

TITLE IX WORKBOOK

**Schools Legal Service
Orange County Department of Education**

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TITLE IX WORKBOOK

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TITLE IX - WORKBOOK

THE STATUTORY LANGUAGE

The primary federal statute prohibiting sex discrimination in educational programs is Title IX of the Education Amendments of 1972.¹ Title IX states in part:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”²

Title IX defines an education institution as any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education.³

FEDERAL REGULATIONS

A. Purpose of Title IX

The U. S. Department of Education has promulgated regulations to implement Title IX.⁴ The purpose of the regulations is to effectuate and implement Title IX and eliminate discrimination on the basis of sex in any educational program or activity receiving federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution.⁵

B. Definitions Under Title IX

The regulations define federal financial assistance as any grant or loan of federal financial assistance, including funds made available for the acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; 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; a grant of federal real or personal property, provision of services by federal personnel, the sale or lease of federal property, or any other contract, agreement or arrangement which has as one of its purposes the provision of assistance to any education program or activity.⁶ A program or activity is defined as a college, university, or other postsecondary institution, or a public system of higher education.⁷ An educational institution includes a preschool, a private elementary or secondary school.⁸

¹ 20 U.S.C. § 1681.

² 20 U.S.C. § 1681(a).

³ 20 U.S.C. § 1681(d).

⁴ 34 C.F.R. § 106 et seq.

⁵ 34 C.F.R. § 106.1.

⁶ 34 C.F.R. § 106.2(g).

⁷ 34 C.F.R. § 106.2(h).

⁸ 34 C.F.R. § 106.2(k).

C. Dissemination of Title IX Policy

The regulations require each local educational agency⁹ to designate at least one employee to coordinate its efforts to comply with Title IX regulations and investigate any complaints.¹⁰ The regulations also require dissemination of a Title IX policy by each local educational agency to students, parents, employees and others.¹¹

D. Discrimination in Admission and Recruitment

The federal regulations specify that no person shall, on the basis of sex, be denied admission or be subject to discrimination in admission by any local educational agency.¹² In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a local educational agency shall not:

1. Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;
2. Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or
3. Otherwise treat one individual differently from another on the basis of sex.¹³

A local educational agency 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.¹⁴

In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a local educational agency:

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;

⁹ For clarity, we have used the term “local educational agency” throughout this workbook to include community colleges, regional occupational programs, county offices of education and school districts.

¹⁰ 34 C.F.R. § 106.8.

¹¹ 34 C.F.R. § 106.9.

¹² 34 C.F.R. § 106.21

¹³ 34 C.F.R. § 106.21(b).

¹⁴ 34 C.F.R. § 106.21(b)(2).

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. A local educational agency 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 that is prohibited by the federal regulations in Title IX.¹⁵

E. Discrimination in Education Programs or Activities

The federal regulations state that 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 educational program or activity operated by a local educational agency which receives federal financial assistance. In providing any aid, benefit or service to a student, a local educational agency 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;

¹⁵ 34 C.F.R. § 106.21(c).

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.¹⁶

A local educational agency 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.¹⁷

With respect to access to classes and schools, a local educational agency shall not provide or otherwise carry out any of its educational 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. The regulations do 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. The federal regulations do not prohibit the 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. 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. Local educational agencies may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.¹⁸

A local educational agency that operates a non-vocational, coeducational elementary or secondary school may provide non-vocational, single-sex classes or extracurricular activities, if:

1. Each single-sex class or extracurricular activity is based on the local educational agency's objective to improve educational achievement of its students, through a local educational agency'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 to meet the particular identified educational need of its students, provided that the single-sex nature of the class or extra-curricular activity is substantially related to achieving that objective;

¹⁶ 34 C.F.R. § 106.31(a) and (b). See, also, "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities," U.S. Department of Education, Office for Civil Rights (December 1, 2014). See, <https://www2.ed.gov>.

¹⁷ 34 C.F.R. § 106.33.

¹⁸ 34 C.F.R. § 106.34(a).

2. The local educational agency implements its objective in an even-handed manner;
3. Student enrollment in a single-sex class or extracurricular activity is completely voluntary;
4. The local educational agency provides to all other students, including students of the excluded sex, a substantially equal co-educational class or extracurricular activity in the same subject or activity.¹⁹

A local educational agency that provides a single-sex class or extracurricular activity, in order to comply with this regulation, may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex.²⁰ The U. S. Department of Education will consider, either individually or in the aggregate as appropriate, several factors in determining whether classes or extracurricular activities are substantially equal, including, but not limited to, the following:

1. The policies and criteria of admission;
2. The educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books;
3. Instructional materials;
4. Technology;
5. The qualifications of faculty and staff;
6. Geographic accessibility;
7. The quality, accessibility, and availability of facilities and resources provided to the class; and
8. Intangible features, such as reputation of faculty.²¹

The local educational agency conducting single-sex classes or extracurricular activities must conduct periodic evaluations to ensure that the 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

¹⁹ 34 C.F.R. § 106.34(b)(1).

²⁰ 34 C.F.R. § 106.34(b)(2).

²¹ 34 C.F.R. §106.34(b)(3).

achievement of the important objective for the classes or extracurricular activities. Evaluations must be conducted at least every two years.²²

A local educational agency 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. 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 providing students of the excluded sex a substantially equal, single-sex school or coeducational school. The U. S. Department of Education will consider such factors, either individually or in the aggregate, in determining whether schools are substantially equal:

1. The policies and criteria of admission;
2. The educational benefits provided, including the quality, range, and content of curriculum and other services, and the quality and availability of book, instructional materials, and technology;
3. The quality and range of extracurricular offerings;
4. The qualifications of faculty and staff;
5. Geographic accessibility;
6. The quality, accessibility, and availability of facilities and resources; and
7. Intangible features, such as reputation of faculty.²³

F. Discrimination in Counseling Services and Other Services

A local educational agency shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.²⁴ A local educational agency 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 the basis of sex 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. The local educational agency 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

²² 34 C.F.R. § 106.34(b)(4).

²³ 34 C.F.R. § 106.34(c). These provisions apply to a “school within a school,” which is defined as an administratively separate school located within another school.

²⁴ 34 C.F.R. § 106.36(a).

instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the local educational agency 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.²⁵

Where a local educational agency finds that a particular class contains a substantially disproportionate number of individuals of one sex, the local educational agency 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.²⁶

In addition, local educational agencies shall not discriminate on the basis of sex in providing financial assistance,²⁷ employment assistance,²⁸ health and insurance benefits and services,²⁹ or marital or parental status.³⁰

G. Discrimination Against Pregnant Students

Regulations promulgated pursuant to Title IX prohibit a local educational agency from applying any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.³¹ A local educational agency may require a pregnant student to obtain a physician's certification that the student is physically and emotionally able to continue participation in a school program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician. The local educational agency is required to 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.³² Therefore, unless the district currently documents other temporary disabilities, it could not document that girls are pregnant in without violating Title IX.

The U.S. Department of Education has issued a publication entitled, "Supporting the Academic Success of Pregnant and Parenting Students."³³ The U.S. Department of Education guidance notes the effect of pregnancy and parenthood on the dropout rate, cites the Title IX regulations, notes that school districts must excuse a student's absence because of pregnancy or childbirth for as long as the student's doctor deems the absences medically necessary, must allow the student to return to the same academic and extracurricular status as before the medical leave began,

²⁵ 34 C.F.R. § 106.36(b).

²⁶ 34 C.F.R. § 106.36(c).

²⁷ 34 C.F.R. § 106.37(a).

²⁸ 34 C.F.R. § 106.38.

²⁹ 34 C.F.R. § 106.39.

³⁰ 34 C.F.R. § 106.40. See, Conley v. Northwest Florida State College, 145 F.Supp.3d 1073 (N.D. Fla. 2015); C.N. v. Wolf, 410 F.Supp.2d 894 (C.D. Cal. 2005).

³¹ 34 C.F.R. § 106.40.

³² 34 C.F.R. § 106.40 (a) and (b).

³³ U.S. Department of Education Office for Civil Rights, "Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the education amendments of 1972" (June 2013).

and provide any special services that the school district provides to students with temporary medical conditions.³⁴

The guidance goes on to state that school districts may not require pregnant students to participate in an alternative program for pregnant students, but may provide information to students who are pregnant about the availability of an alternative program. The alternative program must be offered on a voluntary basis.³⁵ The guidance points out that harassing a student due to pregnancy would violate Title IX and the school district has a duty to stop any harassment of the student by taking prompt and effective steps to end pregnancy-related harassment and eliminate the hostile environment created by the harassment.³⁶ The guidance also indicates that pregnant students have a right to attend classes, participate in school clubs, class activities, interscholastic sports and other school sponsored organizations.³⁷

H. Discrimination in Athletics

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 local educational agency and no local educational agency shall provide any such athletics separately on such basis.³⁸ Notwithstanding these requirements, a local educational agency 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 local educational agency 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 these regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.³⁹

A local educational agency 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 U. S. Department of Education 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;

³⁴ See, USDOE Guidance, pages 1-6. See, <https://www2.ed.gov>.

³⁵ *Id.* at 7.

³⁶ *Id.* at page 8.

³⁷ *Id.* at 9.

³⁸ 34 C.F.R. § 106.41(a)

³⁹ 34 C.F.R. § 106.41(b).

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; and
10. Publicity.⁴⁰

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a local educational agency operates or sponsors separate teams will not constitute noncompliance, but the U. S. Department of Education may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.⁴¹

If the use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the local educational agency shall use appropriate standards that do not have that effect.⁴²

The U.S. Department of Education has stated that the regulations prohibiting discrimination on the basis of sex in interscholastic and intercollegiate athletic programs applies to elementary and secondary education.⁴³ The Office for Civil Rights has indicated that when it conducts an investigation to determine whether a school district provides equal athletic opportunities as required by the Title IX regulations, OCR considers several factors related to the activity's structure, administration, team preparation, and competition, when determining whether an activity is a sport that can be counted as part of the school district's interscholastic program. Taking into account the unique aspects inherent in the nature of the basic operation of specific sports, OCR considers whether the activity is structured and administered in a manner consistent with established interscholastic varsity sports in the school district's athletic program, including:

⁴⁰ 34 C.F.R. § 106.41(c).

⁴¹ 34 C.F.R. § 106.41(c).

⁴² 34 C.F.R. § 106.43.

⁴³ See, U.S. Department of Education Letter to Pacific Legal Foundation dated March 27, 2008. See, <https://www2.ed.gov>.

1. Whether the operating budget, supports services, and coaching staff are administered by the athletic department or another entity, and are provided in a manner consistent with established varsity sports.
2. Whether the participants in the activity are eligible to receive athletic scholarships and athletic awards if available to athletes in established varsity sports.
3. Whether the practice opportunities are available in a manner consistent with established varsity sports in a school district's athletic program.
4. Whether the regular season competitive opportunities differ quantitatively and/or qualitatively from established varsity sports.
5. If pre-season and/or post-season competition exists for the activity, whether the activity provides an opportunity for student athletes to engage in the pre-season and/or post-season competition in a manner consistent with established varsity sports.
6. Whether the primary purpose of the activity is to provide athletic competition at the interscholastic varsity levels, rather than to support or promote other athletic activities.⁴⁴

The Office for Civil Rights utilizes a three-part test to determine whether a school district is providing nondiscriminatory athletic participation opportunities and compliance with Title IX regulations. The test provides the following three compliance options:

1. Whether interscholastic participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.
2. Whether members of one sex have been and are underrepresented among interscholastic athletes, whether the school district can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex.
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the school district can show a history and practice of program expansion, whether it can be demonstrated that the

⁴⁴ See, U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter dated September 17, 2008 (Attachment 1).

interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.⁴⁵

I. Discrimination in Employment in Education Programs

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 or part time, under any education program or activity operated by a recipient which receives federal financial assistance.⁴⁶

A local educational agency shall make all employment decisions in any education program or activity operated by the local educational agency 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.⁴⁷

A local educational agency shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the local educational agency.⁴⁸

A local educational agency 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.⁴⁹

The provisions of these regulations 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;

⁴⁵ See, U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter dated April 20, 2010 (Attachment 2).

⁴⁶ 34 C.F.R. § 106.51(a)(1).

⁴⁷ 34 C.F.R. § 106.51(a)(2).

⁴⁸ 34 C.F.R. § 106.51(a)(3).

⁴⁹ 34 C.F.R. § 106.51(a)(4).

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 local educational agency;
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.⁵⁰

A local educational agency 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 such test or other criterion is shown to predict validly successful performance in the position in question and alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.⁵¹

A local educational agency shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a local educational agency 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 local educational agency shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination. A local educational agency 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.⁵²

A local educational agency shall not make or enforce any policy or practice which, on the basis of sex, makes distinctions in rates of pay or other compensation or 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

⁵⁰ 34 C.F.R. § 106.51(b).

⁵¹ 34 C.F.R. § 106.52.

⁵² 34 C.F.R. § 106.53.

work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.⁵³

A local educational agency shall not classify a job as being for males or for females, maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex, or 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.⁵⁴

A local educational agency shall not 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. A local educational agency shall not 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 local educational agency for members of each sex, or 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. Fringe benefits are defined as 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.⁵⁵

A local educational agency shall not apply any policy or take any employment action 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 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.⁵⁶ A local educational agency 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.⁵⁷

A local educational agency 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.⁵⁸

In the case of a local educational agency 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 local educational agency shall treat pregnancy, childbirth,

⁵³ 34 C.F.R. § 106.54.

⁵⁴ 34 C.F.R. § 106.55.

⁵⁵ 34 C.F.R. § 106.56.

⁵⁶ 34 C.F.R. § 106.57(a).

⁵⁷ 34 C.F.R. § 106.57(b).

⁵⁸ 34 C.F.R. § 106.57(c). This same principle applies to students. See, for example, Conley v. Northwest Florida State College, 145 F.Supp.3d 1073 (N.D. Fla. 2015).

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.⁵⁹

The obligation to comply with the Title IX regulations is not alleviated by the existence of any state or local law or requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex. A local educational agency which provides any compensation, service, or benefit to members of one sex pursuant to a state or local law requirement shall provide the same compensation, service, or benefits to members of the other sex.⁶⁰

A local educational agency 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.⁶¹ A local educational agency shall not make any pre-employment inquiry as to the marital status of an applicant for employment.⁶² A local educational agency 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.⁶³

A local educational agency may take action otherwise prohibited, 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 local educational agency shall not take action 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 these regulations shall prevent a local educational agency from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.⁶⁴

U. S. SUPREME COURT CASES

The United States Supreme Court has issued a number of rulings interpreting Title IX. In Cannon v. University of Chicago,⁶⁵ the Supreme Court held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination. In Franklin v. Gwinnett County Public Schools,⁶⁶ the Supreme Court held that private parties may seek monetary damages for intentional violations of Title IX. The Court has also held that the private right of action

⁵⁹ 34 C.F.R. § 106.57(d).

⁶⁰ 34 C.F.R. § 106.58.

⁶¹ 34 C.F.R. § 106.59.

⁶² 34 C.F.R. § 106.60(a).

⁶³ 34 C.F.R. § 106.60(b).

⁶⁴ 34 C.F.R. § 106.61.

⁶⁵ 441 U.S. 677, 690-693 99 S.Ct. 1946 (1979).

⁶⁶ 503 U.S. 60 112 S.Ct. 1028 (1992).

encompasses intentional sex discrimination in the form of a local education agency's deliberate indifference to a teacher's sexual harassment of a student⁶⁷ or to sexual harassment of a student by another student.⁶⁸ In Davis v. Monroe County Board of Education,⁶⁹ the United States Supreme Court held that students who are harassed by other students may sue their school district for monetary damages under federal law.⁷⁰

Under federal law, Title IX prohibits discrimination on the basis of gender by educational institutions receiving federal funds. In Cannon v. University of Chicago,⁷¹ the Supreme Court held that individuals had a right to sue in court under Title IX. In Franklin v. Gwinnett County Public Schools,⁷² the Supreme Court held that students may be awarded monetary damages under Title IX for intentional acts of discrimination. The court in Franklin stated that sexual harassment of a student by a teacher constituted a form of discrimination under Title IX but did not define the standard for determining liability under Title IX.

In Gebser v. Lago Vista Independent School District,⁷³ the Supreme Court defined the standard of liability for sexual harassment of a student by a teacher holding that a school official who had authority to stop the alleged discrimination must have actual knowledge of the misconduct and display deliberate indifference to the harassment for the school district to be liable under Title IX. The court rejected less stringent standards.

In Gebser, an eighth grade student at a middle school was sexually molested by a teacher. The teacher initiated sexual contact and the two had sexual intercourse on a number of occasions. The student did not report the relationship to school officials.

When the student was in high school, the parents complained to the high school principal about the teacher's suggestive comments in class. The teacher apologized. The complaints were not reported to the school district superintendent.

Several months later, a police officer discovered the teacher and the student engaging in sexual intercourse and arrested the teacher. The school district terminated the teacher's employment and the Texas education agency revoked the teacher's teaching license.

The student and her mother filed lawsuit against the school district and the teacher. The federal district court granted summary judgment in favor of the school district, holding that there was no evidence that the school district had actual constructive knowledge that the teacher was involved in a sexual relationship with the student. The Fifth Circuit Court of Appeals and the U.S. Supreme Court affirmed the lower court's decision.

⁶⁷ Gebser v. Lago Vista Independent School Dist., 524 U.S. 274, 290-291, 118 S.Ct. 1989 (1998).

⁶⁸ Davis v. Monroe County Bd. Of Educ., 526 U.S. 629, 642, 119 S.Ct. 1661 (1991).

⁶⁹ 119 S.Ct. 1661, 526 U.S. 629, 134 Ed.Law Rep. 477 (1999).

⁷⁰ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

⁷¹ 441 U.S. 677 (1979).

⁷² 502 U.S. 60 (1992).

⁷³ 118 S.Ct. 1989, 524 U.S. 274, 125 Ed.Law Rep. 1055 (1998).

In Davis, it was alleged that a fifth grade boy taunted and touched a female student numerous times over a five month period and that three teachers and the principal failed to help her. The fifth grade boy's conduct allegedly continued for many months. The student made many suggestive comments and inappropriately touched the plaintiff. The male student was charged and pleaded guilty to sexual battery for his misconduct. Other girls in the class were also victimized.

The female student filed suit in U.S. District Court against the school district, the school district superintendent, and the principal, alleging violation of Title IX. The district court dismissed the complaint. The Court of Appeals reversed and the school district appealed to the U.S. Supreme Court. The U.S. Supreme Court reversed the Court of Appeals decision and remanded the matter back to the Court of Appeals.

The U.S. Supreme Court adopted the standard in Gebser and held that school districts may be held liable under Title IX when a school official has actual knowledge of the harassment and is deliberately indifferent to it. In order to prevail in a cause of action against a school district a student would have to prove:

1. Gender-oriented conduct that is severe, pervasive and objectively offensive.
2. The alleged harassment has denied the student an equal opportunity or benefit to an education.
3. The school district had actual knowledge of the alleged harassment.
4. The school district was deliberately indifferent to the harassment.
5. Damages as a result of the harassment.⁷⁴

⁷⁴ Id. at 1998-2000. See, also, Floyd v. Waiters, 133 F.3d. 786 (11th Cir. 1998) (school district was not liable for sexual harassment under Title IX, absent evidence that either superintendent or members of the school board had knowledge of the misconduct and failed to act); Davis v. DeKalb County School District, 233 F.3d. 1367 (11th Cir. 2000) (another student's complaint about the teacher was insufficient to alert the school district to the possibility that the teacher was sexually molesting plaintiff students and principal, and the district did not respond with deliberate indifference); Gabrielle M. v. Park Forest-Chicago Heights, Illinois School District, 315 F.3d. 817 (7th Cir. 2003) (school district's response to the inappropriate conduct was not clearly unreasonable as required for school district to incur Title IX liability); Warren v. Reading School District, 278 F.3d. 163 (3rd Cir. 2002) (principal was appropriate person whose knowledge of teacher's sexual abuse and failure to respond could have subjected school district to liability but guidance counselor was not appropriate person); Delgado v. Stegall, 367 F.3d. 668 (7th Cir. 2004) (university officials had no knowledge of any prior instances of sexual harassment by professor and, thus, university was not liable under Title IX); Bostic v. Smyrna School District, 418 F.3d 355 (3rd Cir. 2005) (district had insufficient knowledge to be held liable under Title IX); Escue v. Northern Oklahoma College, 450 F.3d. 1146 (10th Cir. 2006) (information known to university did not constitute actual knowledge that professor posed substantial risk of sexually harassing university students); Jennings v. University of North Carolina, 482 F.3d. 686 (4th Cir. 2007) (coach's alleged actions, if proven, constituted sexual harassment based on sex as required for liability under Title IX); Rost v. Steamboat Springs RE-2 School District, 511 F.3d. 1114 (10th Cir. 2008) (student and parent statements that boys were bothering student did not provide district with actual knowledge of sexual harassment for purposes of Title IX, and district was not deliberately indifferent to harassment for purposes of Title IX); Doe v. Flaherty, 623 F.3d. 577 (8th Cir. 2010)

A school district may also be held liable for sexual harassment of students under state law. The standard of liability will be determined by the state courts.

In Jackson v. Birmingham Board of Education,⁷⁵ the U. S. Supreme Court held that retaliation against a person because that person complained of sex discrimination in the form of intentional sex discrimination under Title IX violated the provisions of Title IX. The Court held that the coach stated a claim of discrimination on the basis of sex even though he was not a victim of discrimination that was the subject of his original complaint. The plaintiff was a girls' basketball coach at a public high school and when he discovered his team was not receiving equal funding and equal access to athletic equipment or facilities, he complained unsuccessfully to his supervisors. He then received negative work evaluations and was ultimately removed as the girls' coach. The Supreme Court held that Title IX's private right of action encompasses claims of retaliation against an individual because he has complained about sex discrimination. The Court stated, "Retaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is 'discrimination' on 'the basis of sex' just as retaliation of advocacy on behalf of a black lessee in Sullivan was discrimination on the basis of race."⁷⁶

The Supreme Court noted that Title IX's enforcement scheme depends on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient of federal aid has received actual notice of the discrimination. If recipients were able to avoid such notice by retaliating against all those who dare complain, the statute's enforcement scheme would be subverted.⁷⁷ The Court also noted that the Title IX regulations clearly prohibit retaliation and have been in force and effect for many years.⁷⁸

SEXUAL HARASSMENT

A. Sexual Harassment in General

Under both federal and state law (including Title IX), sexual harassment is a prohibited form of sex discrimination.⁷⁹ In Meritor Savings Bank v. Vinson,⁸⁰ the United States Supreme Court held

(principal did not have actual knowledge of basketball coach's sexual relationship with student; therefore, school district was not liable under Title IX for principal's alleged deliberate indifference); J.F.K. v. Troup County School District, 678 F.3d. 1254 (11th Cir. 2012) (principal lacked actual notice of harassment); Doe v. St. Francis School District, 649 F.3d. 869 (7th Cir. 2012) (school district could not be held liable under Title IX for teacher's sexual abuse of student where school officials did not have notice of the misconduct); Hill v. Cundiff, 797 F.3d. 948 (11th Cir. 2015) (teacher's aide was not appropriate person capable of putting board on notice of male student's sexual harassment of female students).

⁷⁵ 125 S.Ct. 1497 (2005). See, also, U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter dated April 24, 2013 (Attachment 3).

⁷⁶ Id. at 1506.

⁷⁷ Id. at 1508.

⁷⁸ Id. at 1509.

⁷⁹ 42 U.S.C. § 2000e-2 (Title VII); 20 U.S.C. § 1681 et seq. (Title IX); Government Code § 12940; Education Code § 212.5; Title 2 California Code of Regulations, sections 7291.1 and 7287.6. See, also, "Questions and Answers on Title IX and Sexual Violence," U.S. Department of Education, Office for Civil Rights (April 29, 2014); U.S.

that sexual harassment which creates a hostile, oppressive and offensive working environment constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964.⁸¹

The Equal Employment Opportunity Commission (EEOC), which is the federal agency charged with enforcing Title VII of the Civil Rights Act of 1964, defines sexual harassment as follows:

“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment 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.”⁸²

Hostile or offensive working environment sexual harassment occurs when an employer creates, condones, or permits a hostile, intimidating, or offensive work environment to exist due to unwanted or unwelcome sexual conduct in the workplace. Hostile or offensive working environment sexual harassment does not necessarily result in any tangible or economic employment benefits being lost. Employers may be liable when this type of harassment occurs in the workplace, not just for the actions of their managers or supervisors, but also for the actions of co-workers, visitors, or even independent contractors. In a hostile work environment sexual harassment claim, the sexual conduct must be sufficiently severe or pervasive so as to alter the conditions of the victim’s employment and thereby create an abusive working environment.⁸³ In evaluating a hostile work environment sexual harassment claim, the EEOC considers the following factors:

1. Whether the conduct was verbal or physical, or both;
2. How frequently it occurred;
3. Whether the conduct was hostile and patently offensive;
4. Whether the alleged harasser was a co-worker or a supervisor;
5. Whether others joined in perpetuating the harassment; and

Department of Education, Office for Civil Rights, Dear Colleague Letter: Sexual Violence, dated April 14, 2011. See, <http://www2.ed.gov>.

⁸⁰ 447 U.S. § 54 (1986).

⁸¹ 42 U.S.C. § 2000(e)-2.

⁸² 29 C.F.R. §1604.11(a) (1980).

⁸³ See, Meritor Savings Bank v. Vinson, 447 U.S. 54 (1986).

6. Whether the harassment was directed at more than one individual.

B. Sexual Harassment -- Damages

The United States Supreme Court in Franklin v. Gwinnett County Public Schools⁸⁴ held that a student may recover damages for sexual harassment by a school district employee under Title IX.⁸⁵ Therefore, districts should be aware that the prohibitions against sexual harassment apply to students as well as employees.

C. Sexual Harassment -- Sufficient Action to Remedy Harassment

In Intlekofer v. Turnage,⁸⁶ the Court of Appeals held that an employer could be held liable under federal law for failing to sufficiently discipline an employee who was sexually harassing another employee. Ms. Intlekofer filed 16 reports with her employer, the Veterans Administration (VA), regarding her co-worker's touching, personal suggestions and constant pressure to resume their previous intimate relationship. Supervisors met with the co-worker, Cortez, and orally warned him to stop. A complaint was filed with the EEOC and, although the VA followed 3 of the 4 recommendations of the EEOC, the harassment continued. The VA continued to orally warn Cortez but took no more severe disciplinary steps.

The Court of Appeals held that the VA did not respond to the complaints in a manner likely to put a stop to Cortez's unlawful behavior. The VA should have taken more severe disciplinary measures against Cortez, once it learned that he was continuing his harassing behavior towards Ms. Intlekofer. The Court of Appeals held that remedial actions taken by an employer must be reasonably calculated to end the harassment; thus, the appropriateness of the remedy depends on the seriousness of the offense, the employer's ability to stop the harassment, and the likelihood that the remedy will end the harassment.

D. Sexual Harassment -- Protection of Both Genders

In Oncale v. Sundowner Offshore Services, Inc.,⁸⁷ the United States Supreme Court held that the prohibition against discrimination because of sex protects men as well as women. The Court also held that nothing in Title VII necessarily bars a claim of discrimination because of sex merely because the plaintiff and the defendant are of the same sex. The Court ruled that there was no justification in the statutory language or previous court decisions for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.

In Oncale, the Court reiterated that Title VII does not reach innocuous differences in the way men and women routinely interact with members of the same sex and of the opposite sex. The

⁸⁴ 112 S.Ct. 1028, 72 Ed.Law Rep. 32 (1992).

⁸⁵ 20 U.S.C. § 1681(a).

⁸⁶ 973 F.2d 773 (9th Cir. 1992).

⁸⁷ 118 S.Ct. 998, 523 U.S. 75 (1998); see, also, Kinman v. Omaha Public School District, 94 F.3d. 4636 (8th Cir. 1996).

prohibition of harassment on the basis of sex requires that the harassing conduct be severe or pervasive.⁸⁸

The Court held that the severity of harassment in a same sex case should be judged from the perspective of a reasonable person in the plaintiff's position considering all of the circumstances. In same sex harassment cases, that inquiry will require careful consideration of the social context in which particular behavior occurs and is experienced by the victim.⁸⁹

The Court concluded by stating:

“The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context will enable courts and juries to distinguish between simple teasing or rough housing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.”⁹⁰

E. Sexual Harassment -- School District Liability

In Gebser v. Lago Vista Independent School District,⁹¹ a high school student in the Lago Vista Independent School District had a sexual relationship with one of her teachers. The two had sexual intercourse on a number of occasions. The student never reported the relationship to school officials. In January, 1993, a police officer discovered the teacher and the student engaging in sexual intercourse and arrested the teacher. The Lago Vista School District terminated his employment and his teaching credential was subsequently revoked. During this time period, the district had not promulgated or distributed an official grievance procedure for lodging sexual harassment complaints nor had it issued a formal anti-harassment policy.⁹²

The Court held that under Title IX, a damages remedy will not lie against a school district, unless a school district official, who at a minimum had authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf, had actual knowledge of discrimination and failed to respond adequately. The Court stated that individual school employees could still be sued under 42 U.S.C. Section 1983 for Title IX violations, and that their decision did not affect any right of recovery under state law against school districts and employees.⁹³ The Court held that the school official's response must amount to deliberate indifference to discrimination. The basis for this standard was that Title IX's administrative enforcement scheme presupposes that

⁸⁸ Id. at 1002.

⁸⁹ Id. at 1002-1003.

⁹⁰ Id. at 1003.

⁹¹ 118 S.Ct. 1989, 524 U.S. 274 (1998).

⁹² Id. at 1993.

⁹³ Id. at 1999.

an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance.⁹⁴

F. Sexual Harassment -- Employee Liability

In Faragher v. City of Boca Raton,⁹⁵ the Supreme Court held that an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with authority over the employee. The employer defense created by the Court is comprised of two elements, (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. In Faragher, the Court emphatically stated, “No affirmative defense is available, . . . when the supervisor’s harassment culminates in a tangible employment action such as discharge, demotion or undesirable reassignment.”⁹⁶

The Court reached a similar conclusion in Burlington Industries, Inc. v. Ellerth,⁹⁷ in which it also held that an employer is subject to vicarious liability to an injured employee for a hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. No affirmative defense is available to an employer when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.⁹⁸

The California Supreme Court in Miller v. Department of Corrections⁹⁹ ruled that widespread and pervasive sexual favoritism in the workplace that creates a hostile work environment violates state law prohibiting sexual harassment. The California Supreme Court held that widespread sexual favoritism can send a demeaning message to female employees that they are viewed by management as “playthings” or that to be promoted in the workplace women must engage in sexual conduct with their supervisors or management, and that this conduct, if widespread and pervasive, violates state law.

The case had been dismissed by the trial court and the Court of Appeal. However, the California Supreme Court held that based on the alleged facts, there was a sufficient basis for going to trial and reversed the matter and sent it back to the lower court.¹⁰⁰

The allegations were that the chief deputy warden of the facility was having sexual affairs with three female subordinates. The allegations were that these three female subordinates received promotions and other employment benefits as a result of their relationship, and that two of the subordinates used the relationship to abuse and mistreat other employees. The allegations were that

⁹⁴ Id. at 1999-2000.

⁹⁵ 118 S.Ct. 2275, 524 U.S. 775 (1998).

⁹⁶ Id. at 2292-93.

⁹⁷ 118 S.Ct. 2257, 524 U.S. 742 (1998).

⁹⁸ Id. at 2270-2271.

⁹⁹ Miller v. Department of Corrections, 36 Cal.4th 446 (2005).

¹⁰⁰ Id. at 451

the chief deputy warden refused to intervene when the two subordinates abused other employees, and that the refusal was based on their personal relationship.¹⁰¹

The California Supreme Court noted that the Department of Corrections had completed an internal investigation and that the chief deputy warden retired, that one subordinate was transferred and demoted, and another subordinate resigned with disciplinary proceedings pending. The California Supreme Court concluded:

“Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile working environment.”¹⁰²

The plaintiffs in the case alleged that they were treated unfairly, passed over for promotions, and were subjected to abusive behavior by the subordinates having an affair with the chief deputy warden and that this created a hostile working environment for them.¹⁰³

As a result of this decision, districts should make sure that they have a work environment that is free of such pervasive sexual favoritism. If districts receive complaints that consensual sexual relationships among employees are creating a hostile work environment, the district should investigate the matter thoroughly and consult with legal counsel.

G. Sexual Harassment -- Deliberate Indifference

In Sauls v. Pierce County School District,¹⁰⁴ the United States Court of Appeals for the Eleventh Circuit held that a school district was not liable for sexual harassment allegedly perpetrated by a teacher upon a student. The Court of Appeals held that the school district had conducted an appropriate investigation and did not act with deliberate indifference.

The underlying allegations in the case were that the teacher sexually harassed and engaged in sexual activity with a 16-year-old student. The matter was not pursued under state criminal law in Georgia because Georgia defines statutory rape as sex with someone under the age of 16. In California unlawful sexual intercourse with a minor is defined as sex with someone under the age of 18.

The parents brought a civil action under federal law.¹⁰⁵ The Court of Appeals noted that, under federal law, in cases involving teachers sexually harassing students, the school district will not be liable for damages unless an official of the school district who had authority to institute corrective

¹⁰¹ Id. at 452-453.

¹⁰² Id. at 466.

¹⁰³ Id. at 467.

¹⁰⁴ 399 F.3d. 1279 (11th Cir. 2005).

¹⁰⁵ 20 U.S.C. § 1681 (Title IX of the Education Amendments of 1972).

measures on the district's behalf, had actual notice of, and was deliberately indifferent to, the teacher's misconduct.¹⁰⁶ The United States Supreme Court defined deliberate indifference as an official decision by a school district not to remedy the violation.¹⁰⁷

The Court of Appeals held that the student's Title IX claim failed because they could not demonstrate that school district officials acted with deliberate indifference. The record showed that the school district responded to each report of misconduct the district received by interviewing the alleged victim several times. In each of the cases, the alleged victim denied that any misconduct had occurred. The school district also consistently monitored the teacher's conduct and warned the teacher about her interaction with students. The teacher was admonished both orally and in writing to avoid even the appearance of impropriety when dealing with students. In a prior incident involving another student and the incident involving the student filing the lawsuit, both students denied any misconduct occurred. It was not until a written note from the student was discovered that concrete evidence of an inappropriate relationship was found. The school district then asked the state agency certifying teachers to investigate.¹⁰⁸

Based on these facts, the Court of Appeals held that the school district was not deliberately indifferent and could not be held liable since a thorough investigation was conducted and the school district monitored the activities of the teacher.¹⁰⁹

In Doe v. Glaster,¹¹⁰ the Court of Appeals held that the school district and school administrators were not deliberately indifferent in responding to harassment. The student involved was born in Russia, came to the United States at the age of two and was adopted by American parents. During her sixth and seventh grade years at Elmbrook School District's Pilgrim Park Middle School, several male classmates bullied her with gender and ethnic insults. The bullying turned violent near the end of the seventh grade. Three boys were eventually charged with criminal battery and were expelled or withdrew from school.

The student filed suit under Title IX and Title VI of the Civil Rights Act of 1964.¹¹¹ The Court of Appeals noted that school officials must have actual knowledge of harassment so severe, pervasive and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. To have actual knowledge of an incident, school officials must have witnessed it or received a report of it. To impose liability, school officials' response to known harassment also must have been clearly unreasonable in light of the known circumstances.¹¹²

¹⁰⁶ 399 F.3d 1279, 1284; see, also, Gebser v. Lago Vista Independent School District, 524 U.S. 274, 118 S. Ct. 1989 (1998).

¹⁰⁷ Ibid.

¹⁰⁸ Id. at 1285.

¹⁰⁹ Id. at 1287.

¹¹⁰ 768 F.3d 611 (7th Cir. 2014)

¹¹¹ Id. at 613.

¹¹² Id. at 613-614.

In Doe v. Glaster, however, the Court of Appeals found that once the school district gained actual notice of the behavior that qualified as severe and pervasive, they took action against the wrongdoers that fell well within their broad discretion and, therefore, the court found the school district was not deliberately indifferent to the harassment of the student.¹¹³ The Court of Appeals found that after each reported or observed incident, the perpetrators were disciplined and steps were taken to prevent future inappropriate conduct. For each reported or observed incident of bullying, the school administrators promptly intervened. As the incidents persisted and escalated, so did the school district's responses.¹¹⁴

The Court of Appeals found that the school district imposed detentions, suspensions and other discipline, moved the lockers of the perpetrators, assigned the perpetrators to different study groups, and directed them to stay away from the victim.¹¹⁵ The Court of Appeals also found that it was not unreasonable that the school district did not tell the victim about the details of the perpetrators' expulsion. The Court of Appeals stated:

“Finally, we do not think it clearly unreasonable that the school district failed to tell the Does by a specific date that summer that the boys would not be returning. As Superintendent Gibson correctly explained, although Doe's family understandably would have liked to know what was happening in the boys' expulsion hearings, school officials also had to respect the privacy rights of the disciplined students. . . . Given this tension between the legal rights of all the students involved, a reasonable jury could not find that it was clearly unreasonable for school officials not to inform the Does about the status of all three boys by the end of August.”¹¹⁶

A similar result occurred in Stiles v. Grainger County, Tennessee.¹¹⁷ In Stiles, the Court of Appeals found that the school district did not act with deliberate indifference to report such student-on-student sexual harassment in violation of Title IX. The student was subjected to bullying of a severe nature. Over a significant period of time, the student was harassed, called names, threatened with rape, punched in the ribs, threatened with physical injury, and was rammed head first into a wall.¹¹⁸ The Court of Appeals held that the school district did not exhibit deliberate indifference to the victim. Each time the victim or his mother communicated a specific complaint of harassment, the school district investigated promptly and thoroughly by interviewing the perpetrators, taking

¹¹³ Id. at 614.

¹¹⁴ Id. at 619-620.

¹¹⁵ Id. at 620.

¹¹⁶ Id. at 621. See, also, Simpson v. University of Colorado Boulder, 500 F.3d 1170 (10th Cir. 2007), Shrum v. Kluck, 249 F.3d 773 (8th Cir. 2001) (school district's action in entering into a confidential settlement agreement with teacher rather than terminating him outright for molesting student and providing him with a neutral letter of recommendation did not rise to the level of deliberate indifference so as to warrant liability for sexual molestation of student in another district by teacher after leaving his employment with the first district).

¹¹⁷ 819 F.3d 834 (6th Cir. 2016).

¹¹⁸ Id. at 840-844.

detailed notes, and disciplining the guilty students. The perpetrators were given verbal warnings, suspensions, and other discipline.¹¹⁹

The Court of Appeals acknowledged that the school's remedial measures did not eliminate the victim's problems with other students, but the court found that the school district took reasonable steps to remediate the situation. The court noted that in prior cases, the school district spoke with the offenders without imposing discipline, but in Stiles, the school district imposed suspensions and other discipline.¹²⁰ The Court of Appeals concluded:

“In sum, the school's conduct in this case does not rise to the level of deliberate indifference. The school's disciplinary and remedial responses were reasonably tailored to the findings of each investigation and, thus, not clearly unreasonable in light of known circumstances. Although the school's efforts did not end DS's problems, Title IX does not require school districts to eliminate peer harassment. Moreover, the facts of this case and the responses of the school officials are sufficiently distinct from those in Patterson and Vance to justify a different result.

“Because Plaintiffs cannot demonstrate deliberate indifference, the district court correctly granted summary judgment to the Board of Education on the Title IX claim.”¹²¹

In contrast, in Vance v. Spencer County Public School District,¹²² the Court of Appeals found that there was sufficient evidence to establish that the school district was deliberately indifferent to sexual harassment. In Vance, the victim, a sixth grade student, was harassed for an entire school year with verbal harassment regarding her sexual orientation. The assistant principal brushed off the parent's complaint, saying that the boys involved considered the victim cute and they were flirting with her and just being friendly.¹²³

However, during the seventh grade year, students regularly shoved the victim into walls, grabbed her book bag, stole and destroyed her homework, called her names, stabbed her in the hand with a pen, and other similar conduct. The school district talked to the perpetrators but did not impose any discipline.¹²⁴ The victim was diagnosed with depression and withdrew from school. The victim then filed a complaint under Title IX of the Education Amendments of 1972.¹²⁵

The Court of Appeals found that the pivotal issue in the case was whether the school district acted with deliberate indifference. While the school district was not required to remedy the sexual

¹¹⁹ Id. at 849.

¹²⁰ Id. at 849-851.

¹²¹ Id. at 851.

¹²² 231 F.3d. 253 (6th Cir. 2000).

¹²³ Id. at 256.

¹²⁴ Id. at 256-257.

¹²⁵ Id. at 257; 20 U.S.C. § 1681.

harassment or ensure that students conform their conduct to certain rules, the school district must respond to known peer harassment in a manner that is clearly reasonable.¹²⁶ The Court of Appeals held that where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances and may be deliberately indifferent.¹²⁷

In particular, the Court of Appeals noted that after the perpetrator stabbed the victim with a pen, no disciplinary action was taken. When another student attempted to pull the victim's hair and rip off her clothes, no disciplinary action was taken. As a result, the harassing behavior continued. The court stated that although Title IX does not require certain specific responses, it does require a reasonable response and in this case the court found that the school district's response was not reasonable.¹²⁸

For these reasons, the Court of Appeals found that there was evidence of deliberate indifference. Having heard this evidence, the jury could have reasonably assumed the school district understood that one effective response could lead to at least two others and that deliberate indifference was found.¹²⁹

H. Limits on Anti-Harassment Policies

Districts must balance the goal of prohibiting harassment with the free speech protections of the First Amendment. Policies that go too far and prohibit speech protected by the First Amendment may be held to be unconstitutional by the courts.

In Saxe v. State College Area School District,¹³⁰ the Third Circuit Court of Appeals held that a school district's anti-harassment policy violated the First Amendment free speech rights of students. The Court of Appeals found that the policy prohibited a substantial amount of speech that would not have constituted actionable harassment under either federal or state law. The Court of Appeals determined that the policy was unconstitutionally overbroad because the policy prohibited a substantial amount of non-vulgar student speech and the policy's restrictions were not necessary to prevent substantial disruption or material interference with the work of the school or the rights of other students.¹³¹

In August 1999, the school district adopted an anti-harassment policy. The purpose of the policy was to provide all students with a safe, secure, and nurturing school environment. The policy indicated that disrespect among members of the school community is unacceptable behavior which threatens to disrupt the school environment and well-being of the individual. The policy defines

¹²⁶ Id. at 260.

¹²⁷ Id. at 261.

¹²⁸ Id. at 263.

¹²⁹ Id. at 264.

¹³⁰ 240 F.3d 200, 140 Ed.Law Rep. 946 (3rd Cir. 2001). Judge Samuel Alito wrote the opinion of the court.

¹³¹ Id. at 202.

harassment as verbal or physical conduct based on one’s actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student’s educational performance or creating an intimidating, hostile, or offensive environment.¹³²

This policy gives examples of the harassment, which includes demeaning comments or behaviors, slurs, mimicking, name-calling, graffiti, innuendo, gestures, stalking, threatening or bullying. The policy defines various types of prohibited harassment including “other harassment” on the basis of characteristics such as “clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies, or values.”¹³³

The Court of Appeals noted that non-expressive, physically harassing conduct is entirely outside the scope of the free speech clause. The court also noted that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another’s race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, the Court of Appeals found that however detestable the views expressed may be, First Amendment rights are implicated.¹³⁴ The court noted that the bedrock principle underlying the First Amendment is that government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.¹³⁵

The Court of Appeals pointed out that the school district policy prohibited harassment based on personal characteristics that are not protected under federal law (e.g., the policy includes personal characteristics such as clothing, appearance, hobbies, values and social skills). The court noted that insofar as the policy attempts to prevent students from making negative comments about other students’ appearance, clothing, social skills, and, in particular, values, it unconstitutionally strikes at the heart of moral and political discourse which is the lifeblood of constitutional self-government and the core concern of the First Amendment.¹³⁶

The Court of Appeals found that the policy went beyond protecting the rights of other students. The Court of Appeals noted that there was no evidence on the record of past disruptions but only objections by students of comments made by other students. The court distinguished the holding in West v. Derby Unified School District and held that in Saxe there was insufficient evidence of possible disruption or invasion of the rights of others. The Court of Appeals stated:

“To summarize: Under Fraser, a school may categorically prohibit lewd, vulgar, or profane language. Under Hazelwood, a school may regulate school-sponsored speech . . . on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to Tinker’s general rule: it may be regulated

¹³² Id. at 202.

¹³³ Id. at 203.

¹³⁴ Id. at 206.

¹³⁵ Id. at 209; citing, Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533 (1989).

¹³⁶ Id. at 210.

only if it would substantially disrupt school operations or interfere with the rights of others.”¹³⁷

The Court of Appeals concluded that the policy appears to cover substantially more speech than could be prohibited under the Tinker substantial disruption test and that therefore the policy is unconstitutionally overbroad.

In DeJohn v. Temple University,¹³⁸ the Third Circuit Court of Appeals held that Temple University’s sexual harassment policy was unconstitutionally overbroad and vague. The Temple University’s policy read in part:

“ . . . All forms of sexual harassment are prohibited, including . . . expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (c) such conduct has the purpose or effect of unreasonably interfering with an individual’s work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment.”

The plaintiff claimed that the policy was facially overbroad because it inhibited him from expressing his opinions in class concerning women in combat and women in the military. As a history graduate student, DeJohn found himself engaged in conversations and class discussions regarding issues he believed were implicated by the policy. As a result, the plaintiff was concerned that discussing his social, cultural, political and/or religious views regarding these issues might be sanctionable by the university. Thus, the plaintiff contended that the policy had a chilling effect on his ability to exercise his constitutionally-protected free speech rights.¹³⁹

The Third Circuit Court of Appeals noted that the overbreadth doctrine may be appropriately utilized in the school setting.¹⁴⁰ The courts have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the government’s ability to control speech within the university is restricted by the vagueness and overbreadth doctrines of the First Amendment.

In the context of school antidiscrimination policies, the Third Circuit has emphasized that harassing or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that are protected by the First Amendment.¹⁴¹ If there is a fundamental principle underlying the First Amendment, it is that the government may not prohibit expression of an idea simply because society finds the idea offensive or disagreeable.¹⁴² Because overbroad harassment policies can suppress or chill protected speech, and are susceptible to selective application

¹³⁷ Id. at 215; citing, Chandler v. McMinnville School District, 978 F.2d 524 (9th Cir. 1992).

¹³⁸ DeJohn v. Temple University, 537 F.3d 301 (3rd Cir. 2008).

¹³⁹ Id. at 305.

¹⁴⁰ See, Rust v. Sullivan, 500 U.S. 173, 200, 111 S.Ct. 1759 (1991); Keyishian v. Board of Regents, State University of New York, 385 U.S. 589, 603, 605-06, 87 S.Ct. 675 (1967).

¹⁴¹ Saxe v. State College Area School District, 240 F.3d 200, 209 (3rd Cir. 2001).

¹⁴² Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533 (1989).

amounting to content-based or viewpoint discrimination, the overbreadth doctrine may be invoked in student free speech cases.¹⁴³ In reviewing policies in response to an overbreadth challenge, the court must determine whether the relatively broad language of the policy can reasonably be viewed narrowly enough to avoid any overbreadth problem.¹⁴⁴

The Court of Appeals in DeJohn also noted that in reviewing the overbreadth of a policy, there is a difference between the extent that an elementary or high school may regulate student speech and that of a university. It is well recognized that the college classroom is recognized as a marketplace of ideas and the First Amendment guarantees wide freedom in matters of adult public discourse. However, certain speech which cannot be prohibited to adults may be prohibited to public elementary and high school students.¹⁴⁵ In effect, public school administrators are granted more leeway to restrict speech than public colleges and universities.¹⁴⁶

The Court of Appeals noted that when laws or policies against harassment attempt to regulate oral or written expression, the views expressed may be protected by the First Amendment. While there is no question that physically harassing conduct is entirely outside the protection of the free speech clause of the First Amendment, where pure expression is involved, antidiscrimination laws may collide with the First Amendment.¹⁴⁷

In DeJohn, the Court of Appeals took issue with Temple University's policies that focused on the motives of the speaker. The court noted that under Tinker, a public school must show that the speech will cause actual material disruption before prohibiting it. Under the Temple University policy, a student who intends to interfere with another student's work, educational performance or status or to create a hostile environment would be subject to punishment regardless of whether these motives and actions had their intended effect. Thus, the court stated, "As such, the focus on motive is contrary to Tinker's requirement that speech cannot be prohibited in the absence of a tenable threat of disruption."¹⁴⁸

In addition, the court stated that the Temple University policy's use of "hostile," "offensive," and "gender-motivated" is, on its face, sufficiently broad and subjective that the policy could conceivably be applied to cover any speech of a gender-motivated nature, the contents of which offends someone. This could include core political and religious speech, such as gender politics and sexual morality. Absent any requirement that there be a showing of severity or pervasiveness, the policy provides no shelter for core-protected speech, according to the court in DeJohn.¹⁴⁹

The Third Circuit Court of Appeals noted that the term "gender-motivated" is a fluid concept subject to a broad interpretation. The court also noted that the policy punishes not only speech that

¹⁴³ DeJohn v. Temple University, 537 F.3d 301, 314 (3rd Cir. 2008).

¹⁴⁴ Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243, 258-59 (3rd Cir. 2002).

¹⁴⁵ Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969); Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986).

¹⁴⁶ DeJohn v. Temple University, 537 F.3d 301, 316 (3rd Cir. 2008).

¹⁴⁷ Id. at 316.

¹⁴⁸ Id. at 317.

¹⁴⁹ Id. at 317-318.

actually causes disruption, but also speech that merely intends to do so.¹⁵⁰ For these reasons, the Court of Appeals found that the policy fails to satisfy the Tinker requirement of disruption. The Court of Appeals stated:

“As we observed in Saxe, . . . we do believe that a school has a compelling interest in preventing harassment. Yet, unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core-protected speech.”¹⁵¹

The Court of Appeals also held that some speech that creates a hostile or offensive environment may be protected speech under the First Amendment. The court indicated that the term “hostile or offensive environment” is very broad and could encompass any speech that might simply be offensive to a listener, or a group of listeners, believing that they are being subjected to or surrounded by hostility.¹⁵² The court concluded that the Temple University policy covers much more speech than could be prohibited under Tinker’s substantial disruption test and did not amount to “fighting words” speech which would not be protected.¹⁵³

The Court of Appeals concluded that injunctive relief was appropriate and affirmed the district court’s order granting injunctive relief in favor of DeJohn.

In summary, the courts will continue to struggle with balancing the potential conflicts between the First Amendment protections and anti-harassment policies. Anti-harassment policies that are too broad or go beyond the statutory definition of harassment run the risk of being declared unconstitutional by the courts.

To avoid running afoul of First Amendment requirements, anti-harassment policies should be tightly worded and only speech which has the purpose and effect of interfering with an individual’s work performance or creating an intimidating, hostile or offensive work environment, which meets the Tinker standard of disruption of school operations, and that interferes with the rights of others may be prohibited. Anti-harassment policies such as in Saxe that go beyond the statutory protected characteristics or as in DeJohn prohibit speech which has the purpose or intent of disruption or creating an intimidating, hostile or offensive environment may be struck down as unconstitutional by the courts.

Given the difficulty of determining when a policy crosses the line into unconstitutional territory, it can be expected that the courts will continue to struggle with this issue in the future.

In Rodriguez v. Maricopa County Community College District,¹⁵⁴ the Ninth Circuit Court of Appeals held that a community college professor’s e-mail speech was protected by the First

¹⁵⁰ Id. at 318-319.

¹⁵¹ Id. at 319-320.

¹⁵² Id. at 320.

¹⁵³ Id. at 320. See, also, Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73, 62 S.Ct. 766 (1942).

¹⁵⁴ 605 F.3d 703, 257 Ed.Law Rep. 30 (9th Cir. 2010).

Amendment. Professor Kehowski sent three e-mails over a distribution list maintained by the Maricopa County Community College District, where he teaches math. Every district employee with an e-mail address received a copy.¹⁵⁵ Plaintiffs, a certified class of the district's Hispanic employees, sued the district, its governing board and two district administrators (the chancellor and the president), claiming that their failure to properly respond to Kehowski's e-mails created a hostile work environment in violation of Title VII of the 1964 Civil Rights Act and the Equal Protection Clause.¹⁵⁶

In his first e-mail, Kehowski criticized the district's celebration of Dia de la Raza as an explicitly racist event and claimed that the holiday was celebrated by some Hispanics instead of Columbus Day.¹⁵⁷ Kehowski's next e-mail about Columbus Day stated that it was time to acknowledge and celebrate the superiority of western civilization and noted that democracy, human rights, and cultural freedom are European ideas.¹⁵⁸ A third e-mail from Kehowski stated that his prior e-mails were not racist and criticized multi-culturalism and former President Bill Clinton. The third e-mail linked to a website maintained by Kehowski on the district's web server. The college's technology policy encouraged faculty to develop district hosted websites for use as a learning tool, although faculty also maintained sites of a personal nature. Kehowski's site declared that immigration reform should preserve the white majority in the United States and urged people to report illegal aliens to the Immigration Service.¹⁵⁹

The president of the college circulated an e-mail stating that Kehowski's e-mails were counter to the college's beliefs about inclusiveness and respect. The college president stated that he supported the district's values and philosophy about diversity.¹⁶⁰ The chancellor of the community college district issued a press release stating that Kehowski's message is not aligned with the vision of the community college district and explained that disciplinary action against Kehowski could seriously undermine the college's promotion of true academic freedom.¹⁶¹

A number of students found out about Kehowski's e-mails and protested. A number of district employees complained to the district's administration that Kehowski had created a hostile work environment. No disciplinary action was taken against Kehowski and no steps were taken to enforce the district's existing anti-harassment policy.¹⁶²

The plaintiffs sued and sought damages against the community college district for failing to take immediate or appropriate steps to prevent Kehowski from sending plaintiffs harassing e-mails and from disseminating harassing speech via the district hosted website. The district court granted summary judgment to the president and chancellor on plaintiffs' Title VII claim on the ground that Title VII liability does not extend to agents of the employer. The district court denied summary

¹⁵⁵ *Id.* at 705.

¹⁵⁶ *Id.* at 706.

¹⁵⁷ *Id.* at 705.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Id.* at 706.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

judgment to the president and chancellor on the plaintiffs' constitutional claim. The chancellor and the president appealed.¹⁶³

The Court of Appeals held that public employees are entitled to equal protection to be free of purposeful workplace harassment. The Court of Appeals held that it must address the First Amendment free speech issue.¹⁶⁴ The Court of Appeals noted that the objections to Kehowski's speech are based entirely on his point of view and noted that government may not silence speech because the ideas it promotes are thought to be offensive.¹⁶⁵ The Court of Appeals held that precisely because Kehowski's ideas fall outside the mainstream, his words have sparked intense debate. The court noted that the Constitution embraces such a heated exchange of views, even when they concern sensitive topics like race.¹⁶⁶ The Court of Appeals stated:

“Without the right to stand against society's most strongly held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched. . . . The right to provoke, offend and shock lies at the core of the First Amendment.”¹⁶⁷

The Court of Appeals noted that intellectual advancement has traditionally progressed through discord and dissent as a diversity of views and ensures that ideas survive. Colleges and universities have historically fostered that exchange. The desire to maintain a sedate academic environment does not justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured and even distinctly unpleasant terms.¹⁶⁸

The Court of Appeals noted that free speech has been a powerful force for the spread of equality under the law. The courts must not squelch free speech because it may also be harnessed by those who promote retrograde or unattractive ways of thought. The Court of Appeals went on to state that it doubted that a college professor's expression on a matter of public concern, directed to the college community, could ever constitute unlawful harassment and justify the judicial intervention that the plaintiffs seek. The Court of Appeals noted that harassment law generally targets conduct and can only target speech when it is consistent with the First Amendment. For example, the court noted that racial insults or sexual advances directed at particular individuals in the workplace may be prohibited on the basis of their nonexpressive qualities, as they do not seek to

¹⁶³ *Id.* at 706-07.

¹⁶⁴ *Id.* at 707; see, Alaska v. EEOC, 564 F.3d 1062, 1069 (9th Cir. 2009); Bator v. Hawaii, 39 F.3d 1021, 1029 (9th Cir. 1994).

¹⁶⁵ *Id.* at 708; see, Brandenburg v. Ohio, 395 U.S. 434, 448-49 (1969); Saxe v. State College Area School District, 240 F.3d 200, 204 (3rd Cir. 2001); DeAngelis v. El Paso Municipal Police Officers' Association, 51 F.3d 591, 596-97 (5th Cir. 1995).

¹⁶⁶ *Ibid.*; see, R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

¹⁶⁷ *Ibid.*

¹⁶⁸ *Id.* at 708-09; see, Adamian v. Jacobsen, 523 F.2d 929, 934 (9th Cir. 1975).

disseminate a message to the general public, but intrude upon the targeted listener and do so in an especially offensive way.¹⁶⁹

The Court of Appeals held that Kehowski’s website and e-mails were pure speech. The court held that they were the effective equivalent of standing on a soapbox in a campus square and speaking to all within earshot. The offensive quality was based entirely on their meaning and not on any conduct or inherent threat of conduct that they contained. The fact that Kehowski disseminated his views using the district’s web servers and e-mail, which provided such resources on a content-neutral basis to facilitate campus discussion, does not suggest official endorsement of the resulting speech.¹⁷⁰

The Court of Appeals rejected plaintiffs’ argument that the district could have suppressed Kehowski’s speech by limiting discussion on its mailing list and web servers to official school business. The Court of Appeals noted that the community college district had a policy which it is not enforcing. The Court of Appeals stated:

“If speech is harassment, the proper response is to silence the harasser, not shut down the forum. And if speech is not harassment, listeners who are offended by the ideas being discussed certainly are not entitled to shut down an entire forum simply because they object to what some people are saying. Such a rule would contravene the First Amendment’s hostility toward laws that confer broad powers of censorship in the form of a ‘heckler’s veto’ upon any opponent of certain points of view.”¹⁷¹

The Court of Appeals concluded that the defendants did not violate plaintiffs’ right to be free of workplace harassment. The Court of Appeals stated:

“ . . . the First Amendment doesn’t allow us to weigh the pros and cons of certain types of speech. Those offended by Kehowski’s ideas should engage him in debate or hit the ‘delete’ button when they receive his e-mails. They may not invoke the power of the government to shut him up.”¹⁷²

I. Sexual Harassment and Bullying

On October 26, 2010, the U.S. Department of Education, Office for Civil Rights issued a Dear Colleague letter regarding harassment and bullying. The letter indicated that bullying fosters a

¹⁶⁹ *Id.* at 710; citing, *Frisby v. Schultz*, 487 U.S. 474, 486 (1988); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 60, 73 (1986).

¹⁷⁰ *Id.* at 710; citing, *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 841 (1995).

¹⁷¹ *Id.* at 711.

¹⁷² *Id.* at 711. See, also, *Dariano v. Morgan Hill Unified School District*, 767 F.3d 764 (9th Cir. 2014) (holding that requiring students to change clothing bearing American flag did not violate the First Amendment to avoid threats of race-related violence or harassment).

climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning. The letter notes that many school districts are adopting anti-bullying policies and notes that school districts must also consider whether the student misconduct results in discriminatory harassment.¹⁷³

The Dear Colleague Letter notes that federal law (including Title IX) prohibits harassment based on sex, as well as race, color, national origin, and disability, sexual orientation, and religion. Harassing conduct can include verbal acts and name-calling, graphic and written statements, harassment through the use of cell phones or the Internet, and other conduct that may be physically threatening, harmful, or humiliating. 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 the U.S. Department of Education Office for Civil Rights enforces.¹⁷⁴

The Dear Colleague Letter notes that 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.¹⁷⁵

DISCRIMINATION IN ATHLETIC PROGRAMS

A. Contact Sports

In Mercer v. Duke University,¹⁷⁶ the Court of Appeals held that once a university allowed a female student to try out for its football team, it could not discriminate against that student on the basis of sex. Before attending Duke University, the female student was an all-star kicker at her high school. Upon enrolling at Duke, the female student tried out for the Duke football team as a walk-on kicker. Eventually, the female student made the team and was selected to participate in an intersquad scrimmage. In that game, the female student kicked the winning 28-yard field goal. Soon after the intersquad scrimmage, the female student was told that she was on the Duke football team. However, the female student was not allowed to play during the 1995 football season. At the beginning of the 1996 season, the female student was informed that she was being dropped from the team. The female student then filed suit under Title IX.¹⁷⁷ The Court of Appeals reviewed the facts and concluded:

“Accordingly, because appellant has alleged that Duke allowed her to try out for its football team (and actually made her a member of the team), then discriminated against her and ultimately

¹⁷³ See, U.S. Department Office for Civil Rights Dear Colleague Letter: Harassment and Bullying, dated October 26, 2010, page 1 (Attachment 4).

¹⁷⁴ *Id.* at 2.

¹⁷⁵ *Id.* at 3.

¹⁷⁶ 190 F.3d 643 (4th Cir. 1999).

¹⁷⁷ *Id.* at 644-645.

excluded her from participation in the sport on the basis of her sex, we conclude that she has stated a claim under the applicable regulation, and therefore under Title IX.”¹⁷⁸

In Williams v. School District of Bethlehem,¹⁷⁹ the Third Circuit Court of Appeals reversed a lower court decision that held that as a matter of law, field hockey was not a contact sport. The Court of Appeals noted that the lower court granted summary judgment against the school district which argued that field hockey was a contact sport. The lower court ruled as a matter of law that field hockey was not a contact sport despite conflicting affidavits which in part argued that field hockey was indeed a contact sport, since the major activities of the sport of field hockey, including running up and down the field, attempting to score a goal, or preventing the other team from doing so involve bodily contact. One of the affidavits stated that these activities inevitably produce and involve bodily contact, even though such contact is a violation of the rules of play. The affidavit concluded that field hockey is a contact sport because bodily contact regularly occurs throughout the course of any competitive game.¹⁸⁰

The Third Circuit Court of Appeals noted that there is a subtle but important distinction between whether a major activity of field hockey involves bodily contact, or whether bodily contact is the purpose or major activity of field hockey. The Court of Appeals held that the district court focused too narrowly on whether the purpose of field hockey was bodily contact, and held that even though bodily contact may violate the rules of field hockey, it could still be a major activity of field hockey. The Court of Appeals noted that at least one court has ruled that field hockey is a contact sport for purposes of Title IX.¹⁸¹ The Court remanded the matter back to the trial court to determine whether field hockey must be considered a contact sport. If it is considered a contact sport, then a school district may operate separate teams for members of each sex.

The concurring opinion stated that whether field hockey is a contact sport cannot turn solely on the rules. The focus must be on the realities of play. The concurring opinion stated:

“High school basketball rules forbid a player from holding, pushing, tripping, or impeding the progress of an opponent . . . yet basketball is a contact sport and is cited as such in 34 C.F.R. Section 106.41(b). Although basketball’s rules penalize charging into an opponent, collisions occur as players compete for possession of the ball. Similarly, in field hockey, players compete for possession of the ball. Collisions occur and, for purposes of Section 106.41(b), it is of little consequence that such conduct violates the rules. That contact is penalized cannot be dispositive.”¹⁸²

¹⁷⁸ Id. at 648.

¹⁷⁹ 998 F.2d 168, 84 Ed.Law Rep. 629 (3rd Cir. 1993).

¹⁸⁰ Id. at 172.

¹⁸¹ Id. at 173. See, Kleczek v. Rhode Island Interscholastic League, 768 F.Supp. 951 (D.R.I. 1991).

¹⁸² Id. at 180.

B. Unequal Treatment of Boys' and Girls' Teams

In Horner v. Kentucky High School Athletic Association,¹⁸³ the Court of Appeals reversed the District Court's granting of summary judgment to the athletic association, where twelve female students who participated in interscholastic girls' high school slow-pitch softball contended that they were discriminated against on the basis of sex by sanctioning fewer sports for girls than for boys and by refusing to sanction girls' interscholastic fast-pitch softball. The Court of Appeals held that there were genuine issues of material fact as to whether female students were statistically underrepresented in athletics.¹⁸⁴

In Kelley v. Board of Trustees,¹⁸⁵ the Court of Appeals held that the university's decision to terminate the men's swimming program while retaining the women's swimming program did not violate Title IX. In 1982, the Office of Civil Rights for the U. S. Department of Education determined that the University of Illinois had denied its female students equal athletic opportunities. The University of Illinois then decided to cut the men's swimming program due to a deficit in the athletic budget. Men's swimming was selected for termination because it was a historically weak program and did not have a large spectator following.¹⁸⁶

The Court of Appeals relied on the Title IX regulations regarding substantial proportionality and held that the university had not violated Title IX.¹⁸⁷ A similar result was reached in Neal v. Board of Trustees of the California State Universities. In Neal, the Court of Appeals held that the reduction in the number of roster spots available to male student athletes, in order to remedy an imbalance between each gender's participation in varsity sports, did not violate Title IX.¹⁸⁸ In McCormick v. School District of Mamaroneck,¹⁸⁹ the Court of Appeals held that the school district's scheduling of girl's high school soccer in the spring and boy's high school soccer in the fall deprived the girls but not the boys of the opportunity to compete in the New York regional and state championships in soccer and, thus, was a violation of Title IX.

In Biediger v. Quinnipiac University,¹⁹⁰ the Court of Appeals affirmed a lower court decision issuing a permanent injunction to enjoin the elimination of women's volleyball and any future discrimination against women's athletics. The Court of Appeals found that the university failed to afford female students varsity athletic opportunities substantially proportionate to their enrollment and, thus, violated Title IX.

¹⁸³ 43 F.3d 265 (6th Cir. 1994)

¹⁸⁴ Id. at 275.

¹⁸⁵ 35 F.3d 265 (7th Cir. 1994).

¹⁸⁶ Id. at 269.

¹⁸⁷ Id. at 270-271. See, also, 34 C.F.R. § 106.41.

¹⁸⁸ 198 F.3d 763 (9th Cir. 1999); see, also, Miami University Wrestling Club v. Miami University, 302 F.3d 608 (6th Cir. 2002) (university's equalization of athletic opportunities for men and women by eliminating men's team sports was not a violation of Title IX).

¹⁸⁹ 370 F.3d 275 (2nd Cir. 2004).

¹⁹⁰ 691 F.3d 85 (2nd Cir. 2012).

In Ollier v. Sweetwater Union High School District,¹⁹¹ the Ninth Circuit Court of Appeals affirmed a lower court decision that the school district had violated Title IX¹⁹² and had discriminated against female students by providing unequal treatment and benefits in athletic programs, and unequal participation and opportunities in athletic programs.

In July 2008, the plaintiffs moved for partial summary judgment on their Title IX claims alleging unequal participation opportunities in athletic programs. The school district conceded that female athletic participation at Castle Park High School was lower than overall female enrollment, but argued that the figures were substantially proportionate for Title IX compliance purposes. The school district noted that there were more athletic teams for girls (23) than for boys (21) at Castle Park High School.

The district court granted summary judgment to plaintiffs on their unequal participation claim in March 2009.¹⁹³ The district court found that substantial proportionality requires a close relationship between athletic participation and enrollment, and concluded that the school district had not shown a close relationship because it failed to provide female students with opportunities to participate in athletics in substantially proportionate numbers as male students. The district court based its decision on the actual number and the percentage of females participating in athletics and not the number of teams offered to female students. The Ninth Circuit Court of Appeals affirmed the trial court decision.

With respect to plaintiffs' other claims, after a 10-day bench trial, the district court granted plaintiffs' declaratory and injunctive relief on their Title IX claims that alleged unequal treatment of and benefits to female athletes at Castle Park and retaliation.¹⁹⁴ The district court concluded that Sweetwater violated Title IX by failing to provide equal treatment and benefits in nine different areas, including recruiting, training, equipment, scheduling, and fundraising.¹⁹⁵ The district court found that female athletes at Castle Park High School were supervised by overworked coaches, provided with inferior competition and practice facilities, and received less publicity than male athletes.¹⁹⁶ The district court also found that female athletes received unequal treatment and benefits as a result of systemic administrative failures at Castle Park High School, and that Sweetwater failed to implement policies or procedures designed to cure the many areas of noncompliance with Title IX.¹⁹⁷

The district court also ruled that the school district violated Title IX when it retaliated against plaintiffs by firing the Castle Park softball coach after the father of one of the two named plaintiffs complained to school administrators about inequalities for girls in the school's athletic programs.¹⁹⁸ The district court found that the softball coach was fired six weeks after the Castle Park athletic

¹⁹¹ 768 F.3d 843 (9th Cir. 2014).

¹⁹² 20 U.S.C. § 1681.

¹⁹³ See, Ollier v. Sweetwater Union High School District, 604 F.Supp.2d 1264 (S.D.Cal.2009).

¹⁹⁴ Ollier v. Sweetwater Union High School District, 858 F.Supp.2d 1093 (S.D.Cal.2012).

¹⁹⁵ Id. at 1098-1108, 1115.

¹⁹⁶ Id. at 1099-1104, 1107.

¹⁹⁷ Id. at 1108.

¹⁹⁸ Id. at 1108.

director told him that he could be fired at any time for any reason, a comment the coach understood to be a threat that he would be fired if additional complaints were made about the girls' softball facilities.¹⁹⁹ The trial court made further findings as follows:

1. The plaintiffs engaged in protective activity when they complained to the school district about Title IX violations and when they filed their complaint;
2. The plaintiffs suffered adverse actions including the firing of their softball coach and his replacement by a less experienced coach, the cancellation of the team's annual awards banquet in 2007, and being unable to participate in a Las Vegas tournament attended by college recruiters that caused their long-term and successful softball program to be significantly disrupted; and
3. That a causal link between the protected conduct and the school district's retaliatory actions could be established by an inference derived from circumstantial evidence, including proximity and time.²⁰⁰

In addition, the district court rejected Sweetwater's non-retaliatory reasons for firing the softball coach, concluding that they were not credible and were pretextual.²⁰¹ The district court determined that the school district's suggested non-retaliatory justifications were rationalizations for its decision to fire the coach in retaliation for the complaints.²⁰²

In 1979, the Office for Civil Rights published a "policy interpretation" of Title IX setting a three-part test to determine whether an institution is complying with Title IX requirements as follows:

1. Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments;
2. Where members of one sex have been and are underrepresented among athletes, whether the institutions can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

¹⁹⁹ Id. at 1108.

²⁰⁰ Id. at 1113-14.

²⁰¹ Id. at 1114.

²⁰² Id. at 1114.

3. Where the members of one sex are underrepresented among athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.²⁰³

The Court of Appeals analyzed whether the number of participation opportunities is substantially proportionate to each sex's enrollment. Between 1998 and 2008, female enrollment at Castle Park High School ranged from a low of 975 to a high of 1133. Male enrollment ranged from 1128 to 1292. Female athletes ranged from 144 to 198, while male athletes ranged from 221 to 343. Girls made up 45.4% to 49.6% of the student body at Castle Park, but only 33.4% to 40.8% of the athletes from 1998 to 2008. At no point in that ten-year span between 1998 and 2008 was the disparity between the percentage of female athletes and the percentage of female students less than 6.7%. It was less than 10% in three years, and at least 13% in five years.²⁰⁴

While there were more athletic sports teams for girls (23) than boys (21), the Court of Appeals held that it is the number of female athletes that matters. The Court of Appeals noted that at Castle Park, the 6.7% disparity in the 2007-2008 school year was equivalent to 47 girls who would have played sports if participation were exactly proportional to enrollment and no fewer boys participate. As the district court noted, 47 girls can sustain at least one viable competitive team.

The Court of Appeals also concluded that there was no history and continuing practice of program expansion for women's sports at Castle Park High School, and that female athletic participation is not substantially proportionate to overall female enrollment at Castle Park High School. The Court of Appeals also concluded that the school district had not fully and effectively accommodated the interests and abilities of female athletes and noted that it had cut the field hockey team despite student interest.²⁰⁵

The Court of Appeals rejected the school district's argument that the students did not have standing to allege retaliation against them for the firing of the softball coach. The Court noted that sometimes adult employees are the only effective advocates against discrimination in schools.²⁰⁶ The Court found that the fired softball coach gave players extra practice time and individualized attention by persuading volunteer coaches to help with specialized skills and arranged for the team to play in tournaments attended by college recruiters. After the coach was fired, the school district stripped the softball team of its volunteer assistant coaches, canceled the team's 2007 awards banquet, and prohibited the team from participating in a Las Vegas tournament attended by college recruiters. The district court found these injuries, among others, sufficient to confer standing on plaintiffs and the Court of Appeals affirmed.

²⁰³ See, 44 Fed.Reg. 71,413, 71,418 (Dec. 11, 1979). The Ninth Circuit has adopted this standard in Neal v. Board of Trustees of the California State Universities, 198 F.3d 763, 767-68 (9th Cir. 1999).

²⁰⁴ Id. at 856.

²⁰⁵ Id. at 857-859.

²⁰⁶ Id. at 865-866; see, also, Jackson v. Birmingham Board of Education, 544 U.S. 167, 181 (2005).

The Court of Appeals concluded by stating:

“Having determined that the district court did not clearly err when it found (1) that Plaintiffs established a *prima facie* case of Title IX retaliation, and (2) that Sweetwater’s purported non-retaliatory reasons for firing Coach Martinez were pretextual excuses for unlawful retaliation, we conclude that it was not an abuse of discretion for the district court to grant permanent injunctive relief to Plaintiffs on their Title IX retaliation claim. We affirm the grant of injunctive relief to Plaintiffs on that issue.”²⁰⁷

The Ninth Circuit Court of Appeals’ decision should be reviewed by school districts with their legal counsel to determine if their athletic programs are in compliance with Title IX.

DISCRIMINATION INVOLVING PREGNANT STUDENTS

In Conley v. Northwest Florida State College,²⁰⁸ the U. S. District Court held that a college could not deny a pregnant student the opportunity to complete clinical rotations and take final exams for a semester due to her taking time off for the birth of her child. Conley became pregnant in early 2012 while enrolled as a student in the university’s paramedic program for the 2012-2013 school year. As part of the program, Conley was required to participate in an off-campus clinical rotation for academic credit.

In October 2012, Conley informed the agency operating her clinical rotation that she was pregnant and inquired about her rights under the Family and Medical Leave Act. Conley provided medical documentation that she was able to participate in the clinical portion of her educational program. On November 10, 2012, Conley was admitted to the hospital for false labor contractions. The following day she was discharged from the hospital and placed on bed rest for three days. Conley provided the discharge papers to the agency, but she was informed that she would not be allowed to participate in the clinical rotation due to potential liability regarding her unborn child. The next day, the agency dismissed Conley from her clinical rotation and gave her an incomplete for the course.²⁰⁹

On November 14, 2012, Conley was placed on bed rest for the remainder of her pregnancy. On December 15, 2012, Conley inquired about taking the final exam she missed due to the birth of her daughter. On January 3, 2013, she was released by her doctor to return to school in the clinical rotation. On January 6, 2013, Conley was advised that she would not be reinstated to the status she had before her maternity leave began, and would not be able to take the final exam or finish her clinical rotation before the start of the spring semester.²¹⁰

²⁰⁷ Id. at ____.

²⁰⁸ 145 F.Supp.3d 1073 (N.D. Fla. 2015).

²⁰⁹ Id. at 1074-1075.

²¹⁰ Id. at 1075.

The District Court concluded that the university discriminated against Conley due to her pregnancy, and that Title IX includes discrimination prohibitions based on pregnancy, childbirth, or related medical conditions.²¹¹

TRANSGENDER STUDENTS

On May 13, 2016, the U. S. Department of Education, Office for Civil Rights, issued a “Dear Colleague” letter, which stated that Title IX and its implementing regulations would prohibit sex discrimination in educational programs and activities, encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s gender status. The letter defines gender identity as referring to an individual’s internal sense of gender. A person’s gender identity may be different from or the same as the person’s sex assigned at birth. Transgender is defined as a person whose gender identity is different from the sex they were assigned at birth.

The letter states that as a condition of receiving federal funds, a school agrees that it will not discriminate based on sex, including a student’s gender identity, and that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. Therefore, if a transgender student identifies as female, the student should be treated as female even if they are biologically male.

The letter goes on to state that schools and school districts must allow transgender students access to restrooms, locker rooms, athletics, single-sex classes, single-sex schools, social fraternities and sororities, housing and overnight accommodations, and other sex-specific activities in a manner consistent with the student’s gender identity. The letter also states that the privacy of transgender students must be protected.

In G.G. v. Gloucester County School Board,²¹² the Fourth Circuit Court of Appeals upheld the U. S. Department of Education’s interpretation of Title IX with respect to transgender students. The Court of Appeals held that the school district impermissibly discriminated against a transgender male student by not allowing the student to use the boys’ restroom at the high school based on a local school board policy. The Court of Appeals deferred to the U. S. Department of Education’s “Dear Colleague” letter and regulations, and held that the transgender male student was entitled to use the boys’ restroom under Title IX. The matter has been stayed and is currently being heard in the U. S. Supreme Court. On February 22, 2017, the U. S. Department of Education withdrew its earlier guidance and stated that the transgender issue should be left to the states to decide.

In California, legislation has been passed which states that it is the policy of the State of California that elementary and secondary school classes and courses allow transgender students to participate in programs and activities and use facilities consistent with their gender identity.²¹³ The California law states:

²¹¹ Id. at 1084-1085.

²¹² 822 F.3d 709 (4th Cir. 2016).

²¹³ See, California Education Code § 221.5(f).

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

Attachment 1



UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, DC 20202- _____

The Office for Civil Rights in the United States Department of Education issues this guidance to provide State educational agencies, local educational agencies, and postsecondary institutions with information to ensure that male and female students are provided equal opportunities to participate in intercollegiate and interscholastic athletics programs consistent with *Title IX of the Education Amendments of 1972*, 20 U.S.C §§ 1681 *et seq.*, and its implementing regulations (34 C.F.R. Part 106).

This guidance represents the Department's current thinking on this topic. It does not create or confer any rights for or on any person. This guidance does not impose any requirements beyond those required under applicable law and regulations.

If you are interested in commenting on this guidance, please email us your comment at OCR@ed.gov or write to us at the following address: Assistant Secretary for Civil Rights, 400 Maryland Avenue, SW, Potomac Center Plaza, Washington, DC 20202-1100.

Dear Colleague:

SEP 17 2008

On behalf of the Office for Civil Rights (OCR) of the United States Department of Education, I am writing to provide technical assistance regarding your compliance with *Title IX of the Education Amendments of 1972 (Title IX)*, 20 U.S.C. §§ 1681 *et seq.* Specifically, this letter provides clarifying information to help institutions determine which intercollegiate or interscholastic athletic activities can be counted for the purpose of *Title IX* compliance; it does not represent a change in OCR's policy under *Title IX*.

As you are aware, *Title IX* prohibits discrimination on the basis of sex in education programs and activities by recipients of Federal financial assistance. The *Title IX* regulations governing athletics state, in relevant part:

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....

34 C.F.R. § 106.41(a). In particular, the regulations require institutions to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c).

When OCR conducts an investigation to determine whether an institution provides equal athletic opportunities as required by the *Title IX* regulations, OCR evaluates the opportunities provided by the institution's intercollegiate or interscholastic "sports." OCR does not have a specific definition of the term "sport." Instead, OCR considers several factors related to an activity's structure, administration, team preparation and competition, which are identified below, when

determining whether an activity is a sport that can be counted as part of an institution's intercollegiate or interscholastic athletics program for the purpose of determining compliance with 34 C.F.R. § 106.41(c).

Many institutions are members of intercollegiate athletic organizations, such as the National Collegiate Athletic Association and the National Association of Intercollegiate Athletics, or state high school associations that have organizational requirements, which address the factors identified by OCR. When the organizational requirements satisfy these factors and compliance with the requirements is not discretionary, OCR will presume that such an institution's established sports can be counted under *Title IX*. This presumption can be rebutted by evidence demonstrating that the institution is not offering the activity in a manner that satisfies the factors below.

When the presumption does not apply or has been rebutted effectively, OCR will evaluate an institution's activity on a case-by-case basis. In such an evaluation, OCR will consider the factors below to make an overall determination of whether the activity can be considered part of the institution's intercollegiate or interscholastic athletics program for the purpose of *Title IX* compliance.

If, after reviewing the factors in their entirety, OCR determines that an activity should not be counted under *Title IX*, an institution may ask OCR to reconsider its initial determination and may provide OCR with other evidence related to the activity's structure, administration, team preparation and competition. This approach affords recipients the flexibility to create athletics programs that are responsive to the specific interests and abilities of their particular student bodies.

In its case-by-case evaluation of whether an activity can be counted as an intercollegiate or interscholastic sport for the purpose of *Title IX* compliance, OCR will consider all of the following factors:

- ✧ I. **PROGRAM STRUCTURE AND ADMINISTRATION** — Taking into account the unique aspects inherent in the nature and basic operation of specific sports, OCR considers whether the activity is structured and administered in a manner consistent with established intercollegiate or interscholastic varsity sports in the institution's athletics program, including:
 - A. Whether the operating budget, support services (including academic, sports medicine and strength and conditioning support) and coaching staff are administered by the athletics department or another entity, and are provided in a manner consistent with established varsity sports; and
 - B. Whether the participants in the activity are eligible to receive athletic scholarships and athletic awards (e.g., varsity awards) if available to athletes in established varsity sports; to the extent that an institution recruits participants in its athletics program, whether participants in the activity are recruited in a manner consistent with established varsity sports.

II. **TEAM PREPARATION AND COMPETITION** — Taking into account the unique aspects inherent in the nature and basic operation of specific sports, OCR considers whether the team prepares for and engages in competition in a manner consistent with established varsity sports in the institution’s intercollegiate or interscholastic athletics program, including:

- A. Whether the practice opportunities (e.g., number, length and quality) are available in a manner consistent with established varsity sports in the institution’s athletics program; and
- B. Whether the regular season competitive opportunities differ quantitatively and/or qualitatively from established varsity sports; whether the team competes against intercollegiate or interscholastic varsity opponents in a manner consistent with established varsity sports;

When analyzing this factor, the following may be taken into consideration:

- 1. Whether the number of competitions and length of play are predetermined by a governing athletics organization, an athletic conference, or a consortium of institutions;
 - 2. Whether the competitive schedule reflects the abilities of the team; and
 - 3. Whether the activity has a defined season; whether the season is determined by a governing athletics organization, an athletic conference, or a consortium.
- C. If pre-season and/or post-season competition exists for the activity, whether the activity provides an opportunity for student athletes to engage in the pre-season and/or post-season competition in a manner consistent with established varsity sports; for example, whether state, national and/or conference championships exist for the activity; and
- D. Whether the primary purpose of the activity is to provide athletic competition at the intercollegiate or interscholastic varsity levels rather than to support or promote other athletic activities.

When analyzing this factor, the following may be taken into consideration:

- 1. Whether the activity is governed by a specific set of rules of play adopted by a state, national, or conference organization and/or consistent with established varsity sports, which include objective, standardized criteria by which competition must be judged;
- 2. Whether resources for the activity (e.g., practice and competition schedules,¹ coaching staff) are based on the competitive needs of the team;

¹ For purposes of this analysis, there is no presumption that the amount of time dedicated to competition must be equal to or greater than the amount of time dedicated to practice.

3. If post-season competition opportunities are available, whether participation in post-season competition is dependent on or related to regular season results in a manner consistent with established varsity sports; and
4. Whether the selection of teams/participants is based on factors related primarily to athletic ability.

Please keep in mind that OCR's determinations based on these factors are fact-specific. Therefore, determinations may vary depending on a school district or postsecondary institution's athletics program, the nature of the particular activity, and the circumstances under which it is conducted.

It is OCR's policy to encourage compliance with the *Title IX* athletics regulations in a flexible manner that expands, rather than limits, student athletic opportunities. By disseminating this list of factors, OCR intends to provide institutions with information to include new sports in their athletics programs, such as those athletic activities not yet recognized by governing athletics organizations and those featured at the Olympic games, if they so choose. Expanding interscholastic and intercollegiate competitive athletic opportunities through new sports can benefit students by creating and stimulating student interest in athletics, taking advantage of athletic opportunities specific to a particular competitive region, and providing the opportunity for access to a wide array of competitive athletic activities.

OCR remains available to provide technical assistance on this issue to recipients on a case-by-case basis. If you have further questions regarding the application of *Title IX* to athletics programs, or seek technical assistance, please contact the OCR enforcement office serving your state or territory. Contact information for these offices is available on the Department's website at <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>.

Thank you for your attention to these matters and your continued efforts to ensure equal athletic opportunities for all of our nation's students.

Sincerely,



Stephanie Monroe
Assistant Secretary for Civil Rights

Attachment 2



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

APR 20 2010

Dear Colleague:

Title IX of the Education Amendments of 1972¹ (Title IX) prohibits discrimination on the basis of sex in education programs and activities by recipients of Federal financial assistance, which include schools, colleges and universities. Since its passage, Title IX has dramatically increased academic, athletic and employment opportunities for women and girls. Title IX stands for the proposition that equality of opportunity in America is not rhetoric, but rather a guiding principle.

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

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

OCR enforces Title IX and its implementing regulation.² The regulation contains specific provisions governing athletic programs³ and the awarding of athletic scholarships.⁴ Specifically, the Title IX regulation provides that if an institution operates or sponsors an athletic program, it must provide equal athletic opportunities for members of both sexes.⁵ In determining whether equal athletic opportunities are available, the regulation requires OCR to consider whether an institution is effectively accommodating the athletic interests and abilities of students of both sexes.⁶

¹ 20 U.S.C. § 1681 *et seq.*

² 34 C.F.R. Part 106.

³ 34 C.F.R. § 106.41.

⁴ 34 C.F.R. § 106.37(c).

⁵ 34 C.F.R. § 106.41(c).

⁶ 34 C.F.R. § 106.41(c)(1). The Title IX regulation at 34 C.F.R. § 106.41(c) provides that OCR also will consider other factors when determining whether equal athletic opportunity is available at an institution. This Dear Colleague

The “Intercollegiate Athletics Policy Interpretation”⁷ (1979 Policy Interpretation), published on December 11, 1979, provides additional guidance on the Title IX intercollegiate athletic regulatory requirements.⁸ The 1979 Policy Interpretation sets out a three-part test that OCR uses to assess whether an institution is effectively accommodating the athletic interests and abilities of its students to the extent necessary to provide equal athletic opportunity.⁹ On January 16, 1996, OCR issued the “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test” (1996 Clarification) to provide additional clarification on all parts of the three-part test, including the specific factors that OCR uses to evaluate compliance under the third part of the three-part test (Part Three).¹⁰

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

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

letter only addresses the regulatory requirement, at 34 C.F.R. § 106.41(c)(1), to effectively accommodate interests and abilities.

⁷ 44 Fed. Reg. 71413 (1979). The 1979 Policy Interpretation was published by the former Department of Health, Education, and Welfare, and was adopted by the Department of Education when it was established in 1980.

⁸ Although the 1979 Policy Interpretation is designed for intercollegiate athletics, its general principles, and those of this letter, often will apply to interscholastic, club, and intramural athletic programs. 44 Fed. Reg. at 71413. Furthermore, the Title IX regulation requires institutions to provide equal athletic opportunities in intercollegiate, interscholastic, club, and intramural athletics. 34 C.F.R. § 106.41(c).

⁹ As discussed in the 1979 Policy Interpretation, OCR also considers the quality of competitive opportunities offered to members of both sexes in determining whether an institution effectively accommodates the athletic interests and abilities of its students. 44 Fed. Reg. at 71418.

¹⁰ OCR’s “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance,” which was issued as a Dear Colleague letter on July 11, 2003, also reincorporated the 1996 Clarification’s broad range of specific factors and illustrative examples.

on, the multiple indicators discussed in the 1996 Clarification that guide OCR's analysis of whether institutions are in compliance with Part Three, as well as the nondiscriminatory implementation of a survey as one assessment technique.

The Three-Part Test

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

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.¹¹

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

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

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

¹¹ 44 Fed. Reg. at 71418.

the underrepresented sex are fully and effectively accommodated. This letter provides information that guides OCR in its evaluation of compliance with Part Three and the nondiscriminatory implementation of assessments of students' athletic interests and abilities under it.

Under Part Three, the focus is on full and effective accommodation of the interests and abilities of the institution's students who are members of the underrepresented sex — including students who are admitted to the institution though not yet enrolled.¹² As stated in the 1996 Clarification, and as further discussed below, in determining compliance with Part Three, OCR considers all of the following three questions:

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

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

A. Unmet Interest and Ability — OCR Evaluation Criteria

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

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

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

¹² OCR examines an institution's recruitment practices under another part of the 1979 Policy Interpretation. See 44 Fed. Reg. at 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that its women's teams are provided with substantially equal opportunities to recruit potential student athletes.

1. Nondiscriminatory Methods of Assessment

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

- a. The processes take into account the nationally increasing levels of women's interests and abilities;
- b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- c. The methods of determining ability take into account team performance records; and
- d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.¹³

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

2. Assessments Not Used To Eliminate Viable Teams

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

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

3. Multiple Indicators Evaluated to Assess Interest

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

¹³ 44 Fed. Reg. at 71417.

1996 Clarification, OCR evaluates the interests of the underrepresented sex by examining the following list of non-exhaustive indicators:

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

In accordance with the 1996 Clarification, OCR also will consider the likely interest¹⁶ of the underrepresented sex by looking at participation in intercollegiate sports in the institution's normal competitive regions.

4. Multiple Indicators Evaluated to Assess Ability

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

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

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

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

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

¹⁶ See Footnote 15 above.

- **opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain an intercollegiate team; and**
- **if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.**

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

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

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

5. Frequency of Assessments

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

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

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

¹⁷ For example, in a typical four-year institution, the student body population will change substantially each year, by approximately 25 percent annually.

6. Effective Procedures for Evaluating Requests to Add Teams and Assessing Participation

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

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

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

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

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

¹⁸ 34 C.F.R. § 106.8(a).

Under Part Three, OCR evaluates the overall weight it will accord the conclusions drawn by an institution from the results of a survey by examining the following factors, among others:

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

OCR also considers whether a survey is implemented in such a way as to maximize the possibility of obtaining accurate information and facilitating responses. A properly designed survey should effectively capture information on interest and ability¹⁹ across multiple sports, without complicating responses with superfluous or confusing questions.

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

a. Content of the Survey

i. *Purpose*

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

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

ii. *Collect information regarding all sports*

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

¹⁹ Experience in sports generally is one indicator of ability.

²⁰ These associations are the National Collegiate Athletic Association, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association. A current list of these sports for both sexes is: baseball, basketball, bowling, cross country, fencing, field hockey, football, golf, gymnastics, ice hockey, lacrosse, rifle, rowing, skiing, soccer, softball, swimming and diving, tennis, indoor track and field, outdoor track and field, volleyball, water polo, and wrestling.

listed.²¹ OCR considers whether the survey allows students to identify their interest in future or current participation in all of the sports they identify and general athletic experience. OCR also considers whether the survey allows students to provide additional information or comments about their interest, experience, and ability. For technical assistance purposes, the types of questions an institution could ask regarding interest in future participation, current participation, and prior athletic experience might be:

Sport	Interest in Future Participation: At what level do you wish to participate in this sport at [Institution]?	Current Participation: At what level are you participating in this sport?	Prior Experience: At what level did you participate in this sport or any other relevant sport in high school, college, or in another capacity?	
Basketball	<input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational	<input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational <input type="checkbox"/> Other _____	College <input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational	High School <input type="checkbox"/> Varsity <input type="checkbox"/> Junior Varsity <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational <input type="checkbox"/> Other _____
Lacrosse	<input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational	<input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational <input type="checkbox"/> Other _____	College <input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational	High School <input type="checkbox"/> Varsity <input type="checkbox"/> Junior Varsity <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational <input type="checkbox"/> Other _____
Other sport identified by student ²²	<input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational	<input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational <input type="checkbox"/> Other _____	College <input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational	High School <input type="checkbox"/> Varsity <input type="checkbox"/> Junior Varsity <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational <input type="checkbox"/> Other _____

iii. *Contact Information*

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

b. Target Population Surveyed

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

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

²² If the survey is provided in paper form, an institution should provide a surplus of rows to ensure that a respondent can provide information for all the sports for which there is interest.

students of the underrepresented sex and admitted students of the underrepresented sex.²³ Using a census of all students can avoid several issues associated with sample surveys including, but not limited to: selection of the sampling mechanism, selection of the sample size, calculation of sampling error, and using sample estimates. If an institution intends to administer a survey to a sample population to gauge an estimate of interests and abilities, the larger the sample, the more weight OCR will accord the estimate.

c. Responses: Rates and Treatment of Non-Responses

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

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

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

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

If institutions administer the survey through a web-based distribution system, students who indicate that they have no current interest²⁵ in athletic participation should be asked to confirm their lack of interest before they exit the system. If response rates using the methods described

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

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

²⁵ Students may have, or may be unaware of whether they will have, a future interest in athletic participation.

above are low, an institution should consider administering the survey in another manner to obtain higher response rates.

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

d. Confidentiality Protections

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

e. Frequency of Conducting the Survey

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

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

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

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

When evaluating the minimum number of athletes needed, OCR may consider factors such as the:

- rate of substitutions necessitated by factors such as length of competitions, intensity of play, or injury;
- variety of skill sets required for competition; and
- minimum number of athletes needed to conduct effective practices for skill development.

B. Reasonable Expectation of Competition — OCR Evaluation Criteria

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

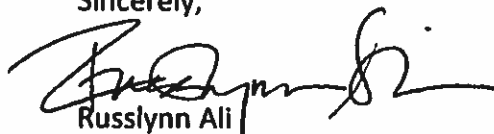
- competitive opportunities offered by other schools against which the institution competes; and
- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.²⁶

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

Conclusion

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

Sincerely,



Russlynn Ali

Assistant Secretary for Civil Rights

²⁶ Under the 1979 Policy Interpretation, an institution also may be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex. 44 Fed. Reg. at 71418.

Attachment 3



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 24, 2013

Dear Colleague:

The Office for Civil Rights (OCR) in the United States Department of Education (Department) is responsible for enforcing Federal civil rights laws that prohibit discrimination based on race, color, national origin, sex, disability, or age by recipients of Federal financial assistance (recipient(s)) from the Department.¹ Although a significant portion of the complaints filed with OCR in recent years have included retaliation claims, OCR has never before issued public guidance on this important subject. The purpose of this letter is to remind school districts, postsecondary institutions, and other recipients that retaliation is also a violation of Federal law.² This letter seeks to clarify the basic principles of retaliation law and to describe OCR's methods of enforcement.

The ability of individuals to oppose discriminatory practices, and to participate in OCR investigations and other proceedings, is critical to ensuring equal educational opportunity in accordance with Federal civil rights laws. Discriminatory practices are often only raised and remedied when students, parents, teachers, coaches, and others can report such practices to school administrators without the fear of retaliation. Individuals should be commended when they raise concerns about compliance with the Federal civil rights laws, not punished for doing so.

The Federal civil rights laws make it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by these laws.³ If, for example, an individual brings

¹ OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI), Title IX of the Education Amendments of 1972 (Title IX), Section 504 of the Rehabilitation Act of 1973 (Section 504), the Age Discrimination Act of 1975 (Age Act), and the Boy Scouts of America Equal Access Act (Boy Scouts Act). OCR also shares enforcement responsibilities with the Department of Justice for Title II of the Americans with Disabilities Act of 1990 (Title II), which prohibits discrimination against individuals with disabilities in state and local government services, programs and activities, regardless of whether they receive Federal financial assistance.

² The Federal courts have repeatedly affirmed that retaliation is a violation of the Federal civil rights laws enforced by OCR. *See, e.g., Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005); *Peters v. Jenney*, 327 F.3d 307, 320-21 (4th Cir. 2003); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1311 (11th Cir. 2002).

³ *See* 34 C.F.R. § 100.7(e) (Title VI); 34 C.F.R. § 106.71 (Title IX) (incorporating 34 C.F.R. § 100.7(e) by reference); 34 C.F.R. § 104.61 (Section 504) (incorporating 34 C.F.R. § 100.7(e) by reference); and 34 C.F.R. § 108.9 (Boy Scouts Act)

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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.

concerns about possible civil rights problems to a school's attention, 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 made a complaint, testified, or participated in any manner in an OCR investigation or proceeding. Thus, once a student, parent, teacher, coach, or other individual complains formally or informally to a school about a potential civil rights violation or participates in an OCR investigation or proceeding, the recipient is prohibited from retaliating (including intimidating, threatening, coercing, or in any way discriminating against the individual) because of the individual's complaint or participation. OCR will continue to vigorously enforce this prohibition against retaliation.

If OCR finds that a recipient retaliated in violation of the civil rights laws, OCR will seek the recipient's voluntary commitments through a resolution agreement to take specific measures to remedy the identified noncompliance.⁴ Such a resolution agreement must be designed both to ensure that the individual who was retaliated against receives redress and to ensure that the recipient complies with the prohibition against retaliation in the future. OCR will determine which remedies, including monetary relief, are appropriate based on the facts presented in each specific case.

Steps OCR could require a recipient to take to ensure compliance in the future include, but are not limited to:

- training for employees about the prohibition against retaliation and ways to avoid engaging in retaliation;
- adopting a communications strategy for ensuring that information concerning retaliation is continually being conveyed to employees, which may include incorporating the prohibition against retaliation into relevant policies and procedures; and
- implementing a public outreach strategy to reassure the public that the recipient is committed to complying with the prohibition against retaliation.

If OCR finds that a recipient engaged in retaliation and the recipient refuses to voluntarily resolve the identified area(s) of noncompliance or fails to live up to its commitments in a resolution agreement, OCR will take appropriate enforcement action. The enforcement actions available to OCR include initiating administrative proceedings to suspend, terminate, or refuse to grant or continue financial assistance made available through the Department to the recipient; or referring the case to the U.S. Department of Justice for judicial proceedings.⁵

(incorporating 34 C.F.R. §100.7(e) by reference). Title II and the Age Act have similar regulatory language. *See* 28 C.F.R. § 35.134 (Title II); and 34 C.F.R. § 110.34 (Age Act).

⁴ See OCR's Case Processing Manual for more information about resolution agreements, *available at* <http://www.ed.gov/ocr/docs/ocrcpm.html>.

⁵ *See* 34 C.F.R. § 100.8.

OCR is available to provide technical assistance to entities that request assistance in complying with the prohibition against retaliation or any other aspect of the civil rights laws OCR enforces. Please visit <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm> to contact the OCR regional office that serves your state or territory.

Thank you for your help in ensuring that America's educational institutions are free from retaliation so that concerns about equal educational opportunity can be openly raised and addressed.

Sincerely,

/s/

Seth M. Galanter
Acting Assistant Secretary for Civil Rights

Attachment 4



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's 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/OESD/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://wdcrobcolp01.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

U.S. Department of Education
Office for Civil Rights



Dear Colleague Letter Harassment and Bullying (October 26, 2010)
Background, Summary, and Fast Facts

What are the possible effects of student-on-student harassment and bullying?

- Lowered academic achievement and aspirations
- Increased anxiety
- Loss of self-esteem and confidence
- Depression and post-traumatic stress
- General deterioration in physical health
- Self-harm and suicidal thinking
- Feelings of alienation in the school environment, such as fear of other children
- Absenteeism from school

What does the Dear Colleague letter (DCL) do?

- Clarifies the relationship between bullying and discriminatory harassment under the civil rights laws enforced by the Department of Education's (ED) Office for Civil Rights (OCR).
- Explains how student misconduct that falls under an anti-bullying policy also may trigger responsibilities under one or more of the anti-discrimination statutes enforced by OCR.
- Reminds schools that failure to recognize discriminatory harassment when addressing student misconduct may lead to inadequate or inappropriate responses that fail to remedy violations of students' civil rights. Colleges and universities have the same obligations under the anti-discrimination statutes as elementary and secondary schools.
- Discusses racial and national origin harassment, sexual harassment, gender-based harassment, and disability harassment and illustrates how a school should respond in each case.

Why is ED Issuing the DCL?

ED is issuing the DCL to clarify the relationship between bullying and discriminatory harassment, and to remind schools that by limiting their responses to a specific application of an anti-bullying or other disciplinary policy, they may fail to properly consider whether the student misconduct also results in discrimination in violation of students' federal civil rights.

What are the anti-discrimination statutes that the Office for Civil Rights enforces?

- Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin.
- Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex.
- Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990, which prohibit discrimination on the basis of disability.¹

What are a school's obligations under these anti-discrimination statutes?

- Once a school knows or reasonably should know of possible student-on-student harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred.
- If harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, and prevent its recurrence. These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy and regardless of whether the student makes a complaint, asks the school to take action, or identifies the harassment as a form of discrimination.

How can I get help from OCR?

OCR offers technical assistance to help schools achieve voluntary compliance with the civil rights laws it enforces and works with schools to develop creative approaches to preventing and addressing discrimination. A school should contact the OCR enforcement office serving its jurisdiction for technical assistance. For contact information, please visit ED's website at <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>.

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

¹ OCR also enforces the Age Discrimination Act of 1975 and the Boy Scouts of America Equal Access Act. The DCL does not address these statutes.