may require disclosure of the student's identity to the alleged perpetrator. If the school determines that it must disclose a student's identity to an alleged perpetrator, it should inform the student prior to making this disclosure. In these cases, it is also especially important for schools to take whatever interim measures are necessary to protect the student and ensure the safety of other students. If a school has a sexual assault response coordinator, that person should be consulted in identifying safety risks and interim measures that are necessary to protect the student. In the event the student requests that the school inform the perpetrator that the student asked the school not to investigate or seek discipline, the school should honor this request and inform the alleged perpetrator that the school made the decision to go forward. For additional information on interim measures see questions G-1 to G-3. Any school officials responsible for

discussing safety and confidentiality with students should be trained on the effects of trauma and the appropriate methods to communicate with students subjected to sexual violence. See questions J-1 to J-3.

On the other hand, if, for example, the school has no credible information about prior sexual violence committed by the alleged perpetrator and the alleged sexual violence was not perpetrated with a weapon or accompanied by threats to repeat the sexual violence against the complainant or others or part of a larger pattern at a given location or by a particular group, the balance of factors would likely compel the school to respect the student's request for confidentiality. In this case the school should still take all reasonable steps to respond to the complaint consistent with the student's confidentiality request and determine whether interim measures are appropriate or necessary. Schools should be mindful that traumatic events such as sexual violence can result in delayed decisionmaking by a student who has experienced sexual violence. Hence, a student who initially requests confidentiality might later request that a full investigation be conducted.

E-3. What are the reporting responsibilities of school employees who provide or support the provision of counseling, advocacy, health, mental health, or sexual assault-related services to students who have experienced sexual violence?

Answer: OCR does not require campus mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person, to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student. Although these employees may have responsibilities that would otherwise make them responsible employees for Title IX purposes, OCR recognizes the importance of protecting the counselor-client relationship, which often requires confidentiality to ensure that students will seek the help they need.

Professional counselors and pastoral counselors whose official responsibilities include providing mental-health counseling to members of the school community are not required by Title IX to report *any* information regarding an incident of alleged sexual violence to the Title IX coordinator or other appropriate school designee.²⁶

²⁶ The exemption from reporting obligations for pastoral and professional counselors under Title IX is consistent with the Clery Act. For additional information on reporting obligations under the Clery Act, see Office of Postsecondary Education, *Handbook for Campus Safety and Security Reporting* (2011), available at <http://www2.ed.gov/admins/lead/safety/handbook.pdf>. Similar to the Clery Act, for Title IX purposes, a pastoral counselor is a person who is associated with a religious order or denomination, is recognized by that religious

OCR recognizes that some people who provide assistance to students who experience sexual violence are not professional or pastoral counselors. They include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers ("non-professional counselors or advocates"), including front desk staff and students. OCR wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student's consent.²⁷ These non-professional counselors or advocates are valuable sources of support for students, and OCR strongly encourages schools to designate these individuals as confidential sources.

Pastoral and professional counselors and non-professional counselors or advocates should be instructed to inform students of their right to file a Title IX complaint with the school and a separate complaint with campus or local law enforcement. In addition to informing students about campus resources for counseling, medical, and academic support, these persons should also indicate that they are available to assist students in filing such complaints. They should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary.

In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women's centers, or

order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor. A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the school, but are under contract to provide counseling at the school. This includes individuals who are not yet licensed or certified as a counselor, but are acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the school.

²⁷ Postsecondary institutions should be aware that an individual who is counseling students, but who does not meet the Clery Act definition of a pastoral or professional counselor, is not exempt from being a campus security authority if he or she otherwise has significant responsibility for student and campus activities. See fn. 24.

health centers. Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.

E-4. Is a school required to investigate information regarding sexual violence incidents shared by survivors during public awareness events, such as “Take Back the Night”?

Answer: No. OCR wants students to feel free to participate in preventive education programs and access resources for survivors. Therefore, public awareness events such as “Take Back the Night” or other forums at which students disclose experiences with sexual violence are not considered notice to the school for the purpose of triggering an individual investigation unless the survivor initiates a complaint. The school should instead respond to these disclosures by reviewing sexual assault policies, creating campus-wide educational programs, and conducting climate surveys to learn more about the prevalence of sexual violence at the school. Although Title IX does not require the school to investigate particular incidents discussed at such events, the school should ensure that survivors are aware of any available resources, including counseling, health, and mental health services. To ensure that the entire school community understands their Title IX rights related to sexual violence, the school should also provide information at these events on Title IX and how to file a Title IX complaint with the school, as well as options for reporting an incident of sexual violence to campus or local law enforcement.

F. Investigations and Hearings

Overview

F-1. What elements should a school’s Title IX investigation include?

Answer: The specific steps in a school’s Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

For the purposes of this document the term “investigation” refers to the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions

the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.

In all cases, a school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence. The investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing.²⁸ Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation. It could be the Title IX coordinator, provided there are no conflicts of interest, but it does not have to be. All persons involved in conducting a school's Title IX investigations must have training or experience in handling complaints of sexual violence and in the school's grievance procedures. For additional information on training, see question J-3.

When investigating an incident of alleged sexual violence for Title IX purposes, to the extent possible, a school should coordinate with any other ongoing school or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator. A school should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event. If the investigation includes forensic evidence, it may be helpful for a school to consult with local or campus law enforcement or a forensic expert to ensure that the evidence is correctly interpreted by school officials. For additional information on working with campus or local law enforcement see question F-3.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence as required by Title IX. If a school typically processes complaints of sexual violence through its disciplinary process and that process, including any investigation and hearing, meets the Title IX requirements discussed above and enables the school to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, then the school may use that process to satisfy its Title IX obligations and does not need to conduct a separate Title IX investigation. As discussed in question C-3, the Title IX coordinator should review the disciplinary process

²⁸ This answer addresses only Title IX's requirements for investigations. It does not address legal rights or requirements under the U.S. Constitution, the Clery Act, or other federal, state, or local laws.

to ensure that it: (1) complies with the prompt and equitable requirements of Title IX; (2) allows for appropriate interim measures to be taken to protect the complainant during the process; and (3) provides for remedies to the complainant and school community where appropriate. For more information about interim measures, see questions G-1 to G-3, and about remedies, see questions H-1 and H-2.

The investigation may include, but is not limited to, conducting interviews of the complainant, the alleged perpetrator, and any witnesses; reviewing law enforcement investigation documents, if applicable; reviewing student and personnel files; and gathering and examining other relevant documents or evidence. While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator. A balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.²⁹ Specifically:

- Throughout the investigation, the parties must have an equal opportunity to present relevant witnesses and other evidence.
- The school must use a preponderance-of-the-evidence (*i.e.*, more likely than not) standard in any Title IX proceedings, including any fact-finding and hearings.
- If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.
- If the school permits one party to submit third-party expert testimony, it must do so equally for both parties.
- If the school provides for an appeal, it must do so equally for both parties.
- Both parties must be notified, in writing, of the outcome of both the complaint and any appeal (see question H-3).

²⁹ As explained in question C-5, the parties may have certain due process rights under the U.S. Constitution.

Intersection with Criminal Investigations

F-2. What are the key differences between a school's Title IX investigation into allegations of sexual violence and a criminal investigation?

Answer: A criminal investigation is intended to determine whether an individual violated criminal law; and, if at the conclusion of the investigation, the individual is tried and found guilty, the individual may be imprisoned or subject to criminal penalties. The U.S. Constitution affords criminal defendants who face the risk of incarceration numerous protections, including, but not limited to, the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation. In addition, government officials responsible for criminal investigations (including police and prosecutors) normally have discretion as to which complaints from the public they will investigate.

By contrast, a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required. Further, while a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence. Because the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.

Of course, criminal investigations conducted by local or campus law enforcement may be useful for fact gathering if the criminal investigation occurs within the recommended timeframe for Title IX investigations; but, even if a criminal investigation is ongoing, a school must still conduct its own Title IX investigation.

A school should notify complainants of the right to file a criminal complaint and should not dissuade a complainant from doing so either during or after the school's internal Title IX investigation. Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local, or other federal laws.

F-3. How should a school proceed when campus or local law enforcement agencies are conducting a criminal investigation while the school is conducting a parallel Title IX investigation?

Answer: A school should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, it is important for a school to understand that during this brief delay in the Title IX investigation, it must take interim measures to protect the complainant in the educational setting. The school should also continue to update the parties on the status of the investigation and inform the parties when the school resumes its Title IX investigation. For additional information on interim measures see questions G-1 to G-3.

If a school delays the fact-finding portion of a Title IX investigation, the school must promptly resume and complete its fact-finding for the Title IX investigation once it learns that the police department has completed its evidence gathering stage of the criminal investigation. The school should not delay its investigation until the ultimate outcome of the criminal investigation or the filing of any charges. OCR recommends that a school work with its campus police, local law enforcement, and local prosecutor's office to learn when the evidence gathering stage of the criminal investigation is complete. A school may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations. Any MOU or other agreement must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably, and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws.

The DCL states that in one instance a prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances. OCR understands that this example may not be representative and that the law enforcement agency's process often takes more than ten days. OCR recognizes that the length of time for evidence gathering by criminal investigators will vary depending on the specific circumstances of each case.

Off-Campus Conduct

F-4. Is a school required to process complaints of alleged sexual violence that occurred off campus?

Answer: Yes. Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.

A school must determine whether the alleged off-campus sexual violence occurred in the context of an education program or activity of the school; if so, the school must treat the complaint in the same manner that it treats complaints regarding on-campus conduct. In other words, if a school determines that the alleged misconduct took place in the context of an education program or activity of the school, the fact that the alleged misconduct took place off campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus.

Whether the alleged misconduct occurred in this context may not always be apparent from the complaint, so a school may need to gather additional information in order to make such a determination. Off-campus education programs and activities are clearly covered and include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (*e.g.*, a debate team trip to another school or to a weekend competition).

Even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity. The school cannot address the continuing effects of the off-campus sexual violence at school or in an off-campus education program or activity unless it processes the complaint and gathers appropriate additional information in accordance with its established procedures.

Once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct. The mere presence on campus or in an

off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment. A school should also take steps to protect a student who alleges off-campus sexual violence from further harassment by the alleged perpetrator or his or her friends, and a school may have to take steps to protect other students from possible assault by the alleged perpetrator. In other words, the school should protect the school community in the same way it would had the sexual violence occurred on campus. Even if there are no continuing effects of the off-campus sexual violence experienced by the student on campus or in an off-campus education program or activity, the school still should handle these incidents as it would handle other off-campus incidents of misconduct or violence and consistent with any other applicable laws. For example, if a school, under its code of conduct, exercises jurisdiction over physical altercations between students that occur off campus outside of an education program or activity, it should also exercise jurisdiction over incidents of student-on-student sexual violence that occur off campus outside of an education program or activity.

Hearings³⁰

F-5. Must a school allow or require the parties to be present during an entire hearing?

Answer: If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety of a hearing, it must do so equally for both parties. At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means. Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school's Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

³⁰ As noted in question F-1, the investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing. Although Title IX does not dictate the membership of a hearing board, OCR discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence.

F-6. May every witness at the hearing, including the parties, be cross-examined?

Answer: OCR does not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.

OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment. A school may choose, instead, to allow the parties to submit questions to a trained third party (*e.g.*, the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.

F-7. May the complainant's sexual history be introduced at hearings?

Answer: Questioning about the complainant's sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence. The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant.

Timeframes

F-8. What stages of the investigation are included in the 60-day timeframe referenced in the DCL as the length for a typical investigation?

Answer: As noted in the DCL, the 60-calendar day timeframe for investigations is based on OCR's experience in typical cases. The 60-calendar day timeframe refers to the entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate. Although this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school's response was prompt and equitable as required by Title IX.

OCR does not require a school to complete investigations within 60 days; rather OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable. Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct. OCR recognizes that the investigation process may take longer if there is a parallel criminal investigation or if it occurs partially during school breaks. A school may need to stop an investigation during school breaks or between school years, although a school should make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.

Because timeframes for investigations vary and a school may need to depart from the timeframes designated in its grievance procedures, both parties should be given periodic status updates throughout the process.

G. Interim Measures

G-1. Is a school required to take any interim measures before the completion of its investigation?

Answer: Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow the complainant to change academic and extracurricular activities or his or her living, transportation, dining, and working situation as appropriate. The school should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. If a school does not offer these services on campus, it should enter into an MOU with a local victim services provider if possible.

Even when a school has determined that it can respect a complainant's request for confidentiality and therefore may not be able to respond fully to an allegation of sexual violence and initiate formal action against an alleged perpetrator, the school must take immediate action to protect the complainant while keeping the identity of the complainant confidential. These actions may include: providing support services to the

complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred.

G-2. How should a school determine what interim measures to take?

Answer: The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. A school should consider a number of factors in determining what interim measures to take, including, for example, the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (*e.g.*, civil protection orders).

In general, when taking interim measures, schools should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.

G-3. If a school provides all students with access to counseling on a fee basis, does that suffice for providing counseling as an interim measure?

Answer: No. Interim measures are determined by a school on a case-by-case basis. If a school determines that it needs to offer counseling to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.

H. Remedies and Notice of Outcome³¹**H-1. What remedies should a school consider in a case of student-on-student sexual violence?**

Answer: Effective remedial action may include disciplinary action against the perpetrator, providing counseling for the perpetrator, remedies for the complainant and others, as well as changes to the school's overall services or policies. All services needed to remedy the hostile environment should be offered to the complainant. These remedies are separate from, and in addition to, any interim measure that may have been provided prior to the conclusion of the school's investigation. In any instance in which the complainant did not take advantage of a specific service (*e.g.*, counseling) when offered as an interim measure, the complainant should still be offered, and is still entitled to, appropriate final remedies that may include services the complainant declined as an interim measure. A refusal at the interim stage does not mean the refused service or set of services should not be offered as a remedy.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without more, likely will not be sufficient to satisfy its Title IX obligation to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. Additional remedies for the complainant and the school community may be necessary. If the school's student disciplinary procedure does not include a process for determining and implementing these remedies for the complainant and school community, the school will need to use another process for this purpose.

Depending on the specific nature of the problem, remedies for the complainant may include, but are not limited to:

- Providing an effective escort to ensure that the complainant can move safely between classes and activities;

³¹ As explained in question A-5, if a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to be subjected to a hostile environment. In this case, in addition to the remedies discussed in this section, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately.

- Ensuring the complainant and perpetrator do not share classes or extracurricular activities;
- Moving the perpetrator or complainant (if the complainant requests to be moved) to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- Providing comprehensive, holistic victim services including medical, counseling and academic support services, such as tutoring;
- Arranging for the complainant to have extra time to complete or re-take a class or withdraw from a class without an academic or financial penalty; and
- Reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the sexual violence and the misconduct that may have resulted in the complainant being disciplined.³²

Remedies for the broader student population may include, but are not limited to:

- Designating an individual from the school's counseling center who is specifically trained in providing trauma-informed comprehensive services to victims of sexual violence to be on call to assist students whenever needed;
- Training or retraining school employees on the school's responsibilities to address allegations of sexual violence and how to conduct Title IX investigations;
- Developing materials on sexual violence, which should be distributed to all students;
- Conducting bystander intervention and sexual violence prevention programs with students;
- Issuing policy statements or taking other steps that clearly communicate that the school does not tolerate sexual violence and will respond to any incidents and to any student who reports such incidents;

³² For example, if the complainant was disciplined for skipping a class in which the perpetrator was enrolled, the school should review the incident to determine if the complainant skipped class to avoid contact with the perpetrator.

- Conducting, in conjunction with student leaders, a campus climate check to assess the effectiveness of efforts to ensure that the school is free from sexual violence, and using that information to inform future proactive steps that the school will take;
- Targeted training for a group of students if, for example, the sexual violence created a hostile environment in a residence hall, fraternity or sorority, or on an athletic team; and
- Developing a protocol for working with local law enforcement as discussed in question F-3.

When a school is unable to conduct a full investigation into a particular incident (*i.e.*, when it received a general report of sexual violence without any personally identifying information), it should consider remedies for the broader student population in response.

H-2. If, after an investigation, a school finds the alleged perpetrator responsible and determines that, as part of the remedies for the complainant, it must separate the complainant and perpetrator, how should the school accomplish this if both students share the same major and there are limited course options?

Answer: If there are limited sections of required courses offered at a school and both the complainant and perpetrator are required to take those classes, the school may need to make alternate arrangements in a manner that minimizes the burden on the complainant. For example, the school may allow the complainant to take the regular sections of the courses while arranging for the perpetrator to take the same courses online or through independent study.

H-3. What information must be provided to the complainant in the notice of the outcome?

Answer: Title IX requires both parties to be notified, in writing, about the outcome of both the complaint and any appeal. OCR recommends that a school provide written notice of the outcome to the complainant and the alleged perpetrator concurrently.

For Title IX purposes, a school must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence. The perpetrator should not be notified of the individual remedies offered or provided to the complainant.

Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school. Additional steps the school has taken to eliminate the hostile environment may include counseling and academic support services for the complainant and other affected students. Additional steps the school has taken to prevent recurrence may include sexual violence training for faculty and staff, revisions to the school's policies on sexual violence, and campus climate surveys. Further discussion of appropriate remedies is included in question H-1.

In addition to the Title IX requirements described above, the Clery Act requires, and FERPA permits, postsecondary institutions to inform the complainant of the institution's final determination and any disciplinary sanctions imposed on the perpetrator in sexual violence cases (as opposed to all harassment and misconduct covered by Title IX) not just those sanctions that directly relate to the complainant.³³

I. Appeals

I-1. What are the requirements for an appeals process?

Answer: While Title IX does not require that a school provide an appeals process, OCR does recommend that the school do so where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings. If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties. The specific design of the appeals process is up to the school, as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process. Any individual or body handling appeals should be trained in the dynamics of and trauma associated with sexual violence.

If a school chooses to offer an appeals process it has flexibility to determine the type of review it will apply to appeals, but the type of review the school applies must be the same regardless of which party files the appeal.

³³ 20 U.S.C. § 1092(f) and 20 U.S.C. § 1232g(b)(6)(A).

I-2. Must an appeal be available to a complainant who receives a favorable finding but does not believe a sanction that directly relates to him or her was sufficient?

Answer: The appeals process must be equal for both parties. For example, if a school allows a perpetrator to appeal a suspension on the grounds that it is too severe, the school must also allow a complainant to appeal a suspension on the grounds that it was not severe enough. See question H-3 for more information on what must be provided to the complainant in the notice of the outcome.

J. Title IX Training, Education and Prevention³⁴

J-1. What type of training on Title IX and sexual violence should a school provide to its employees?

Answer: A school needs to ensure that responsible employees with the authority to address sexual violence know how to respond appropriately to reports of sexual violence, that other responsible employees know that they are obligated to report sexual violence to appropriate school officials, and that all other employees understand how to respond to reports of sexual violence. A school should ensure that professional counselors, pastoral counselors, and non-professional counselors or advocates also understand the extent to which they may keep a report confidential. A school should provide training to all employees likely to witness or receive reports of sexual violence, including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsels, athletic coaches, health personnel, and resident advisors. Training for employees should include practical information about how to prevent and identify sexual violence, including same-sex sexual violence; the behaviors that may lead to and result in sexual violence; the attitudes of bystanders that may allow conduct to continue; the potential for revictimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language; the impact of trauma on victims; and, as applicable, the person(s) to whom such misconduct must be reported. The training should also explain responsible employees' reporting obligation, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students' requests for confidentiality, as well as provide the contact

³⁴ As explained earlier, although this document focuses on sexual violence, the legal principles apply to other forms of sexual harassment. Schools should ensure that any training they provide on Title IX and sexual violence also covers other forms of sexual harassment. Postsecondary institutions should also be aware of training requirements imposed under the Clery Act.

information for the school's Title IX coordinator. A school also should train responsible employees to inform students of: the reporting obligations of responsible employees; students' option to request confidentiality and available confidential advocacy, counseling, or other support services; and their right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement. For additional information on the reporting obligations of responsible employees and others see questions D-1 to D-5.

There is no minimum number of hours required for Title IX and sexual violence training at every school, but this training should be provided on a regular basis. Each school should determine based on its particular circumstances how such training should be conducted, who has the relevant expertise required to conduct the training, and who should receive the training to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX. A school should also have methods for verifying that the training was effective.

J-2. How should a school train responsible employees to report incidents of possible sexual harassment or sexual violence?

Answer: Title IX requires a school to take prompt and effective steps reasonably calculated to end sexual harassment and sexual violence that creates a hostile environment (*i.e.*, conduct that is sufficiently serious as to limit or deny a student's ability to participate in or benefit from the school's educational program and activity). But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

OCR therefore recommends that a school train responsible employees to report to the Title IX coordinator or other appropriate school official any incidents of sexual harassment or sexual violence that may violate the school's code of conduct or may create or contribute to the creation of a hostile environment. The school can then take steps to investigate and prevent any harassment or violence from recurring or escalating, as appropriate. For example, the school may separate the complainant and alleged perpetrator or conduct sexual harassment and sexual violence training for the school's students and employees. Responsible employees should understand that they do not need to determine whether the alleged sexual harassment or sexual violence actually occurred or that a hostile environment has been created before reporting an incident to the school's Title IX coordinator. Because the Title IX coordinator should have in-depth knowledge of Title IX and Title IX complaints at the school, he or she is likely to be in a better position than are other employees to evaluate whether an incident of sexual

harassment or sexual violence creates a hostile environment and how the school should respond. There may also be situations in which individual incidents of sexual harassment do not, by themselves, create a hostile environment; however when considered together, those incidents may create a hostile environment.

J-3. What type of training should a school provide to employees who are involved in implementing the school's grievance procedures?

Answer: All persons involved in implementing a school's grievance procedures (*e.g.*, Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the school's grievance procedures. The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

In rare circumstances, employees involved in implementing a school's grievance procedures may be able to demonstrate that prior training and experience has provided them with competency in the areas covered in the school's training. For example, the combination of effective prior training and experience investigating complaints of sexual violence, together with training on the school's current grievance procedures may be sufficient preparation for an employee to resolve Title IX complaints consistent with the school's grievance procedures. In-depth knowledge regarding Title IX and sexual violence is particularly helpful. Because laws and school policies and procedures may change, the only way to ensure that all employees involved in implementing the school's grievance procedures have the requisite training or experience is for the school to provide regular training to all individuals involved in implementing the school's Title IX grievance procedures even if such individuals also have prior relevant experience.

J-4. What type of training on sexual violence should a school provide to its students?

Answer: To ensure that students understand their rights under Title IX, a school should provide age-appropriate training to its students regarding Title IX and sexual violence. At the elementary and secondary school level, schools should consider whether sexual violence training should also be offered to parents, particularly training on the school's process for handling complaints of sexual violence. Training may be provided separately or as part of the school's broader training on sex discrimination and sexual harassment. However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or training provided to students. The school may want to include this training in its orientation programs for new students; training for student athletes and members of student organizations; and back-to-school nights. A school should consider educational methods that are most likely to help students retain information when designing its training, including repeating the training at regular intervals. OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school's policies;
- the school's definition of consent applicable to sexual conduct, including examples;
- how the school analyzes whether conduct was unwelcome under Title IX;
- how the school analyzes whether unwelcome sexual conduct creates a hostile environment;
- reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting;
- the school's grievance procedures used to process sexual violence complaints;
- disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;
- effects of trauma, including neurobiological changes;
- the role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence;
- strategies and skills for bystanders to intervene to prevent possible sexual violence;
- how to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance; and
- Title IX's protections against retaliation.

The training should also encourage students to report incidents of sexual violence. The training should explain that students (and their parents or friends) do not need to determine whether incidents of sexual violence or other sexual harassment created a

hostile environment before reporting the incident. A school also should be aware that persons may be deterred from reporting incidents if, for example, violations of school or campus rules regarding alcohol or drugs were involved. As a result, a school should review its disciplinary policy to ensure it does not have a chilling effect on students' reporting of sexual violence offenses or participating as witnesses. OCR recommends that a school inform students that the school's primary concern is student safety, and that use of alcohol or drugs never makes the survivor at fault for sexual violence.

It is also important for a school to educate students about the persons on campus to whom they can confidentially report incidents of sexual violence. A school's sexual violence education and prevention program should clearly identify the offices or individuals with whom students can speak confidentially and the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. It should also identify the school's responsible employees and explain that if students report incidents to responsible employees (except as noted in question E-3) these employees are required to report the incident to the Title IX coordinator or other appropriate official. This reporting includes the names of the alleged perpetrator and student involved in the sexual violence, as well as relevant facts including the date, time, and location, although efforts should be made to comply with requests for confidentiality from the complainant. For more detailed information regarding reporting and responsible employees and confidentiality, see questions D-1 to D-5 and E-1 to E-4.

K. Retaliation

K-1. Does Title IX protect against retaliation?

Answer: Yes. The Federal civil rights laws, including Title IX, make it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by these laws. This means that if an individual brings concerns about possible civil rights problems to a school's attention, including publicly opposing sexual violence or filing a sexual violence complaint with the school or any State or Federal agency, it is unlawful for the school to retaliate against that individual for doing so. It is also unlawful to retaliate against an individual because he or she testified, or participated in any manner, in an OCR or school's investigation or proceeding. Therefore, if a student, parent, teacher, coach, or other individual complains formally or informally about sexual violence or participates in an OCR or school's investigation or proceedings related to sexual violence, the school is prohibited from retaliating (including intimidating, threatening, coercing, or in any way

discriminating against the individual) because of the individual's complaint or participation.

A school should take steps to prevent retaliation against a student who filed a complaint either on his or her own behalf or on behalf of another student, or against those who provided information as witnesses.

Schools should be aware that complaints of sexual violence may be followed by retaliation against the complainant or witnesses by the alleged perpetrator or his or her associates. When a school knows or reasonably should know of possible retaliation by other students or third parties, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and witnesses and ensure their safety as necessary. At a minimum, this includes making sure that the complainant and his or her parents, if the complainant is in elementary or secondary school, and witnesses know how to report retaliation by school officials, other students, or third parties by making follow-up inquiries to see if there have been any new incidents or acts of retaliation, and by responding promptly and appropriately to address continuing or new problems. A school should also tell complainants and witnesses that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation, but will also take strong responsive action if it occurs.

L. First Amendment

L-1. How should a school handle its obligation to respond to sexual harassment and sexual violence while still respecting free-speech rights guaranteed by the Constitution?

Answer: The DCL on sexual violence did not expressly address First Amendment issues because it focuses on unlawful physical sexual violence, which is not speech or expression protected by the First Amendment.

However, OCR's previous guidance on the First Amendment, including the 2001 Guidance, OCR's July 28, 2003, Dear Colleague Letter on the First Amendment,³⁵ and OCR's October 26, 2010, Dear Colleague Letter on harassment and bullying,³⁶ remain fully in effect. OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution. Therefore, when a school works to prevent

³⁵ Available at <http://www.ed.gov/ocr/firstamend.html>.

³⁶ Available at <http://www.ed.gov/ocr/letters/colleague-201010.html>.

and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.

Title IX protects students from sex discrimination; it does not 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 hostile environment under Title IX. Title IX also does not require, prohibit, or abridge the use of particular textbooks or curricular materials.³⁷

M. The Clery Act and the Violence Against Women Reauthorization Act of 2013

M-1. How does the Clery Act affect the Title IX obligations of institutions of higher education that participate in the federal student financial aid programs?

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. The Clery Act requires institutions of higher education to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. The Clery Act requirements apply to many crimes other than those addressed by Title IX. For those areas in which the Clery Act and Title IX both apply, the institution must comply with both laws. For additional information about the Clery Act and its regulations, please see <http://www2.ed.gov/admins/lead/safety/campus.html>.

M-2. Were a school's obligations under Title IX and the DCL altered in any way by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, including Section 304 of that Act, which amends the Clery Act?

Answer: No. The Violence Against Women Reauthorization Act has no effect on a school's obligations under Title IX or the DCL. The Violence Against Women Reauthorization Act amended the Violence Against Women Act and the Clery Act, which are separate statutes. Nothing in Section 304 or any other part of the Violence Against Women Reauthorization Act relieves a school of its obligation to comply with the requirements of Title IX, including those set forth in these Questions and Answers, the 2011 DCL, and the *2001 Guidance*. For additional information about the Department's negotiated rulemaking related to the Violence Against Women Reauthorization Act please see <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html>.

³⁷ 34 C.F.R. § 106.42.

N. Further Federal Guidance

N-1. Whom should I contact if I have additional questions about the DCL or OCR's other Title IX guidance?

Answer: Anyone who has questions regarding this guidance, or Title IX should contact the OCR regional office that serves his or her state. Contact information for OCR regional offices can be found on OCR's webpage at

<https://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>. If you wish to file a complaint of discrimination with OCR, you may use the online complaint form available at <http://www.ed.gov/ocr/complaintintro.html> or send a letter to the OCR enforcement office responsible for the state in which the school is located. You may also email general questions to OCR at ocr@ed.gov.

N-2. Are there other resources available to assist a school in complying with Title IX and preventing and responding to sexual violence?

Answer: Yes. OCR's policy guidance on Title IX is available on OCR's webpage at <http://www.ed.gov/ocr/publications.html#TitleIX>. In addition to the April 4, 2011, Dear Colleague Letter, OCR has issued the following resources that further discuss a school's obligation to respond to allegations of sexual harassment and sexual violence:

- Dear Colleague Letter: Harassment and Bullying (October 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>
- *Sexual Harassment: It's Not Academic* (Revised September 2008), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf>
- *Revised Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties* (January 19, 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

In addition to guidance from OCR, a school may also find resources from the Departments of Education and Justice helpful in preventing and responding to sexual violence:

- Department of Education’s Letter to Chief State School Officers on Teen Dating Violence Awareness and Prevention (February 28, 2013)
<https://www2.ed.gov/policy/gen/guid/secletter/130228.html>
- Department of Education’s National Center on Safe Supportive Learning Environments
<http://safesupportivelearning.ed.gov/>
- Department of Justice, Office on Violence Against Women
<http://www.ovw.usdoj.gov/>

Exhibit 9



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

U.S. Department of Education
Office for Civil Rights

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。

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức của Bộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

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

Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkol sa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: 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.

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



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

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

¹ Open Letter from Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, WALL ST. J. ONLINE (Feb. 18, 2015), http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf (statement of 16 members of the University of Pennsylvania Law School faculty).

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).

led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints. The guidance has not succeeded in providing clarity for educational institutions or in leading institutions to guarantee educational opportunities on the equal basis that Title IX requires. Instead, schools face a confusing and counterproductive set of regulatory mandates, and the objective of regulatory compliance has displaced Title IX’s goal of educational equity.

The Department imposed these regulatory burdens without affording notice and the opportunity for public comment. Under these circumstances, the Department has decided to withdraw the above-referenced guidance documents in order to develop an approach to student sexual misconduct that responds to the concerns of stakeholders and that aligns with the purpose of Title IX to achieve fair access to educational benefits. The Department intends to implement such a policy through a rulemaking process that responds to public comment. The Department will not rely on the withdrawn documents in its enforcement of Title IX.

The Department refers you to the *Q&A on Campus Sexual Misconduct*, issued contemporaneously with this letter, and will continue to rely on its *Revised Sexual Harassment Guidance*, which was informed by a notice-and-comment process and issued in 2001,³ as well as the reaffirmation of that *Guidance* in the Dear Colleague Letter on Sexual Harassment issued January 25, 2006.⁴ As always, the Department’s enforcement efforts proceed from Title IX itself⁵ and its implementing regulations.⁶

In the forty-five years since the passage of Title IX, we have seen remarkable progress toward an educational environment free of sex discrimination. That progress resulted in large part from the vigorous enforcement of Title IX by the Office for Civil Rights at the Department of Education. The Department remains committed to enforcing these critical protections and intends to do so consistent with its mission under Title IX to protect fair and equitable access to education.

The Department has determined that this letter 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 letter does not add requirements to applicable law.⁷

Sincerely,

/s/

Candice Jackson

Acting Assistant Secretary for Civil Rights

U.S. Department of Education

³ The *Revised Sexual Harassment Guidance* is available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁴ The 2006 Dear Colleague Letter is available at <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>.

⁵ 20 U.S.C. §§ 1681-88.

⁶ 34 C.F.R. § 106.1 *et seq.*; *see also* 34 C.F.R. § 668.46(k) (implementing requirements of the Violence Against Women Act).

⁷ If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339).

Exhibit 10

**OCR**

Office for Civil Rights

■ Home (/about/offices/list/ocr/index.html) ■ Programs/Initiatives (/policy/rights/reg/ocr/index.html) ■ Office Contacts (https://ocr cas.ed.gov/contact-ocr) ■ Reports & Resources (/about/offices/list/ocr/reports-resources.html) ■ News (/about/offices/list/ocr/newsroom.html)	■ About OCR (/about/offices/list/ocr/aboutocr.html) ■ Reading Room (/about/offices/list/ocr/frontpage/faq/readingroom.html) ■ Frequently Asked Questions (/about/offices/list/ocr/faqs.html) ■ Careers/Internships (/about/offices/list/ocr/frontpage/careers/careers-index.html) ■ Blog (/about/offices/list/ocr/blog/index.html)

Prohibited Disability Harassment

Reminder of Responsibilities under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act:

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

July 25, 2000

Dear Colleague:

On behalf of the Office for Civil Rights (OCR) and the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education, we are writing to you about a vital issue that affects students in school - harassment based on disability. Our purpose in writing is to develop greater awareness of this issue, to remind interested persons of the legal and educational responsibilities that institutions have to prevent and

appropriately respond to disability harassment, and to suggest measures that school officials should take to address this very serious problem. This letter is not an exhaustive legal analysis. Rather, it is intended to provide a useful overview of the existing legal and educational principles related to this important issue.

Why Disability Harassment Is Such an Important Issue

Through a variety of sources, both OCR and OSERS have become aware of concerns about disability harassment in elementary and secondary schools and colleges and universities. In a series of conference calls with OSERS staff, for example, parents, disabled persons, and advocates for students with disabilities raised disability harassment as an issue that was very important to them. OCR's complaint workload has reflected a steady pace of allegations regarding this issue, while the number of court cases involving allegations of disability harassment has risen. OCR and OSERS recently conducted a joint focus group where we heard about the often devastating effects on students of disability harassment that ranged from abusive jokes, crude name-calling, threats, and bullying, to sexual and physical assault by teachers and other students.

We take these concerns very seriously. Disability harassment can have a profound impact on students, raise safety concerns, and erode efforts to ensure that students with disabilities have equal access to the myriad benefits that an education offers. Indeed, harassment can seriously interfere with the ability of students with disabilities to receive the education critical to their advancement. We are committed to doing all that we can to help prevent and respond to disability harassment and lessen the harm of any harassing conduct that has occurred. We seek your support in a joint effort to address this critical issue and to promote such efforts among educators who deal with students daily.

What Laws Apply to Disability Harassment

Schools, colleges, universities, and other educational institutions have a responsibility to ensure equal educational opportunities for all students, including students with disabilities. This responsibility is based on Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II), which are enforced by OCR. Section 504 covers all schools, school districts, and colleges and universities receiving federal funds.¹ Title II covers all state and local entities, including school districts and public institutions of higher education, whether or not they receive federal funds.² Disability harassment is a form of discrimination prohibited by Section 504 and Title II.³ Both Section 504 and Title II provide parents and students with grievance procedures and due process remedies at the local level. Individuals and organizations also may file complaints with OCR.

States and school districts also have a responsibility under Section 504, Title II, and the Individuals with Disabilities Education Act (IDEA),⁴ which is enforced by OSERS, to ensure that a free appropriate public education (FAPE) is made available to eligible students with disabilities. Disability harassment may result in a denial of FAPE under these statutes. Parents may initiate administrative due process procedures under IDEA, Section 504, or Title II to address a denial of FAPE, including a denial that results from disability harassment. Individuals and organizations also may file complaints with OCR, alleging a denial of FAPE that results from disability harassment. In addition, an individual or organization may file a complaint alleging a violation of IDEA under separate procedures with the state educational agency.⁵ State compliance with IDEA, including compliance with FAPE requirements, is monitored by OSERS' Office of Special Education Programs (OSEP).

Harassing conduct also may violate state and local civil rights, child abuse, and criminal laws. Some of these laws may impose obligations on educational institutions to contact or coordinate with state or local agencies or police with respect to disability harassment in some cases; failure to follow appropriate procedures under these laws could result in action against an educational institution. Many states and educational institutions also have addressed disability harassment in their general anti-harassment policies.⁶

Disability Harassment May Deny a Student an Equal Opportunity to Education under Section 504 or Title II

Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating.

When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student's rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student's ability to participate in or benefit from the educational program. Examples of harassment that could create a hostile environment follow.

- Several students continually remark out loud to other students during class that a student with dyslexia is "retarded" or "deaf and dumb" and does not belong in the class; as a result, the harassed student has difficulty doing work in class and her grades decline.
- A student repeatedly places classroom furniture or other objects in the path of classmates who use wheelchairs, impeding the classmates' ability to enter the classroom.
- A teacher subjects a student to inappropriate physical restraint because of conduct related to his disability, with the result that the student tries to avoid school through increased absences.⁷
- A school administrator repeatedly denies a student with a disability access to lunch, field trips, assemblies, and extracurricular activities as punishment for taking time off from school for required related to the student's disability.
- A professor repeatedly belittles and criticizes a student with a disability for using accommodations in class, with the result that the student is so discouraged that she has great difficulty performing in class and learning.
- Students continually taunt or belittle a student with mental retardation by mocking and intimidating him so he does not participate in class.

When disability harassment limits or denies a student's ability to participate in or benefit from an educational institution's programs or activities, the institution must respond effectively. Where the institution learns that disability harassment may have occurred, the institution must investigate the incident(s) promptly and respond appropriately.

Disability Harassment Also May Deny a Free Appropriate Public Education

Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the IDEA, as well as Section 504 and Title II. The IDEA was enacted to ensure that recipients of IDEA funds make available to students with disabilities the appropriate special education and related services that enable them to access and benefit from public education. The specific services to be provided a student with a disability are set forth in the student's individualized education program (IEP), which is developed by a team that includes the student's parents, teachers and, where appropriate, the student. Harassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE.

How to Prevent and Respond to Disability Harassment

Schools, school districts, colleges, and universities have a legal responsibility to prevent and respond to disability harassment. As a fundamental step, educational institutions must develop and disseminate an official policy statement prohibiting discrimination based on disability and must establish grievance procedures that can be used to address disability harassment.⁸ A clear policy serves a preventive purpose by notifying students and staff that disability harassment is unacceptable, violates federal law, and will result in disciplinary action. The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action to end the harassment and prevent it from recurring and, where appropriate, remedying the effects on the student who was harassed.

The following measures are ways to both prevent and eliminate harassment:

- Creating a campus environment that is aware of disability concerns and sensitive to disability harassment; weaving these issues into the curriculum or programs outside the classroom.
- Encouraging parents, students, employees, and community members to discuss disability harassment and to report it when they become aware of it.
- Widely publicizing anti-harassment statements and procedures for handling discrimination complaints, because this information makes students and employees aware of what constitutes harassment, that such conduct is prohibited, that the institution will not tolerate such behavior, and that effective action, including disciplinary action, where appropriate, will be taken.
- Providing appropriate, up-to-date, and timely training for staff and students to recognize and handle potential harassment.
- Counseling both person(s) who have been harmed by harassment and person(s) who have been responsible for the harassment of others.
- Implementing monitoring programs to follow up on resolved issues of disability harassment.
- Regularly assessing and, as appropriate, modifying existing disability harassment policies and procedures for addressing the issue, to ensure effectiveness.

Technical Assistance Is Available

U.S. Secretary of Education Richard Riley has emphasized the importance of ensuring that schools are safe and free of harassment. Students can not learn in an atmosphere of fear, intimidation, or ridicule. For students with disabilities, harassment can inflict severe harm. Teachers and administrators must take emphatic action to ensure that these students are able to learn in an atmosphere free from harassment.

Disability harassment is preventable and can not be tolerated. Schools, colleges, and universities should address the issue of disability harassment not just when but before incidents occur. As noted above, awareness can be an important element in preventing harassment in the first place.

The Department of Education is committed to working with schools, parents, disability advocacy organizations, and other interested parties to ensure that no student is ever subjected to such conduct, and that where such conduct occurs, prompt and effective action is taken. For more information, you may contact OCR or OSEP through 1-800-USA-LEARN or 1-800-437-0833 for TTY services. You also may directly contact one of the OCR enforcement offices listed on the enclosure or OSEP, by calling (202) 205-5507 or (202) 245-7468 for TTY services.

Thank you for your attention to this serious matter.

Norma V. Cantu,
Assistant Secretary for
Civil Rights

Judith E. Heumann,
Assistant Secretary
Office of Special Education
and Rehabilitative Services

¹ Section 504 provides: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. § 794(a). See 34 CFR Part 104 (Section 504 implementing regulations).

² Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. See 28 CFR Part 35 (Title II implementing regulations).

³ The Department of Education's Office for Civil Rights (OCR) has issued policy guidance on discriminatory harassment based on race (see 59 Fed. Reg. 11448 (Mar. 10, 1994),) and sex (see 62 Fed. Reg. 12034 (Mar. 13, 1997),). These policies make clear that school personnel who understand their legal obligations to address harassment are in the best position to recognize and prevent harassment, and to lessen the harm to students if, despite their best efforts, harassment occurs. In addition, OCR recently collaborated with the National Association of Attorneys General (NAAG) to produce a guide to raise awareness of, and provide examples of effective practices for dealing with, hate crimes and harassment in schools, including harassment based on disability. See "Protecting Students from Harassment and Hate Crime, A Guide for Schools," U.S. Department of Education, Office for Civil Rights, and the National Association of Attorneys General (Jan. 1999) (OCR/NAAG Harassment Guide), Appendix A: Sample School Policies. The OCR/NAAG Harassment Guide may be accessed on the internet at www.ed.gov/offices/OCR/archives/Harassment/ (<http://www.ed.gov/offices/OCR/archives/Harassment/>). These documents are a good resource for understanding the general principle of discriminatory harassment. The policy guidance on sexual harassment will be clarified to explain how OCR's longstanding regulatory requirements continue to apply in this area in light of recent Supreme Court decisions addressing the sexual harassment of students.

⁴ 20 U.S.C. §1400 et seq.

⁵ 34 C.F.R. § 300.660 et seq.

⁶ For more information regarding the requirements of state and local laws, consult the OCR/NAAG Harassment Guide, cited in footnote 3 above.

⁷ Appropriate classroom discipline is permissible, generally, if it is of a type that is applied to all students or is consistent with the Individuals with Disabilities Education Act (IDEA) and Section 504, including the student's Individualized Education Program or Section 504 plan.

⁸ Section 504 (at 34 CFR § 104.7) and Title II (at 28 CFR § 35.107(a)) require that institutions have published internal policies and grievance procedures to address issues of discrimination on the basis of disability, which includes disability harassment. While there need not be separate grievance procedures designed specifically for disability harassment, the grievance procedures that are available must be effective in resolving problems of this nature.

Enclosure - list of OCR enforcement offices (<http://www2.ed.gov/about/offices/list/ocr/addresses.html>)

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Last Modified: 01/10/2020

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- FAFSA (<https://fafsa.ed.gov/?src=edgov-rn>)
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Regulations.gov (<https://www.regulations.gov/>)

Exhibit 11

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK and THE BOARD
OF EDUCATION FOR THE CITY
SCHOOL DISTRICT OF THE CITY OF
NEW YORK,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
EDUCATION and ELISABETH DEVOS,
*in her official capacity as the Secretary of
Education,*

Defendants.

CIVIL ACTION NO. 1:20-cv-4260

**DECLARATION OF LAURA BRANTLEY IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, Laura Brantley, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am the Executive Director of the Office of Equal Opportunity and Diversity Management ("OEO") for Plaintiff the Board of Education for the City School District of the City of New York, commonly referred to as the New York City Department of Education ("NYCDOE"). I submit this Declaration in support of the NYCDOE's litigation against the United States Department of Education ("ED" or "The Department"), Elisabeth DeVos, in her official capacity as Secretary of Education, and the United States of America regarding the recently issued rule entitled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (the "Final Rule").

2. I make this declaration in my capacity as the Executive Director of the OEO and direct supervisor of the NYCDOE Title IX Coordinator. As the Executive Director, my role is to oversee agency-wide compliance with NYCDOE's anti-discrimination policy, Title VII, and Title IX, including sexual and gender-based harassment and other sex discrimination. This includes oversight of investigations, providing agency-wide training on these issues, developing resources, and supporting schools and central offices with compliance. I am familiar with the matters set forth herein, based on my personal knowledge, experience and observations, conversations with NYCDOE staff, and review of documents provided to me.

3. NYCDOE is the largest public school district in the nation, serving over 1.1 million students from Kindergarten to 12th grade in over 1,600 schools and employing over 135,000 employees.

4. NYCDOE receives \$1.8 to \$2 billion annually in federal funds, including nearly \$679 million under Title I of the Elementary and Secondary Education Act and over \$481 million to provide free breakfasts and lunches to students.

I. NYCDOE's Broad Obligations to Protect Students and Employees From Sexual and Gender-Based Harassment

5. NYCDOE is committed to maintaining a safe and supportive educational and work environment for all students, employees, applicants for employment, and other individuals who do business with the NYCDOE, use NYCDOE facilities, or otherwise interact with the NYCDOE that is free from unlawful discrimination, harassment, or bullying of students. To further this goal, NYCDOE has promulgated a set of regulations that aim to prevent harassment, intimidation, discrimination, and bullying of students; require the reporting of this alleged conduct; ensure prompt, fair, and developmentally appropriate investigations; and provide both victims and accused students with interventions, supports and, where applicable for students who

have been found to have engaged in sexual harassment, a pedagogically sound disciplinary response consistent with federal and state requirements.

6. NYCDOE's specific policies and procedures implementing this commitment to students and employees are codified in Chancellor's Regulations A-830, A-831, and A-832. Copies of Chancellor's Regulations A-830, A-831, and A-832 are attached as Exhibits A, B and C.

7. Because NYCDOE serves children in Kindergarten through 12th grade and because a child's physical, emotional, and mental development evolves throughout their elementary and secondary school years, the procedures that NYCDOE has developed to address reports of sexual harassment involving students, either as a victim, witness or the accused, seek to address sexual harassment in a developmentally appropriate and pedagogically sound manner that focuses on maintaining students' access to NYCDOE programs, activities, resources, and supports.

8. Because of the compulsory nature of elementary and secondary education and NYCDOE's responsibility to act in loco parentis during the school day and other NYCDOE-sponsored programs and activities, NYCDOE's policies and procedures to address sexual harassment are also designed with the goal of resolving matters expeditiously and with the flexibility needed to fashion age-appropriate remedies and supports that allow schools to maintain a safe environment and to appropriately address young students' physical, emotional, and educational needs.

A. NYCDOE's Policies That Prevent and Address Student-to-Student Sexual Harassment

9. Chancellor's Regulation A-831 ("A-831") sets forth NYCDOE's policy prohibiting sexual harassment committed by students against other students.¹ A-831 covers conduct between students that occurs during, before, or after school hours, on school property, at school-sponsored events, on NYCDOE-funded transportation, or off school property, if the conduct disrupts or would foreseeably disrupt the educational process or endangers or would foreseeably endanger the health, safety, morals, or welfare of the school community. *See* Exhibit B at 7 (§ I.B).

10. A-831 prohibits unwelcome conduct or communication of a sexual nature which is sufficiently severe, pervasive, or persistent as to: (1) substantially interfere with a student's ability to participate in or benefit from an educational program, school-sponsored activity, or any other aspect of a student's education; (2) create a hostile, offensive, or intimidating school environment; or (3) otherwise adversely affect a student's educational opportunities. Sexual harassment may be a single incident or a series of related incidents. *See* Exhibit B at 6-7 (§§ I.A, I.D).

11. A-831 expressly covers sexual harassment committed through social media and/or other electronic communications. *See* Exhibit B at 7 (§ I.E).

12. In addition, A-831 covers conduct that constitutes sexual harassment regardless of the gender, sexual orientation, gender identity, or gender expression of any of the students involved. *See* Exhibit B at 7 (§§ I.A, I.D).

¹ NYCDOE's policies prohibiting student-to-student gender-based harassment, intimidation, discrimination, and bullying are set forth in Chancellor's Regulation A-832, which provides procedures for the reporting and investigating of such complaints that are similar to A-831.

13. A-831 sets forth a comprehensive reporting structure for complaints of student-to-student sexual harassment that provides multiple avenues for students, parents and other individuals to report student-to-student sexual harassment. It also requires all school employees who witness or have knowledge or notice of student-to-student sexual harassment to immediately report the conduct through mandated channels. *See* Exhibit B at 8-11 (§ II).

14. Pursuant to A-831, as required under the New York State Dignity for All Students Act (DASA),² NYCDOE investigates all covered allegations of sexual harassment and does not put the onus on young student victims, or on their parents or guardians, to informally or formally request an investigation before NYCDOE takes investigative and remedial action.³ *See* Exhibit B at 10 (§ III.A).

15. A-831 also sets forth procedures for resolving reports of student-to-student sexual harassment in a prompt, equitable, and developmentally appropriate manner that balances the need for both appropriate resolution and appropriate procedural protections for victims, witnesses, and accused students. Developmentally appropriate methods are particularly important in order to minimize trauma to the impacted students and to increase reliability of the outcome.

16. Providing appropriate interventions and remedies is of paramount importance in the K-12 context both for safety and pedagogical reasons. There are significant programmatic and legal impediments preventing the NYCDOE from removing a student from a school given students' right to compulsory education and to attend the public schools in the district in which

² *See* N.Y. Educ. Law Art. 2, 8 NYCRR § 100.2.

³ The principal/designee is required to report any criminal activity to the New York City Police Department ("NYPD"). In addition, if a report cannot be appropriately investigated at the school level because of the nature and seriousness of the reported allegations, the principal/designee is to contact the Title IX Coordinator for further guidance. *See* Exhibit B at 10 (§§ II.L, II.M).

they reside, *see* N.Y. Educ. Law § 3202(1), specific grade-level curricular and instructional requirements for students, some students' rights under federal laws to a particular school or classroom placement, due process protections afforded to students, and pedagogical interests in maintaining the continuity of instruction and minimizing disruptions to students' education. Accordingly, NYCDOE must adhere to a careful framework that ensures all students' rights are protected during and after an investigation and any resulting disciplinary process.

17. Prompt resolution is also important in the K-12 context in order for schools to provide pedagogically sound discipline to students found responsible for sexual harassment. A delayed response will be less effective at correcting behavior as appropriate.

18. NYCDOE's prompt and equitable procedures provide for: (1) immediate notice to the victim and accused students and their parents; (2) a completed investigation by the school principal or their designee ("principal/designee") within five school days of receipt of the report, including interviews and obtaining written statements from both parties and witnesses, and collection of all relevant evidence; (3) an evaluation by the principal/designee of whether the evidence substantiates the allegations and whether A-831 was violated using the preponderance of the evidence standard; and (4) within ten school days of receipt of the report, written notice to the parents of the victim and the parents of the accused student regarding whether any allegations are substantiated and whether the conduct constitutes a violation of A-831. *See* Exhibit B at 9-11 (§§ II.K, III).

19. NYCDOE's policies and procedures for addressing reports of sexual harassment do not allow students to question each other directly or through the principal/designee, or to see the evidence that is collected, except as provided for in connection with a student's rights related to the imposition of a disciplinary suspension. Indeed, NYCDOE does not place a student

directly in an adversarial position with another student or employee under any circumstances. Students, including victims and witnesses, are often already reluctant to cooperate with investigations not only because of various social pressures, but also because of concerns for their safety in certain situations. Subjecting student victims and witnesses to questioning by other students or disclosing the fact that a student witness has cooperated by sharing their statement with other students would have a marked chilling effect.

20. Consistent with NYCDOE's obligation to educate all students and to act in loco parentis during the school day and other NYCDOE-sponsored programs and activities, A-831 also requires the principal/designee to provide interventions or supports to the victim, witnesses, and the accused student after the conclusion of the investigation and at any time during the investigation, as appropriate. Examples of such interventions include counseling support, education or mental health services, and academic supports and adjustments such as changes in classes, lunch/recess, or after-school program schedules, to the extent possible. Principals/designees are required to develop individual support plans for students who have been the victim of, or students found to have engaged in, two or more violations of A-831 within any school year. See Exhibit B at 12 (§§ III.G, IV.B).

21. If the principal/designee determines that the accused student violated A-831, they are required to take appropriate steps to ensure the conduct has stopped and may also impose a disciplinary response consistent with NYCDOE's Citywide Behavioral Expectations to Support Student Learning ("Discipline Code").⁴ The Discipline Code utilizes a progressive model of discipline, which emphasizes social emotional learning and incremental interventions for positive behavioral change and accountability.

⁴ NYCDOE Citywide Behavioral Expectations to Support Student Learning, *available at* <https://www.schools.nyc.gov/school-life/know-your-rights/discipline-code>.

22. If a principal/designee seeks to impose a disciplinary response that involves the removal of a student from a classroom or a suspension, Chancellor's Regulation A-443 ("A-443") sets forth detailed procedures and requirements that must be followed in order to afford the student appropriate due process.⁵

B. NYCDOE's Policies That Prevent and Address Sexual Harassment of Students by Employees

23. It is NYCDOE's policy that sexual behavior of any form by a NYCDOE employee where a student is involved is misconduct and will not be tolerated.

24. Chancellor's Regulation A-830 ("A-830") requires any employee who witnesses sexual harassment by a NYCDOE employee or who has knowledge that a student may have been the victim of such behavior to report the conduct to the principal/designee within one school day and, within two school days, to submit an electronic complaint to the OEO. Any individual, including parents and students, may file a complaint with OEO. See Exhibit A at 5 (§§ II.A, II.C).

25. Chancellor's Regulation A-412 also requires NYCDOE employees to immediately report any information concerning sexual misconduct by NYCDOE employees involving students to their principal/supervisor and to the Special Commissioner of Investigation for the New York City School District ("SCI"), a law enforcement agency that operates independently of NYCDOE to investigate, among other things, allegations of sexual misconduct by NYCDOE employees and vendors. Parents and vendors may also report directly to SCI.

⁵ See Chancellor's Regulation A-443 (Student Discipline Procedures), *available at* <https://www.schools.nyc.gov/docs/default-source/default-document-library/a-443-3-5-04-english>.

When the alleged misconduct would constitute a crime, NYCDOE principals and supervisors must also notify the police.⁶

26. SCI generally investigates reports of sexual misconduct by employees that do not rise to the level of criminal conduct or that the police decline to investigate. OEO refers to SCI all reports it receives of sexual misconduct by a NYCDOE employee.

27. Once SCI conducts an investigation, it submits its final report, if the allegations are substantiated, to the NYCDOE Chancellor (the “Chancellor”).⁷

28. Depending on the nature of the allegations, an employee who is the subject of the investigation may be removed or reassigned from their position while the SCI investigation is pending. NYCDOE may also provide interventions and supports to the victim and witnesses of the reported sexual harassment or misconduct, as appropriate.

29. Upon receipt of an SCI report that substantiates allegations of sexual misconduct or sexual harassment, NYCDOE can proceed to disciplinary proceedings, which vary dependent upon the title and status of the subject employee. Discipline may include immediate termination, suspension, a letter of discipline, training, and/or a disciplinary hearing as required by state law and collective bargaining agreements. *See* N.Y. Educ. Law § 3020-a; N.Y. Civ. Serv. Law § 75.

C. NYCDOE’s Policies That Prevent and Address Sexual Harassment of Employees by Other Employees

⁶ See Chancellor’s Regulation A-412 (Security in Schools), *available at* <https://www.schools.nyc.gov/docs/default-source/default-document-library/a-412-security-in-the-schools-english>.

⁷ In some cases, depending on the allegations, SCI may refer a report of sexual misconduct by an employee back to OEO without conducting an investigation. In those cases, OEO conducts an investigation in the same manner as it investigates complaints of sexual harassment filed by an employee against another employee. As with SCI investigations, employees may be removed or reassigned from their position while OEO investigates, depending on the nature of allegations.

30. NYCDOE's policies for investigating and adjudicating complaints of sexual harassment of an employee by another employee comply with applicable law, including Title IX, Title VII, the New York State Human Rights Law, and the New York City Human Rights Law.

31. A-830 provides broad protections from sexual harassment for employees, including from unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. *See* Exhibit A at 3 (§ I.A).

32. Any NYCDOE employee may file a sexual harassment complaint regarding another employee with OEO within one year of the event that is the subject of the complaint. *See* Exhibit A at 6 (§ II.E).

33. OEO investigates such complaints and prepares a report for the Chancellor regarding whether the allegations are substantiated by a preponderance of the evidence and whether the respondent has violated A-830. *See* Exhibit A at 6 (§ III.B.2).

34. OEO notifies the respondent employee in writing of the Chancellor's determination regarding whether the employee has violated A-830. *See* Exhibit A at 6 (§ III.B.2).

35. If the violation results in discipline, then discipline is imposed as appropriate and according to the nature of the person's title and status as an employee. Discipline may include termination, suspension, a letter to file, training, and/or a disciplinary hearing required by state

law and collective bargaining agreements. See N.Y. Educ. Law § 3020-a; N.Y. Civ. Serv. Law § 75.

II. The Final Rule Imposes Grievance Procedures that Require NYCDOE Students to Engage in An Adversarial Process That Is Not Developmentally Appropriate or Suitable for School-Age Children and Will Traumatize Students

36. The Final Rule creates a myriad of novel procedural requirements that will be harmful to K-12 schoolchildren, traumatize child victims and witnesses, and prevent schools from promptly investigating complaints of sexual harassment. A chart summarizing those grievance procedures is attached as Exhibit D.

A. The Final Rule Creates a Formal Adversarial Process That Is Unsuitable and Harmful to K-12 Students

37. The Final Rule requires NYCDOE to force children as young as four years old into adversarial roles in a litigation-like proceeding. K-12 schoolchildren do not have the judgment, experience, or maturity required to understand or participate in the adversarial process envisioned in the Final Rule.

38. Requiring a child victim to participate in the adversarial process created by the Final Rule will be particularly traumatizing where the adversary is a NYCDOE employee. The adversarial process is also developmentally inappropriate and will be traumatizing to student victims and witnesses as well as those accused of sexual harassment.

39. NYCDOE parents and students may be required to obtain support from an attorney or other advisor in order to navigate the new responsibilities placed on the parties. Under the existing non-adversarial NYCDOE procedures, the majority of those responsibilities are handled by NYCDOE staff.

40. Several provisions in the Final Rule require NYCDOE to treat a victim and accused employee or student as adversaries in a manner that will cause a chilling effect, re-

traumatize students, and impede NYCDOE's ability to effectively identify, respond to, and investigate the allegations of sexual harassment.

41. Reviewing evidence or an investigative report in order to prepare a response or to formulate questions for an adversary or witness would be a challenge for an adult; for NYCDOE students, particularly younger students, it is developmentally inappropriate and will be at best incomprehensible and at worst traumatizing for the victim and/or the accused student to have to participate in the review of an investigator's accumulation and evaluation of evidence regarding whether the student was the victim or found to have engaged in sexual harassment.⁸

42. The Final Rule places the burden on our students and their parents to create and respond to written cross-examination questions (and further follow-up questions) regarding allegations of sexual harassment. Forcing NYCDOE students to confront written, potentially leading, cross-examination questions and prepare written answers will re-traumatize victims and witnesses and is counterproductive to creating a supportive school environment.

43. The Final Rule's requirements that NYCDOE must disclose all evidence obtained as part of its investigation and allow for written cross-examination of witnesses as a matter of regular practice in Title IX investigations is inappropriate in the K-12 context.⁹ Children do not have the judgment, maturity or experience to understand the obligation or necessity to keep such information confidential and as a result may disclose sensitive information regarding other students or employees. In addition, our students are often already reluctant to cooperate with investigations as a result of social pressures and safety concerns and will be even less likely to do so once they understand that the school will regularly identify witnesses and provide their statements and any other evidence obtained as part of the investigation to the victim and the

⁸ See Final Rule at 30,576-77 (§§ 106.45(b)(5)(vi), 106.45(b)(5)(vii), 106.45(b)(6)(ii)).

⁹ See Final Rule at 30,576-77 (§§ 106.45(b)(5)(vi), 106.45(b)(6)(ii)).

accused student or employee.¹⁰ These procedures will have a chilling effect on the reporting of sexual harassment and, therefore, will significantly impede schools' ability to prevent and address sexual harassment.

B. The Final Rule Repeatedly Subjects NYCDOE Minor Victims and Witnesses to Multiple and Unnecessary Traumatizing Interviews and Encounters With Adult Investigators

44. The grievance procedures imposed by the Final Rule will require vulnerable children to be repeatedly questioned by multiple adults about the details of their sexual harassment and abuse. For example: (a) the victim may make an initial report to an NYCDOE employee; (b) the victim will have to discuss the allegations with NYCDOE's Title IX Coordinator¹¹; (c) if the victim or NYCDOE'S Title IX Coordinator files a formal complaint, the victim will be re-interviewed and witnesses will be interviewed as part of the school's investigation; and (d) the victim and witnesses will have to submit to written cross-examination (and further follow up questions) directly by the accused student or employee, or their advisor.¹²

45. Children who have been victimized by a NYCDOE employee, or another student where the student conduct is criminal in nature, will also face further questioning. NYCDOE considers any conduct of a sexual nature involving an employee and a student to be sexual misconduct that must be referred to the NYPD and/or SCI, an independent law enforcement agency with trained law enforcement investigators. NYPD and/or SCI will interview the victim and any student witnesses, at least once if not multiple times, and if the employee is eventually

¹⁰ Disclosure of student witness statements to another student or an employee may violate Chancellor's Regulation A-820, as well as FERPA, which protect the privacy and confidentiality of a student's educational records from disclosure without consent or an applicable exception.

¹¹ See Final Rule at 30574-75 (§ 106.44(a)).

¹² See Final Rule at 30,577 (§ 106.45(b)(6)(ii)).

arrested and prosecuted, victims and witnesses may have to testify at criminal hearings and trials, which may also include cross-examination.

46. The Final Rule prevents NYCDOE from using a trauma-informed approach that reduces the number of times a child is asked to recount their sexual harassment or abuse, particularly where SCI or NYPD is involved. Not only will repetitive interviews by multiple adults be re-traumatizing for student victims and witnesses, it could have a detrimental effect to a child's education. It may also result in less reliable investigations as memories fade over time or students and witnesses move on to other schools or decide not to cooperate, all of which will make it more difficult for NYCDOE to effectively investigate allegations of sexual harassment.

C. The Final Rule Arbitrarily and Unreasonably Creates an Adversarial Process That Prevents NYCDOE From Promptly Investigating Complaints of Sexual Harassment and Conflicts with Existing Due Process Requirements

47. NYCDOE currently requires schools to investigate and issue a determination regarding a report of student-on-student sexual harassment within ten school days, promptly provide interventions, and impose any disciplinary response in accordance with the Discipline Code.

48. NYCDOE's Discipline Code is adopted in accordance with New York Education Law § 2801, which mandates that school districts adopt codes of conduct in order to maintain order on school property. The Discipline Code sets forth clear expectations for student behavior. In order for it to be effective, NYCDOE must apply the Discipline Code consistently, and respond swiftly and promptly to address student misconduct, while simultaneously ensuring that full due process protections for students are afforded in connection with any discipline that is imposed.

49. In contrast, the Final Rule imposes grievance procedures that will undoubtedly take many weeks, if not months, to complete. The Final Rule requires schools to, *inter alia*: (a) provide both parties an electronic or hardcopy of all evidence obtained as part of the investigation and at least ten days to respond to the evidence;¹³ (b) prepare an investigatory report and provide both parties at least ten days to submit a response to the report, including written cross-examination questions for the other party and witnesses;¹⁴ (c) assign a different person to be the decision-maker to review the investigatory report and responses from the parties, and oversee a time-consuming process for written cross-examination and recross-examination;¹⁵ (d) issue an extremely detailed written determination;¹⁶ and (e) provide both parties certain appeal rights, assign a third-person to review any appeal and issue a written decision explaining the result.¹⁷

50. The Final Rule requires NYCDOE to delay disciplinary consequences for weeks, or even months. A delayed disciplinary response will be less effective at correcting behavior and will not have the same deterrent and remedial impact individually, school-wide, and cumulatively and systemically across the NYCDOE. Such a result is counterproductive to NYCDOE's emphasis on progressive discipline and the fostering of supportive school environments.

51. This prolonged timeframe will significantly impede NYCDOE's ability to maintain order and ensure student health and safety by delaying NYCDOE's adjudication of

¹³ Final Rule at 30,576 (§ 106.45(b)(5)(vi)).

¹⁴ Final Rule at 30,576-77 (§§ 106.45(b)(5)(vii), 106.45(b)(6)(ii)).

¹⁵ Final Rule at 30,577 (§§ 106.45(b)(6)(ii), 106.45(b)(7)(i)).

¹⁶ Final Rule at 30,577 (§ 106.45(b)(7)(ii)).

¹⁷ Final Rule at 30,577-78 (§ 106.45(b)(8)).

sexual harassment complaints and imposition of appropriate disciplinary responses in accordance with the Discipline Code.

52. Under the Final Rule, a student can be removed from school during the weeks and potentially months of investigation required by the grievance procedures where there is an “immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment.”¹⁸ In contrast, New York State law gives schools discretion to suspend a student pending a hearing for any conduct that “poses a continuing danger to persons or property or an ongoing threat of disruption to the academic process.” N.Y. Educ. Law § 3214 (3)(b)(1). The Final Rule may prevent NYCDOE from removing a student that poses a danger to other students or disrupts the school environment during the weeks, even months, of the required grievance procedures.

53. In cases where NYCDOE could meet the Final Rule’s standard to remove a student, NYCDOE would have to provide a student that is subject to an emergency removal under the Final Rule with a due process hearing (with the opportunity to present evidence and question and present witnesses) within five days of the removal.¹⁹ For students with disabilities, NYCDOE is required to hold a Manifestation Determination Review, within ten school days of the removal, in order to determine whether the student’s behavior was a manifestation of the student’s disability.²⁰ These proceedings would occur prior to the completion of the grievance procedures, and essentially require findings of fact to be made before completion of the Final Rule’s grievance proceedings. After the completion of the Final Rule’s grievance procedures, if

¹⁸ Final Rule at 30,575 (§ 106.44(c)).

¹⁹ See N.Y. Educ. Law § 3214(3)(c).

²⁰ 8 NYCRR § 201.4(a)(3).

a further suspension is deemed appropriate, the student may be entitled to another due process hearing in connection with the suspension.

III. NYCDOE Is Forced To Devote Significant Resources to Implementing the Final Rule in an Unreasonable Time Frame in the Midst of a Pandemic

54. The extremely complicated changes required by the Final Rule, which fill 547 Federal Register Pages, and include 1,971 footnotes, impose extraordinary administrative, organizational, legal, and financial challenges on NYCDOE that in the best of times would likely require many months, and potentially a full school year to implement.²¹ However, the Final Rule was issued at a uniquely difficult time for NYCDOE. All NYCDOE schools are closed and the vast majority of NYCDOE's employees are working remotely. In March, NYCDOE teachers and employees undertook a herculean effort to transition the largest school system in the nation to remote instruction and online learning. They now continue to focus on addressing the needs of students through the end of the school year and, for many, during summer learning.

55. NYCDOE is working towards a September start for the 2020-2021 school year. However, the timing for staff and students to return to schools and other NYCDOE buildings will be dependent on health and safety indicators. In addition, NYCDOE is considering many options including blended learning models that would incorporate remote and in-person instruction, and staggering school and class schedules to encourage social distancing. When schools do re-open, NYCDOE's priority will be to support the social-emotional needs of students and implement trauma-informed approaches to teaching and learning.

²¹ See Exhibit D for a summary of the novel procedural requirements imposed by the Final Rule.

56. In the midst of the vast uncertainty regarding how schools will reopen and what classrooms will look like, NYCDOE is faced with the impossible mandate to implement the Final Rule by August 14, 2020.

57. Since the Final Rule was issued in May, NYCDOE has had to devote significant resources into analyzing how to reconcile obligations in the Final Rule with NYCDOE's legal obligations pursuant to other federal laws (*e.g.* the Family Educational Rights and Privacy Act ("FERPA"), the Individuals with Disabilities Education Act ("IDEA"), and Title VII of the Civil Rights Act of 1964) and how the Final Rule's preemption provision impacts NYCDOE's obligations under state laws (*e.g.* New York State Dignity for All Students Act, N.Y. Educ. Law Art. 2, 8 NYCRR § 100.2, the New York State Education Law, *e.g.*, N.Y. Educ. Law §§§ 2801, 3214, 4404, the New York State Human Rights Law, N.Y. Exec. Law § 290 *et seq*, and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq*).

58. NYCDOE has also been engaged in the process of trying to untangle how the myriad procedural requirements imposed by the Final Rule will impact the different policies and procedures that NYCDOE has carefully crafted to investigate sexual harassment in a developmentally appropriate and pedagogically sound manner and to impose discipline consistent with Constitutional due process protections reflected in state laws, *see* N.Y. Educ. Law § 3214, and IDEA obligations.

59. NYCDOE has also had to consider how to implement the Final Rule in a manner that does not hinder its commitment to ensuring an educational and workplace environment that is free from sexual harassment as reflected in the broader protections provided to students and employees in Chancellor's Regulations A-830, A-831, and A-832.

60. The changes mandated by the Final Rule will require NYCDOE to propose amendments to one or more existing Chancellor's Regulations. Because those changes must be approved by the Panel for Educational Policy ("PEP"), which meets once a month, after public notice of the proposed changes at least forty-five days in advance of the PEP meeting, it is very unlikely that NYCDOE will be able to make the required changes to the Chancellor's Regulations by August 14th. The Final Rule may also require NYCDOE to make changes to the Discipline Code.

61. But more importantly, implementing the Final Rule's myriad procedural requirements across NYCDOE's 1,600 schools will be a significant undertaking. NYCDOE will have to revise the processes that its schools follow in responding to and investigating allegations of sexual harassment – an undertaking that could require multiple dedicated, full-time employees working for many months. NYCDOE must make fundamental alterations to online reporting systems and tracking databases it utilizes to ensure staff comply with Title IX requirements. Based on NYCDOE's experience with prior efforts, it estimates that these technological updates could cost hundreds of thousands of dollars.

62. The Final Rule requires different individuals to conduct investigations, review the investigator's report and make a determination regarding responsibility, and to review appeals. NYCDOE would have to hire at least ten additional staff members to meet these obligations, including investigators and attorneys, which is projected to impose a cost of at least \$1 million. These new roles are highly specialized, and it will take considerable time to identify qualified applicants, all done in competition with other institutions vying for a limited pool of candidates.

63. These staffing requirements come at a time when NYCDOE has imposed a hiring freeze due to the coronavirus pandemic and its economic fallout. As a result of the City of New

York's precarious fiscal situation, NYCDOE will certainly face hundreds of millions of dollars in annual budget reductions.

64. The Final Rule will require NYCDOE to train thousands of staff, including principals, assistant principals, and sexual harassment prevention liaisons on the new Title IX requirements in the Final Rule. NYCDOE will also have to ensure all staff and its 1.1 million students, and students' parents, are provided with information regarding the new Title IX policy. The uncertainty regarding when and how schools will re-open or when staff will return to schools and offices vastly complicates the planning of such a significant training effort.

I declare under penalty that the foregoing is true and correct and of my own personal knowledge.

DATED this 25th day of June 2020 at New York, New York.



LAURA BRANTLEY

EXHIBIT A



Regulation of the Chancellor

Number: A-830

Subject: ANTI-DISCRIMINATION POLICY AND PROCEDURES FOR FILING INTERNAL COMPLAINTS OF DISCRIMINATION

Category: STUDENTS

Issued: August 29, 2019

SUMMARY OF CHANGES

This regulation replaces and supersedes Chancellor's Regulation A-830 dated March 28, 2019.

Changes:

- Revises equal educational opportunity policy language to reflect that all students are to be provided with access to DOE programs, services, activities, and facilities. Section I.B.
- Revises equal educational opportunity policy language has been revised to explain what types of conduct and/or verbal or written acts may be considered discriminatory conduct or conduct that creates a hostile school environment. Section I.B.
- Clarifies that DOE programs, services, and activities are to be accessible to parents and others who do business with the DOE, use DOE facilities, or otherwise interact with the DOE. Section I.C.
- Streamlines description of procedures for filing complaints with the Office of Equal Opportunity and Diversity Management (OEO). Section III.A.
- Clarifies that the principal/designee should consider whether interim interventions/supports for a student are appropriate during an investigation pursuant to this regulation and provides examples of such interventions/supports, and clarifies that an employee's supervisor may also discuss the provision of such measures with OEO. Section III.A.
- Replaces "gender (sex)" with "gender" throughout.
- Updates definitions of protected classifications within Attachment No. 1. Attachment No. 1.
- Aligns language in the public notice of DOE's Anti-Discrimination Policy to align with language in the regulation. Attachment No. 2.

ABSTRACT

This regulation sets forth the New York City Department of Education's Anti-Discrimination Policy and establishes an internal review process for employees, applicants for employment, parents¹ of students, students, and others who do business with the DOE, use DOE facilities or otherwise interact with the DOE who wish to file complaints of unlawful discrimination or harassment by DOE employees based on a protected classification, or retaliation based on such complaints. Complaints of peer sexual harassment and harassment based on a protected classification, intimidation and/or bullying by one student against another may be filed in accordance with Chancellor's Regulation A-831, Student-to-Student Sexual Harassment, or Chancellor's Regulation A-832, Student-to-Student Discrimination, Harassment, Intimidation, and/or Bullying. Allegations of discrimination/harassment by students directed toward staff must be addressed in accordance with Chancellor's Regulation A-443 and the Citywide Behavioral Expectations to Support Student Learning (Discipline Code).

¹The term "parent," whenever used in this regulation, means the student's parent(s) or guardian(s), or any person(s) in a parental or custodial relationship to the student, or the student, if they are an emancipated minor or has reached 18 years of age.

I. POLICY

- A. It is the policy of the New York City Department of Education (DOE) to provide equal employment opportunities in accordance with applicable laws and regulations and without regard to actual or perceived race, color, religion, creed, ethnicity, national origin, alienage, citizenship status, age, marital status, partnership status, disability, sexual orientation, gender, military status, unemployment status, prior record of arrest or conviction, caregiver status, consumer credit history, predisposing genetic characteristics, or status as a victim of domestic violence, sexual offenses, or stalking.² It is also the policy of the DOE to maintain a workplace environment free of harassment on the basis of the above protected classifications, including sexual harassment, and to comply with all laws and provisions in the DOE's collective bargaining agreements prohibiting discrimination.

Accordingly, it is a violation of this policy for DOE employees to engage in behavior that subjects any employee or applicant for employment to discrimination and/or harassment on the basis of any of the above protected classifications where such conduct: (1) adversely affects any aspect of an employee's/applicant's employment or the compensation, terms, conditions or privileges of employment; or (2) creates a hostile, offensive, or intimidating work environment.

It is also a violation of this policy for DOE employees to engage in discriminatory behavior and/or harassment on the basis of any of the above protected classifications with respect to applicants for employment and other individuals who do business with the DOE, use DOE facilities or otherwise interact with the DOE.

- B. It is the policy of the DOE to provide equal educational opportunities, including ensuring that all students are provided access to DOE programs, services, activities, and facilities, in accordance with applicable laws and regulations and without regard to actual or perceived race, color, religion, age, creed, ethnicity, national origin, alienage, citizenship status, disability, sexual orientation, gender or weight.

It is also the policy of the DOE to maintain an educational environment free of harassment on the basis of any of the above protected classifications, including sexual harassment.²

² The definitions of the categories of unlawful discrimination are found in Attachment No. 1.

Accordingly, it is a violation of this policy for any DOE employee to discriminate against or create a hostile school environment for a student by conduct and/or verbal or written acts, whether on school property or at a school function, on the basis of any of the above-noted grounds where such behavior: (1) has or would have the effect of unreasonably and substantially interfering with a student's ability to participate in or benefit from an educational program, school-sponsored activity or any other aspect of a student's education; or (2) has or would have the effect of unreasonably and substantially interfering with a student's mental, emotional or physical well-being; or (3) reasonably causes or would reasonably be expected to cause a student to fear for their physical safety; or (4) reasonably causes or would be expected to cause physical injury or emotional harm to a student. It is also a violation of this policy for any DOE employee to engage in the behavior noted above off school property when such behavior creates or would foreseeably create a risk of disruption within the school environment.

Such conduct and/or verbal or written acts may include but are not limited to: denial of access to restrooms, changing rooms, locker rooms, and/or field trips on the basis of the above-noted protected classifications; enforcement of a dress code, specific grooming or appearance standards in a manner that discriminates against a student on any of the above noted protected classifications; or the use of name(s) or pronoun(s) or pronunciation of name(s) in a manner that discriminates against a student on any of the above-noted protected classifications (e.g., deliberately using a pronoun that is not consistent with the student's gender identity asserted in school).

- C. It is the policy of the DOE to ensure DOE programs, services, and activities are accessible to parents and others who do business with the DOE, use DOE facilities, or otherwise interact with the DOE without regard to actual or perceived race, color, religion, age, creed, ethnicity, national origin, alienage, citizenship status, disability, sexual orientation, gender, marital status, veteran or active military status.
- D. It is the policy of the DOE to prohibit retaliation against any individual who objects to discriminatory practices in the workplace, who complains of discrimination or harassment on the basis of any of the protected classifications as described in Section I.A, I.B, or I.C above, or who files or participates in the investigation of an internal or external complaint of discrimination. Any adverse act against individuals due to their participation in a protected activity is considered retaliatory.
- E. In order to develop and maintain a positive and supportive learning and working environment that is free of discrimination and harassment on the basis of any of the protected classifications as described in Sections I.A, I.B, or I.C above, retaliation and intimidation, the full cooperation of every staff member is necessary. Employees are expected to be exemplary role models in the schools and offices in which they serve.

- F. Supervisors³ are required to maintain an environment free of unlawful discrimination and harassment on the basis of any of the protected classifications as described in Section I.A and I.B above.
- G. Behavior which violates this policy may serve as a basis for discipline, even if it does not rise to the level of a violation of federal, state or local discrimination laws.
- H. An employee who violates this policy or the requirements of this regulation may be subject to discipline, which may include termination, or other appropriate follow-up action. Nothing in this regulation prevents a supervisor from counseling or disciplining an employee for inappropriate conduct that is not otherwise in violation of this policy.
- I. This policy applies to conduct and comments that constitute a violation of this policy, whether or not intentionally offensive or directed at a particular person or group.
- J. All DOE employees are expected to cooperate with any Office of Equal Opportunity and Diversity Management (OEO) investigations and are required to report if summoned to appear by OEO. Tampering with or impeding an OEO investigation constitutes a violation of this regulation and may result in disciplinary action.

II. REPORTING

- A. Any DOE employee who witnesses another DOE employee discriminate or harass a student on the basis of any of the protected classifications as described in Section I.B above, or who has knowledge or information or receives notice that a student may have been the victim of such behavior by a DOE employee, is required to orally report the alleged incident to the principal/designee within one school day. Within two school days of making the oral report, the reporting DOE employee also must electronically file a written complaint as set forth in Section III.A below. If the allegation is against the principal, the reporting DOE employee is not required to make an oral report to the principal but must electronically file a written complaint with OEO as set forth in Section III.A below.
- B. Any supervisor who becomes aware of actions by a DOE employee that may violate any provision of this regulation must immediately report such violation to OEO. Supervisors must make the report by electronically filing a written a complaint as set forth in Section III.A below. A supervisor's failure to file a complaint in accordance with this paragraph may constitute a violation of this regulation.
- C. Employees, applicants for employment, parents, students and others who do business with the DOE, use DOE facilities or otherwise interact with the DOE may

³ The term supervisor refers to DOE employees acting in a supervisory capacity with authority over the terms and conditions of employment. The term supervisor includes, but is not limited to, principals, assistant principals and site supervisors.

file complaints alleging a violation of this policy.

- D. Except as set forth in Sections II.A and II.B above, all complaints must be filed with OEO as soon as possible in order facilitate the prompt, thorough, and fair resolution of such complaints.
- E. OEO will not accept complaints filed more than one year after the event that is the subject of the complaint. However, complaints alleging discrimination, harassment, or retaliation committed against students are not subject to this one year limit.

III. COMPLAINT PROCEDURES

- A. Procedures for Filing Complaints
 - 1. Individuals may file complaints electronically by using the complaint form available at <https://www.nycenet.edu/oao>, or may file complaints by notifying OEO at the phone number or by visiting OEO at the address found at the end of this regulation.
 - 2. An individual may file an anonymous complaint alleging a violation of this regulation. OEO will review anonymous complaints to determine how they should be processed in light of the information provided.
 - 3. When a complaint is filed alleging discrimination or harassment of a student, the principal/designee should determine whether interim interventions/supports for the student are appropriate while the case is being investigated. Interim interventions and supports could include, but are not limited to, guidance interventions, counseling, assignment of an adult to check in with the student, change in schedule, or referral to the appropriate school support team or outside organization.
 - 4. When a complaint is filed alleging discrimination or harassment of an employee, the employee's supervisor may discuss with OEO whether interim interventions for the employee are appropriate while the case is being investigated.
- B. Procedures for Investigating Complaints
 - 1. Upon receipt of a complaint, OEO will determine whether the complaint articulates a violation of this regulation and, if so, will assign the complaint to an OEO investigator who shall conduct an investigation. If OEO believes that irreparable harm will occur before the complaint can be fully investigated and resolved, OEO may recommend interim relief pending completion of the investigation of the complaint.
 - 2. Following the investigation, OEO will submit written findings and a recommendation as to whether there has been a violation of this regulation to the Chancellor or their designee. The Chancellor/designee will issue a written determination as to whether there has been a violation of this regulation within 90 working days of OEO's receipt of the complaint, unless circumstances warrant extension of the time period. Complainant(s) and respondent(s) will be informed in writing of the determination.
 - 3. If the determination concludes that a violation of this regulation has occurred, OEO will confer with the respondent's supervisor to determine if

any disciplinary or corrective action is required.

4. OEO will ensure that any corrective action required by the written determination is implemented.

C. Confidentiality

It is the DOE's policy to respect the privacy of all parties and witnesses regarding complaints brought under this regulation. However, the need for confidentiality must be balanced against the obligation to cooperate with lawful investigations, to provide due process to the accused, and/or to take necessary action to conciliate, investigate, or resolve the complaint. Therefore, information regarding the complaint may need to be disclosed in certain appropriate circumstances.

D. False Accusations of Discrimination

An individual who knowingly makes a false accusation of discrimination or knowingly provides false information in the course of an investigation of a complaint, may be subject to discipline. A complaint made in good faith, even if found to be unsubstantiated, will not be considered a false accusation.

IV. DISSEMINATION OF THESE PROCEDURES

Notice of the DOE's Anti-Discrimination Policy and internal complaint procedures must be given to employees annually. In addition, each office and school must prominently post the DOE's Anti-Discrimination Policy (see Attachment No. 2), which provides contact information for OEO, and indicates where a copy of this regulation may be obtained.

In accordance with Chancellor's Regulation A-832, each school must distribute a copy of the Respect for All brochure annually to parents and students. This brochure informs students and parents of the DOE's Anti-Discrimination Policy and the procedures for students to file complaints of discrimination/harassment against DOE employees on the basis of any of the protected classifications as described in Section I.B above. Parents/students entering the school during the school year must receive a copy of the brochure upon registration.

V. ALTERNATIVE COMPLAINT PROCEDURES

These internal procedures do not deny the right of any individual to pursue other avenues of recourse, which may include filing charges with any of the external agencies noted below.

- U.S. Department of Education, Office for Civil Rights
- U.S. Equal Employment Opportunity Commission
- New York State Division of Human Rights
- New York City Commission on Human Rights

The time frames for filing with these agencies may vary. Where a complaint is filed with an external agency or a court of competent jurisdiction, OEO will transfer the matter to the DOE's Legal Office.

VI. INQUIRIES

Inquiries pertaining to this regulation should be addressed to:

Office of Equal Opportunity and Diversity Management

NYC Department of Education

65 Court Street

Brooklyn, NY 11201

Telephone: 718-935-3320

Fax: 718-935-2531

SUMMARY OF PROHIBITED DISCRIMINATION

Chancellor's Regulation A-830 sets forth the procedures by which employees, applicants for employment, students, parents and others who do business with the New York City Department of Education (DOE), use DOE facilities or otherwise interact with the DOE can raise and resolve claims of discrimination within the New York City public school system. The following information is intended to provide guidance to assist people in avoiding discriminatory practices but is not, however, exhaustive.

Alienage/Citizenship: actual or perceived immigration status or status as a citizen of a country other than the United States of America. It shall not be an unlawful discriminatory practice for any person to discriminate on the ground of alienage or citizenship status or to make inquiry as to a person's alienage or citizenship status or to give preference to a person who is a citizen or native of the United States when such preference is expressly permitted or required by a federal, city or state law or regulation.

Caregiver Status: actual or perceived status as a caregiver. The term caregiver means person who provides direct and ongoing care for a minor child or a care recipient. A care recipient is defined as a person with a disability who: (i) is a covered relative, or a person who resides in the caregiver's household; and (ii) relies on the caregiver for medical care or to meet the needs of daily living. A covered relative includes a caregiver's child, spouse, domestic partner, parent, sibling, grandchild or grandparent, or the child or parent of the caregiver's spouse or domestic partner, or any other individual in a familial relationship with the caregiver.

Consumer Credit History: an individual's credit worthiness, credit standing, credit capacity, or payment history. Employers may not request or use the consumer credit history of an applicant or employee for the purpose of making any employment decisions, including hiring, compensation, and other terms and conditions of employment unless expressly permitted or required by law or regulation.

Disability: actual or perceived disability, or history of disability. The term "disability" means any physical, medical, mental, or psychological impairment or history or record of such impairment, or a condition regarded by others as a disability. It is not discriminatory for an employer to require that any employee or applicant be able to perform the essential functions of a job with or without reasonable accommodation. If a person believes that they have a qualifying disability and is in need of a reasonable accommodation in order to fulfill the essential functions of their position, that person should contact the DOE's HR Connect Office of Medical, Leaves and Records or DOE's Disability Coordinator within the Office of Equal Opportunity and Diversity Management (OEO) for additional information.

Ethnicity/National Origin: actual or perceived national origin or ethnic identity. National origin is distinct from race/color or religion/creed because people of several races and religions or their

forbearers may come from one nation. The term “national origin” includes members of all national groups and groups of persons of common ancestry, heritage, or background; it also includes individuals who are married to or associated with a person or persons of a particular national origin.

Gender: actual or perceived gender, pregnancy, or conditions related to pregnancy or childbirth. The prohibition against gender discrimination includes sexual harassment. The term “gender” also includes a person’s actual or perceived gender identity and gender expression, meaning their self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth. Gender discrimination may include, but is not limited to, denial of access to restrooms, changing rooms, locker rooms, and/or DOE programs or activities on the basis of gender or the use of name(s) or pronoun(s) in a manner that discriminates (e.g., deliberately using a pronoun that is not consistent with the individual’s gender identity asserted in school, work, or other DOE program or activity).

Partnership Status: actual or perceived status of being in a registered domestic partnership.

Military Status: a person’s participation in the military service of the United States or the military service of the state, including but not limited to, the Armed Forces of the United States, the Army National Guard, the Air National Guard, the New York Naval Militia, the New York Guard and such additional forces as may be created by the federal or state government as authorized by law.

Predisposing Genetic Characteristic: any inherited gene or chromosome, or alteration thereof, determined by a genetic test or inferred from information derived from an individual or family member that is scientifically or medically believed to predispose an individual or the offspring of that individual to a disease or disability, or is associated with a statistically significant increased risk of development of a physical or mental disease or disability.

Prior Arrest/Conviction: record of prior arrests and convictions for criminal offenses. After the extension of a conditional offer, the DOE requires a background investigation, including fingerprint information, which is reviewed under Chancellor’s Regulation C-105 as well as any applicable laws and regulations.

Religion/Creed: actual or perceived religion or creed (set of fundamental beliefs, whether or not they constitute a religion). An employee requesting a reasonable accommodation for religious reasons should follow the procedures in Chancellor’s Regulation C-606. A student requesting a reasonable accommodation for religious reasons should follow the procedures in Chancellor’s Regulation A-630.

Sexual Harassment:

A. Sexual Harassment between Employees:

Sexual harassment of one employee by another consists of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Sexual harassment may take different forms, including explicit sexual propositions or threats, sexual innuendos, sexually suggestive comments, sexually oriented jokes, obscene gestures, displays of pornographic or obscene visual or printed material, and physical contact, such as touching, patting, pinching or brushing against another's body. These behaviors can constitute sexual harassment whether they are directed at persons of the same or opposite sex and may also constitute criminal behavior.

B. Sexual Harassment of Students by Employees:

OEO will forward complaints of this nature to the Special Commissioner of Investigations who will determine how to proceed.

Sexual conduct between an adult employee and a student can never be considered welcome or appropriate. Sexual harassment of a student by an employee consists of sexual advances, requests for sexual favors and other verbal and physical conduct of a sexual nature. It includes situations where:

1. submission to such conduct is a condition of the student's advancement or obtaining an education;
2. submission to or rejection of such conduct by a student is used as a basis for evaluating or grading a student or as a factor in decisions affecting the student's education; or
3. such conduct has the purpose or effect of unreasonably interfering with a student's education or creating an intimidating, hostile or offensive educational environment.

Sexual harassment may take different forms, including explicit sexual propositions or threats, sexual innuendos, sexually suggestive comments, sexually oriented jokes, obscene gestures, displays of pornographic or obscene visual or printed material, and physical contact, such as touching, patting, pinching or brushing against another's body. These

behaviors can constitute sexual harassment whether they are directed at persons of the same or opposite sex and may also constitute criminal behavior.

C. Sexual Harassment of Students by Students:

Please refer to Chancellor's Regulation A-831: Student-to-Student Sexual Harassment.

Sexual Orientation: an individual's actual or perceived romantic, physical or sexual attraction to other persons, or lack thereof, on the basis of gender. A continuum of sexual orientation exists and includes, but is not limited to, heterosexuality, homosexuality, bisexuality, asexuality, and pansexuality.

Unemployment Status: The term unemployment means not having a job, being available for work and seeking employment. However, there are allowances in the law that permit an employer to consider an applicant's unemployment when there is a substantially-job related reason for doing so or to inquire into the circumstances surrounding an applicant's separation from prior employment.

Victim of Domestic Violence, Sexual Offenses, or Stalking: An actual or perceived victim of domestic violence is a person who has been subjected to acts or threats of violence, not including acts of self-defense, committed by a current or former spouse of the victim, by a person who is cohabitating with or who has cohabitated with the victim, by a person who is or has been in a continuing social relationship of a romantic or intimate nature or a person who is or has continuously or at regular intervals lived in the same household as the victim.

An actual or perceived victim of sex offenses or stalking is a person who has been subjected to such behavior as defined by the penal code.

An employee may request a reasonable accommodation due to their status as an actual or perceived victim of domestic violence, sex offenses or stalking in order to fulfill the essential requests of a job. The employee may be asked to provide certification that they are a victim of domestic violence, sex offenses or stalking. An employee requesting the reasonable accommodation shall provide a copy of such certification within a reasonable period after the request is made. The certification requirement may be satisfied by providing a police or court record, documentation from an employee, agent, or volunteer of a victim services organization, an attorney, a member of the clergy, or a medical or other professional service provider that the employee or that employee's family or household member sought assistance as an actual or perceived victim of domestic violence, sex offenses, or stalking and/or the effects of the violence or stalking; or other information consistent with the employee's disclosure and the request for accommodation.



PUBLIC NOTIFICATION OF ANTI-DISCRIMINATION POLICY

It is the policy of the New York City Department of Education (DOE) to provide equal employment opportunities in accordance with applicable laws and regulations and without regard to actual or perceived race, color, religion, creed, ethnicity, national origin, alienage, citizenship status, age, marital status, partnership status, disability, sexual orientation, gender, military status, unemployment status, prior record of arrest or conviction, caregiver status, consumer credit history, predisposing genetic characteristics, or status as a victim of domestic violence, sexual offenses, or stalking, and to maintain an environment free of harassment on any of the above protected classifications, including sexual harassment and retaliation.

It is the policy of the DOE to provide equal educational opportunities in accordance with applicable laws and regulations and without regard to actual or perceived race, color, religion, age, creed, ethnicity, national origin, alienage, citizenship status, disability, sexual orientation, gender, or weight and to maintain an environment free of harassment on the basis of any of the above protected classifications, including sexual harassment and retaliation.

This policy is in accordance with Title VI and Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Age Discrimination in Employment Act of 1967, Section 503 and Section 504 of the Rehabilitation Act of 1973, Fair Labor Standards Amendments of 1974, Immigration Reform and Control Act of 1986, The Americans with Disabilities Act of 1990, Civil Rights Act of 1991, New York State and City Human Rights Laws and Provisions of Anti-Discrimination in Collective Bargaining Agreements of the Department of Education of the City of New York.

Chancellor's Regulation A-830 sets forth the procedures for employees, parents of students, students and others who do business with, use DOE facilities or otherwise interact with the DOE to file complaints of unlawful discrimination, harassment by DOE employees or retaliation based upon such complaints. Complaints may be filed by contacting the Office of Equal Opportunity and Diversity Management (OEO) or by filing with one of the agencies identified below. A copy of Chancellor's Regulation A-830 may be obtained from OEO or at www.nyc.gov/schools/oed/.

DOE Resources:

Main Office:	Questions regarding Title IX compliance should be referred to:	Questions regarding Section 504 accommodations should be referred to:
Office of Equal Opportunity and Diversity Management New York City Department of Education 65 Court Street Brooklyn, New York 11201 Tel: 718-935-3320 Fax: 718-935-2531	Title IX Coordinator 65 Court Street Brooklyn, NY 11201 Tel: 718-935-3320 Title IX Inquiries@schools.nyc.gov	Section 504 Coordinator 504Accommodations@schools.nyc.gov

External Resources:

- U.S. Equal Employment Opportunity Commission, New York District Office – 33 Whitehall Street 5th Floor, New York, NY 10004 – 212-336-3620
- Office for Civil Rights, New York Office U.S. Department of Education – 32 Old Slip, 26th Floor, New York, NY 10005-2500 – 646-428-3900
- New York State Division of Human Rights – 1 Fordham Plaza – 4th floor, Bronx, NY 10458 – 718-741-8400
- New York City Commission on Human Rights – 22 Reade Street – 1st floor, New York, NY 10007 – 212-306-7450

EXHIBIT B



Regulation of the Chancellor

Number: A-831

Subject: STUDENT-TO-STUDENT SEXUAL HARASSMENT

Category: STUDENTS

Issued: October 23, 2019

SUMMARY OF CHANGES

This regulation supersedes and replaces Chancellor's Regulation A-831 dated October 12, 2011.

This regulation establishes a procedure for the filing, investigation, and resolution of complaints of student-to-student sexual harassment at the school level.

Changes:

Clarifies the language in New York City Department of Education's policy regarding student-to-student sexual harassment and retaliation. (Section I)

- Provides that sexual harassment is prohibited off school property when it disrupts or would foreseeably disrupt the educational process or endangers or would foreseeably endanger the health, safety, morals, or welfare of the school community. (Section I.B)
- Clarifies that any adverse act against individuals due to their participation in reporting or investigation of student-to-student sexual harassment is considered retaliatory. Retaliation will be investigated and subject to appropriate disciplinary action if substantiated. (Section I.C)
- Clarifies that sexual harassment may be a single incident or a series of related incidents. (Section I.D)
- Defines electronically communicated sexual harassment and provides examples which includes social media, blogs, chat rooms, and gaming systems. (Section I.E)
- Expands the examples of sexually harassing behavior to include telling lies or spreading rumors of a sexual nature, stalking through the use of technology, leering, sexual flirtations, and pinching, among others. (Section I.F)
- Eliminates definitions section.
- Defines "report" as used in this regulation to mean a report of alleged student-to-student sexual harassment reported by the alleged victim or others (e.g., staff, parents, other students). (Section II.A)
- Clarifies that each principal designate at least one (1) staff member to serve as the Sexual Harassment Prevention liaison to whom reports of student-to-student sexual harassment can be made and who serves as a resource for students and staff. The Sexual Harassment Prevention liaison must be a licensed administrator, supervisor, teacher, guidance

counselor, school psychologist, or social worker who works at the school full-time. (Section II.B)

- Adds that the Sexual Harassment Prevention liaison must receive training. In the event a Sexual Harassment Prevention liaison vacates their appointment, the principal must ensure that a Sexual Harassment Prevention liaison has been appointed and received such training within 30 days. In the interim, the principal must immediately designate an interim Sexual Harassment Prevention liaison. (Section II.B.1)
- Requires that in the event a Sexual Harassment Prevention liaison is temporarily unable to perform their duties in the school for an extended period of time, the principal must designate another person to serve on an interim basis until the Sexual Harassment Prevention liaison returns. (Section II.B.2)
- Adds that any staff member who witnesses student-to-student sexual harassment or who has knowledge or information or receives notice that a student may have been the victim of sexual harassment by another student is required to promptly verbally report the alleged act within one (1) school day and submit the written Complaint/Reporting form describing the incident no later than two (2) school days after making the verbal report. The principal/designee must ensure that hard copies of the reporting forms are readily available. (Section II.C)
- Revises and replaces complaint form attachment with hyperlink/url to Complaint/Reporting form. (Section II.C and D)
- Adds that reports of student-to-student sexual harassment may be done verbally or in writing, including by submitting the Complaint/Reporting form, to the principal/designee, Sexual Harassment Prevention liaison, or to any other school staff member, or via the online portal. Hyperlink/url to online portal also added. (Section II.D)
- Adds that students, parents, and individuals other than staff may make an anonymous report, and such reports will be investigated and addressed to the extent possible in light of the information provided by the anonymous reporter. (Section II.G)
- Requires that the Sexual Harassment Prevention liaison immediately report all reports of student-to-student sexual harassment to the principal/designee. (Section II.H)
- Clarifies that all written reports (e.g., emails, reports made using the Complaint/Reporting form) must be maintained in the investigative file at the school. (Section II.I)
- Requires that all reports of sexual harassment must be entered into the Online Occurrence Reporting System (OORS) within one school day (1) of receipt of the report of sexual harassment. (Section II.J)
- Requires that the principal/designee must advise the parent(s) of the alleged victim and the accused student of the allegations whenever a report is received. Such notifications must be made immediately but no later than two (2) school days following receipt of the report by the principal/designee. (Section II.K)
- Adds that if the alleged victim informs the principal/designee of safety concerns in regard to such notification, the principal/designee shall decide whether to inform the alleged

victim's parent(s) following consideration of privacy and safety concerns. The principal/designee may consult with Senior Field Counsel in making this decision. (Section II.K)

- Clarifies that where the alleged conduct constitutes criminal activity, the principal/designee must also contact the police, and may consult with the Senior Field Counsel and/or the Borough/Citywide Office, Director of Student Services. (Section II.L)
- Adds that if the report cannot be investigated at the school level due to the nature and seriousness of the allegation(s), the principal/designee must consult with the Department of Education's Title IX Coordinator. (Section II.M)
- Clarifies that principal/designee must investigate reports of student-to-student sexual harassment within five (5) school days of receipt of the report. (Section III.A)
- Provides that all parties and all witnesses must be interviewed separately when the principal/designee conducts an investigation, that any investigative notes must be maintained, and that the date of each interview must be documented. (Section III.A)
- Adds that as part of the investigation, relevant evidence must be obtained (e.g., video surveillance) and to refer to the guidance on how to deal with inappropriate cyber-content, and consult with the Borough Safety Director and Senior Field Counsel, if necessary. (Section III.A.6)
- Requires that at the conclusion of the investigation, the principal/designee must review all the evidence and determine whether the allegations are substantiated by a preponderance of the evidence. (Section III.B)
- Clarifies that the principal/designee must determine whether the alleged conduct constitutes a violation of this regulation. (Section III.C)
- Adds further examples of factors to consider in making a determination whether a violation of this regulation occurred, such as, whether conduct adversely affected the victim's education, behavior, social interactions, mental and emotional well-being, and whether concerns expressed about victim's safety. (Section III.C)
- Requires that at the conclusion of the investigation, the principal/designee must enter the following information into Online Occurrence Reporting System: the investigative findings; a determination of whether the allegations have been substantiated; and a determination of whether the conduct constitutes a violation of this regulation. This information must be entered into Online Occurrence Reporting System within ten (10) school days of receipt of the report of alleged student-to-student sexual harassment, absent extenuating circumstances. A copy of the Online Occurrence Reporting System report must be sent to the Title IX Coordinator and the Borough/Citywide Office, Director of Student Services. (Section III.D)
- Requires that within ten (10) school days of receipt of a report of sexual harassment, absent extenuating circumstances, parents must be notified in writing whether the complaint has been substantiated and whether the behavior constitutes a violation of this regulation. (Section III.E)

- Adds that if at any time before or during the course of the investigation, it is determined interventions and supports are appropriate before the final outcome of the investigation, parents must be notified and appropriate interventions and supports should be implemented. (Section III.G)
- Requires that interventions and supports must be provided, where appropriate, to the alleged victim, the accused student, and witnesses. (Section IV.B)
- Provides additional examples of interventions and supports including referral to medical services, academic supports and adjustments (e.g., change in classes, lunch/recess, or after-school program schedules), development of individual support plan, or safety transfer pursuant to Chancellor's Regulations. (Section IV.B)
- Requires that an individual support plan be developed and implemented for a student who has been the victim of two or more substantiated violations of this regulation in the same school year and/or for a student who has been found to have violated this regulation two or more times in the same school year. (Section IV.B)
- Requires that once the investigation is completed and a determination is made, interventions and supports must be provided to the victim and the accused student, and witnesses, where appropriate. Such interventions and supports must be assessed on a case-by-case basis and must be monitored and modified, as appropriate. (Section IV.B)
- Clarifies that students who have been found to have violated this regulation will be subject to appropriate disciplinary responses in accordance with the Discipline Code and the procedures and requirements set forth in Chancellor's Regulation A-443. (Section IV.D)
- Provides that the principal/designee must enter into the Suspensions and Office of Hearings Online system through OORS all interventions and supports offered to the parties and witnesses and all disciplinary responses taken with respect to the student(s) found to have engaged in prohibited conduct. (Section IV.E)
- Added the word "Prevention" to section heading. (Section V)
- Eliminates and replaces attachment for sample notice with hyperlink/url to written materials prepared by Office of Safety and Youth Development. (Section V.A)
- Revises and replaces brochure attachment with hyperlink/url to notice prepared by Office of Safety and Youth Development. Parents and students entering the school during the school year must receive a copy upon enrollment. (Section V.B)
- Clarifies that neither mediation nor conflict resolution is under any circumstances an appropriate intervention for any conduct that violates this regulation and references the Discipline Code and Chancellor's Regulations A-101 and A-449 for additional information on interventions and supports and the policies and procedures for obtaining a transfer. (Section IV.B)
- Requires that the name and contact information of the Sexual Harassment Prevention liaison is included on the school's website. (Section V.C)

- Clarifies that non-instructional staff must be provided with information and training on this regulation. (Section V.D)
- Provides that each principal must receive training on identifying and preventing sexual harassment (including sexual violence), anti-discrimination policies and laws, grievance procedures, and resources available to the parties. (Section V.E)
- Provides that each principal must ensure that the individual designated by the principal to conduct the investigation and the Sexual Harassment Prevention liaison has received training on identifying and preventing sexual harassment and discrimination. (Section V.E)
- Provides that the Consolidated School and Youth Development Plan must state the name(s) of the Sexual Harassment Prevention liaison(s). (Section VI.A)
- Requires that the Consolidated School and Youth Development Plan must also certify that this regulation has been discussed with non-instructional staff. (Section VI.B)
- Requires that the Consolidated School and Youth Development Plan must certify and indicate the date by which the principal, the Sexual Harassment Prevention liaison, and the individual designated to conduct investigations have received training. (Section VI.C)
- Provides that confidentiality must be balanced against the obligation to cooperate with police investigations to provide due process, and/or to take necessary action to investigate or resolve the complaint. (Section VII)
- Provides information for filing an external complaint of student-to-student sexual harassment. (Section VIII)
- Adds contact information for the New York City Department of Education's Title IX Coordinator and hyperlinks/urls to Title IX website. (Section IX)
- Updates names of offices.

Number: **A-831**

Subject: **STUDENT-TO-STUDENT SEXUAL HARASSMENT**

Category: **STUDENTS**

Issued: **October 23, 2019**

ABSTRACT

It is the policy of the New York City Department of Education (DOE) to maintain a safe and supportive learning and educational environment that is free from sexual harassment committed by students against other students. Such harassment is prohibited and will not be tolerated in school, during school hours, before or after school, while on school property, at school-sponsored events, or while traveling on vehicles funded by the DOE or off school property when such behavior disrupts or would foreseeably disrupt the educational process or endangers or would foreseeably endanger the health, safety, morals, or welfare of the school community. This regulation requires the designation of a Sexual Harassment Prevention liaison, as defined below, trained on this regulation and who will receive reports of student-to-student sexual harassment. This regulation sets forth reporting, investigative, notification, and follow-up procedures for student-to-student sexual harassment. Students who have engaged in behavior which violates this regulation will receive interventions, supports, and disciplinary responses, as appropriate consistent with the Citywide Behavioral Expectations to Support Student Learning (Discipline Code) and Chancellor's Regulation A-443. Victims and witnesses will receive interventions and supports as appropriate. For complaints of student-to-student discrimination (including discrimination based on gender, gender identity, gender expression, and sexual orientation), harassment, intimidation and/or bullying, please refer to Chancellor's Regulation A-832.

I. POLICY

- A. It is the policy of the DOE to maintain a safe and supportive learning and educational environment that is free from sexual harassment committed by students against other students. It is a violation of this regulation for a student to harass another student through unwelcome conduct or communication of a sexual nature which is sufficiently severe, pervasive, or persistent as to: (1) substantially interfere with a student's ability to participate or benefit from an educational program, school-sponsored activity, or any other aspect of a student's education; (2) create a hostile, offensive, or

intimidating school environment; or (3) otherwise adversely affect a student's educational opportunities.

- B. Sexual harassment is prohibited in school, during school hours, before or after school, while on school property, at school-sponsored events, or while traveling on vehicles funded by the DOE or off school property when it disrupts or would foreseeably disrupt the educational process or endangers or would foreseeably endanger the health, safety, morals, or welfare of the school community.
- C. It is the policy of the DOE to prohibit retaliation against any student, parent, or DOE employee who in good faith reports or participates in an investigation of allegations of student-to-student sexual harassment. Any adverse act against individuals due to their participation in such protected activity is considered retaliatory. Retaliation will be investigated and subject to appropriate disciplinary action if substantiated. The term "parent" whenever used in this regulation, means the student's parent(s) or guardian(s), or any person(s) in a parental or custodial relationship to the student, or the student, if the student is an emancipated minor or has reached 18 years of age.
- D. Student-to-student sexual harassment is unwelcome conduct and/or communication of a sexual nature by a student directed against another student. Such behavior can constitute sexual harassment regardless of the gender, sexual orientation, gender identity, or gender expression of any of the students involved. Sexual harassment may be a single incident or a series of related incidents.
- E. Student-to-student sexual harassment may take many forms. It may be verbal, nonverbal, physical, written, or electronically communicated. Electronically communicated harassment includes communications via information technology including, but not limited to: Internet; cell phone; email; personal digital assistant; wireless handheld device; social media; and blogs.
- F. Sexual harassment includes but is not limited to:
 - pressure or requests for sexual activity or favors;
 - engaging in sexually violent or coercive behavior (e.g., assault, rape) or forcing a person to perform a sexual act;
 - engaging in physical conduct of a sexual nature such as touching an individual's body or clothes, patting, kissing, pinching, grabbing, or brushing up against another person;
 - making sexual comments, innuendoes, remarks, insults, threats, teasing and/or jokes or asking unwelcome questions of a sexual nature;
 - making graphic, verbal, or written comments about an individual's body;
 - making obscene gestures;
 - stalking another person, including through the use of technology;
 - leering, sexual flirtations, or propositions;
 - spreading lies or rumors of a sexual nature;

- recording, posting, displaying, and/or distributing, without permission, sexually oriented or suggestive images, videos, audio recordings, pictures, or drawings; and
- threatening or engaging in physical, sexual, verbal and/or emotional abuse to harm, intimidate or control a current or former or potential dating partner (dating abuse).

II. REPORTING PROCEDURES

- A. "Report" as used in this regulation means a report of alleged student-to-student sexual harassment reported by the alleged victim or others (e.g., staff, parents, other students).
- B. Each principal must designate at least one (1) staff member to serve as a Sexual Harassment Prevention (SHP) liaison to whom reports of student-to-student sexual harassment can be made and who serves as a resource for students and staff. The SHP liaison must be a licensed administrator, supervisor, teacher, guidance counselor, school psychologist, or social worker who works at the school full-time.
 1. At all times, there must be an SHP liaison in the school who has received the training set forth in Section V.D. In the event an SHP liaison vacates their appointment, the principal must ensure that an SHP liaison has been appointed and received such training within 30 days. In the interim, the principal must immediately designate an interim SHP liaison.
 2. In the event an SHP liaison is temporarily unable to perform their duties in the school for an extended period of time, the principal must designate another person to serve on an interim basis until the SHP liaison returns.
- C. Any staff member who witnesses student-to-student sexual harassment or who has knowledge or information or receives notice that a student may have been the victim of sexual harassment by another student is required to promptly verbally report the alleged act to the SHP liaison or to the principal/designee within one (1) school day and submit the [Complaint/Reporting form](https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/a-831-reporting-form.pdf?sfvrsn=43ca449) (available at <https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/a-831-reporting-form.pdf?sfvrsn=43ca449>) describing the incident to the SHP liaison or to the principal/designee no later than two (2) school days after making the verbal report. The principal/designee must ensure that hard copies of the reporting forms are readily available.

- D. Students, parents, and individuals other than staff may report allegations of student to-student sexual harassment verbally or in writing, including by submitting the [Complaint/Reporting form](https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/a-831-reporting-form.pdf?sfvrsn=43ca449) (available at <https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/a-831-reporting-form.pdf?sfvrsn=43ca449>), to the principal/designee, SHP liaison, or any other school staff member, or via the [online portal](https://www.nycenet.edu/bullyingreporting) (available at <https://www.nycenet.edu/bullyingreporting>).
- E. Students who believe they have been the victim of sexual harassment by another student or who witness or have information of such incidents should immediately report the incident.
- F. If a student or parent has concerns about making a report to the school, the student/parent may contact the Office of Safety and Youth Development (OSYD) by e-mailing the report to RespectForAll@schools.nyc.gov. Examples of circumstances where this might be appropriate include: if the student/parent is not sure the behavior is covered by the regulation; if the student/parent previously made a report and the behavior has continued; or if the student/parent is concerned about coming forward. In such circumstances, OSYD will determine the appropriate follow-up action consistent with this regulation.
- G. Students, parents, and individuals other than staff may make an anonymous report, and such reports will be investigated and addressed pursuant to the procedures set forth in this regulation to the extent possible in light of the information provided by the anonymous reporter.
- H. The SHP liaison must immediately notify the principal/designee of any report received.
- I. The principal/designee must ensure that all written reports (e.g., emails, reports made using the [Complaint/Reporting form](https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/a-831-reporting-form.pdf?sfvrsn=43ca449) (available at <https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/a-831-reporting-form.pdf?sfvrsn=43ca449>) are maintained in the investigative file at the school.
- J. The principal/designee must enter all reports into the Online Occurrence Reporting System (OORS) within one (1) school day of receipt of the report and promptly investigate as set forth in Section III.
- K. The principal/designee must advise the parent(s) of the alleged victim and the accused student of the allegations whenever a report is received. Such notifications must be made immediately but no later than two (2) school days following receipt of the report by the principal/designee. If the alleged victim informs the principal/designee of safety concerns in regard to such notification, the principal/designee shall decide whether to inform the alleged victim's parent(s) following consideration of privacy and safety concerns. The principal/designee may consult with their Senior Field Counsel in making this decision.

- L. Where the principal/designee believes that the alleged conduct constitutes criminal activity, they must contact the police. The principal/designee may consult with their Senior Field Counsel and/or the Borough/Citywide Office, Director of Student Services.
- M. If the report cannot be investigated at the school level due to the nature and seriousness of the allegation(s), the principal/designee must consult with the DOE's Title IX Coordinator.

III. INVESTIGATION

- A. All reports must be investigated. All parties and all witnesses must be interviewed separately, any investigative notes must be maintained, and the date of each interview must be documented. The principal/designee must take the specific investigative steps set forth below as soon as practicable, but no later than five (5) school days after receipt of the report:
 - 1. interview the alleged victim;
 - 2. ask the alleged victim to prepare a written statement which includes as much detail as possible, including a description of the behavior, when and where it took place and who may have witnessed it;
 - 3. interview the accused student, and advise them that if the conduct has occurred, it must cease immediately;
 - 4. ask the accused student to prepare a written statement;
 - 5. interview any witnesses and obtain their written statements; and
 - 6. obtain any relevant evidence (e.g., image(s) or video surveillance or audio recordings, where applicable). The principal/designee should refer to the DOE guidance on how to deal with inappropriate cyber-content, and should consult with the Borough Safety Director and Senior Field Counsel, if necessary.
- B. At the conclusion of the investigation, the principal/designee must review all the evidence and determine whether the allegations are substantiated by a preponderance of the evidence (i.e., whether based upon a review of all of the evidence, including the quality of the evidence and the credibility of the parties and witnesses, it is more likely than not that the alleged conduct occurred).
- C. If the allegations are substantiated, the principal/designee must also determine whether the conduct violates this regulation. In making this determination, the principal/designee must evaluate the totality of the circumstances surrounding the conduct. The principal/designee should consider a number of factors, which may include but are not limited to:
 - the ages of the parties involved;

- the nature, severity and scope of the behavior;
 - whether the conduct is sexual in nature;
 - whether the conduct is offensive;
 - whether the conduct is unwelcome;
 - the frequency and duration of the behavior;
 - the number of persons involved in the behavior;
 - the context in which the conduct occurred;
 - where the conduct occurred;
 - whether there have been other incidents in the school involving the same students;
 - whether the conduct adversely affected the victim's education, including attendance, academic performance, or participation in extracurricular activities;
 - whether the conduct has affected the victim's behavior or social interactions in school;
 - whether concerns have been expressed about the victim's safety; and
 - whether the victim's mental, emotional, or physical well-being have been impacted.
- D. At the conclusion of the investigation, the principal/designee must enter the following information into OORS: the investigative findings; a determination of whether the allegations have been substantiated; and a determination of whether the conduct constitutes a violation of this regulation. This information must be entered into OORS within ten (10) school days of receipt of the report of alleged student-to-student sexual harassment, absent extenuating circumstances. A copy of the OORS report must be sent to the Title IX Coordinator and the Borough/Citywide Office, Director of Student Services.
- E. The principal/designee must advise the parent(s) of the alleged victim and the parent(s) of the accused student in writing whether any allegations are substantiated and whether the conduct constitutes a violation of this regulation. If any of the allegations are substantiated, this notice must also advise the parents to contact the school to discuss the incident and any follow-up action and the availability of interventions and supports for their child, where applicable. Parents must be advised within ten (10) school days of receipt of the report, absent extenuating circumstances. If a decision was made not to notify the parents of the alleged victim as set forth in Section II.K, such parents shall also not be advised of the information set forth in this paragraph.
- F. The information set forth in Section III.E shall be provided in accordance with state and federal laws protecting the confidentiality of student record information. Therefore, the parents of the alleged victim may only be notified of any follow-up action, interventions or supports that pertain to the alleged victim and the parents of the accused student may only be notified of any follow-up action, interventions or supports that pertain to the accused student.

- G. If at any time before or during the course of the investigation, the principal/designee determines that interventions and supports are appropriate before the final outcome of an investigation to ensure the safety or the well-being of a student (including the victim, the accused student and any witnesses), the student's parent must be notified, and appropriate interventions and supports should be implemented and monitored, and modified where appropriate, as set forth in Section IV.B.

IV. FOLLOW-UP ACTION

- A. The principal/designee must take immediate steps and appropriate follow-up action to ensure that the conduct has stopped.
- B. Once the investigation is completed and a determination is made, as set forth in Section III, interventions and supports must be provided to the victim and the accused student, and witnesses, where appropriate. Such interventions and supports must be assessed on a case-by-case basis and must be monitored and modified, as appropriate. Interventions and supports include but are not limited to the following:
- Referral to in-school or out-of-school medical services;
 - Referral to the school social worker, guidance counselor, psychologist, or other appropriate school staff, or referral to community-based agencies for counseling, support, and/or education or mental health services;
 - Academic supports and adjustments (e.g., change in classes, lunch/recess, or after-school program schedules); and
 - Development of an individual support plan (an individual support plan must be developed and implemented for a student who has been the victim of two or more substantiated violations of this regulation in the same school year and/or for a student who has been found to have violated this regulation two or more times in the same school year).

Additional information about supports and interventions can be found in the Discipline Code. Neither mediation nor conflict resolution is under any circumstances an appropriate intervention for any conduct that violates this regulation. (Also see Chancellor's Regulation A-101 and A-449 which set forth the policies and procedures for obtaining a transfer if a transfer may be appropriate).

- C. When one student uses a pattern of threatened or actual physical, sexual, and/or emotional abuse to control a dating partner or in cases of sexual violence, the school should refer the victim and the accused student to separate appropriate school or community-based agencies for counseling, support, and education.

- D. Students who have been found to have violated this regulation will be subject to appropriate disciplinary responses in accordance with the Discipline Code and the procedures and requirements set forth in Chancellor's Regulation A-443.
- E. The principal/designee must enter all interventions and supports offered to the parties and witnesses and all disciplinary responses taken with respect to the student(s) found to have engaged in the prohibited conduct into the Suspensions and Office of Hearings Online system (SOHO) through OORS.

V. PREVENTION, NOTIFICATION and TRAINING

- A. Each school must conspicuously post a copy of the notice prepared by OSYD (available at <https://www.schools.nyc.gov/school-life/policies-for-all/respect-for-all/respect-for-all-handouts>) explaining the DOE's policy with respect to student-to-student sexual harassment in a place accessible to students, parents, and staff. This notice must contain the name of the SHP liaison designated to receive reports of sexual harassment and must indicate where in the school copies of this regulation may be obtained and how to file a report.
- B. Each school must annually distribute or make electronically available the written materials prepared by OSYD (available at <https://www.schools.nyc.gov/school-life/policies-for-all/respect-for-all/respect-for-all-handouts>) highlighting the procedures and policies set forth in this regulation, including the procedures for how to make a report to all school staff, parents and students. Parents/students entering the school during the school year must receive this information upon enrollment.
- C. Each principal/designee must ensure that the name and contact information of the SHP liaison are included on the school's website and shared with students and parents at least once per year, including but not limited to through electronic communication or sending such information home with students.
- D. Each principal/designee must ensure that students and staff (including non-instructional staff) have been provided with information and training on the policy and procedures set forth in this regulation by October 31 of each school year.
- E. Each principal must receive training on identifying and preventing sexual harassment (including sexual violence), anti-discrimination policies and laws, grievance procedures, and resources available to the parties involved by October 31 of each school year. Each principal must ensure that the individual designated to conduct the investigation described in Section III has also received such training by October 31 of each school year.
- F. Each principal must ensure that, in addition to the school training set forth in Section V.D, the SHP liaison completes the SHP mandated training developed by OSYD.
- G. A copy of this regulation must be made available to parents, school staff, and students upon request.

VI. CONSOLIDATED SCHOOL AND YOUTH DEVELOPMENT PLAN

Each principal must submit the following information in its annual Consolidated School and Youth Development Plan by October 31 of each school year:

- A. The name(s) of the SHP liaison(s). This information must be updated as appropriate.
- B. Certification that the policies and procedures set forth in this regulation have been discussed with students and staff (including non-instructional staff); and
- C. Certification and date that the principal, the SHP liaison, and the individual designated to conduct investigations as set forth in Section III have received the training required by this regulation.

VII. CONFIDENTIALITY

It is the policy of the DOE to respect the privacy of all parties and witnesses to reports made under this regulation. However, the need for confidentiality must be balanced against the obligation to cooperate with police investigations, to provide due process, and/or to take necessary action to investigate or resolve the report. Therefore, information regarding the report may be disclosed in appropriate circumstances or as required by law or where necessary to protect a student whose safety or well-being is at risk.

VIII. ALTERNATE REPORTING PROCEDURE

These internal procedures do not deny the right of any individual to pursue other avenues of recourse, which may include filing charges with an external agency such as:

Office for Civil Rights

New York Office

32 Old Slip, 26th Floor

New York, NY 10005-2500 Telephone:

(646) 428-3800

Facsimile: (646) 428-3843

OCR.NewYork@ed.gov

<http://www.ed.gov/ocr>

IX. INQUIRIES

Inquiries pertaining to this regulation should be addressed to:

Office of School and Youth Development

NYC Department of Education

52 Chambers Street – Room 218

New York, NY 10007

Telephone: (212) 374-6807

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Facsimile: (212) 374-5751

RespectForAll@schools.nyc.gov

Title IX Coordinator

[Title IX Inquiries@schools.nyc.gov](mailto:Title_IX_Inquiries@schools.nyc.gov)

Telephone: (718) 935-4987

EXHIBIT C

A-832 STUDENT-TO-STUDENT DISCRIMINATION, HARASSMENT, INTIMIDATION AND/OR BULLYING
10/23/2019



Regulation of the Chancellor

Number: **A-832**

Subject: **STUDENT-TO-STUDENT DISCRIMINATION, HARASSMENT, INTIMIDATION AND/OR BULLYING**

Category: **STUDENTS**

Issued: **October 23, 2019**

SUMMARY OF CHANGES

This regulation supersedes Chancellor's Regulation A-832, dated August 21, 2013. It establishes a procedure for the filing, investigation, and resolution of complaints of student-to-student discrimination, harassment, intimidation, and/or bullying.

Changes

- Clarifies the language in the Department of Education's ("DOE's") policy with respect to student-to-student discrimination, harassment, intimidation and/or bullying. (Section I. A-F)
- Clarifies the DOE's policy regarding retaliation and that any adverse act against individuals due to their participation in the reporting or investigation of student-to-student discrimination, harassment, intimidation and/or bullying is considered retaliatory. Retaliation will be investigated and subject to appropriate disciplinary action. (Section I. B)
- Clarifies the definition of bullying and harassment. (Section I.E)
- Clarifies that discrimination, harassment, intimidation and/or bullying may be a single incident or a series of related incidents. (Section I.F)
- Expands the examples of behavior which may constitute discrimination, harassment, intimidation and/or bullying. (Section I.F.2)
- Clarifies that the Respect for All ("RFA") liaison must be a licensed administrator, supervisor, teacher, guidance counselor, school psychologist, or social worker who works in the school full-time. (Section II. B)
- Updates the Complaint/Reporting form for making a written report of alleged student-to-student discrimination, harassment, intimidation and/or bullying and replaces Attachment 2 with a hyperlink/url. (Section II.C)
- Provides that the principal/designee must ensure that hard copies of the Complaint/Reporting form are readily available. (Section II.C)
- Provides that students, parents, and individuals other than staff may report student-to-student discrimination, harassment, intimidation and/or bullying verbally or in writing, including by submitting the Complaint/Reporting form, to the principal/designee, RFA liaison, or any other school staff member, or via the online portal. (Section II.D)

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- Clarifies that students who believe that they have been the victim of discrimination, harassment, intimidation and/or bullying by another student or who witness or have information about such incidents should immediately report the incident. (Section II.E)
- Clarifies that students, parents and individuals other than staff may make an anonymous report alleging student-to student discrimination, harassment, intimidation and/or bullying and such reports will be investigated and addressed pursuant to the procedures set forth in this regulation to the extent possible in light of the information provided by the anonymous reporter. (Section II.G)
- Provides that the RFA liaison must immediately notify the principal/designee of any report of student-to-student discrimination, harassment, intimidation and/or bullying that they receive. (Section II. H)
- Provides that the principal/designee must ensure that all written reports alleging student-to-student discrimination, harassment, intimidation and/or bullying are maintained in the investigative file at the school. (Section II.I)
- Clarifies that all reports of student-to student discrimination, harassment, intimidation and/or bullying must be entered into the Online Occurrence Reporting System (“OORS”) within one (1) school day of receipt of the report. (Section II.J)
- Provides that the principal/designee must notify the parents of the alleged victim and of the accused student immediately but no later than two (2) school days following receipt of a report alleging student-to-student discrimination, harassment, intimidation and/or bullying. (Section II.K)
- Clarifies that if a report of student-to-student discrimination, harassment, intimidation and/or bullying cannot be investigated at the school level due to the nature and seriousness of the allegation(s), the principal/designee must consult with the Office of Safety and Youth Development (“OSYD”). (Section II.M)
- Clarifies that the principal/designee must investigate reports of student-to-student discrimination, harassment, intimidation and/or bullying within five (5) school days of receipt of the report. (Section III.A)
- Provides that all parties and all witnesses must be interviewed separately when the principal/designee conducts an investigation, any investigative notes must be maintained, and the date of each interview must be documented. (Section III.A)
- Clarifies that the principal/designee must obtain any relevant evidence, including video surveillance and audio recordings, as part of the investigation and should refer to the DOE’s guidance on how to deal with inappropriate cyber-content and consult with their Borough Safety Director and Senior Field Counsel, if necessary. (Section III.A.6)
- Clarifies that at the conclusion of the investigation, the principal/designee must review all of the evidence and determine whether the allegations were substantiated by a preponderance of the evidence. (Section III.B)
- Clarifies that the principal/designee must determine whether the conduct violates the regulation and provides additional factors to consider in making this determination. (Section III.C)

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- Provides that at the conclusion of the investigation, the principal/designee must enter the following information into OORS: the investigative findings; a determination of whether the allegations have been substantiated; and a determination of whether the behavior constitutes a violation of this regulation. This must be entered into OORS within ten (10) school days of receipt of the report of alleged discrimination, intimidation, harassment and/or bullying, absent extenuating circumstances. (Section III. D)
- Provides that the principal/designee must advise the parent(s) of the alleged victim and the parent(s) of the accused student in writing whether any allegations are substantiated and whether the conduct constitutes a violation of this regulation. If any of the allegations are substantiated, this notice must also advise the parents to contact the school to discuss the incident and any follow-up action and the availability of interventions and supports for their child, where applicable. Provides that this notification must be made within ten (10) school days of receipt of the report, absent extenuating circumstances. If a decision was made not to notify the parents of the alleged victim as set forth in the regulation, such parents shall also not be advised of this information. (Section III.E)
- Provides that the notification to parents of the outcome of the investigation shall be provided in accordance with state and federal laws protecting the confidentiality of student record information. (Section III.F)
- Provides that if at any time before or during the course of the investigation, the principal/designee determines that interventions and supports are appropriate before the final outcome of any investigation to ensure the safety or the well-being of a student (including the alleged victim, the accused student and any witnesses), the parent must be notified and appropriate interventions and supports must be implemented and monitored, and modified where appropriate. (Section III.G)
- Provides that following completion of the investigation, interventions and supports must be provided to the victim, the accused student, and witnesses, where appropriate, and that such interventions and supports must be assessed on a case-by-case basis and must be monitored and modified, as appropriate. (Section IV.B)
- Provides additional examples of interventions and supports. (Section IV.B)
- Provides that an individual support plan must be developed and implemented for a student who has been the victim of two (2) or more substantiated violations of this regulation in the same school year and/or a student who has been found to have violated this regulation two (2) or more times in the same school year. (Section IV.B)
- Clarifies that neither mediation nor conflict resolution is under any circumstances an appropriate intervention for bullying or intimidation and references the Citywide Behavioral Expectations to Support Student Learning ("Discipline Code") and Chancellor's Regulations A-101 and A-449 for additional information on interventions and supports and the policies and procedures for obtaining a transfer. (Section IV.B)

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- Clarifies that students who have been found to have violated this regulation will be subject to appropriate disciplinary responses in accordance with the Discipline Code and the procedures and requirements set forth in Chancellor’s Regulation A-443(Section IV C).
- Provides that the principal/designee must enter all interventions and supports offered to the parties and witnesses and all disciplinary responses taken with respect to the student(s) found to have engaged in prohibited conduct into the Suspensions and Office of Hearings Online System (“SOHO”) through OORS. (Section IV.D)
- Added the word “Prevention” to the section heading. (Section V)
- Clarifies that each school must annually distribute or make electronically available the written material prepared by OSYD highlighting the policies and procedures set forth in this regulation, including the procedures for how to make a report, to all school staff, parents and students. (Section V.B)
- Provides that each principal/designee must ensure that the name and contact information of the RFA liaison(s) are included on the school’s website and shared with students and parents at least once per year, including but not limited to through electronic communication or sending such information home with students. (Section V.C)
- Clarifies that a copy of this regulation must be made available to parents, school staff and students upon request. (Section V.G)
- Clarifies that the names of the RFA liaisons must be updated as appropriate in the school’s Consolidated School and Youth Development Plan. (Section VI.A)
- Provides that each principal must confirm in the Consolidated School and Youth Development Plan that the agenda, signed attendance rosters and a copy of all training material to document the annual staff training required by the regulation are on file at the school. (Section VI.E)
- Clarifies that information regarding reports made under this regulation may be disclosed as required by law or where necessary to protect a student whose safety or well-being is at risk. (Section VII)
- Updates Attachment 1, Summary of Prohibited Discrimination and Bias-Based Harassment, Intimidation and/or Bullying.
- Replaces Attachment 3, RFA poster, with a hyperlink/url.
- Replaces Attachment 4, RFA brochure, with a hyperlink/url.
- Names of offices have been updated.

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BULLYING – 10/23/2019



Regulation of the Chancellor

Number: **A-832**

Subject: **STUDENT-TO-STUDENT DISCRIMINATION, HARASSMENT, INTIMIDATION, AND/OR BULLYING**

Category: **STUDENTS**

Issued: **October 23, 2019**

ABSTRACT

It is the policy of the New York City Department of Education (“DOE”) to maintain a safe and supportive learning and educational environment that is free from harassment, intimidation and/or bullying committed by students against other students and discrimination by students against other students on account of actual or perceived race, color, creed, ethnicity, national origin, citizenship/immigration status, religion, gender, gender identity, gender expression, sexual orientation, disability, or weight. Such discrimination, harassment, intimidation and/or bullying is prohibited and will not be tolerated in school, during school hours, before or after school, while on school property, at school-sponsored events, while traveling in vehicles funded by the DOE or off school property when such behavior disrupts or would foreseeably disrupt the educational process or endangers or would foreseeably endanger the health, safety, morals, or welfare of the school community. This regulation sets forth reporting, investigative, notification, and follow-up procedures for student-to-student discrimination, harassment, intimidation and/or bullying. Students who have engaged in behavior which violates this regulation will receive interventions, supports, and disciplinary responses, as appropriate, consistent with the Citywide Behavioral Expectations to Support Student Learning (“Discipline Code”) and Chancellor’s Regulation A-443. Victims and witnesses will receive interventions and supports as appropriate. For complaints of peer sexual harassment, please refer to Chancellor’s Regulation A-831.

I. POLICY

- A. It is the policy of the DOE to maintain a safe and supportive learning and educational environment that is free from discrimination, harassment, intimidation and/or bullying committed by students against other students. Discrimination, harassment, intimidation, and/or bullying are prohibited in school, while on school property,

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during school hours, before or after school, at school-sponsored events, or while traveling in vehicles funded by the DOE. Such behavior is also prohibited off school property when it disrupts or would foreseeably disrupt the educational process or endangers or would foreseeably endanger the health, safety, morals, or welfare of the school community.

- B. It is the policy of the DOE to prohibit retaliation against any student, parent, or DOE employee who in good faith reports or participates in an investigation of allegations of student-to-student discrimination, harassment, intimidation and/or bullying. Any adverse act against individuals due to their participation in such protected activity is considered retaliatory. Retaliation will be investigated and subject to appropriate disciplinary action if substantiated. The term “parent,” whenever used in this regulation, means the student’s parent(s) or guardian(s), or any person(s) in a parental or custodial relationship to the student, or the student, if the student is an emancipated minor or has reached 18 years of age.
- C. It is a violation of this regulation for any student to harass, intimidate or bully another student.
- D. It is a violation of this regulation for any student to discriminate against another student on account of actual or perceived race, color, creed, ethnicity, national origin, citizenship/immigration status, religion, gender, gender identity, gender expression, sexual orientation, disability, or weight. The Summary of Prohibited Discrimination and Bias-Based Harassment, Intimidation and/or Bullying is found in Attachment No. 1.
- E. Harassment and bullying are the creation of a hostile school environment for another student by conduct or by threats, intimidation, or abuse, including cyberbullying, that:
 - 1. have or would have the effect of unreasonably and substantially interfering with a student’s educational performance, opportunities, or ability to participate in or benefit from an educational program, school- sponsored activity or any other aspect of a student’s education; or
 - 2. have or would have the effect of unreasonably and substantially interfering with a student’s mental, emotional, or physical well-being; or
 - 3. reasonably cause or would reasonably be expected to cause a student to fear for their physical safety; or
 - 4. reasonably cause or would reasonably be expected to cause physical injury or emotional harm to a student.

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Acts of harassment and bullying include but are not limited to harassment, intimidation and/or bullying on account of actual or perceived race, color, creed, ethnicity, national origin, citizenship/immigration status, religion, gender, gender identity, gender expression, sexual orientation, disability, or weight.

F. . Discrimination, harassment, intimidation and/or bullying may take many forms and can be physical, non-verbal, verbal, or written. It may be a single incident or a series of related incidents.

1. Written conduct includes electronically transmitted communication via information technology including, but not limited to: Internet; cell phone; email; personal digital assistant; wireless handheld device; social media; blogs; chat rooms; and gaming systems.
2. Acts of discrimination, harassment, intimidation and/or bullying may include but are not limited to:
 - physical violence;
 - stalking;
 - threats, taunts, teasing;
 - aggressive or menacing gestures;
 - exclusion from peer groups designed to humiliate or isolate;
 - using derogatory language;
 - making derogatory jokes, name calling, or slurs, including statements based on a student's actual or perceived race, color, creed, ethnicity, national origin, citizenship/immigration status, religion, gender, gender identity, gender expression, sexual orientation, disability or weight;
 - written or graphic material, including graffiti, photographs, drawings, or videos, containing comments or stereotypes that are derogatory of others that are electronically circulated or are written or printed;
 - verbal or physical conduct that threatens another with harm;
 - hazing; and
 - deliberately using a name, mispronouncing a name or using a pronoun in a manner that discriminates, harasses, bullies, or intimidates based on a student's actual or perceived race, color, creed, ethnicity, national origin, citizenship/immigration status, religion, gender, gender identity, gender expression, sexual orientation, disability or weight;

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II. REPORTING PROCEDURES

- A. “Report” as used in this regulation means a report of alleged student-to-student discrimination, harassment, intimidation and/or bullying reported by the alleged victim or others (e.g., staff, parents, other students).
- B. Each principal must designate at least one (1) staff member to serve as a Respect for All liaison (“RFA liaison”) to whom reports can be made and who serves as a resource for students and staff. The RFA liaison must be a licensed administrator, supervisor, teacher, guidance counselor, school psychologist, or social worker who works at the school full-time.
 - 1. At all times, there must be at least one (1) RFA liaison in the school who has received the training set forth in Section V.E-F. In the event an RFA liaison vacates their appointment, the principal must ensure that an RFA liaison has been appointed and received such training within thirty (30) days. In the interim, the principal must immediately designate an interim RFA liaison.
 - 2. In the event an RFA liaison is temporarily unable to perform their duties in the school for an extended period of time, and there is no other RFA liaison, the principal must designate another person to serve on an interim basis until the RFA liaison returns.
- C. Any staff member who witnesses student-to-student discrimination, harassment, intimidation and/or bullying or who has knowledge or information or receives notice that a student may have been the victim of such behavior by another student is required to promptly verbally report the alleged act to the RFA liaison(s) or to the principal/designee within one (1) school day and submit the Complaint Reporting Form (available at https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/a-832-reporting-form.pdf?sfvrsn=43ca4491_6) describing the incident to the RFA liaison or the principal/designee no later than two (2) school days after making the verbal report. The principal/designee must ensure that hard copies of the Complaint Reporting Forms (available at https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/a-832-reporting-form.pdf?sfvrsn=43ca4491_6) are readily available.
- D. Students, parents, and individuals other than staff may report allegations of student-to-student discrimination, harassment, intimidation and/or bullying verbally or in writing, including by submitting the Complaint Reporting Forms (available at https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/a-832-reporting-form.pdf?sfvrsn=43ca4491_6)

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to the principal/designee, RFA liaison, or any other school staff member, or via the online portal (available at <https://www.nycenet.edu/bullyingreporting>).

- E. Students who believe that they have been the victim of discrimination, harassment, intimidation and/or bullying by another student or who witness or have information of such incidents should immediately report such incidents.
- F. If a student or parent has concerns about making a report to the school, the student/parent may contact the Office of Safety and Youth Development (“OSYD”) by e-mailing the report to RespectforAll@schools.nyc.gov. Examples of circumstances where this might be appropriate include: if the student/parent is not sure the behavior is covered by the regulation; if the student/parent previously made a report and the behavior has continued; or if the student/parent is concerned about coming forward. In such circumstances, OSYD will determine the appropriate follow-up action consistent with this regulation.
- G. Students, parents and individuals other than staff may make an anonymous report, and such reports will be investigated and addressed pursuant to the procedures set forth in this regulation to the extent possible in light of the information provided by the anonymous reporter.
- H. The RFA liaison must immediately notify the principal/designee of any reports they receive.
- I. The principal/designee must ensure that all written reports [e.g., emails, reports made using the Complaint Reporting Form (available at https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/a-832-reporting-form.pdf?sfvrsn=43ca4491_6)] are maintained in the investigative file at the school.
- J. The principal/designee must enter all reports into the DOE’s Online Occurrence Reporting System (“OORS”) within one (1) school day of receipt of the report and promptly investigate as set forth in Section III.
- K. The principal/designee must advise the parent(s) of the alleged victim and the accused student of the allegations whenever a report is received. Such notification must be made immediately but no later than two (2) school days following receipt of the report by the principal/designee. If the alleged victim informs the principal/designee of safety concerns in regard to such notification, the principal/designee shall decide whether to inform the alleged victim’s parent(s) following consideration of privacy and safety concerns. The principal/designee may consult with their Senior Field Counsel in making this decision.

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- L. Where the principal/designee believes that the alleged conduct constitutes criminal activity, they must contact the police. The principal/designee may consult with their Senior Field Counsel and/or the Borough/Citywide Office, Director of Student Services.
- M. If the report cannot be investigated at the school level due to the nature and seriousness of the allegation(s), the principal/designee must consult with OSYD.

III. INVESTIGATION

- A. All reports must be investigated. All parties and all witnesses must be interviewed separately, any investigative notes must be maintained, and the date of each interview must be documented. The principal/designee must take the specific investigative steps set forth below as soon as practicable, but no later than five (5) school days after receipt of the report:
 - 1. interview the alleged victim;
 - 2. ask the alleged victim to prepare a written statement which includes as much detail as possible, including a description of the behavior, when and where it took place and who may have witnessed it;
 - 3. interview the accused student and advise them that if the conduct has occurred, it must cease immediately;
 - 4. ask the accused student to prepare a written statement;
 - 5. interview any witnesses and obtain their written statements; and
 - 6. obtain any relevant evidence (e.g., video surveillance or audio recordings). The principal/designee should refer to DOE guidance on how to deal with inappropriate cyber-content and consult with their Borough Safety Director and Senior Field Counsel, if necessary.
- B. At the conclusion of the investigation, the principal/designee must review all the evidence and determine whether the allegations are substantiated by a preponderance of the evidence (i.e., whether based upon a review of all of the evidence, including the quality of the evidence and the credibility of the parties and witnesses, it is more likely than not that the alleged conduct occurred.)
- C. If the allegations are substantiated, the principal/designee must also determine whether the conduct violates this regulation. In making this determination the principal/designee must evaluate the totality of the circumstances surrounding the conduct. The principal/designee should consider a number of factors, which may include but are not limited to:

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- the ages of the parties involved;
 - the nature, severity and scope of the behavior;
 - the frequency and duration of the behavior;
 - the number of persons involved in the behavior;
 - the context in which the conduct occurred;
 - where the conduct occurred;
 - whether there have been other incidents in the school involving the same students;
 - whether the conduct adversely affected the victim's education, including attendance, academic performance or participation in extracurricular activities;
 - whether the conduct has affected the victim's behavior or social interactions in school;
 - whether concerns have been expressed about the victim's safety; and
 - whether the victim's mental, emotional or physical well-being have been impacted.
- D. At the conclusion of the investigation, the principal/designee must enter the following information into OORS: the investigative findings; a determination of whether the allegations have been substantiated; and a determination of whether the conduct constitutes a violation of this regulation. This information must be entered into OORS within ten (10) school days of receipt of the report, absent extenuating circumstances.
- E. The principal/designee must advise the parent(s) of the alleged victim and the parent(s) of the accused student in writing whether any allegations are substantiated and whether the conduct constitutes a violation of this regulation. If any of the allegations are substantiated, this notice must also advise the parents to contact the school to discuss the incident and any follow-up action and the availability of interventions and supports for their child, where applicable. Parents must be advised within ten (10) school days of receipt of the report, absent extenuating circumstances. If a decision was made not to notify the parents of the alleged victim as set forth in Section II.K, such parents shall also not be advised of the information set forth in this paragraph.
- F. The information set forth in Section III.E shall be provided in accordance with state and federal laws protecting the confidentiality of student record information. Therefore, the parents of the alleged victim may only be notified of any follow-up action, interventions or supports that pertain to the alleged victim and the parents of the accused student may only be notified of any follow-up action, interventions or supports that pertain to the accused student.

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- G. If at any time before or during the course of the investigation, the principal/designee determines that interventions and supports are appropriate before the final outcome of an investigation to ensure the safety or the well-being of a student (including the alleged victim, the accused student and any witnesses), the student's parent must be notified, and appropriate interventions and supports should be implemented and monitored, and modified where appropriate, as set forth in Section IV.

IV. FOLLOW-UP ACTION

- A. The principal/designee must take immediate steps and appropriate follow-up action to ensure that the conduct has stopped.
- B. Once the investigation is completed and a determination is made, as set forth in Section III, interventions and supports must be provided to the victim, the accused student, and witnesses, where appropriate. Such interventions and supports must be assessed on a case-by-case basis and must be monitored and modified, as appropriate. Interventions and supports include but are not limited to the following:
- Referral to the school social worker, guidance counselor, psychologist, or other appropriate school staff, or referral to community-based agencies, for counseling, support, and/or education or mental health services;
 - Academic supports and adjustments (e.g., change in classes, lunch/recess, or after-school program schedules);
 - Development of an individual support plan (an individual support plan must be developed and implemented for a student who has been the victim of two (2) or more substantiated violations of this regulation in the same school year and/or a student who has been found to have violated this regulation two (2) or more times in the same school year)

Additional information about supports and interventions can be found in the Discipline Code. Neither mediation nor conflict resolution is under any circumstances an appropriate intervention for bullying or intimidation. (Also see Chancellor's Regulation A-101 and A-449 which set forth the policies and procedures for obtaining a transfer if a transfer may be appropriate.)

- C. Students who have been found to have violated this regulation will be subject to appropriate disciplinary responses in accordance with the Discipline Code and the procedures and requirements set forth in Chancellor's Regulation A-443.

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- D. The principal/designee must enter all interventions and supports offered to the parties and witnesses and all disciplinary responses taken with respect to the student(s) found to have engaged in the prohibited conduct into the Suspensions and Office of Hearings Online system (“SOHO”) through OORS.

V. PREVENTION, NOTIFICATION and TRAINING

- A. Each school must conspicuously post “Respect for All” posters (available at <https://www.schools.nyc.gov/school-life/policies-for-all/respect-for-all/respect-for-all-handouts>) in locations deemed highly visible to students, parents and staff. The posters must contain the name of the RFA liaison(s).
- B. Each school must annually distribute or make electronically available the written material prepared by OSYD highlighting the policies and procedures set forth in this regulation, including the procedures for how to make a report, (available at <https://www.schools.nyc.gov/school-life/policies-for-all/respect-for-all/respect-for-all-handouts>) to all school staff, parents and students. Parents/students entering the school during the school year must receive this information upon enrollment.
- C. Each principal/designee must ensure that the name and contact information of the RFA liaison(s) are included on the school’s website and shared with students and parents at least once per year, including but not limited to through electronic communication or sending such information home with students.
- D. Each principal/designee must ensure that students have been provided with information and training on the policy and procedures in this regulation by October 31 of each school year.
- E. Each principal must ensure that all staff members, including non-instructional staff, are provided with training on the policy and procedures in this regulation by October 31 of each school year. Such training must address:
 - 1. Raising awareness and sensitivity to potential acts of discrimination, harassment, intimidation, and bullying directed at students, including, but not limited to, those acts based on a student’s actual or perceived race, color, creed, ethnicity, national origin, citizenship/immigration status, religion, gender, gender identity, gender expression, sexual orientation, disability, or weight;
 - 2. The identification and mitigation of discrimination, harassment, intimidation, and bullying;
 - 3. The social patterns of discrimination, harassment, intimidation, and bullying;

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4. Preventing and responding to incidents of discrimination, harassment, intimidation, and bullying;
 5. Understanding the effects of discrimination, harassment, intimidation, and bullying and strategies for effectively addressing problems of exclusion, bias, and aggression in educational settings; and
 6. Promoting a safe and supportive school climate, including incorporating the concepts into classroom activities.
- F. Each principal must ensure that, in addition to the school training set forth in Section V.E, at least one (1) RFA liaison completes the RFA mandated training developed by OSYD which addresses: 1) human relations in the areas of race, color, creed, ethnicity, national origin, citizenship/immigration status, religion, gender, gender identity, gender expression, sexual orientation, disability and weight, and 2) the issues set forth in Section V.E.
- G. A copy of this regulation must be made available to parents, school staff and students upon request.

VI. CONSOLIDATED SCHOOL AND YOUTH DEVELOPMENT PLAN

Each principal must submit the following information in its annual Consolidated School and Youth Development Plan by October 31 of each school year:

- A. The name of the RFA liaison(s). This information must be updated as appropriate.
- B. Certification that at least one (1) RFA liaison has or will receive the training set forth in Section V.F.
- C. Certification that students have been provided with information and training on the policy and procedures in this regulation.
- D. Certification that staff members, including non-instructional staff, have been provided with the information and training set forth in Section V.E.
- E. Confirmation that the agenda, signed attendance rosters and a copy of all training materials to document the annual staff training required by Section V.E are on file at the school; and
- F. A plan for preventing and addressing bias, harassment, intimidation, and/or bullying.

VII. CONFIDENTIALITY

It is the policy of the DOE to respect the privacy of all parties and witnesses to reports made under this regulation. However, the need for confidentiality must be balanced against the obligation to cooperate with police investigations, to provide due process, and/or to take necessary action to investigate or resolve the report. Therefore,

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information regarding the report may be disclosed in appropriate circumstances or as required by law or where necessary to protect a student whose safety or well-being is at risk.

VIII. INQUIRIES

Inquiries pertaining to this regulation should be addressed to:

Office of School and Youth Development

NYC Department of Education

52 Chambers Street – Room 218

New York, NY 10007

Telephone: (212) 374-6807

Facsimile: (212) 374-5751

RespectForAll@schools.nyc.gov

Title IX Coordinator

[Title IX Inquiries@schools.nyc.gov](mailto:Title_IX_Inquiries@schools.nyc.gov)

Telephone: 718-935-4987



SUMMARY OF PROHIBITED DISCRIMINATION AND BIAS-BASED HARASSMENT, INTIMIDATION AND/OR BULLYING

It is the policy of the New York City Department of Education to maintain a safe and supportive learning and educational environment that is free from discrimination, harassment, intimidation and/or bullying committed by students against other students including discrimination, harassment, intimidation, and/or bullying on account of actual or perceived race, color, creed, ethnicity, national origin, citizenship/immigration status, religion, gender, gender identity, gender expression, sexual orientation, disability or weight. Such discrimination, harassment, intimidation and/or bullying is unacceptable conduct and will not be tolerated in school, during school hours, before and after school, while on school property, at school-sponsored events, while traveling in vehicles funded by the Department of Education or off school property when such behavior disrupts or would foreseeably disrupt the educational process or endangers or would foreseeably endanger the health, safety, morality or welfare of the school community. Students found guilty of violating this regulation will be subject to appropriate disciplinary responses and interventions and supports consistent with the Discipline Code and **Chancellor's Regulation A-443**. Please refer to **Chancellor's Regulation A-831** for complaints of peer sexual harassment.

The following is intended to provide guidance to staff and students in identifying bias-based behavior.

Citizenship/Immigration Status: actual or perceived immigration status or status as a citizen of a country other than the United States of America.

Disability: actual or perceived disability, or history of disability. The term “disability” means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques; or (b) a record of such an impairment; or (c) a condition regarded by others as such an impairment.

Ethnicity/National Origin: actual or perceived national origin or ethnic identity. National origin is distinct from race/color or religion/creed because people of several races and religions or their forbearers may come from one nation. The term “national origin” includes members of all national groups and groups of persons of common ancestry, heritage or background; it also includes individuals who are married to or associated with a person or persons of particular national origin.

Gender: actual or perceived gender, pregnancy, or conditions related to pregnancy or childbirth. The prohibition against gender discrimination includes sexual harassment.

The term “gender” includes a person’s actual or perceived gender identity and gender expression, meaning their self-image, appearance, behavior, expression, or other gender-

related characteristic, regardless of the sex assigned to that person at birth. Gender discrimination includes but is not limited to the use of names or pronouns in a manner that discriminates (e.g. deliberately using a pronoun that is not consistent with the student's gender identity asserted at school or other DOE program or activity).

Race/Color: actual or perceived race or color. Race includes traits historically associated with race, including but not limited to, hair texture and protective hairstyles. Protective hairstyles shall include, but not be limited to, such hairstyles as braids, locks and twists.

Religion/Creed: actual or perceived religion or creed (set of fundamental beliefs, whether or not they constitute a religion).

Sexual Orientation: actual or perceived sexual orientation. The term sexual orientation means an individual's actual or perceived romantic, physical or sexual attraction to other persons, or lack thereof, on the basis of gender. A continuum of sexual orientation exists and includes, but is not limited to heterosexuality, homosexuality, bisexuality, asexuality and pansexuality.

Weight: actual or perceived weight.

EXHIBIT D

Exhibit D: Requirements Imposed on Schools by the Rule's Grievance Procedures

Category	Codified Provision	Specific Requirements
Formal Complaint	106.44(a) & 106.30(a)	- Upon actual notice of sexual harassment in an education program or activity against a person in the United States, the school's Title IX Coordinator must contact the complainant to discuss the availability of supportive measures, with or without the filing of a formal complaint, and explain the process for filing a formal complaint, if the complainant has not already done so. - A formal complaint is a document that requests an investigation, signed by the complainant. If the complainant does not wish to file a formal complaint, the school's Title IX Coordinator may draft, sign and submit the formal complaint in certain circumstances. - In order for a school to investigate a report of sexual harassment pursuant to the Rule's grievance procedures, a formal complaint must be filed with the school's Title IX Coordinator. - The Title IX Coordinator must have specific reasons justifying the filing of the complaint against the complainant's wishes. Final Rule at 30,304.
Emergency Removal of a Respondent	106.44(c)	- In order to remove a student from an education program or activity prior to the conclusion of the grievance procedure, a school must undertake an "individualized safety and risk analysis," and determines there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment that justifies removal. - The school must provide the removed student with notice and an opportunity to challenge the removal decision immediately following the removal.¹
Discipline	106.44(a) & 106.45(b)(1)(i)	Other than the emergency removal described above, a school may not impose any disciplinary sanction against a respondent before the completion of all of the required grievance procedures.

¹ NYCDOE must provide a student subject to emergency removal under the Final Rule with a due process hearing within 5 days. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975) (due process requirements for student discipline); N.Y. Educ. Law § 3214 (codifying same). For students with disabilities, NYCDOE is required to hold a Manifestation Determination Review within ten school days of the removal, in order to determine whether the student's behavior was a manifestation of the student's disability. These proceedings would occur prior to the completion of the grievance procedures and essentially require findings of fact to be made before completion of the Final Rule's grievance proceedings.

Written Grievance Procedures	106.45(b)(1)	• A school must prepare written grievance procedures that comply with all requirements in the Rule. • The written grievance procedures must state the standard of evidence the school will apply (see below). • The written procedures must describe the range of supportive measures available to both parties. • The written grievance procedures must include reasonably prompt time frames for conclusion of the grievance process, including for any informal resolution processes and for appeals, as well as a process that allows for the temporary delay or extension of time frames for good cause with written notice and explanation to the parties. • The written grievance procedures must describe the possible disciplinary sanctions and remedies that the school may implement following a determination of responsibility.
Notice of Allegations	106.45(b)(2)(i)-(ii)	• Upon receipt of a formal complaint, the school must provide all known parties: (a) written notice of the school's grievance procedures, including any informal resolution process; and (b) notice of the allegations potentially constituting sexual harassment containing sufficient details known at the time, including the identities of the parties involved in the incident, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident. • The notice must be provided to the parties with sufficient time to prepare a response before any initial interview. • The notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. • The notice must also inform the parties that they may have an advisor of their choice and may review evidence. • The notice must inform the parties of any provision in the school's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process. • If during the course of its investigation, the school decides to investigate additional allegations that

		were not included in the original notice provided to the parties, the school must provide the parties notice of the additional allegations.
Mandatory Dismissal of a Formal Complaint	106.45(b)(3)(i), (iii)	• A school must dismiss a formal complaint with regard to the alleged conduct for purposes of sexual harassment under Title IX if it determines that the conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Rule, did not occur in its education program or activity, or did not occur against a person in the United States. • The school must provide written notices to the parties simultaneously regarding the reasons for the dismissal.
Investigation	106.45(b)(5)(i)-(v) & 106.45(b)(1)(iii)	• A school must assign individual(s) to investigate the allegations of a formal complaint. • The school must provide training for investigators regarding: (a) the Rule and its requirements; (b) how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and (c) issues of relevance in order to create an investigative report that fairly summarizes relevant evidence (see below requirement). • The school must ensure that the burden of proof and gathering evidence remains on the school, but must also provide the parties an equal opportunity to present both fact and expert witnesses, as well as other inculpatory and exculpatory evidence. • A school cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. • A school must allow the parties the same opportunities to be accompanied to any meeting or grievance procedure by an advisor of choice, but may restrict the participation of advisors (other than in connection with a live hearing). • A school must provide any party whose participation is invited or encouraged written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare.

Standard of Evidence	105.45(b)(1)(vii)	A school can only apply the preponderance of the evidence standard if it applies that standard to formal complaints against both students and employees. Otherwise, it must apply the clear and convincing evidence standard.
Disclosure of Evidence	106.45(b)(5)(vi)	- A school must provide the parties and their advisors a copy of all evidence that is directly related to the allegations raised in the formal complaint, even if the school does not intend to rely on the evidence in reaching a determination regarding responsibility. - The school must give the parties at least 10 days to provide a written response and consider such response prior to issuing its investigative report (see below).
Investigative Report	106.45(b)(5)(vii)	- A school must create a written investigative report that fairly summarizes relevant evidence and considers the parties' written responses to the evidence. - The school must provide the report to the parties and their advisors at least 10 days prior to any hearing or, if no hearing is provided, prior to the determination of responsibility. The parties may submit a written response to the investigative report.
Hearing to Determine Responsibility [post secondary]	106.45(b)(6)(i), 106.45(b)(1)(iii) & 106.45(b)(7)	- Post-secondary schools must conduct a live hearing.² - The hearing must be conducted by the decision-maker(s), who cannot be the same individual(s) as the investigator(s) or the Title IX Coordinator. - The school must provide training for decision-maker(s) regarding: (a) the Rule and its requirements; (b) how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; (c) technology to be used at the hearing; and (d) issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant. - The decision-maker(s) must permit each party's advisor, who may be an attorney, to cross-examine the other party and any witnesses directly and orally. - At the request of any party, the post-secondary school must arrange for the parties to be located in

² NYCDOE does not have to implement the requirements relating to live hearings, but they are provided for context. All other procedures discussed apply to NYCDOE.

		separate rooms during the live hearing with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. • The decision-maker(s) must determine whether a cross-examination question is relevant and must explain any decision to exclude a question as not relevant. • The decision-maker(s) must find that questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. • If a party does not have an advisor present at the live hearing, the post-secondary school must provide the party with an advisor, without fee or charge, to conduct cross-examination on behalf of that party. • In making a determination regarding responsibility, the decision-maker(s) cannot rely on any statement of a party or witness who does not submit to cross-examination, but cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to submit to cross-examination. • The post-secondary school must prepare a recording or transcript of the hearing and make it available to the parties.
Determination of Responsibility [elementary and secondary]	106.45(b)(6)(ii) & 106.45(b)(1)(iii)	• Elementary and secondary schools are not required to conduct a live hearing. • The school must assign the decision-maker(s), who cannot be the same individual(s) as the investigator(s) or the Title IX Coordinator. • The school must provide training for decision-maker(s) regarding: (a) the Rule and its requirements; (b) how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;; and (c) issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant. • After the school provides the parties with the investigative report, the decision-maker(s) must give each party the opportunity to submit written cross-examination questions for other parties and

		witnesses, provide each party with the answers, and allow for additional, limited follow-up questions from each party. • The decision-maker(s) must explain any decision to exclude a question as not relevant. • The decision-maker(s) must find that questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
Written Determination	106.45(b)(7)(i)-(iv)	• The decision-maker(s) must issue a written determination regarding responsibility and provide it to both parties simultaneously. • The written determination must include: - o Identification of the allegations potentially constituting sexual harassment under Title IX. - o Description of the procedural steps taken from the receipt of the formal complaint through the determination. - o Findings of fact. - o Conclusions regarding the application of the recipient's code of conduct to the facts. - o For each allegation, a statement of and rationale for the result, including any disciplinary sanctions imposed on the respondent and the remedies that will be provided to the complainant. - o The school's procedures and the bases for appeal. • The determination regarding responsibility becomes final on the date of any written determination of the result of any appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
Appeals	106.45(b)(8)(i)-(iii) & 106.45(b)(1)(iii).	• Schools must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any of its allegations on any of the following bases: (a) a procedural irregularity affected the outcome; (b) there is new evidence that could have affected the determination of responsibility, and (3) the Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias that affected the outcome. • When a party files an appeal, the school must notify the other party in writing that an appeal has

		been filed and implement all appellate procedures equally for both parties. • The school must assign a decision-maker(s) for the appeal, who cannot be the Title IX Coordinator, or have served as an investigator or an initial decision-maker. • The school must provide training for appellate decision-maker(s) regarding: (a) the Rule and its requirements; (b) how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and (c) issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant. • The school must provide both parties the opportunity to submit a written statement in support of or challenging the outcome. • The decision-maker must issue a written determination describing the result and rationale, which must be provided to both parties simultaneously.

Exhibit 12

**Redline Showing the Final Rule's
Amendments to the Department of
Education's Title IX Regulations**

TITLE 34 EDUCATION

SUBTITLE B REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF
EDUCATION

CHAPTER I OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION

**PART 106 NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION
PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE**

AUTHORITY: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

SOURCE: 45 FR 30955, May 9, 1980, unless otherwise noted.

Subpart A—Introduction

§ 106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93–568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93–568, 88 Stat. 1855, and sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93–380)~~

§ 106.2 Definitions.

As used in this part, the term:

(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92–318, as amended by section 3 of Pub. L. 93–568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

(e) *Reviewing Authority* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *Administrative law judge* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *Federal financial assistance* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *Program or activity* and *program* means all of the operations of—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or local government; or

(ii) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity that is established by two or more of the entities described in paragraph (h)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 20 U.S.C. 1687)

(i) *Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.

(j) *Applicant* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(k) *Educational institution* means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (l), (m), (n), or (o) of this section.

(l) *Institution of graduate higher education* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(m) *Institution of undergraduate higher education* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(n) *Institution of professional education* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(o) *Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(p) *Administratively separate unit* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(q) *Admission* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(r) *Student* means a person who has gained admission.

(s) *Transition plan* means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

[45 FR 30955, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

§ 106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient shall take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c)(ii) of this section and of any remedial steps taken pursuant to paragraph (c)(iii) of this section.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §106.3(a) to eliminate existing discrimination on the basis of sex

or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 65 FR 68056, Nov. 13, 2000]

§ 106.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of subpart B of this part.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.6 Effect of other requirements and preservation of rights.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Authority: Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives Federal financial assistance.

(d) *Constitutional protections.* Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA).* The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

(f) *Title VII of the Civil Rights Act of 1964.* Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

(g) *Exercise of rights by parents or guardians.* Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) *Preemptive effect.* To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

§ 106.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.8 Designation of ~~responsible employee~~ coordinator, dissemination of policy, and adoption of grievance procedures.

(a) *Designation of ~~responsible employee~~ coordinator.* Each recipient ~~shall~~ must designate and authorize at least one employee to coordinate its efforts to comply with ~~and carry out~~ its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.” ~~including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part.~~ The recipient ~~shall~~ must notify applicants for admission and employment, all its students, parents or legal guardians of elementary and secondary school students, and employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator ~~appointed~~ pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. Such report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part. Dissemination of policy—(1)

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

~~§ 106.9—Dissemination of policy.~~

~~(a) Notification of policy. (1)~~ Each recipient must notify persons entitled to notification under paragraph (a) of this section that the recipient ~~shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient,~~ that it does not discriminate on the basis of sex in the educational program or activity which that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must ~~shall contain such information,~~

~~and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall]~~ state at least that the requirement not to discriminate in the education program or activity extends to ~~employment therein, and to admission thereto~~ (unless Subpart C of this part does not apply) and to the recipient employment, and that inquiries ~~concerning about~~ the application of title IX and this part to such recipient may be referred to the ~~employee designated pursuant to §106.8~~ recipient's Title IX Coordinator, ~~or to the Assistant Secretary,~~ or both.

~~(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in:~~

~~(i) Local newspapers;~~

~~(ii) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and~~

~~(iii) Memoranda or other written communications distributed to every student and employee of such recipient.~~

~~(b) Publications.~~ (4i) Each recipient shall must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the include a statement of the policy described in paragraph (ba)(1) of this section on its website, if any, and in each handbook or in each announcement, bulletin, catalog, or application form which that it makes available to any persons entitled to notification under of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

~~(2ii)~~ A recipient shall must not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, stating that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.

~~(c) Distribution. Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.~~ Adoption of grievance procedures. A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

(d) *Application outside the United States.* The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

§ 106.9 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subpart B—Coverage

§ 106.11 Application.

Except as provided in this subpart, this part 106 applies to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 86298, Dec. 30, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

§ 106.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Assurance of eExemption.* An educational institution ~~which that seeks assurance of wishes to claim~~ the exemption set forth in paragraph (a) of this section; ~~shall may~~ do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part ~~which that~~ conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; sec. 3(a) of P.L. 93-568, 88 Stat. 1862 amending Sec. 901)~~

§ 106.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§106.16 and 106.17, and subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of subpart C.* Except as provided in paragraphs (d) and (e) of this section, subpart C applies to each recipient. A recipient to which subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980]

§ 106.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which subpart C applies which:

- (1) Admitted only students of one sex as regular students as of June 23, 1972; or
- (2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of subpart C unless it is carrying out a transition plan approved by the Secretary as described in §106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.17 Transition plans.

(a) *Submission of plans.* An institution to which §106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which §106.16 applies shall result in treatment of applicants to or students of such recipient in violation of subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b) (3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b) (4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which §106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment which emphasizes the institution's commitment to enrolling students of the sex previously excluded.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

§ 106.18 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 106.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

- (i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;
 - (ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or
 - (iii) Otherwise treat one individual differently from another on the basis of sex.
- (2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.
- (c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:
- (1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;
 - (2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;
 - (3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and
 - (4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is “Miss” or “Mrs.” A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

~~(Authority: Sees. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

~~(Authority: Sees. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to §106.3(a), and may choose to undertake such efforts as affirmative action pursuant to §106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

~~(Authority: Sees. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.24 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§ 106.30 Definitions.

(a) As used in this part:

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Consent. The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or
- (3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing

locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

(b) As used in §§ 106.44 and 106.45:

Elementary and secondary school means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.

Postsecondary institution means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

§ 106.31 Education programs or activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which subpart C does not apply, or (2) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) Deny any person any such aid, benefit, or service;
- (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;
- (5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aid, benefits or services not provided by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

[45 FR 30955, May 9, 1980, as amended at 47 FR 32527, July 28, 1982; 65 FR 68056, Nov. 13, 2000]

§ 106.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and

(ii) Comparable in quality and cost to the student.

A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

~~(Authority: Sees. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)~~

§ 106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

~~(Authority: Sees. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)~~

§ 106.34 Access to classes and schools.

(a) *General standard.* Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex.

(1) *Contact sports in physical education classes.* This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling,

boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(2) *Ability grouping in physical education classes.* This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) *Human sexuality classes.* Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls.

(4) *Choruses.* Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

(b) *Classes and extracurricular activities.* (1) *General standard.* Subject to the requirements in this paragraph, a recipient that operates a nonvocational coeducational elementary or secondary school may provide nonvocational single-sex classes or extracurricular activities, if—

(i) Each single-sex class or extracurricular activity is based on the recipient's important objective—

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;

(ii) The recipient implements its objective in an evenhanded manner;

(iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and

(iv) The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.

(2) *Single-sex class or extracurricular activity for the excluded sex.* A recipient that provides a single-sex class or extracurricular activity, in order to comply with paragraph (b)(1)(ii) of this section, may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether classes or extracurricular activities are substantially equal include, but are not limited to, the following: the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of

curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.

(4) *Periodic evaluations.* (i) The recipient must conduct periodic evaluations to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.

(ii) Evaluations for the purposes of paragraph (b)(4)(i) of this section must be conducted at least every two years.

(5) *Scope of coverage.* The provisions of paragraph (b)(1) through (4) of this section apply to classes and extracurricular activities provided by a recipient directly or through another entity, but the provisions of paragraph (b)(1) through (4) of this section do not apply to interscholastic, club, or intramural athletics, which are subject to the provisions of §§106.41 and 106.37(c) of this part.

(c) *Schools.* (1) *General Standard.* Except as provided in paragraph (c)(2) of this section, a recipient that operates a public nonvocational elementary or secondary school that excludes from admission any students, on the basis of sex, must provide students of the excluded sex a substantially equal single-sex school or coeducational school.

(2) *Exception.* A nonvocational public charter school that is a single-school local educational agency under State law may be operated as a single-sex charter school without regard to the requirements in paragraph (c)(1) of this section.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether schools are substantially equal include, but are not limited to, the following: The policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the quality and range of extracurricular offerings, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources, and intangible features, such as reputation of faculty.

(4) *Definition.* For the purposes of paragraph (c)(1) through (3) of this section, the term “school” includes a “school within a school,” which means an administratively separate school located within another school.

~~(Authority: 20 U.S.C. 1681, 1682)~~

[71 FR 62542, Oct. 25, 2006]

§ 106.35 Access to institutions of vocational education.

A recipient shall not, on the basis of sex, exclude any person from admission to any institution of vocational education operated by that recipient.

~~(Authority: 20 U.S.C. 1681, 1682)~~

[71 FR 62543, Oct. 25, 2006]

§ 106.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided*, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and §106.41.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)~~

§ 106.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates subpart E of this part.

~~(Authority: Sees. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

~~(Authority: Sees. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such

recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

~~(Authority: Sees. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;

- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)~~

§ 106.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.43 Standards for measuring skill or progress in physical education classes.

If use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have that effect.

~~(Authority: 20 U.S.C. 1681, 1682)~~

[71 FR 62543, Oct. 25, 2006]

§ 106.44 Recipient's response to sexual harassment.

(a) General response to sexual harassment. A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) Response to a formal complaint. (1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) Emergency removal. Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) Administrative leave. Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

§ 106.45 Grievance process for formal complaints of sexual harassment.

(a) Discrimination on the basis of sex. A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) Grievance process. For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

(1) Basic requirements for grievance process. A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) Notice of allegations—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice

must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(3) Dismissal of a formal complaint—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) Consolidation of formal complaints. A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR

99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(6) Hearings. (i) For postsecondary institutions, the recipient’s grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request

of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) Determination regarding responsibility. (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) Appeals. (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) *Informal resolution.* A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient

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(i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) *Recordkeeping.* (i) A recipient must maintain for a period of seven years records of –

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

§ 106.46 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

§ 106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

- (1) Recruitment, advertising, and the process of application for employment;
- (2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;
- (3) Rates of pay or any other form of compensation, and changes in compensation;
- (4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;
- (5) The terms of any collective bargaining agreement;
- (6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;
- (7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;
- (8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;
- (9) Employer-sponsored activities, including those that are social or recreational; and
- (10) Any other term, condition, or privilege of employment.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

§ 106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

- (a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons

on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in §106.61.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.56 Fringe benefits.

(a) *Fringe benefits defined.* For purposes of this part, *fringe benefits* means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability

resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is “Miss or Mrs.”

(b) *Sex*. A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

§ 106.62 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subpart F—Retaliation

§ 106.71 Retaliation.

(a) *Retaliation prohibited*. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct

of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(b) *Specific circumstances.* (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

§ 106.72 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subpart ~~GF~~—Procedures ~~{Interim}~~

§ 106.781 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6–100.11 and 34 CFR, part 101. The definitions in § 106.30 do not apply to 34 CFR 100.6-100.11 and 34 CFR part 101.

§ 106.82 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

~~(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)~~

Appendix A to Part 106—Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs

Editorial Note: For the text of these guidelines, see 34 CFR part 100, appendix B.

[44 FR 17168, Mar. 21, 1979]

Exhibit 13

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
EDUCATION, *et al.*,

Defendants.

No. 1:20-cv-04260-JGK

DECLARATION OF JOSEPH STORCH

1. I, Joseph Storch, pursuant to 28 U.S.C. § 1746, hereby declare that the following is true and correct:

2. I submit this Declaration in support of the State of New York's litigation against the United States Department of Education ("ED" or "The Department") and Elisabeth DeVos, in her official capacity as Secretary of Education, regarding the recently issued rule entitled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (the "Final Rule"). I have compiled the information in the statements set forth below either through personal knowledge, through The State University of New York ("SUNY") personnel who have assisted me in gathering this information from our institution, or on the basis of documents I have reviewed. I have also familiarized myself with the Final Rule in order to understand its immediate impact upon SUNY.

3. I am an Associate Counsel at The State University of New York and serve as Chair of the SUNY Office of General Counsel Student Affairs Practice Group. I have held this position since August 2007. I received a Bachelor of Arts, *summa cum laude* from SUNY Oswego, a Master of

Public Policy from the University at Albany, and a Juris Doctor, Public Law Concentration, from Cornell University Law School.

4. I serve as the Principal Investigator of the SUNY Student Conduct Institute, an institute which provides trainings, both live and digital, on the requirements for the investigation and adjudication of sexual and interpersonal violence claims. I serve as the Principal Investigator for the SUNY Campus Climate Survey, which collects information on the prevalence of incidents of sexual harassment and sexual and interpersonal violence among faculty, staff, and students, as well as the survey respondent's level of understanding of the availability and applicability of laws, regulations and policies covering this area. The SUNY survey is one of the largest comprehensive surveys of campus climate around sexual and interpersonal violence in the nation.

5. In 2014-2015, I served as an advisor to the Office of Governor Andrew M. Cuomo, where I helped draft New York Education Law Article 129-B ("NYEL 129-B"), which established procedures for the prevention of and response to sexual assault, dating violence, domestic violence, and stalking at higher education institutions.

Background on SUNY and Receipt Of Federal Education Funds

6. SUNY is the nation's largest comprehensive system of higher education. SUNY's 64 campuses include four-year State-operated institutions, two-year Community Colleges, and statutory campuses located at Cornell University and Alfred University.

7. SUNY was founded in 1948, in large part to provide educational opportunities to individuals that other educational institutions would not admit. Alongside the City University of New York, SUNY provides a public option to hundreds of thousands of people annually. As of Fall 2019 more than 415,000 students were enrolled in a degree program at a SUNY campus. In total, SUNY served 1.4 million students in credit-bearing courses and programs, continuing education, and

community outreach programs in the 2018-19 academic year. One in three New Yorkers with a college degree is a SUNY alumnus.

8. In the 2018-2019 fiscal year, SUNY received over \$1.4 billion dollars in funding from the federal government for education, financial aid, and sponsored research.

9. In addition, SUNY has received over \$1 billion dollars in federal education grants each year for at least the last seven fiscal years.¹ Based on all enrolled students in 2018-19, (full time and part time), approximately 150,000 SUNY Students were offered a total of about \$634 million in Pell Grants in academic year 2018-19.

10. The federal funds that SUNY receives are essential to provide learning, research, and service opportunities in New York State and beyond. SUNY faculty and scholars receive hundreds of millions of dollars to conduct innovative research on pressing problems for New York State, and beyond.

11. A loss of, or reduction of access to federal funds would cripple the University, harm students, reduce patient access to SUNY and partner hospitals and health care facilities, reduce critical research conducted by University staff, and reduce the number of students and professionals who are able to graduate from SUNY.

12. Within the higher education community, SUNY is regarded as a national leader in programs and policies for responding to and preventing sexual and interpersonal violence, having built a structure that balances the right of reporting parties to be heard and protected from misconduct with the due process guaranteed to accused individuals under the Constitution and federal and state law and regulation.

¹ In the 2012-13 fiscal year, SUNY received \$1.325 billion; in the 2013-14 fiscal year, SUNY received \$1.299 billion; in the 2014-15 fiscal year, SUNY received \$1.269 billion; in the 2015-16 fiscal year, SUNY received \$1.259 billion; in the 2016-17 fiscal year, SUNY received \$1.242 billion; in the 2017-18 fiscal year, SUNY received \$1.335 billion; and in the 2018-2019 fiscal year, SUNY received \$1.42 billion.

13. In 2014, SUNY's Chancellor established a Temporary Working Group on Continual Improvement to Sexual Violence Prevention Policies,² following discussions between Governor Andrew M. Cuomo and the SUNY Board of Trustees. The Board unanimously passed a Resolution,³ which provided for uniform policies on sexual violence prevention and response. This pioneering Policy was widely lauded, and formed the basis for legislation introduced by the Governor in 2015.⁴ That legislation, NYEL 129-B, was passed by wide bipartisan majorities.

14. SUNY System Administration and campus staff worked with the New York State Department of Education ("NYSED"), representatives of private colleges, the City University of New York, and several other agencies over the course of several months to develop regulations implementing pieces of NYEL 129-B.⁵ SUNY also assisted NYSED in providing guidance to assist campuses in implementing the law.⁶

15. NYEL 129-B is widely regarded as a model of a balanced approach to sexual and interpersonal violence that respects all students, provides equity in the process, and uses modern terms and best practices. Nearly half of the law is devoted to due process/fair process, and contains rigorous standards for ensuring fairness in investigations.

SUNY's Current Policies and Procedures in Implementing Title IX

16. Although each SUNY college is governed by its own Code of Conduct and processes, Title IX investigations at each college are also governed by New York State Law,

² <https://system.suny.edu/sexual-violence-prevention-workgroup/>.

³ <https://www.suny.edu/about/leadership/board-of-trustees/meetings/webcastdocs/Sexual%20Assault%20Response%20and%20Prevention%20REVISED-Merged.pdf>.

⁴ <https://system.suny.edu/media/suny/content-assets/documents/sexualviolenceprevention/SUNY-Policies-Sexual-Violence-Prevention-Response-Updated-Jun2015.pdf>.

⁵ Part 48 Annual Aggregate Data Reporting by New York State Institutions of Higher Education Related to Reports of Domestic Violence, Dating Violence, Stalking and Sexual Assault, NEW YORK STATE EDUCATION DEPARTMENT (Aug. 31, 2017), available at <https://www.regents.nysed.gov/common/regents/files/917brca4.pdf>.

⁶ Complying with Education Law Article 129-B, NEW YORK STATE EDUCATION DEPARTMENT (June 2, 2016), available at <http://www.nysed.gov/common/nysed/files/article-129-b-guidance.pdf>.

SUNY System Policy, and collective bargaining agreements. Policies are often developed through a committee or working group system that engages various stakeholders, from the President's cabinet, to leadership and staff in student affairs, academic programs, faculty, students, and other groups. Policies and collective bargaining discussions are also often conducted in concert with leadership and staff at SUNY System Administration and the Board of Trustees.

17. Each SUNY college or university is required to appoint a Title IX Coordinator. At some SUNY campuses, this role may be shared among multiple staff. At many campuses, there are Deputy Title IX Coordinators, Title IX Investigators, and Prevention Specialists, among other roles. Their responsibilities include receiving reports of unequal treatment on the basis of sex, sexual harassment, and sexual and interpersonal violence, conducting or coordinating investigations, writing or reviewing interim and final reports, and liaising with student affairs, law enforcement, conduct officials, and other actors. They ensure that the parties to any investigation are treated equitably, arrange for interim administrative measures to avoid the creation of a further hostile environment pending the outcome of an investigation and adjudication, and collect data to identify when individuals or organizations are engaging in a pattern of discrimination and may present an imminent threat.

18. All SUNY colleges and universities are bound by the SUNY Policies on Sexual Violence Prevention and Response. Pursuant to this policy, SUNY campuses must provide all student-parties the right to present evidence and testimony at a hearing, whether through telephone, videoconferencing or testifying with a room partition. These policies also provide students with the right to ask questions of the decision-maker and fact witnesses and indirectly request responses from the other party via the decision-maker.

19. SUNY also has designated “responsible employees,” the precise makeup of which differs by campus. Some collective bargaining units, such as United University Professions (UUP) voluntarily adopted responsible employee status for most of their members in their most recent contract.⁷ When conduct is reported to such responsible employees, campus policy has been to require the responsible employee to forward the complaint to the Title IX Coordinator or designee.

20. SUNY campuses must also comply with NYEL 129-B, which provides a comprehensive framework for higher education institutions to prevent, remedy and address sexual violence. NYEL 129-B harmonizes the procedural protections required by the Fourteenth Amendment, Title IX, and the 2013 Violence Against Women Act (“VAWA”) Amendments to the Clery Act. NYEL requires, among other things, that institutions:

- a. Provide parties with an opportunity to offer evidence during an investigation, and at a hearing, where appropriate;
- b. Respect the complainant’s right to determine whether to participate in the process;
- c. Respond to sexual and interpersonal violence that occurs on-campus, off-campus, or while studying abroad;
- d. Provide confidentiality, privacy protections, and specific evidentiary exclusions for parties; and
- e. Allow for necessary flexibility for institutions, including the ability to make modifications to the process that allow all students to equitably participate.

21. Finally, SUNY provides trainings to students, faculty and staff in the law and best practices around investigations and adjudications of conduct violations, including sexual and interpersonal violence allegations through its Student Conduct Institute. The Institute provides in-

⁷ See AGREEMENT BETWEEN THE STATE OF NEW YORK AND UNITED UNIVERSITY PROFESSIONS, 2016-2022, <https://uupinfo.org/contract/pdf/20162022NYSUUPAgreement.pdf>, Appendix A-5, at 80-81.

depth live and digital training on due process and fair process, trauma-informed investigations and adjudications, questioning and weighing of evidence, Title IX regulations and guidance, the Clery Act, and state law (including New York State Education Law 129-B).

22. Typically, university code of conduct policies are amended through a committee or working group system. Amendments are usually made in the winter or spring for the following fall, after multiple levels of review from a designated committee, review and approval by counsel, review and approval by Cabinet and the President, and then, pursuant to New York State Education Law,⁸ consideration and passage by the College Council (for State-operated colleges) or Board of Trustees (for Community Colleges and the College of Environmental Science and Forestry).

23. In calendar year 2018, 1,497 incidents were reported to SUNY Title IX offices. Of the incidents reported, 790 occurred on campus, 622 occurred off campus, and 110 occurred in an unknown location. As far as the Title IX Coordinators were aware, 295 incidents were reported to municipal law enforcement and 792 were reported to campus University Police or Public Safety.

SUNY Must Immediately Overhaul Its Title IX Program to Comply With The Final Rule

24. The Final Rule will immediately impact several well-established requirements for investigating and adjudicating cases of campus sexual assault and sexual harassment at SUNY campuses, pose confusing and unworkable situations for SUNY and its campuses, and require massive investments in overhauling policies and procedures, all at a time when SUNY is dealing with the COVID-19 crisis.

25. For example, the Final Rule requires SUNY's campuses to train its employees on the new Title IX requirements. SUNY understands the effective date of the Final Rule to be August 14, 2020, and that all of SUNY's 64 campuses are required to come into compliance by that date.

⁸ N.Y. Educ. L. §356.

This compliance would require SUNY to review the Final Rule; amend all of SUNY's Code of Conduct and Title IX policies; and then train hundreds, if not thousands, of students, faculty and staff – all within a matter of weeks.

26. SUNY typically mails changes to its Codes of Conduct to new students before summer orientation. Given the short turnaround time between the Rule's publication and summer orientations, generally held in July and August, SUNY would have to procure, pay for and print thousands of copies of its new policies, and pay to mail these new policies to its community in short order. By contrast, Codes of Conduct amendments are generally finalized in the winter and spring of the prior academic year to allow sufficient time for board approval, formatting, printing, and mailing to new students before summer orientation.

27. All of these changes would need to take place at a time when SUNY's Boards, Committees, and Councils are not meeting in person in order to promote social distancing and minimize transmission of the coronavirus. We do not have plans to resume in-person meetings in the immediate future.

28. Additionally, the Final Rule requires outreach to all students to notify them of the changes in policy and procedure, and to ensure that they understand how to report sexual harassment or sexual violence. SUNY colleges would likely need to use email or other electronic means to do so because of the COVID-19 crisis, and could not guarantee that these communications will be meaningfully understood before the start of the fall semester. Many students have already reported that they struggle to keep up with the many electronic notifications from their institutions during this pandemic.

29. I understand the Final Rule to impose dozens of new requirements on the Title IX hearing process, including a live hearing requirement, the right to direct cross-examination, and

the right for parties to be represented by an advisor of choice, who may be an attorney. Given this legalization of the Title IX process, some SUNY campuses may feel the need to hire additional attorneys to serve as hearing officers for Title IX hearings.

30. Using the number of cases that went through to the hearing process detailed in SUNY's reports to NYSED (289 cases), if each Title IX Investigative Report takes 25 hours to prepare (a conservative estimate) the overall cost of compliance will range between \$578,000 per year (assuming reports are prepared by specialized non-attorneys averaging \$80 per hour) and \$2,348,125 (assuming reports are prepared by specialized attorneys averaging \$350 per hour, conservative for New York State). If SUNY instead hired full time investigators at each campus, the cost could exceed \$7 million annually.

31. Under the Final Rule, SUNY will be obligated to provide parties with advisors of choice – at no cost to the party. Assuming 16 hours of work per hearing at a low rate of \$325/hour, this will cost SUNY \$5,200 per case. Assuming only 10% of the 289 cases that went through the full process require an attorney/advisor provided to one party, the cost to SUNY would be \$150,800. Assuming 50% of the 289 cases require an attorney/advisor to one party, the cost to SUNY would be \$ 754,000. This cost could increase exponentially if parties on both sides assert their right to an advisor of choice or fail to appear with one.

32. I understand the Final Rule to require institutions to provide parties with the right to inspect and review all evidence obtained during a Title IX investigation, either by electronic means or hard copy. These requirements will likely require SUNY to evaluate and purchase new technology, train staff on this technology, and ensure that this technology complies with the confidentiality and privacy protections of NYEL 129-B, the Family Educational Rights and Privacy Act (FERPA) – which prohibits the disclosure of educational records without a student's

consent – and, where relevant, the Health Insurance Portability and Accountability Act (HIPAA) – which prohibits the disclosure of medical records without a patient’s consent.

33. Furthermore, these requirements may cause complainants to be more nervous about participating. Particularly for those who may be concerned about their private sexual information being shared, such as LGBTQIA+ individuals, or others who may be targeted for retaliation by recipients of such shared information. SUNY is also concerned that these disclosure provisions may require it to share explicit images of students, if such images directly relate to an investigation. If any of these images make it into the wrong hands, this will not only be humiliating for the students involved, but also may lead people who are victims of similar violations not to come forward.

34. The Final Rule’s required investigatory timeline adds onerous burdens and delay to SUNY’s investigate process. For example, The Final Rule’s requirement that SUNY provide official notice of the charges and time for respondents to prepare before an initial interview, may increase the risk that a respondent will destroy evidence or concoct alibis before the investigation is completed.

35. Similarly, the Final Rule may complicate SUNY’s partnership with law enforcement, who will not be bound by the waiting period and formal notice requirement before speaking with an accused individual. Unlike traditional *Miranda* rights, the Final Rule does not appear to leave room for exceptions such as waiver, inevitable discovery, imminent destruction of evidence, or statements to a third party that are not the investigator. The Final Rule thus creates confusion with respect to whether institutions can use evidence obtained from law enforcement in a § 106.45 grievance process.⁹

⁹ 85 Fed. Reg. 30,099, n. 466.

36. The Final Rule's requirement that cross-examination must be done "directly, orally, and in real time"¹⁰ may harm certain students with hearing or speaking disabilities, which may or may not be ameliorated by a sign language interpreter,¹¹ as the institution would seemingly be barred from allowing a written exchange between the student and adjudicator. Similarly, students may be harmed by the Final Rule's bar on the use of pre-recorded testimony¹² which would otherwise be allowed under NYEL 129-B where extenuating circumstances prevent the person from making it to the hearing.

37. The Final Rule's requirement that institutions publish on their website (unless they do not maintain a website) all training materials poses unique challenges. Requiring the publication of materials used to train the covered individuals on the websites of institutions will dis-incentivize the creation of such training materials (including high-quality materials created by SUNY and not-for-profit higher education associations) that would otherwise be protected by intellectual property laws, leading long term to lower quality of material across the board.

38. In addition to the above, the Final Rule creates new bases for parties to challenge SUNY's Title IX procedures, including claims of bias, claims that parties did not subject themselves to full cross examination, and claims that a piece of directly related, albeit non-relevant, evidence was not provided. SUNY will expend additional resources to determine how to best protect itself from such challenges.

39. The Final Rule comes at a particularly difficult time for SUNY, given the ongoing hardship faced as a result of the COVID-19 global pandemic.

¹⁰ *Id.* at 30,336.

¹¹ As allowed under the process. 85 Fed. Reg. 30,339.

¹² *Id.* at 30,320.

40. All of our campuses are currently closed to in-person instruction, therefore, all of our classes must be delivered by remote instruction and online learning. With our students displaced, our faculty and staff are working as hard as they can to move and support courses to digital and online systems. This is not a simple task, but requires an institution-wide lift. For example, we are working intently to try to provide educational access to students with disclosed disabilities, those who are taking lab or other similar coursework, and those who do not have computers, internet access, or other access to technology.

41. Our students are reporting unprecedented levels of stress due to the uncertainty and devastation caused by COVID-19. Even as we begin to plan to welcome students back to campus, we do not know how many students will be unable to return because they or their families lose work, because they can no longer afford to attend our programs, or because they become ill and suffer short or long term health effects.

42. In addition to these educational challenges, SUNY operates three academic medical centers that are seeing patients that do and do not present with COVID-19. We mobilized as quickly as possible to expand ICU capacity, build negative pressure rooms, obtain ventilators and protective equipment, and, tragically, increase morgue and refrigerated storage for bodies. Beyond the standard challenges of completing the legally required policy amendment, review, and approval process, a number of our campuses have additional challenges now that go beyond even the unprecedented challenges of COVID-19.

43. The Final Rule's requirement that institutions implement major changes to their Title IX processes by August 14, 2020 is practically impossible for SUNY, given the significant resources it must expend on a daily basis to respond to the ongoing COVID-19 public health crisis. Many SUNY staff are serving on the front lines in the medical field and trying to save lives. SUNY

educators are trying to make an unprecedented transition to remote learning, and to support all students in ensuring continuity of education. SUNY's Board of Trustees and leadership are working to address major issues that can be properly (and without exaggeration) classified as "life or death" questions. In this environment, their ability to devote significant attention to the changes required by Title IX will come at the cost of sacrificing health, safety, and well-being of patients, students, and staff.

44. The Department asserts that implementing the Final Rule will take only 12 hours for the Title IX Coordinator and 48 hours for an attorney, plus four hours for an administrator's review. But reading only the Final Rule is insufficient to make the changes it requires. My own reading unearthed a number of confusing aspects of the Preamble where the Department includes additional requirements, explanations, exceptions, and examples that are not found in the text of the Final Rule.¹³ Such a process far exceeds the estimated time.

¹³ For example, private apartments that are not part of a program or activity are not covered, except that they might be in certain cases (85 Fed. Reg. 30,093,30,199 n.875); one must be a participant in educational activities to file a formal complaint but not to receive supportive measures (*Id.* at 30,093); at the time of the formal complaint, a complainant must be "participating in or attempting to participate in the education program or activity of the recipient" (*Id.* at 30,574), except that perhaps a graduate, even a graduate from many years ago who wishes to participate in alumni activities is covered (*Id.* at 30,138, 30,219) and depending upon whether they have been admitted yet, an applicant who is harassed or assaulted on an admissions visit may or may not be covered (*Id.* at 30,187); whether misconduct meets the Final Rule's status uses a reasonable person standard accounting for ages and abilities of those involved and should be applied with a common sense approach (*Id.* at 30,158); unwelcomeness of conduct is interpreted using a *subjective* standard but "severity, pervasiveness, objective offensiveness, and denial of equal access" are to be determined by a "*reasonable person* in the shoes of the complainant." (*Id.* at 30,159, 30,170) (emphasis added); the regulations do not apply to "groups or organizations against whom a recipient wishes to impose sanctions arising from a group member being accused of sexual harassment because such potential sanctions by the recipient against the group do not involve determining responsibility for perpetrating Title IX sexual harassment but rather involve determination of whether the group violated the recipient's code of conduct" (*Id.* at 30,096, 30,274-75), but "conspiring to sexually harass people (such as fraternity members telling new pledges to "score"), or other unwelcome conduct that harms and humiliates a person on the basis of sex may meet the elements of the *Davis* standard including pervasiveness, particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement." (*Id.* at 30,166); "effectively denies a person equal access to the recipient's education program or activity" (*Id.* at 30,574) does not actually require "entire, physical exclusion but can be undermining or detracting so as that 'victim-students are effectively denied equal access to an institution's resources and opportunities'" (*Id.* at 30,169), potentially including reactions by children outside of the school environment or a student-athlete quitting their team, skipping class, declining grades, or other factors (*Id.* at 30,170); stalking is included as a *per se* violation (*Id.* at 30,574), but "Stalking may not always be "on the basis of sex" (for example when a student stalks an athlete due to celebrity worship rather than sex), but when stalking is "on the

SUNY's Educational Mission Will Be Undermined by The Final Rule

45. Under previous guidance imputing knowledge to an institution based on constructive notice of Title IX violations, each campus has established which employees serve as responsible employees under Title IX. The Final Rule will require SUNY to undergo a new process of identifying individuals with authority, which could lead to confusion and inconsistent application.

46. The Final Rule's geographic limitations necessarily reduce or eliminate protections for those students who do not live on-campus, and even for those who do. Under the Rule, our institutions may not be able to use the Title IX process to protect a residential student who is raped off-campus at a private house of another student, or a student whose spouse or partner (also a student) assaults them at their private home such that they can no longer attend classes. While some college students live in residence halls, the majority of SUNY students, particularly students at community colleges, and non-traditional and post-traditional students, do not live on campus.

47. The adverse consequences of the Final Rule's coverage definition are particularly acute now, given that virtually all SUNY students are learning remotely due to the COVID-19 crisis. The Final Rule is vague on how Title IX coverage may extend to students who are assaulted

basis of sex'' (for example, when the stalker desires to date the victim) stalking constitutes ''sexual harassment'' under § 106.30. Stalking that does not constitute sexual harassment because it is not ''on the basis of sex'' may be prohibited and addressed under a recipient's non-Title IX codes of conduct.'' (*Id.* at 30,172 n.772); like with the Clery Act, the incorporated VAWA crimes (*Id.* at 30,574-2015) also include attempts thereof (*Id.* at 30,174); the obligation is not to have supportive measures that are ''designed'' to restore or preserve access, but to have measures that ''do'' restore or preserve access (*Id.* at 30,180); if ineligibility to play on a sports team or run for student government is listed in the sanction list or range that cross-references with the Clery Act sanction list, then such action of removal from a sports team or student government position may not be used as an interim supportive measure where a violation meets the Final Rule's definitions (*Id.* at 30,182) though it can be used if the conduct does not meet the Final Rule's definitions; supportive measures ''may include...mutual restrictions on contact between the parties'' (specifically listed) (*Id.* at 30,574) but this does not actually prohibit unilateral restrictions of contact (*Id.* at 30,231), but perhaps would so prohibit if they are both members of the same athletic team (*Id.*); the burden of establishing sufficient evidence in the grievance process is on the institution and not the complainant or respondent (see, for example, *Id.* at 30,098) but an institution may place the burden in the case of an emergency removal on the respondent (*Id.* at 30,235); hanging a poster with the phrase ''Don't Be That Guy'' could potentially be covered as sex discrimination under interpretations of an aspect of the Final Rule (*Id.* at 30,470); and others.

while engaging in remote learning at home. Furthermore, this geographic limitation does not comport with SUNY's obligations under the Clery Act, VAWA Amendments, and NYEL 129-B, which require SUNY to report on and respond to incidents that happen off-campus.

48. SUNY will, to the fullest extent allowed by the Final Rule, address such conduct through its Codes of Conduct, but this will require SUNY to use two policies – SUNY's institutional policies for incidents that do not meet the coverage of the Final Rule, and a new policy, with its narrow coverage for incidents that do meet the coverage requirements. This will burden students, faculty, and staff, and lead to confusion among complainants as to whether they enjoy the protections and rights of various laws, regulations, and policies.

49. In many cases our institutions will not have sufficient information to determine whether conduct meets the Final Rule's new limited definitions *ex ante*. Institutions will likely have to perform some sort of investigation. It is possible that only after dismissal can an institution confidently address the conduct under its own Code of Conduct. This adds unnecessary burdens and time to the evidence gathering process, has a negative impact on both complainants and respondents, potentially compromising the institution's ability to effectively investigate conduct that the Final Rule does not even purport to regulate.

50. The Final Rule fails to take into account the varied type of learners we see at our SUNY campuses. In particular, there is significant overlap and cross between college and K-12 education. High school students take SUNY classes at their own school, sit alongside college students on our campuses, at home or digitally, and in various permutations. SUNY student-teachers engage in experience-based education at K-12 institutions. The Department has drawn significant distinctions between the required processes in K-12 and post-secondary education, such as not requiring K-12 institutions to hold live hearings, and allowing a report of sexual harassment

to any employee at a K-12 institution to constitute knowledge to the institution. These distinctions do not take into account the ages and capabilities of students in either system, or the students who straddle both systems. The Final Rule will lead to arbitrary outcomes – a SUNY student accused of assaulting a 12th grader is subject to entirely different provisions under the Final Rule than a similar SUNY student who accuses a 12th grader of assault, due to the Rule's distinctions between higher education and K-12 environments.

51. The Final Rule's exclusionary rule, which prevents institutions from relying on statements made by any party or witness who does not submit to cross-examination, may incentivize parties to encourage witnesses and other parties not to appear. Power dynamics within a group or a residence hall can make some witnesses less inclined to participate, fearing retribution from their peers. I have seen past cases where respondents exert influence over witnesses not to fully participate in the process. This will likely impact younger students, first-generation students, and members of marginalized groups who may be further impacted by such pressure not to participate. In these cases, SUNY is left without a meaningful recourse, as we do not have subpoena power.

52. Relatedly, although NYEL 129-B allows complainants to decline to participate in a student conduct process and the institution to pursue charges, the Final Rule's mandate of excluding the statements of witnesses or parties who do not submit to cross-examination would effectively compel participation by a complainant to allow an institution to move forward with the process, unless the institution has uncontroverted evidence at its disposal.

53. By requiring a party to submit to live, oral, direct cross-examination, the Final Rule risks exposing parties to questions about their past mental health history and past sexual history that would otherwise be prohibited under NYEL and SUNY's institutional policies. Because the

cross-examination must occur live, orally, and directly, the party would have to sit and listen to such questions, as compared to NYEL, which allows for the submission of written questions and indirect examination by the adjudicator. The Final Rule's requirements therefore risk re-traumatizing survivors of sexual harassment and sexual assault on SUNY's campus, and also undermine SUNY's mission of providing a safe educational environment to all.

54. The Final Rule's grievance requirements also threaten SUNY's compliance with pre-existing collective bargaining agreements. Although the Department states that "Recipients may wish to forego receiving Federal financial assistance if the recipients do not wish to renegotiate a collective bargaining agreement . . ." ¹⁴ this is not a real choice for SUNY, which is dependent on federal educational funding. Furthermore, renegotiating collective bargaining agreements affecting hundreds of thousands of employees in a matter of months is no small task.

55. Under the Final Rule, if an employee does not testify or subject themselves to cross-examination, the decision-maker could not consider the employee's statements. However, labor arbitrations under New York law allow for the admission of hearsay testimony, with arbitrators accepting it "for what it's worth."

56. SUNY does not have the authority to require that the decision-maker in union arbitrations use the Final Rule's prescriptive grievance procedures. Typically, these decision-makers are independent contractors who maintain their own authority to determine which evidentiary rules and grievance procedures to follow.

57. The Final Rule may also subject SUNY to liability under Title VII, which requires employers to redress harassing conduct when they knew or *should have known* of conduct that is

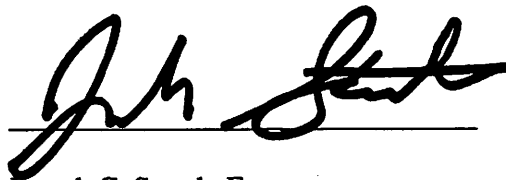
¹⁴ 85 Fed. Reg. 30,444.

severe *or* pervasive. As compared to the Final Rule's "actual knowledge" standard, and requirement that actionable conduct be severe, pervasive and objectively unreasonable.

58. In a situation where a supervisor is alleged to have sexually harassed an employee, and both that employee and a corroborating witness are willing to make statements, but are too scared of professional consequences to face a cross-examination, Title IX would *prevent* their statements from being used in a grievance process, while an institution could find themselves liable under Title VII if they did *not* act upon such statements and redress the harassment.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed on this 17 day of June, 2020

A handwritten signature in black ink, appearing to read "J. Storch", is written over a horizontal line.

Joseph C. Storch, Esq.
Associate Counsel
The State University of New York

Exhibit 14

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
EDUCATION, *et al.*,

Defendants.

No. 1:20-cv-04260-JGK

DECLARATION OF RODNEY L. PEPE-SOUVENIR

1. My name is Rodney L. Pepe-Souvenir. I submit this Declaration in support of the litigation by the State of New York and the New York City Department of Education against the United States Department of Education (“DOE”) and Elisabeth DeVos, in her official capacity as Secretary of Education, regarding the recently issued Final Rule entitled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 84 Fed. Reg. 30026 (May 19, 2020) (the “Final Rule”). I have compiled the information in the statements set forth below either through personal knowledge, through the City University of New York (“CUNY”) personnel who have assisted me in gathering this information from our institution, or on the basis of documents I have reviewed. I have also familiarized myself with the Final Rule in order to understand its immediate impact upon CUNY.

2. I am currently employed at CUNY as the University Title IX Director. I have worked at CUNY since July 2015, and I assumed the role of University Title IX Director in November 2017. My office is located at 555 West 57th Street, New York, NY 10019. I have a Bachelor of Arts degree in Speech Communications from Pace University, and a Juris Doctorate

degree from Benjamin N. Cardozo School of Law. I have an extensive background in criminal law as a former prosecutor with the Kings County District Attorney's office. I also worked for the New York City Administration for Children's Services for five years as an attorney handling child protection adjudications and have worked on equal employment, discrimination and labor law issues with several city and state agencies, including the New York City Housing Authority, New York City Fire Department, and the New York State Office for People With Developmental Disabilities.

3. As University Title IX Director, I am responsible for overseeing CUNY's compliance with Title IX, and more broadly, its Policy on Sexual Misconduct. At CUNY, Title IX complaints and other complaints of sexual misconduct are generally handled on the campus at which the complainant is a student or employee. At this time, CUNY has a total of 21 Title IX Coordinators across 25 campuses. The campus Title IX Offices are leanly staffed and consist of the Title IX Coordinator, and in some cases either a Deputy Title IX Coordinator, Title IX investigator, or an Administrative Assistant. The duties and responsibilities of the Title IX Coordinator are to respond to complaints of sexual misconduct; assist in providing interim and supportive measures; conduct the investigation of the complaint; train staff; ensure training and awareness of CUNY's policies by students; and work with campus stakeholders to ensure that all procedures are being observed.

Overview of CUNY

4. CUNY is the nation's largest urban university, with 25 campuses, including senior and community colleges and graduate institutions including the CUNY Graduate School and University Center, the CUNY Graduate School of Public Health and Health Policy and the CUNY School of Medicine at City College. CUNY has approximately 1,600 different academic programs

ranging from certificate programs to Ph.D. and professional programs. The University has an enrollment of approximately 253,000 full and part-time undergraduate and graduate students and has approximately 200,000 students enrolled in adult and continuing education programs. It employs approximately 45,000 full-time and part-time employees.

5. Since the founding of what is now City College (the oldest college in the CUNY system) in 1847, CUNY has had a special mission to provide an affordable and excellent education for students from disadvantaged backgrounds. Section 6201(2) of the New York State Education Law recognizes this mission and sets forth the legislature's intent that "the University will continue to maintain and expand its commitment to academic excellence and to the provision of equal access and opportunity for students, faculty and staff from all ethnic and racial groups and from both sexes" as well as its understanding that "[t]he City University is of vital importance as a vehicle for the upward mobility of the disadvantaged in the City of New York." Approximately 42 percent of CUNY's students are in the first generation of their families to attend college.

6. In accordance with Section 6204 of the New York State Education Law, CUNY is governed and administered by its Board of Trustees, consisting of seventeen trustees: ten appointed by the Governor of New York, five appointed by the mayor of New York, a student trustee and a non-voting faculty trustee.

7. CUNY receives the majority of its funding from three sources: New York State and New York City in the form of operating and capital appropriations, and tuition revenue. In the 2019 fiscal year, CUNY received \$948 million of federal expenditures mostly related to the Federal Pell Grant Program, Federal Direct Student Loan Program, and the Federal Supplemental Educational Opportunity Grants. In addition, the CUNY Research Foundation, which is CUNY's

fiscal agent for the receipt of all funding for CUNY sponsored programs and research, expended \$192,305,823 in funding from federal grants in the 2019 fiscal year.

CUNY's Policies and Procedures on Title IX

8. At CUNY, significant work has been done by multiple constituencies to adopt policies and procedures addressing sexual misconduct that are in compliance with Title IX (based on earlier Department of Education guidance), Section 129-B of the New York State Education Law (“Enough is Enough”), other New York State and New York City laws (e.g. New York State Human Rights Law and New York City Human Rights Law), due process considerations, the Bylaws of the CUNY Board of Trustees (which contain the student disciplinary procedures), and the disciplinary process under collective bargaining agreements with CUNY’s instructional and classified staff unions.

9. While CUNY had issued prior guidance on sex discrimination, sexual harassment¹ and sexual assault, its broad Policy on Sexual Misconduct (“Policy”) was adopted by CUNY’s Board of Trustees on December 1, 2014 (effective January 1, 2015). This policy was written, in large part, to comply with the Title IX guidance provided by the DOE’s Office for Civil Rights (“OCR”) in its August 4, 2011 “Dear Colleague Letter” and its April 29, 2014 “Questions and Answers on Title IX and Sexual Violence.” The Policy was amended significantly on October 1, 2015 after New York State adopted New York State Education Law Section 129-B, which included many additional requirements for higher education institutions to follow in addressing sexual misconduct complaints by students. On June 25, 2018, CUNY again amended its Policy on Sexual Misconduct based on findings and guidance contained in an audit conducted by the State of New York under Education Law Section 129-B, the adoption of a new state statute (Labor Law Section

¹ CUNY’s Board of Trustees adopted its first Policy Against Sexual Harassment effective October 1995.

201-G) addressing sexual harassment against employees, and revised OCR guidance under Title IX and the Clery Act, 20 U.S.C. 1092(f).

10. Before CUNY promulgated its Policy on Sexual Misconduct in 2014, and in each case in which the policy was amended, the University followed an extensive and inclusive process to ensure not only that new legal mandates were followed, but also that the policy was improved based on any implementation concerns that had come to CUNY's attention since the most recent version went into effect.

11. The University's process for revising its Policy on Sexual Misconduct in each case has been as follows: The University General Counsel's Office prepares an initial draft of a revised policy to capture all required legal changes, and consults with a group of Central Office administrators, including the University Title IX Director. Thereafter, CUNY widely circulates the draft revised policy throughout the University, to groups including but not limited to senior University administrators, College Presidents and College senior administrators (including Title IX Coordinators, Chief Student Affairs Officers and Human Resources Directors), the University Faculty Senate, the University Student Senate, and other student groups. CUNY reviews the input and adopts appropriate suggestions and edits from these University groups and individuals, which are based on different perspectives from those of the University administration. This wide input is critical in making CUNY's policy one that was not only compliant with the multiplying number of federal and state laws and guidance documents, but also thoughtful and consistent with the University's governance structures and culture. This process of review and revision took many months in each case. After this extensive vetting process, a final version of the draft Policy on Sexual Misconduct was considered and voted on by the CUNY Board of Trustees, first by its subcommittee on Student Affairs and Special Programs, and then by the full Board of Trustees.

The Board of Trustees' subcommittees and the full Board of Trustees have historically not met in the summer.

The Final Rule's Impact on CUNY

12. The Final Rule will have an immediate, burdensome and detrimental impact on CUNY's Title IX procedures, and on CUNY's ability to respond to sexual assault and sexual harassment on its campuses. The processes required by the Final Rule are different from CUNY's processes in many material respects given that CUNY's Policy on Sexual Misconduct: (1) was initially written to comply with earlier DOE guidance; (2) contains legal requirements under New York State Education Law Section 129-B, including guidance from a New York State compliance audit²; (3) includes different fact-finding and disciplinary processes for students from those that have historically been contained in CUNY's Bylaws, and for employees are contained in collectively-bargained disciplinary procedures.

13. Drafting a policy that complies with the Final Rule and New York State law, amending inconsistent CUNY Bylaws and policies, disseminating a draft new policy for constituencies to review, obtaining Board of Trustees approval of the revised policies, and obtaining the resources to effectuate the changes will be impossible by August 14, 2020, the effective date required by the Final Rule.

14. CUNY is particularly concerned about needing to train "advisors" to conduct cross-examination, update its current investigations manual, create and update its current forms, train its Title IX Coordinators and others in the new processes, and provide information and education to the CUNY community on the Final Rule's new requirements in a very short timeframe.

² For example, the Article 129-B provisions regarding the scope of conduct that is required to be investigated, "no contact" orders, removing students who present a continuing threat to the education program, and filing confidential complaints are different from those in the Title IX regulations.

15. A threshold issue for CUNY in complying with the Final Rule is the need to harmonize the definition of “sexual harassment” in CUNY’s Policy on Sexual Misconduct with the definition under the Final Rule. CUNY’s policy defines sexual harassment as “unwelcome conduct of a sexual nature, including but not limited to unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, graphic and electronic communications or physical conduct of a sexual nature” when either: (a) submission to or rejection of such conduct is made either explicitly or implicitly a condition of an individual’s employment or academic standing or is used as the basis for employment decisions or for academic evaluation, grades, or advancement (quid pro quo); or (b) such conduct is sufficiently serious that it alters the conditions of, or has the effect of substantially interfering with, an individual’s educational or work experience by creating an intimidating, hostile, or offensive environment (hostile environment). The effect is evaluated based on the perspective of a reasonable person in the position of complainant.

16. CUNY’s definition of hostile environment sexual harassment is consistent with the definition of sexual harassment that OCR previously used, and reflects the broad definitions under the New York City and New York State human rights laws.³ The Final Rule, on the other hand, now defines hostile environment sexual harassment as “[u]nwelcoming conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.” Final Rule at 30,574 (34 CFR 106.30(a)).

³ The New York State Human Rights Law, NY Exec. Law 296(1), was recently amended to make the definition of sexual harassment even broader, providing that sexual harassment (or any form of harassment) is prohibited “regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims. Such harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual’s membership in one or more of these protected categories.” Under the New York City Human Rights Law, “sexual harassment, a form of gender-based discrimination, is unwelcome verbal or physical conduct based on a person’s gender.” www1.nyc.gov/site/cchr/law/stop-sexual-harassment-act.page.

17. To implement the Final Rule and at the same time comply with its legal obligation to address hostile environment sexual harassment as defined by New York State and New York City law, CUNY will need to amend its policy to include two completely different definitions of sexual harassment. When Title IX Coordinators receive a complaint, they will have to review it to determine whether it meets the more stringent definition of sexual harassment under the Final Rule (i.e., severe, pervasive and objectively offensive) and, if it does not, send a dismissal notice to the complainant (which is subject to appeal), and proceed under the Policy on Sexual Misconduct with regard to the non-Title IX harassment. Such a determination is extremely difficult for a Title IX Coordinator to make at such an early stage where no investigation has been conducted, not to speak of the added burden to the student who might be required to provide evidence at the initial stage of the complaint process to support whether the complaint constitutes Title IX sexual harassment. This process in and of itself will require extensive training for the more than 20 Title IX Coordinators on CUNY's different campuses, as well as any staff members. It will also require the University to spend extensive time and resources to engage in outreach and education to explain the new Policy and procedures to the entire University community.

18. Further, although the Final Rule does not preclude CUNY from addressing a claim that does not meet the definition of Title IX sexual harassment under its Code of Conduct (in this case, its Policy on Sexual Misconduct), under the Final Rule a dismissal under Title IX followed by an investigation under other sections of CUNY's policy may be perceived as retaliation and interfering with any right or privilege afforded under the Final Rule.

19. Receiving a dismissal of their complaint under the new Title IX Final Rule (even if it will be addressed under New York State law) will also be very disconcerting to

complainants, who will likely feel that the University has not taken their complaints seriously. Over time, this procedure will almost certainly have a chilling effect on students' and employees' willingness to come forward and report sexual harassment. The Final Rule therefore will interfere with CUNY's ability to combat sexual misconduct on campus and to assure a safe environment for its students to learn and its employees to work.

20. CUNY will have to devote significant resources to amending its procedures for investigating and adjudicating complaints in order to comply with the Final Rule. Under CUNY's Policy, a complaint of sexual misconduct may be made to the campus Title IX Coordinator, or one of several other College offices, depending on whether the complainant is a student or employee. The Policy provides that "[t]here is no prescribed method for filing a complaint of sexual misconduct and the college will respond to complaints whether they are oral or written." Once the Title IX Coordinator receives the complaint either directly or through one of the designated offices, the Title IX Coordinator investigates the complaint, including interviewing the complainant, the respondent and other witnesses, and gathering and reviewing pertinent evidence. By contrast, the Final Rule imposes many new limitations to this process, including the requirement that complainants must file a "formal complaint" with the Title IX Coordinator before an institution can begin a Title IX investigation, except in limited cases where the Title IX Coordinator signs the complaint. These requirements are likely to deter many complainants – who often are already reluctant to complain -- from coming forward.

21. CUNY's process, which is consistent with the previous Title IX guidance and New York law, provides its Title IX Coordinators with flexibility to perform their investigations, make factual findings, and then report the findings to the President and/or Chief Student Affairs Officer. Under the Final Rule, however, CUNY's Title IX Coordinators will be required to

prepare an investigative report, to which both parties have the right to respond and offer new evidence, and then the matter will proceed to a hearing regardless of the Title IX Coordinator's opinion of the evidence.

22. Moreover, while CUNY holds hearings before disciplining students or employees for sexual misconduct, CUNY will now have to create or revise its hearing processes for cases meeting the new Title IX definition of sexual harassment. This is particularly true where the respondent is an employee, as there is currently no procedure where a decision maker who works for the University conducts a live hearing with cross-examination and issues a decision in the specific format outlined in the regulations. Rather, in accordance with long-standing collective bargaining agreements, the disciplinary process for most employees at CUNY culminates in an employee appeal to arbitration.

23. In the case of instructional staff, such as faculty members, the only live hearing permitted is the disciplinary hearing before a neutral arbitrator selected by the parties. This hearing is nothing like the hearing process outlined in the Final Rule, as the arbitrator does not work for CUNY, and CUNY cannot require the arbitrator to make evidentiary decisions in accordance with the Title IX regulations, to write a decision in a specified format, or to subject themselves to training. Furthermore, there is no appeal from arbitration. CUNY will therefore have to create an additional hearing process for represented employees solely for Title IX allegations and not for any other allegations of discrimination or misconduct.

24. Affording represented employees this additional hearing process—essentially giving employees accused of sexual misconduct two bites of the apple – will make it doubly difficult to discipline employees who have engaged in sexual misconduct, including sexual assault, on campus. Under the arbitration process alone, it takes many months at a minimum to complete

the process, and during that time faculty members in particular are required to be kept on payroll. Adding a second layer to the process will delay CUNY's ability to rid its campus of sexual predators and cause expenditures of limited funds that could be used to enhance student learning. In addition, the fact that complainants will now have to testify and be cross-examined at two hearings will strongly deter complainants from participating in the fact-finding and disciplinary processes.

25. CUNY's student disciplinary processes in the CUNY Bylaws will also need to be revised because they do not contain certain procedures required by the Final Rule's new hearing requirement. For example, the student disciplinary hearing process does not require that "advisors" are the only ones that can conduct cross-examination.

26. The requirement that CUNY provide an advisor to a party who does not have one for the purposes of conducting cross-examination presents both administrative and financial issues at the University. CUNY does not currently have a group of individuals who have any expertise to serve as advisors to a Title IX complainant or respondent, even for the limited purpose of conducting cross-examination, and it is not clear what employees or other individuals can be identified and will be available and trained to be advisors, particularly before the implementation date of August 14. The cost of these advisors will also constitute a major expense for the University, particularly now when CUNY is undergoing severe financial hardships and has instituted a hiring freeze.

27. Implementation of the new Title IX regulations by the deadline of August 14, 2020 is particularly difficult for CUNY given the ongoing hardship it has faced as a result of the COVID-19 global pandemic. CUNY's campuses have been closed to in-person student instruction since mid-March, and summer classes are also being held through distance learning. In addition, with

the exception of a very small number of essential employees, faculty and staff of the University (including Title IX Coordinators) have been working remotely. CUNY has not yet made a decision as to whether classes in the Fall 2020 semester will be held in-person, online, or in some kind of hybrid manner. No return date has been set for most administrative staff at the Central Office and the campuses to return to their physical office locations, and faculty members do not work in the summer, which is a period of annual leave (vacation) for them under their collective bargaining agreement.

28. In light of this situation, it has been an extreme challenge for CUNY to engage in its core educational functions since March 2020, as well as for administrators and staff to perform both regular work and the additional functions necessary to address the operational and financial issues caused by the COVID pandemic. For example, given that CUNY serves a huge population of low-income students who do not have the technology to successfully participate in remote learning, CUNY purchased and distributed approximately 20,000 laptop computers and tablets to students in need. The CUNY administration has been working hard to distribute to students the funding that it has received from the federal government under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), and has formed working groups to consider the timing and process of “reopening”. During the pandemic, CUNY’s Board of Trustees, which makes all policy decisions for the University, as well as subcommittees of the Board, have not been able to hold live meetings but have been meeting by teleconference. The last CUNY Board of Trustees meeting of the academic year is scheduled for June 29, 2020, and the next regularly scheduled meeting is not until Fall 2020.

29. As an educational institution, the input of faculty, staff and students is critical to CUNY’s decision-making process. As was described above, CUNY’s Policy on Sexual

Misconduct was not adopted or amended until the CUNY Central administration had reached out to many employee and student groups to obtain input about how the proposed policy would operate in the real CUNY world.

30. While the new Title IX regulations are mandatory, many decisions still need to be made on how to implement those regulations given CUNY's current policies, structure, staffing and finances. CUNY will not be able to perform the stakeholder engagement necessary to make the many decisions required by the Final Rule before the Rule's August 14, 2020 effective date. These questions include, for example, what person or body will be the decision maker in cases with employee respondents? Who will hear appeals? What employees or non-employees are available and appropriate to be advisors in Title IX hearings? How will CUNY's 36-page Policy on Sexual Misconduct be amended to provide a coherent procedure understandable to students that addresses both Title IX sexual harassment and sexual misconduct covered by New York State law? What kind of training is necessary for which groups and what resources are available for training? Resolving these issues takes time and the attention of many different groups of people in the CUNY community, and CUNY's attention this summer is focused on education and reopening safely.

31. Requiring compliance with the Final Rule by August 14 will thus have a very negative impact on the University's ability to appropriately address sexual misconduct complaints.

Under 28 U.S.C. § 1746, I declare under penalty of perjury of the laws of the United States that, to the best of my knowledge, the foregoing is true and correct.

Executed on this 18 day of June, 2020,



Rodney L. Pepe-Souvenir
University Title IX Director
The City University of New York

Exhibit 15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF EDUCATION, *et al.*,

Defendants.

No. 1:20-cv-04260-JGK

DECLARATION OF ANDREA STAGG

1. I, Andrea Stagg, Esq., pursuant to 28 U.S.C. § 1746, hereby declare that the following is true and correct:

2. I submit this Declaration in support of the State of New York and the Board of Education for the City School District of the City of New York’s litigation against the United States Department of Education (“DOE”) and Elisabeth DeVos, in her official capacity as Secretary of Education, regarding the recently issued rule entitled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 84 Fed. Reg. No. 30,026 (May 19, 2020) (the “Final Rule”). I have compiled the information in the statements set forth below either through personal knowledge, through Barnard College (“Barnard” or the “College”) personnel who have assisted me in gathering this information from our institution, or on the basis of documents I have reviewed. I have also familiarized myself with the Final Rule in order to understand its immediate impact upon Barnard.

3. I am the Deputy General Counsel at Barnard. I obtained my Juris Doctorate from the George Washington University Law School, and received a bachelor’s degree from Rutgers

University. I have been employed as Deputy General Counsel since 2015. Prior to my tenure at Barnard, I served as counsel to the State University of New York system, providing system-wide advice on Title IX and campus safety from 2010 to 2015. I also co-coordinated a working group of higher education professionals and outside experts who developed uniform policies on sexual and interpersonal violence prevention and response, and in 2015, I advised the Office of the Governor and select legislative staff when these policies became the basis for New York State Education Article 129-B (“Enough is Enough”).

Background on Barnard

4. Founded in 1889, Barnard is devoted to empowering young women to pursue their passions. Barnard aims to provide the highest quality liberal arts education to promising and high-achieving young women, offering the unparalleled advantages of an outstanding residential college in partnership with Columbia University, a major research university. With a dedicated faculty of scholars distinguished in their respective fields, Barnard is a community of accessible teachers and engaged students who participate together in intellectual risk-taking and discovery. Barnard students develop the intellectual resources to take advantage of opportunities as new fields, new ideas, and new technologies emerge. They graduate prepared to lead lives that are professionally satisfying and successful, personally fulfilling, and enriched by a love of learning.

5. As a college for women, Barnard embraces its responsibility to address issues of gender in all of their complexity and urgency and to help students achieve the personal strength that will enable them to meet the challenges they will encounter throughout their lives. Located in the cosmopolitan environment of New York City and committed to diversity in its student body, faculty, and staff, Barnard prepares its graduates to flourish in different cultural surroundings in an increasingly interconnected world.

6. The Barnard community thrives on high expectations. By setting rigorous academic standards and giving students the support they need to meet those standards, Barnard enables them to discover their own capabilities. Living and learning in this unique environment, Barnard students become agile, resilient, responsible, and creative, prepared to lead and serve their society.

7. Among the 635 students who will become Barnard's class of 2023, 51% are students of color, and 13% are the first in their families to attend college. In addition, 38% of these students receive need-based grants from Barnard, and 12% are Pell grant eligible.

8. Barnard receives a total of over \$11 million in Title IV financial aid funds. These funds are essential to Barnard's mission, and include: Pell grants, which are awarded only to undergraduate students who display exceptional financial need; Federal Work Study, which is a program that provides funds for part-time employment to help low-income students finance college; Federal Supplemental Educational Opportunity Grant (SEOG), a grant for students with exceptional financial need; and Federal loans.

Barnard's Title IX Landscape

9. Barnard's Title IX & Equity Office, which manages the College's Title IX program, consists of an Executive Director for Equity who is also the Title IX Coordinator, and an Associate Director for Community Standards and Investigations. The Executive Director and Associate Director both serve as investigators for Title IX and other complaints under the Policy Against Discrimination and Harassment. Barnard's Executive Director of Equity/Title IX Coordinator position is currently vacant. The Title IX & Equity Office therefore currently maintains a staff of one, our Associate Director for Community Standards and Investigations, who also serves as our interim Title IX Coordinator.

10. Barnard's policy that prohibits unlawful discrimination and harassment is entitled the "Policy Against Discrimination and Harassment" (the "Policy"). The Policy prohibits a broad range of behaviors, including sexual assault, defined as any non-consensual intentional physical contact of a sexual nature; various forms of stalking; and dating or domestic violence. Furthermore, this conduct is prohibited if it has or may have a continuing effect on Barnard's campus, or occurred in the context of official College programs or activities, regardless of location.

11. Barnard's procedure that governs the investigatory and adjudicatory process for Title IX complaints and complaints of sexual and interpersonal violence is entitled the "Grievance Procedures for Gender-Based Misconduct, Sexual Harassment, Sexual Assault, Domestic Violence, and Stalking" (the "Procedure"). The Procedure provides that the College should weigh any complainant request for anonymity or lack of consent to a formal investigation with the College's commitment to provide a reasonably safe and non-discriminatory environment. If the College cannot maintain a complainant's request for anonymity or it is deemed necessary to proceed with investigation with the College as complainant, she/he will be notified by the Title IX Coordinator.

12. During the investigation process, the investigator may, among other things, conduct interviews and collect evidence. Both the complainant and the respondent have an equal opportunity to provide the investigator with relevant evidence and/or specific witness information.

13. The complainant and respondent have an equal opportunity to review the investigative report in its draft form and to ask questions about the report. The parties' feedback about the investigative report is incorporated into the final report that is given to the adjudicator.

After review of the draft report, the parties may also submit additional information to be provided to the adjudicator for consideration along with the report.

14. The adjudicator reviews the final report prepared by the investigator, along with any relevant evidence collected, and responses by the parties, and the adjudicator weighs the evidence using a preponderance of the evidence standard. The parties are not entitled to a hearing.

15. At the conclusion of this process, the adjudicator prepares a written decision reflecting a determination of responsibility, which also details the factual findings supporting the determination and the rationale for the sanction(s) imposed.

16. In determining appropriate sanctions, past findings of violations of the Policy, among other things, may be admissible for consideration.

17. Barnard receives around one report of sex discrimination under the Policy every year.

18. Barnard requires all employees to annually acknowledge receipt of the Policy. Barnard conducts training on the Policy for all incoming students and employees, and additional annual training in accordance with state and city law. Training for students and employees is offered both online and in-person. As of spring 2019, the College provided training to over 120 employees in-person, and over 850 employees completed online modules for the prevention of discrimination and harassment and prevention of sexual violence. In the 2019 calendar year, Barnard held over 40 in-person trainings for students.

Immediate Impact of the Final Rule Upon Barnard

19. The Final Rule requires an immediate and extraordinary shift in resources away from continuing operations amidst the global COVID-19 pandemic, only to implement a rule that will chill Title IX reporting and harm Barnard's ability to protect students.

20. Like most of New York City, Barnard's doors have been closed to students and non-essential staff since March 13, 2020.

21. Up until that time, Barnard had never in its history held a single online course. Nor did Barnard have an official telecommuting policy to facilitate remote working for employees. In fact, at the time Barnard's campus and offices closed, the College did not have enough licenses for VPN technology to enable a substantial number of employees to work remotely. Many employees did not have computers issued by the College, and some employees did not have sufficient technology and internet access to work from home. The network infrastructure to fully enable virtual learning and remote working was developed after the pandemic shut down the city.

22. The estimated cost of moving our classes and operations online was over \$160,000 to date.

23. The College spent to date at least \$45,000 on additional cleaning, cleaning supplies, and personal protective equipment for those who remain working on campus.

24. Despite these challenges, Barnard has worked hard to support its students, staff and the broader community during this time of need.

25. Barnard donated personal protective equipment it had in its possession to the New York City government and a local hospital, including over 1,000 face masks, over 100 boxes of gloves, dozens of face shields and goggles, hand soap, and bleach cleaner.

26. Barnard provided financial assistance to students trying to get home during the shutdown, including those who needed to return from study abroad, paid for moving companies to get students' personal items home or into storage, and gave emergency grants to students for other necessities. This assistance cost the institution over \$130,000.

27. At no cost to the students, Barnard housed 28 students who were unable to leave campus after the typical May move-out dates. Barnard also provided extensions, free of charge, to more than 50 students who did not empty their rooms of their personal belongings by the May move-out dates.

28. At a significant cost to the College, Barnard kept all employees whole on payroll until May 31, even if their job function could not be performed remotely or if their hours were reduced between March 13 and May 31. On May 31, Barnard instituted furloughs and reduced workloads under New York's Shared Work Program, so that furloughed employees could apply for unemployment benefits and CARES Act funds, including Federal Pandemic Unemployment Compensation. The College is fully funding furloughed employees' health and vision benefits during the furlough and Shared Work periods, and employees remain eligible for existing benefits such as employee and dependent tuition reimbursement.

29. Recently, Barnard issued summer work exemptions for students whose financial aid packages contained an anticipated earnings contribution from summer employment. Because many of our students are unable to work this summer due to the pandemic, Barnard relieved students of the expected contribution. This cost the institution approximately \$3 million.

30. Barnard has a need-blind admissions policy for first-year domestic students, meaning it admits such students without consideration of their ability to pay tuition and housing costs.¹

31. Barnard's total endowment is approximately \$364 million, which makes it the only need-blind postsecondary institution in the United States with an endowment less than \$1 billion. Barnard also has the lowest endowment among the Seven Sisters colleges.²

32. Because of Barnard's low endowment, the institution depends on revenue to continue its operations. However, the COVID-19 pandemic has devastated Barnard's revenue streams.

33. For example, every summer Barnard's campus hosts third-party programs that rent its facilities. In addition, Barnard runs its own summer program for high school students on campus. Both of these activities are crucial revenue streams for Barnard.

34. This summer, Barnard's summer program for high school students has been moved online at a reduced cost, which represents a \$1.8 million loss in revenue to the College. The third-party programs hosted on Barnard's campus have been cancelled entirely, which represents an additional \$ 1.5 million in lost revenue.

35. Before the pandemic, the College anticipated having eight residence halls open for Barnard programs, third-party summer programs, and facilities rentals for conferences. This summer only one residence hall remains open, housing students who were or are unable to return home for a number of reasons after the end of the semester.

¹ Barnard considers need for international first-year applicants and fall domestic transfer applicants.

² The Seven Sisters Colleges are: Barnard College, Bryn Mawr College, Mount Holyoke College, Smith College, Wellesley College, Vassar College and Radcliffe College.

36. Barnard is currently focusing its resources on determining how to continue its operations and create a safe learning environment for students for the fall 2020 semester. For example, Barnard is outfitting classes with audio-video equipment, in the event that some, but not all, students are able to return to campus in September. This effort is estimated to cost Barnard over \$600,000.

37. Barnard has robust working groups preparing for the upcoming academic year, including a group about returning to campus. To return Barnard students and employees to campus will likely include testing, contact tracing, quarantine and isolation procedures, among other safety measures.

38. Notwithstanding the institution's urgent need to respond to this crisis, DOE's Final Rule requires Barnard to divert resources toward these efforts in order to comply with the rule by August 14, 2020.

39. Barnard will need to create a new Title IX policy that, among other things, reflects the DOE's new definition of sexual harassment, and provides for a live hearing during the grievance process.

40. Given how complex the rule is, and Barnard's limited staff, Barnard will likely have to engage outside parties to provide training to all faculty, staff and students, and also to conduct its live hearings. Barnard will also need to identify appropriate advisors for the parties in the grievance process, who will conduct cross-examination.

41. Engaging outside vendors at a certain cost level requires Barnard to put the engagement out to bid, a process that takes months before an organization is identified and fully vetted to begin work. This work is expected to exceed that amount and a bidding process would be required.

42. These organizations will likely charge hundreds of dollars per hour, with a significant amount of hours spent on policy and procedure development, training, and any live hearings that occur.

43. The College would need to spend time and money to update existing online training modules that explain the Title IX policy and procedure to faculty, staff, and students. The College would also need to update the materials for in-person training given annually and ongoing to students and employees. These updates would take hours of staff time, and may require consulting with legal counsel at significant costs.

44. The College would need to identify and purchase technology to allow compliance with the Final Rule. Given the ongoing impact of the pandemic, which has impacted New York City particularly, live hearings may be required to be conducted remotely to facilitate social distancing and allow all parties to attend if Barnard is operating remotely. The College will need to train staff to conduct such hearings, facilitate evidence sharing while preserving privacy, including limiting screen shots and copying of materials while providing access, and more.

45. This process is further complicated by the fact that there are few organizations offering expertise on the Final Rule, because it was just issued.

46. Furthermore, the Final Rule appears to conflict with the collective bargaining agreements Barnard has in place with staff, in multiple respects, including elements of the required procedures that would conflict with the agreed-upon grievance and arbitration processes. Barnard will need to engage outside counsel to analyze the full extent of these conflicts and will need to give notice to the unions of changes. The College has four unions with separate collective bargaining agreements. Working with outside counsel to analyze the full extent of conflicts is likely to require at least 20 hours of time. Furthermore, if alterations from

current practice are required by law or regulation, Barnard is still required by labor law to give notice and an opportunity to the unions to bargain the impact of the changes.

47. Despite these substantial efforts, compliance with the Final Rule will undermine, not enhance, Barnard's ability to protect its students from sexual harassment.

48. For example, Barnard's Title IX & Equity Office receives approximately one Title IX complaint per year that would fall under the definition of sex discrimination in the Final Rule.

49. Students, unsure of whether their complaint is redressible by the Title IX office, may decide not to report at all.

50. On the other hand, Barnard will continue to receive, as it currently does, comparatively more complaints for harassment on the basis of other protected classes, including disability, race, color and national origin, as well as complaints about sex or gender-based discrimination that fall short of the definition in the Final Rule. Respondents in these matters will learn that, despite changes to the Title IX grievance procedures, which the DOE suggests are necessary to provide for a fair process, they will be entitled to no additional procedural protections, for no other reason than the fact that they are not accused of *sexual* harassment under the narrow definition in the Final Rule.

51. Thus, in addition to forcing a diversion of resources during an unprecedented emergency toward an effort that will only hamper our ability to protect students, the Final Rule will also force Barnard to send a divisive message to our community that is inconsistent with our values, and undermine considerable efforts to support our students and employees during the COVID-19 pandemic.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed on this 17th day of June, 2020

A handwritten signature in black ink, appearing to read 'A. Stagg', is positioned above a horizontal line.

Andrea I. Stagg, Esq.
Deputy General Counsel
Barnard College

Exhibit 16



1615 Duke Street | Alexandria, VA 22314
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TO: AASA Members

FROM: Chris Rogers, Policy Analyst
 Noelle Ellerson Ng, Associate Executive Director, Advocacy & Governance

RE: Report of Initial Findings: COVID Survey 2 Impact on Public Schools

DATE: June 12, 2020

As a result of the continuation of nationwide school closures due to the COVID-19 pandemic, last May, AASA launched its second national coronavirus school response survey to provide federal, state and local policymakers with immediate data on how districts are adapting and responding to prolonged closings, the resources and information superintendents are relying on or still need, and the initial financial implications associated with the pandemic as well as re-opening schools this summer/fall. As an indication of this study, AASA garnered 501 responses from 48 states over the weeks of May 5 through June 8, 2020. This report represents the second iteration of a series that AASA will release about the impact of COVID-19 on school districts and only speaks to the preliminary effects of the COVID-19 pandemic on district operations. The initial findings are summarized below.

COVID School Response and Operations

- When asked whether their district announced when schools will re-open and resume in-person instruction, 94% of respondents replied “No, but we are closed for the remainder of the 2019-20 school year” compared to 5% who responded “Yes, we will re-open based on state and local health officials.” (Q4)
- When asked how districts are providing distance learning while schools are closed due to COVID-19, respondents replied “district owned laptop, tablets, and hotspots” (92%); “texts and phone calls home to students and families” (91%); “video casts/webinars” (89%); “work packets” (82%); “online test and quizzes” (70%); “interactive whiteboards & online platforms” (65%); “textbooks” (53%); “classroom blogs & wikis” (52%); “instant grading and feedback” (29%); and “podcast” (23%). (Q9)
- When asked what, if anything, their district is doing to address equity during the COVID-19 Pandemic, respondents replied “pickup/delivery of free and reduced-price meals” (96%); “devices are provided for students who need them” (91%); “online/phone therapy” (72%); “additional online tutoring/assistance” (66%); “home internet access is provided for all students” (37%); “maintaining access to district/school-provided health services” (33%); “families can use phones/internet to request assistance with emergency housing, utility, etc.” (22%); and “other” (9%). (Q5)
- When asked what, if anything, their district is finding hard to provide equitably during this time, respondents answered “special education and related services” (78%); “access to online learning” (52%); “access to district health/school-provided health services” (35%); “devices for all students who need them” (27%); “childcare services for emergency personnel” (25%); “pickup/delivery of free and reduced-price meals” (12%); and “other” (11%). (Q6)
- When asked to describe how their district’s summer learning will look prior to the 2020-21 school year, respondents replied “hybrid of virtual and in-person learning for students who are at greatest risk of significant learning lost” (29%); “virtual programming for traditional summer school courses we offer” (24%); “other” (16%); “we are not offering summer learning” (13%); and “in-person instruction for students who are behind that is not optional” (1%). (Q13)
- When asked if their district planning to offer remedial learning for the 2019-20 school year, 43% of respondents replied “yes,” 43% said “not yet decided,” and 13% answered “no.” (Q11)

- When asked which of the following scheduling options their district considered for the 2020-21 school year, respondents replied “blended/combination of onsite and remote learning” (74%); “traditional schedule” (70%); “alternating days/weeks” (59%); “half days” (37%); “extending the school day to allow for the full day while accommodating social distancing” (22%); and “none of the above” (3%). (Q16)
- When asked to describe their district’s decision status regarding re-opening for the 2020-21 school year, respondents replied “we intend to open on time” (56%); “we are considering a modified schedule” (32%); “we have not yet begun planning” (16%); “we intend to start on time with a modified schedule” (15%); “we anticipate a delayed opening” (13%); “we have started planning and are almost complete” (9%); “we intend to start the school year early” (6%). (Q15)
- When asked to describe their district’s capacity (in terms of physical space) to fully comply with recommended social distancing, respondents replied “very hard to do” (77%); “we do not have enough physical space to accommodate full enrollment and to comply with social distancing” (69%); “my district includes at least one school that enrolls more than 50 people (staff and students included), putting us at odds with CDC guidance” (64%); “my district has some capacity to repurpose space (like gymnasiums, libraries, and cafeterias) to be used for classroom purposes” (33%); “my district could transition seamlessly to a social-distancing scenario” (1%), and “other” (1%). (Q25)

Remote/Distance Learning & Homework Gap

- When asked to identify barriers that would prohibit their district from transitioning to a fully online-learning model, respondents answered “we lack adequate internet access at home (student homework gap)” (60%); “we do not have the instructional capacity for online learning (teacher technology proficiency, lack of online student learning portal/platform, etc.)” (40%); “we lack the resources to purchase a comprehensive software program that could host all of our classes and data” (30%); “our educators and school personnel lack adequate connectivity and technology” (29%); “we offer one-to-one device programs in only certain grade spans/student clusters” (28%); “we do not have adequate bandwidth” (22%); “other” (18%); “we do not offer anyone to one device programs in our district” (14%). (Q14)
- When asked what percentage of their students are unable to participate in remote learning because they lack either internet access or a device at home, respondents replied “less than 10%” (47%); “11-20%” (22%); “21-30%” (12%); “31-40%” (6%); “41-50%” (3%); and “51% or greater” (6%).
- When asked how is their district paying for ed-tech services to deliver curriculum and instruction in the event of an extended COVID-19 outbreak, respondents replied “repurposing existing local funding” (61%); “repurposing existing state funding” (57%); “federal emergency education relief fund” (41%); “realize efficiencies within existing school budget” (41%); “federal E-rate program” (32%); “federal governors fund” (12%); “public-private partnerships” (12%); “private philanthropy or foundation” (10%); and “other” (6%). (Q20)

COVID-19 Fiscal Impact & Policy Relief

- When asked what, if any, contracts their district has that are not being fully realized because of the pandemic, respondents reported “transportation/bus service” (47%); “student support services” (33%); “food/nutritional services” (21%); “janitorial” (20%); and “other” (9%). (Q17)
- When asked how their district is paying for ed-tech services to deliver curriculum and instruction in the event of an extended COVID-19 outbreak, respondents replied “repurposing existing local funding” (61%); “repurposing existing state funding” (57%); “federal emergency education relief fund” (41%); “realize efficiencies within existing school budget” (41%); “federal E-rate program” (32%); “federal governors fund” (12%); “public-private partnerships” (12%); “private philanthropy or foundation” (10%); and “other” (6%). (Q20)

- When asked what costs they are most concerned about due to COVID-19), respondents were replied “costs related to restructuring and or/staggering of student and staff schedules” (70%); “costs related to delivering special education and related services” (67%); “increased transportation costs (to allow physical distancing on buses)” (63%); “costs related to connectivity” (47%); “costs related to serving increased health, particularly mental health, needs of students and staff” (46%); “costs related to technology devices (laptops and personal devices)” (41%); “personal protective equipment for students and staff” (40%); “costs related to extended hours/contracts for teachers” (34%); “costs associated with building/facility cleaning” (33%); “costs associated with staff/student sanitization” (31%); “increased use of paid time off (sick leave, vacation leave, personal leave)” (29%); “costs for additional staff to maintain new health/sanitization protocols in school buildings” (27%); “costs for additional tutors, substitutes, teachers, and assistants” (26%); “costs related to providing food services to students off-site” (22%); “costs related to serving increased number of homeless students and meeting McKinney Vento obligations” (17%); “costs related to construction and capital outlay projects” (8%); and “printing/disseminating paper learning materials” (6%). (Q22)

Demographics

- The survey response rate was well above average for AASA and is nationally representative (38%). Data was not collected in a manner to support state-specific analysis. Responses were collected from 48 states, all but Hawaii and Florida.
- Community Type: 61% of respondents described their community as “rural,” compared to 30% responding “suburban” and 9% responding “urban.”
- District Enrollment:

Responses	Count	%
Fewer than 300	15	2.99%
300 to 999	127	25.35%
1,000 to 2,999	185	36.93%
3,000 to 4,999	55	10.98%
5,000 to 9,999	67	13.37%
10,000 to 24,999	32	6.39%
25,000 to 49,999	11	2.20%
50,000 to 99,999	5	1.00%
100,000 or more	2	0.40%
(Did not answer)	2	0.40%
Total Responses	501	100%

AASA intends to re-issue elements of this survey again in three and six months along with additional relevant items, to benchmark the rolling impact of COVID on schools, as well as the impact of the pending economic slowdown/recession. Direct any questions to Noelle Ellerson Ng (nellerson@aasa.org) and Chris Rogers (crogers@aasa.org).

Exhibit 17

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
EDUCATION, *et al.*,

Defendants.

No. 1:20-cv-04260-JGK

DECLARATION OF VICTORIA A. AJIBADE

1. I, Victoria A. Ajibade, Esq., pursuant to 28 U.S.C. § 1746, hereby declare that the following is true and correct:

2. I submit this Declaration in support of the State of New York's litigation against the United States Department of Education ("DOE") and Elisabeth DeVos, in her official capacity as Secretary of Education, regarding the recently issued rule entitled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 84 Fed. Reg. No. 30026 (May 19, 2020) (the "Final Rule"). I have compiled the information in the statements set forth below either through personal knowledge, through the State University of New York Downstate Health Sciences University ("SUNY Downstate") personnel who have assisted me in gathering this information from our institution, or on the basis of documents I have reviewed. I have also familiarized myself with the Final Rule in order to understand its immediate impact upon SUNY Downstate.

3. I am the Assistant Vice President of Diversity and Inclusion/Chief Diversity Officer at SUNY Downstate located in Kings County, New York. I obtained my Juris Doctorate from Touro College Jacob D. Fuchsberg Law Center in 2001, and received a bachelor's degree from the State

University of New York at Stony Brook. My educational background includes: certifications from the Cornell School of Industrial and Labor Relations in the areas of Strategic Human Resources Leadership and Diversity and Inclusion. I have been employed as the Assistant Vice President of SUNY Downstate's Office of Diversity and Inclusion since August 9, 2018. Prior to my tenure at Downstate, I served as the Chief Diversity Officer/Title IX Coordinator for the City University of New York—Kingsborough Campus from 2015-2018. Additionally, in 2012, I had the distinct honor and privilege of having served as the inaugural Chief Title IX Coordinator for the New City Department of Education which is our nation's largest school system.

Background on SUNY Downstate

4. As one of the nation's leading urban medical centers, SUNY Downstate traces its roots back to 1860, when a school of medicine was founded at the Long Island College Hospital. The new college's faculty revolutionized medical education in this country by bringing the teaching of medicine to the hospital bedside, rejecting the idea that physicians should be trained exclusively in university lecture halls. As an academic medical center, SUNY Downstate serves the people of Brooklyn through its three-fold mission of education, research, and patient care.

5. Today, SUNY Downstate Health Sciences University comprises a College of Medicine, School of Health Professions, College of Nursing, School of Graduate Studies, School of Public Health, and the University Hospital of Brooklyn ("UHB"). SUNY Downstate is the only academic medical center in Brooklyn -- making UHB the borough's only hospital located at an academic medical center -- and UHB offers the most advanced and comprehensive care available to its globally diverse population of over 2.3 million people.

6. In its five constituent colleges and schools, SUNY Downstate educates a total of approximately 1,800 students, over half of whom are racial minorities and more than 70 percent of

whom receive financial aid. In addition, SUNY Downstate trains about 1,000 medical residents, who are assigned to two dozen affiliated hospitals.

7. More physicians who practice medicine in New York City received their training at SUNY Downstate's College of Medicine than at any other medical center in the country. And in Brooklyn, specifically, SUNY Downstate has trained nearly half of all doctors practicing in numerous specialty areas. SUNY Downstate's College of Medicine ranks seventh in the country in the number of its graduates who are now engaged in academic medicine.

8. SUNY Downstate is one of the largest employers in Brooklyn, with a total of over 4,000 employees, more than half of whom reside in Brooklyn.

9. SUNY Downstate is one of SUNY's twenty-nine State-operated colleges, and UHB is one of three hospitals that SUNY operates (along with the health science centers at Stony Brook and Upstate). SUNY campuses are listed as separate line items in the New York State budget, however, SUNY has flexibility (within statutory limits) to distribute funding among campuses and programs according to the priorities of SUNY's Board of Trustees.

10. SUNY Downstate receives significant amounts of funding from the federal government for education, financial aid, and for research activities. SUNY Downstate and its students are particularly reliant on funds provided and administered by the Department of Education. In each of the 2018-19 and 2019-20 academic years, SUNY Downstate received more than \$40 million dollars in federal student aid, which includes graduate and undergraduate loans, Pell Grants, and Work Study funds.

11. The federal funds that SUNY Downstate receives are essential to its three-fold mission to provide education, research, and patient care. Many of SUNY Downstate's undergraduate and

graduate students would simply be unable to matriculate without the provision of such financial aid packages.

12. The Department of Education can enforce what it determines to be violations of Title IX by suspending, terminating, or refusing to grant or continue federal funds from the Department of Education. If SUNY Downstate were to lose its federal funding from the Department of Education, it would not only result in a loss of jobs and placement for students, but also have a very real, and very adverse, impact on the patient care provided to the hundreds of thousands of Brooklyn residents who rely on SUNY Downstate for their healthcare needs.

SUNY Downstate's Current Policies and Procedures in Implementing Title IX

13. SUNY Downstate has a longstanding commitment to diversity and equal opportunity in all aspects of our campus experiences, including Title IX. The campus's Office of Diversity and Inclusion ("ODI"), which manages the institution's Title IX program, has enjoyed the full support the Office of the President and senior leadership, with respect to the development, implementation and enforcement of Title IX policies in our educational and workplace environments.

14. ODI has extensive, nuanced expertise with regard to the breadth and complexity of Title IX because we recognize that, in addition to the well-known segments of Title IX like athletics and sexual misconduct, the scope of Title IX consists of other socially vital areas that include, but are not limited to: gender-identity, gender-based pay inequity, the rights of pregnant and parenting students, conscious/unconscious gender segregation in career and technical education, disparities in the hiring of women available to teach STEM courses as well as the institution's obligation to mitigate or eradicate any achievement gaps between the sexes in STEM courses. SUNY Downstate's ODI has balanced these complicated and sensitive efforts by

positioning ODI as a confidential resource to all members of the campus community. While sexual misconduct on the basis of sex was a protected category and was thereby incorporated into SUNY Downstate's non-discrimination policy, in 2018, SUNY Downstate drafted and promulgated a stand-alone sexual misconduct policy to underscore the institution's message of zero tolerance for any such conduct.

15. SUNY Downstate's ODI currently consists of the Assistant Vice President/Chief Diversity Officer, the Title IX Associate and the Associate Director, for a total of three staff members who are trained and have the subject matter expertise to address such complaints. In addition to Title IX, ODI is responsible vetting all EEO-related complaints, affirmative action planning, and various SUNY Systems Diversity initiatives. ODI also conducts campus wide EEO educational trainings pursuant to Title VII, corrective action trainings and department specific trainings by request.

16. SUNY Downstate's sexual misconduct policy clearly defines prohibited conduct of a sexual nature, and delineates who and how one may file a Title IX-related complaint at SUNY Downstate. Under this policy, sexual misconduct is defined "as any unwelcome sexual advance, request for sexual favors, or other verbal or physical conduct of a sexual nature, as well as gender-based harassment that need not include sexual advances, when: (a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or status as a student; (b) submission to or rejection of such conduct is used as the basis for decisions affecting the employment or academic status of said individual; or (c) any such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or educational experience, creates an intimidating, hostile or offensive work or educational environment.

17. The definition of sexual misconduct is not limited by geography. SUNY Downstate asserts jurisdiction of Title IX complaints that take place off-campus where the alleged incident took place in a setting that is deemed an extension of the workplace, such as University sanctioned holiday gatherings, retirement events, work conferences, etc. Moreover, SUNY Downstate, sua sponte, may exercise jurisdiction where one or more of the parties to a Title IX complaint are members of the campus community and a sufficient nexus to the work or educational environment is articulated.

18. As a general rule, ODI will accept verbal or written complaints. Individuals may file complaints electronically by using the complaint form available on ODI's website, email or telephone. An individual may file a complaint anonymously. ODI reviews the anonymous complaints to ascertain whether there is a legitimate investigative avenue. Title IX-related complaints alleging sexual misconduct against a student are managed by SUNY Downstate's Office of Student and Academic Affairs.

19. Upon intake of a Title IX-related complaint, ODI, in consultation with campus stakeholders (which might include leaders from the Office of General Counsel, the Office of Student and Academic Affairs, the Office for Graduate Medical Education, or Human Resources, as appropriate), will render a recommendation as to what, if any, interim supportive measures should occur. Upon receipt of a complaint, ODI will contact the individual directly for additional information. ODI will determine whether the complaint articulates a violation of the policy and, if so, will conduct an investigation. ODI also provides guidance and technical assistance in the event that the person reporting an issue is unsure of the appropriate category for the conduct at issue.

20. ODI's investigative process includes, but is not limited to, conducting an interview of the complainant and other relevant parties, requesting supporting evidence (e-mails, text messages, screenshots, pictures, etc.), an interview of the respondent, and if appropriate witnesses identified by the respondent. ODI carefully reviews such complaints and makes the determination as to whether there has been articulation of a violation of the sexual misconduct policy. Complaints that fail to articulate a violation of policy, or that are brought by a complainant-witness who later withdraws the complaint or is unresponsive/uncooperative will be administratively closed without prejudice.

21. It is ODI's policy to respect the privacy of all parties and witnesses involved in Title IX complaints. However, the need for confidentiality must be balanced against the obligation to cooperate with lawful investigations, to provide due process to the accused, and/or to take necessary action to conciliate, investigate, or resolve the complaint. Therefore, at the discretion of the Chief Diversity Officer, information regarding the subject complaint may be disclosed in appropriate circumstances.

22. Between August 9, 2018 to date, ODI has fielded 27 sexual misconduct complaints. It should be noted that, in some of these cases, the complainant did not articulate sexual misconduct within the meaning of SUNY Downstate's sexual misconduct policy and the allegations were not substantiated.

23. ODI participates in student orientations, as well as customized employee orientations, advising attendees of their rights and responsibilities pursuant to Title IX. This is bolstered by the annual dissemination of the President's Reaffirmation of the Institution's Commitment to Diversity, Affirmative Action and Title IX Letter center-wide email.

24. ODI has developed and disseminated separate tailored educational Title IX trainings to student and staff, consistent with longstanding federal Title IX guidance, the institution's obligations under the Clery Act, and the goals of Title VII and New York's "Enough is Enough" statute, Education Law §129-B. Since November 2018, ODI has conducted over 100 live training sessions to students, faculty and staff, and over 2,000 individuals have completed ODI's online trainings on SUNY Downstate's anti-discrimination policies.

Immediate Impact of The Final Rule upon SUNY Downstate

25. The Final Rule will have a substantial and unnecessarily disruptive impact on SUNY Downstate's Title IX investigations.

26. Most notably, the Final Rule would redirect the institution's attention away from its most pressing mission which is to provide an effective, focused emergency response to COVID-19 in that the vast majority of SUNY Downstate's student population and workforce are essential workers.

27. Upon UHB's designation by Governor Andrew Cuomo as a COVID-only facility in late March 2020, UHB devoted all available resources to combatting the virus. This included the immediate cessation or suspension of all elective medical admissions, all elective surgeries, all obstetric deliveries (both scheduled and spontaneous), all elective imaging studies and ambulatory care appointments. UHB transferred out existing, non-COVID patients to other facilities, forgoing the revenue that treating such patients would have provided. UHB also undertook emergency credentialing of staff to support patient care and maintain adequate staffing (including physicians, nurses, respiratory therapists, social workers, etc.) during a time of profound fear and unease among the general population and its workforce. Hospital bed capacity was increased to allow for critical/intensive care, which itself requires plastic barriers between patient bays, and outdoor tents

were erected for use as a potential surge space. UHB utilized two Body Collection Project trailers from the Office of the Chief Medical Examiner to help deal with decedents.

28. As of this writing, SUNY Downstate had conducted nearly 2500 COVID-19 tests, had nearly 800 inpatients infected with COVID-19, and had, tragically, lost 297 patients since the start of the pandemic. SUNY Downstate's staff has bravely endured a heavy toll these past few months, and that toll is unlikely to lift anytime soon, as both clinical and ancillary disciplines will be called upon to support ongoing patient care and infection control initiatives.

29. SUNY Downstate will have to divert substantial resources to the implementation of the Final Rule in a number of ways, all of which will distract it from its overall mission in the midst of the pandemic.

30. The institution would no longer be permitted to use a "single investigator model," which has one official tasked with investigating, adjudicating and issuing disciplinary sanctions against respondents. The regulations instead require three separate individuals to work through separate pieces of a single Title IX complaint process: a Title IX coordinator, who receives reports of sexual misconduct; an investigator, to gather facts and interview parties and witnesses; and a decision maker, to determine sanctions and remedies for parties. This new model would further strain ODI's already overworked staff, if not be outright unfeasible for its three members to effectuate, and would undermine the integrity of the existing process. To train and/or hire additional staff to meet this need will not be possible for SUNY Downstate, given budget constraints precipitated by its aforementioned ongoing fight against COVID-19.

31. Further, because the decision maker cannot be the Title IX Coordinator or someone who has played a part in the investigation, institutions like SUNY Downstate may shy away from appointing the best-trained and qualified individuals to specific portions of investigations if they

wish to preserve the right to use such individuals during a subsequent grievance hearing. These arbitrary restrictions on roles can lead to results that directly conflict with the stated purpose of “balanced interest and restored due process.”

32. The Final Rule’s insistence that both parties must use an “advisor” to conduct cross-examination, without providing guidance on who can – and cannot – serve as an advisor, also adversely affects the integrity of SUNY Downstate’s existing Title IX investigative process. A respondent could very well choose as an advisor someone who plays a central role in the reporting individual’s career advancement (for instance, a Chief Resident), which would have the obvious effect of making a reporting individual hesitant to come forward with even legitimate complaints.

33. Additionally, the requirement that Title IX hearings be live and/or interactive creates its own chilling effect, and unnecessary undue hardship. In conjunction with the “advisor” rule, a reporting individual would be much more likely to experience unnecessary re-traumatization when required to participating in such live or interactive hearing.

34. The Final Rule’s definition of sexual harassment is unduly burdensome in that it requires that unwelcome sexual conduct be severe, pervasive *and* objectively offensive, and that this conduct effectively deny access to educational opportunities to constitute a violation of Title IX, flies in the face of principles of equity and fairness. The new definition will result in a chilling effect, as students and even residents – many of whom, by definition, are in strictly hierarchical arrangements as they hope to advance toward the completion of their degree and/or fellowship – will be less willing to come forward. This is especially true in light of the different standards that the Final Rule would impose on students as compared with employees. Medical residents already occupy a unique, almost hybrid student-employee role on campus; the fact that the Final Rule’s

definition of sexual harassment departs from that under Title VII will create not only a chilling effect, but unnecessary confusion for medical residents, as well.

35. The Final Rule's requirement that unwelcome sexual conduct be not only "...severe, pervasive and objectively offensive," but also result in the denial of "access to educational programming and/or activities" is unduly restrictive. This new definition would require that complainants and institutions meet new, stringent requirements before SUNY Downstate can fulfill its obligation to prevent and redress sexual misconduct. The new definition of sexual harassment has the purpose and/or effect of deterring complainants from coming forward because many complainants will not believe that their experience satisfies the Rule's new definition of sexual harassment.

36. Finally, in-person hearings are not feasible considering the nation, and Brooklyn especially, is in the midst of a pandemic whose response prescribes social distancing. SUNY Downstate does not have the physical infrastructure or fiscal resources to accommodate this change. To the extent that live hearings can be done via video conferencing, this presumes that third-party complainants or witnesses to an investigation have access to technology to meaningfully participate in any such hearing.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed on this 19th day of June, 2020

A handwritten signature in black ink, appearing to read 'Victoria Ajibade', written over a horizontal line.

Victoria Ajibade, Esq.
Assistant Vice President of Diversity
Inclusion/Chief Diversity Officer
SUNY Downstate Health Sciences University

Exhibit 18

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
EDUCATION, *et al.*,

Defendants.

No. 1:20-cv-04260-JGK

DECLARATION OF MARY HAVILAND

1. I, Mary Haviland, Esq., pursuant to 28 U.S.C. § 1746, hereby declare that the following is true and correct:

2. I submit this Declaration in support of the litigation by the State of New York and the New York City Department of Education against the United States Department of Education (“DOE”) and Elisabeth DeVos, in her official capacity as Secretary of Education, regarding the recently issued rule entitled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 84 Fed. Reg. 30026 (May 19, 2020) (the “Final Rule”). I have compiled the information in the statements set forth below either through personal knowledge, through New York City Alliance Against Sexual Assault (“the Alliance”) personnel who have assisted me in gathering this information from our institution, or on the basis of documents I have reviewed. I have also familiarized myself with the Final Rule in order to understand its immediate impact upon the Alliance and its constituents.

3. I am the Executive Director at the Alliance located in New York City. I have been employed as Executive Director since November 11, 2011.

4. My educational background includes: Honors, Bachelor of Arts from McGill University (1977), a Master Degree in Political Science & Public Policy, Columbia University (1986), and Juris Doctorate from New York University Law School (1994). I was the recipient of the Charles H. Revson Fellowship on the Future of New York (1985-86) and the Root, Tilden, Snow Fellowship at NYU Law School (1990-1994).

5. I am admitted to practice law in New York State.

6. I have been working in the field of domestic and sexual violence almost uniquely since 1978. I began as a paralegal in the Brooklyn Legal Services Matrimonial Unit where many of our cases were based on physical abuse and have moved to progressively responsible positions. For the past 23 years, I have directed organizations which have had the mission of decreasing the incidence of both Domestic Violence and Sexual Assault. These organizations are: The Coalition for Criminal Justice Reform for Battered Women, CONNECT and the Alliance. I have published multiple articles in academic publications the fields of domestic and sexual violence.

The Alliance's Title IX Work

7. The mission of the Alliance is to prevent sexual violence and reduce the harm it causes through education, research and advocacy. The Alliance was founded in 2000 by a coalition of New York City Rape Crisis Programs as a leadership organization to address gaps in services and prevention on the city, state and federal level. The Alliance's offices are located at 32 Broadway, Suite 1101, New York, N.Y. 10006.

8. In Fiscal Year 2019, the Alliance provided trainings to over 1,000 people, including law enforcement officials, government officials, social services providers, staff at non-profits and affected young people across New York City. Additionally, the Alliance provided trainings and technical assistance, including 63 workshops and 16 panel events, at 10 campuses in New York

State, reaching over 2,000 students and staff. The Alliance further provided training to hundreds of rape crisis center staff, and provided counseling and information to hundreds of survivors of sexual assault.

9. Training is core to the Alliance's mission. We have the largest training institute in New York State for medical professionals to become certified Sexual Assault Forensic Examiners in New York State, and train over 130 medical professionals a year in conducting adult and pediatric forensic exams. Both of our training courses are approved by the NYS Department of Health and the International Association of Forensic Nurses. We train human service professionals on responding to sexual assault and the basics of trauma-informed care. The Alliance is also certified to provide Continuing Education credits for Social Workers and regularly provides webinars on topics such as child sexual abuse, trauma-informed care, and long-term health care for sexual assault survivors.

10. Our Campus Program provides education and training for in-coming students, student leaders and various student groups such as athletes, women's groups, and support programs for students struggling with college. As a complement, our Training and Technical Assistance program provides training for rape crisis centers in the Greater Metropolitan Region on topics such as working with higher education on campus sexual assault, meeting the needs of the LGB, Gender Non-Conforming and Transgender community, and emerging issues on campus such as cross-complaints among others. Our training receives excellent evaluations and the Alliance is looked to as a leader in sexual violence education.

11. Refined over 20 years, the Alliance's best practices and policies for prevention and intervention are currently being implemented citywide by hospitals, law enforcement, college campuses and youth-serving organizations.

12. We have a direct services program that provides crisis intervention and system advocacy to survivors of sexual assault, including student survivors of sexual violence on campus. In the last year, we started a legal program that assists survivors of sexual assault with the legal ramifications of sexual violence including: Family Court proceedings; public benefits and credit issues, immigration status, Housing Court proceedings and campus adjudications. Nearly 1.5 million students, faculty and staff have been reached through rape crisis program technical assistance provided to institutions of higher education (hereafter IHEs) in New York State since 2016. And an average of 4,890 students are reaching out for services annually.¹

13. As the lead agency in the New York City Sexual Violence Prevention Center, the Alliance also supports a robust prevention program which concentrates on high risk communities of youth and on nightlife settings in New York City.

14. In addition, the Alliance's Campus Sexual Assault program has been a direct provider of training and technical assistance to IHEs since 2016. We provide regular programming and education to twelve schools across New York City. The Alliance's skilled Campus Coordinator works with students of all backgrounds, administrators, staff members and faculty, Title IX Investigators and Title IX Coordinators, staff of Women's Resource Centers and Counseling/Wellness Centers, Higher Education Opportunity Program staff, and the International Student offices on the implementation of sensitive and effective responses to incidents of sexual violence. The Alliance also coordinates a Campus Training Institute (CTI) and conducts annual needs assessments of each of the partner campuses. In these meetings, often with Title IX Coordinators, the Alliance staff learns of the specific challenges and trends

¹ Unpublished statistics obtained from the New York State Department of Health, Bureau of Maternal & Child Health

they are seeing. They share which types of cases are the most prevalent and how the school responds to them.

15. In addition to the relationships outlined above, the Alliance Campus Program created two programs entitled the Student Volunteers Program (SVP) and the Faculty Advisory Board (FAB) in response to requests from students and faculty at each of our campus partners to meet with other New York City campuses. The Alliance established an application and interview processes which yielded 25 SVP interviews and 9 FAB interviews from our 12 campus partners. The 15-member SVP and 4-member FAB have been meeting since February 2020. Both groups focus on educating the Higher Education community on the issues of sexual and domestic violence as well as instituting new and on-going programming on their campuses on these issues. Each group conducted webinars during Sexual Assault Awareness Month (April) on addressing sexual assault during the Pandemic.

16. Finally, the Alliance worked with stakeholders on the drafting and bipartisan passage of our 2015 amendments to the New York State Education Law. This law, NYEL Article 129-B, sets out requirements for colleges and universities, public and private, with regards to their response to domestic violence, dating violence, stalking and sexual assault.²

The Alliance Must Immediately Overhaul Its Programs to Comply with The Final Rule

17. At the moment, nearly all of the Alliance's planned trainings on campus sexual assault and sexual violence are on hold so the Alliance can devote all of its resources and energy to providing training, technical assistance and guidance on the Final Rule before its August 14th effective date. This suspension of the Alliance's trainings is necessary due to the Rule's complexity, departure from past Title IX precedent and guidance, and the incredibly short

² New York State Education Law, Article 129-B

timeframe between the Rule's publication and effective date. While the trainings are suspended, the Alliance expects to engage in broad revisions of its programs, policies and guidance.

18. The Alliance's Training and Technical Assistance program, for example, will be required to thoroughly review the Rule and create new programming on the Rule's requirements for 52 rape crisis programs that we serve over the next few weeks. Significant legal expertise – both internally and externally – will be required to fully understand the interaction between the Final Rule and Article 129-B, Title VII, Title II, the Clery Act, and the Sexual Harassment Laws in New York State and New York City.

19. It is critical that the Alliance adequately educate rape crisis centers on the new Rule in the next few weeks, as rape crisis centers provide 24-hour assistance to sexual assault survivors as well as many educational trainings for students and IHE staff, and must therefore be ready to answer questions and provide whatever assistance is needed. Rape crisis centers are also often called upon to provide guidance on IHE policy on sexual violence at the educational institutions with which they partner.

20. The Alliance will have to train university administrators on Title IX compliance under the new Rule. Rule provisions such as the new definition for sexual harassment, the actual knowledge standard, the limitation on responding to off-campus conduct, and the new due process requirements will require the Alliance to work with campus administrators to make major policy adjustments.

21. The Alliance anticipates needing to revise the majority of its pre-existing Title IX trainings, including on issues such as: affirmative consent, sexual misconduct resources, healthy relationships, responding to disclosures of sexual violence, and sexual violence in the LGBTQ+ community, trainings on best practices of for responsible employees, and on-campus jurisdiction.

22. The Alliance will have to devote significant resources towards preparing program staff and our partners on the Rule's live cross-examination requirement. The Alliance will have to equip staff who have no investigatory experience with the expertise to conduct these cross-examinations, and then to share this expertise with the partners who depend upon us. There are few best practices for this brand new process to pull from, and as such, significant resources will need to be allocated for this endeavor.

23. Finally, in cases where the Alliance is requested to train Title IX hearing panels and/or Title IX staff, the Rule requires those training materials to be publicly posted to campus websites. Our Campus and Training and Technical Assistance programs will need to create new trainings for these requests, that campuses can make publicly accessible to students and staff. This will be difficult in the time frame ordered by the new Rule.

24. Furthermore, as many of the provisions in the new Rule have caused significant confusion, particularly in regard to how they interact with existing state and federal requirements, litigation is already expected. The Alliance's Training and Technical Assistance Center will need to strategize about how best to support programs with these challenges moving forward. The Alliance will also have to ensure that its current programs which serve colleges and universities under Article 129-B are not jeopardized due to the confusion and concerns caused by the Title IX Rule.

25. The outreach and education required to implement the new requirement in the Rule is massive. The Alliance has been working to reach students, campus partners and rape crisis centers to let them know about the many changes that flow from the Rule. We are maintaining services remotely and conducting outreach campaigns to ensure that these constituents understand that we are a resource for them.

26. In the few weeks since the Rule's publication, the Alliance has fielded many questions and provided trainings on what we understand so far about the changes to take place. The Campus Program's updated menu of staff, faculty, and student CTI training services will need to be communicated to all of our current and incoming campus partners. Our outreach efforts will need to be both proactive and reactive to the upcoming developments and unanticipated issues as they arise.

27. The Final Rule's publication comes at a particularly challenging time for New York City. To date, New York State has had nearly 400,000 cases of confirmed COVID cases, and over 24,000 deaths with 55% of the cases and 70% of the deaths occurring in NYC.³ The State and City of New York are facing huge deficits because of this pandemic (NYC-\$14 billion and NYS-\$13 billion). The Alliance receives approximately 80% of its funding from these two sources. We know that the funds that support our campus and technical assistance programs for IHE are slated to be cut. As a result, in the next several months, the Alliance stands to lose some portion of its \$2 million budget. In addition, the organization has had to expend resources in order to convert to remote working, make our direct services programs accessible to on-line participation and assist clients with emergency expenses. As such, the Final Rule has already caused significant hardships to the Alliance, and these hardships will continue between now and the August 14, 2020 effective date.

The Alliance's Mission Will Be Undermined by The Final Rule

28. Many of the Final Rule's requirements will negatively impact the communities the Alliance serves.

³ New York State Department of Health COVID-19 Tracker, available at <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Map?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n> (last accessed June 16, 2020).

29. For example, the live cross-examination requirement will likely deter survivors from making complaints. In our experience, campus sexual assault often takes place in friendship networks that are just being established by young students. Confronting friends, or friends of friends, is a daunting and sometimes impossible expectation of a young adult who is just making their way independently in the adult world. Furthermore, the Rule expects parties' advisors of choice, who may be untrained in law, to carry out the important function of assessing the truth of an accusation, conducting cross-examinations, and weighing evidence, with little to no background or guidance on how to do so.

30. The possibility that the Final Rule's new provisions may deter reporting of sexual assault and sexual harassment is of extreme importance to the Alliance, given the already alarmingly low rate of sexual violence reporting. The Alliance is deeply concerned that the Rule will make it harder to hold perpetrators accountable and therefore to prevent future sexual and domestic violence.

31. The Alliance is also concerned that the Rule conflicts with and undercuts several major protections for sexual harassment survivors provided by the former Title IX regulations and current New York State law.

32. The Final's Rule definition of sexual harassment, which now requires conduct to be severe, pervasive and objectively offensive will not allow our campus partners to use their Title IX processes to investigate a range of conduct that they otherwise would, including single acts of sexual harassment. It may also render perceived lesser forms of repeated harassment ineligible for action.

33. The Rule goes on to further limit its applicability by geography to many situations commonly experienced in the higher education setting. By limiting a school's response to those

instances when the sexual harassment takes place within the school's education program or activity in the United States, the Rule allows IHEs to ignore many serious incidents of sexual, domestic and dating violence, even when both parties are students and even when the effects on the survivor continue to impact the survivor's ability to access an IHE's education program and activities. The Rule withdraws support to students previously protected by Clery/VAWA and prevents Title IX from applying to: programs abroad, non-recognized student organizations (which may include some fraternities), cyber abuse when students are off-campus, and many situations on commuter campuses.

34. Of the Alliance's twelve current partner campuses, 100% of them have a predominantly commuter-based student body. As a result, sexual and domestic violence are most likely to occur "off-campus," outside of a school-sponsored program or event. The Rule essentially blocks commuter-based students from accessing the protections of Title IX from their schools.

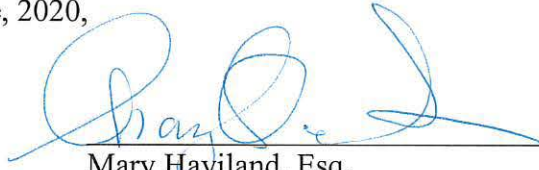
35. Consider a commuter student who is being stalked and receiving threats of violence from an ex-partner who is a current student and knows victim's academic schedule. Though these threats and stalking behaviors may take place off-campus, these behaviors are likely to have *on-campus* effects, such as the victim feeling anxious and fearful while at school. The Rule's failure to protect students from the on-campus effects of sexual harassment is both illogical and undermines the purpose of Title IX.

36. In sum, the new Rule promulgated by the U. S. Department of Education, taken in its entirety, will chill the reporting of incidents of sexual and domestic violence and harassment, will fail to protect all students who experience these forms of violence, and therefore, will fail to reduce the incidence of this violence in the future. As such, the Rule

does not satisfy the central aim of Title IX, that is, to address discriminatory behavior and activity which discourages access to educational programs and opportunities at IHEs.

Under 42 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that, to the best of my knowledge, the foregoing is true and correct.

Executed on this 18th day of June, 2020,

A handwritten signature in blue ink, appearing to read "Mary Haviland", is written over a horizontal line.

Mary Haviland, Esq.
New York City Alliance Against Sexual Assault