

“DEAR COLLEAGUE”

A SUMMARY OF THE NEW TITLE IX GUIDANCE ON SEXUAL HARASSMENT AND SEXUAL VIOLENCE IN SCHOOLS



On April 4, 2011, the United States Department of Education’s Office for Civil Rights (“OCR”) issued a “significant guidance document” intended to assist schools receiving Federal funding in meeting their obligations under Title IX of the Education Amendments of 1972 (“Title IX”). Title IX prohibits discrimination on the basis of sex - including sexual harassment and sexual violence - in any educational program or activity operated by a recipient of Federal funding. The new guidance, presented in the form of a letter and entitled “Dear Colleague,” explains schools’ Title IX obligations pertaining to sexual harassment and sexual violence. The following is a brief summary of the key points in the new guidance, prepared for your convenience by the California Women’s Law Center.¹

PART I: TITLE IX REQUIREMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL VIOLENCE

1. Schools’ Obligations, Generally

Schools are obligated under Title IX to respond to sexual harassment and sexual violence. This obligation extends to all academic, educational, extracurricular, athletic, and other school-sponsored programs, regardless of whether the activity takes place on school grounds. Sexual harassment and violence may create a hostile environment serious enough to interfere with a student’s ability to participate in or benefit from school. A hostile environment may occur where there is a repetitive series of incidents or if a single or isolated incident is particularly severe, as in the case of rape.²

Immediate action is required. If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, the school must eliminate the harassment, prevent its recurrence, and address its effects.³ This is true even if the conduct occurred off school grounds.⁴

School officers and employees must be properly trained. School employees likely to witness or receive reports of sexual harassment and violence must be trained in how and to whom they should report any such incidents.⁵ This includes teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors. Employees with authority to address harassment must also be trained in how to respond to these reports.

Investigations must be prompt, thorough and impartial. If anyone files a complaint of sexual harassment or violence, or the school knows or should know about possible harassment, the school must conduct a prompt, thorough and impartial investigation. Schools must use a preponderance of the evidence standard in resolving allegations of sexual harassment or violence.⁶ A law enforcement investigation into the same incident or incidents does not relieve school of its obligation to investigate.

2. Procedural Requirements

A. Notice of Nondiscrimination

Title IX requires that schools in receipt of Federal funding publish a notice of nondiscrimination. The notice should be distributed to all students, parents of students, employees, applicants for admission and employment, and any other relevant persons. It should also be posted on the school's website and throughout school grounds, and included in any electronic or printed publications providing information about the school's services and policies.⁷ It should be available and easily accessible at all times.

To comply with Title IX, a Notice of Nondiscrimination should contain the following:

- A statement that Title IX requires that the school not discriminate on the basis of sex;
- A statement that the school does not discriminate on the basis of sex;
- A statement that inquiries about Title IX may be referred to the Title IX Coordinator or OCR;
- The name or title and contact information of the school's designated Title IX coordinator.⁸

B. Title IX Coordinators and School Law Enforcement Unit Employees

Schools must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities.⁹

The Title IX Coordinator's responsibilities include:

- Overseeing all Title IX complaints;
- Identifying and addressing any problems arising during review of Title IX complaints;
- Meeting with students as needed;
- Avoiding other job responsibilities that may create a conflict of interest;
- Assisting school law enforcement unit employees in responding to reports of sexual violence;
- Reviewing the school's disciplinary procedures for compliance with Title IX.¹⁰

The Title IX Coordinator must be adequately trained on what constitutes sexual harassment and on the school's grievance procedures. All law enforcement unit employees of the school should receive similar training, and copies of the school's Title IX procedures.

School law enforcement unit employees' responsibilities include:

- Notifying complainants of their right to file a Title IX complaint in addition to filing a criminal complaint;
- Reporting incidents of sexual violence to the Title IX Coordinator, if the complainant consents;
- Allowing the Title IX coordinator access to investigation notes and findings as necessary for the Title IX investigation.¹¹

C. Prompt and Equitable Grievance Procedures

Schools must adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints filed by students against other students, school employees, or third parties.¹² These procedures must apply to all students, including athletes; such complaints may not

be addressed solely by athletics department procedures.¹³ Voluntary, informal resolution procedures like mediation may be appropriate for resolving some types of sexual harassment complaints, but may be inappropriate for more serious complaints.¹⁴ Schools should never require the complainant to resolve the problem directly with the alleged perpetrator, or without appropriate school involvement.¹⁵

To determine whether a school's grievance procedures are prompt and equitable under Title IX, OCR considers the following elements: (i) notice of grievance procedures, (ii) application of these procedures to students' complaints of harassment, (iii) adequate, reliable and impartial investigation of complaints, (iv) designated and reasonably prompt time frames for the complaint process, (v) notice of outcome, and (vi) the school's assurance that it will take steps to prevent recurrence of any harassment and correct its discriminatory effects, if appropriate.¹⁶ The first five elements are discussed in the remainder of Part I of this summary; the sixth element, prevention and correction, is discussed in Part II.

i. Notice of Grievance Procedures

Schools' grievance procedures for resolving complaints of sexual discrimination and sexual harassment should be easily located and widely distributed. These procedures should be written in language that the students can easily understand.¹⁷

ii. Application of Grievance Procedures to Complaints

Schools must ensure that employees responsible for implementing and enforcing the school's grievance procedures are doing so. Title IX requires not only that schools have prompt and equitable grievance procedures, but that these procedures be applied to complaints of sexual harassment or sexual violence.

iii. Adequate, Reliable and Impartial Investigation of Complaints

Schools have a duty to resolve complaints promptly and equitably, and to take immediate steps to protect the student in school, if needed.¹⁸ Police reports or investigations are not determinative of whether the conduct violates Title IX; schools must conduct their own investigations and notify a complainant of their right to file a criminal complaint.¹⁹ If a school has a Memorandum of Understanding ("MOU") with the local police department, such an agreement must allow the school to meet its Title IX obligations.²⁰ Any MOU should also include clear policies on when a school should refer a matter to the local police.

The burden of proof required by OCR in sexual discrimination complaints, including claims of sexual harassment or violence, is a "preponderance of the evidence" standard. Therefore, in order to comply with Title IX, schools must use the preponderance of the evidence standard in resolving allegations of discrimination.²¹ Schools using a different standard of proof, such as the higher "clear and convincing" standard, are not in compliance with Title IX.²²

Parties to a school's Title IX investigation must have an equal opportunity to present witnesses and other evidence.²³ Schools are strongly discouraged from allowing the parties to personally question or cross-examine each other, as this may be intimidating or traumatizing for the alleged victim. Anyone involved in implementing a school's grievance procedures should be trained in the school's grievance procedures, how to handle sexual harassment and sexual violence complaints, and any applicable confidentiality requirements.²⁴ In cases involving sexual violence, the fact-finder and decision-maker must be trained in or have adequate knowledge regarding sexual violence.²⁵

If other rules violations were involved in the incident, schools should assure students that student safety is the school's primary concern.²⁶ OCR also recommends that schools inform students that any other rules violations will be addressed separately from the sexual violence claim, and that use of alcohol or drugs never makes the victim at fault for sexual violence.²⁷

iv. Designated and Reasonably Prompt Time Frames

Schools' grievance procedures should specify the time frames for all major stages of the procedures, and state the process for extending those time frames. A school's grievance procedures should provide time frames for the time it will take the school to conduct a full investigation of a complaint,²⁸ when the parties can expect to learn the outcome of the complaint, and, if applicable, when the parties may file an appeal.²⁹ Complaint resolutions must be timely, although timeliness may vary depending on the complexity of the investigation and the severity and extent of the harassment.

v. Notice of Outcome

Schools must notify both parties, in writing, as to the outcome of the complaint and any appeal. That is, schools must let both parties know whether or not it determined that sexual harassment occurred.³⁰

Although the Family Educational Rights and Privacy Act ("FERPA") prohibits disclosing personally identifiable information from a student's record without consent, OCR interprets the General Education Provision Act, of which FERPA is part, as permitting the requirements of Title IX to override any conflicting FERPA provisions.³¹ Thus, if the alleged perpetrator is found to have engaged in harassment and the sanction imposed directly relates to the harassed student, the school may disclose information about that sanction to the harassed student.³² If the alleged perpetrator is found to have committed a violent crime or non-forcible sex-offense and has violated the schools' rules or policies, a post-secondary school may disclose this finding to anyone.³³

It is important to note that the Clery Act, which applies to post-secondary schools participating in Federal student financial aid programs, also requires that both parties be informed of the outcome of any school disciplinary proceeding involving an alleged sex offense.³⁴

PART II: STEPS TO PREVENT SEXUAL HARASSMENT AND SEXUAL VIOLENCE AND CORRECT ITS DISCRIMINATORY EFFECTS

1. Education and Prevention

OCR recommends that schools take proactive measures to prevent sexual harassment and violence by implementing preventive education programs. These programs should include discussions on what constitutes sexual harassment and sexual violence, the school's policies and disciplinary procedures, consequences of violating the school's policies and disciplinary procedures, and information aimed at encouraging students to report incidents of sexual violence to school and law enforcement officials.³⁵

In addition to preventative programs, schools should also develop specific sexual violence materials for students and employees. These materials should contain information on school policies and rules, what students should do if they are victims of sexual violence, and what students and employees should do if they know of an incident of sexual violence. Schools should routinely review student activities for violations of school policies on sexual harassment and sexual violence.

2. Remedies and Enforcement

Title IX requires that schools take steps to protect the complainant as soon as a school has notice of a sexual harassment or violence allegation. Schools should notify the complainant of options to avoid contact with the alleged perpetrator, and if a school takes steps to separate the two parties, it should minimize the burden on the complainant. For example, a school should not remove complainants from classes or housing while allowing alleged perpetrators to remain.³⁶

Schools must also have policies and procedures in place to protect against retaliation by the alleged perpetrator or associates of the alleged perpetrator. Schools must, at the very least, be sure complainants, and in some cases their parents, know how to report any subsequent problems, and should follow-up with complainants to see whether there have been any new incidents.³⁷

OCR also recommends that schools provide remedies for sexual harassment and sexual discrimination, both for the complainant and the broader population.³⁸ Remedies OCR suggests schools provide to alleged victims include: provision of an escort, ensuring that the victim shares no classes with the alleged perpetrator, moving the parties to different dorms or different schools, counseling, medical and academic support, and allowing the alleged victim to drop and retake classes without penalty.³⁹ Suggested remedies for the school's broader population include counseling and training, developing materials and implementing policies and procedures on sexual harassment and violence, school investigations and periodic assessments, and providing OCR with copies of each sexual harassment or violence grievance along with all related documentation.⁴⁰

CONCLUSION

With this new guidance, OCR underscores its commitment to ensuring that all students feel safe and have the opportunity to benefit from their schools' education programs and activities. For additional information about Title IX, OCR's policies, or technical assistance, contact your local OCR enforcement office.⁴¹ Additionally, the U.S. Department of Justice's Office on Violence Against Women is an excellent resource for information on victim resources, information for schools, and addressing sexual violence.⁴²

¹ This document is intended to provide a summary of the Office for Civil Rights' 'Dear Colleague' letter issued on April 4, 2011. Receiving and/or reading this document does not make you a client of the California Women's Law Center. It is not intended to be nor should it be relied upon, as legal advice.

² Office for Civil Rights, U.S. Dept. of Educ., Dear Colleague Letter 3 (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter *Dear Colleague Letter*] (emphasizing the fact that "[t]he more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment").

³ *Dear Colleague Letter*, *supra* note 1, at 4. This is the standard where a plaintiff seeks injunctive relief. Where a plaintiff seeks monetary damages, the standard is actual knowledge and deliberate indifference. *Id.*

⁴ *Id.* at 4. Schools must process complaints of conduct that occurred off-campus in accordance with established procedures and determine whether the conduct creates a hostile environment on campus. This is true regardless of whether the conduct occurred at a school-sponsored activity or event.

⁵ *Id.* at 4.

⁶ *Id.* at 10-11.

⁷ *Id.* at 6-7.

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.* at 7, 8.

¹¹ *Id.*

¹² *Id.* at 8.

¹³ *Id.* at 8 note 23.

¹⁴ For example, OCR makes clear that in cases involving sexual assault, mediation is never appropriate, even on a voluntary basis. *Id.* at 8.

¹⁵ Where informal proceedings are appropriate and voluntarily elected to by the complainant, the complainant must be notified of their right to end the informal process at any time and begin formal proceedings. *Id.*

¹⁶ *Id.* at 9.

¹⁷ See discussion *infra* Part I.1.A.

¹⁸ See discussion *infra* Part I.1.

¹⁹ *Dear Colleague Letter, supra* note 1, at 10.

²⁰ In such cases, schools should not wait for the ultimate outcome of the police investigation or the filing of charges to resume the Title IX investigation. Occasionally schools may need to delay their Title IX investigation while the police are gathering evidence, but once notified that the police have completed gathering evidence, the school must promptly resume its investigation. *Id.*

²¹ *Id.* at 10. The preponderance of the evidence standard requires that the school determine whether it is more likely than not that sexual harassment or violence occurred. This is a lower standard of proof than “clear and convincing,” which asks whether it is highly probable or reasonably certain that sexual harassment or violence occurred.

²² *Id.* at 11.

²³ *Id.*

²⁴ See discussion *infra* Part I.1. Persons who must be trained include Title IX coordinators, investigators and adjudicators. *Dear Colleague Letter, supra* note 1, at 12.

²⁵ *Dear Colleague Letter, supra* note 1, at 12 note 30. OCR notes that if an investigation or hearing involves forensic evidence, this evidence should be reviewed by a trained forensic examiner. To ensure that a school’s investigation and hearing processes are impartial, any real or perceived conflicts of interest between investigators or adjudicators and the parties should be disclosed.

²⁶ *Id.* at 15.

²⁷ *Id.*

²⁸ *Id.* at 12. OCR notes that based on its experience, a typical investigation takes 60 calendar days following receipt of the complaint.

²⁹ *Id.*

³⁰ There is no requirement that schools notify the alleged perpetrator before the complainant; OCR suggests notifying both parties concurrently. *Id.* at 13.

³¹ *Id.* at 13 note 32. See also Office for Civil Rights, U.S. Dept. of Educ., Revised Sexual Harassment Guidance vii (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

³² Such information includes orders that the harasser stay away from the victim, be prohibited from attending school for a period of time, or be transferred to other classes or another dorm. Such information is particularly important in sexual harassment cases because it relates to the elimination of a hostile environment. *Dear Colleague Letter, supra* note 1, at 13 note 33.

³³ *Id.* at 14.

³⁴ 38 C.F.R. § 668.46(b)(11)(vi)(B); *Dear Colleague Letter, supra* note 1, at 14.

³⁵ *Dear Colleague Letter, supra* note 1, at 15. If other rules violations were involved in the incident, schools should assure students that the school’s primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence claim, and that use of alcohol or drugs never makes the victim at fault for sexual violence.

³⁶ *Id.* at 16.

³⁷ *Id.* at 15-16.

³⁸ *Id.* at 16-19.

³⁹ *Id.* at 16-17. OCR also suggests that the school review any disciplinary actions against the complainant to determine whether they are related to the harassment.

⁴⁰ *Id.* at 18-19.

⁴¹ A list of offices is available at <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>.

⁴² For more information, please visit the Office on Violence Against Women’s website: <http://www.ovw.usdoj.gov>.