DEPARTMENT OF EDUCATION

Office for Civil Rights Sexual Harassment Guidance: Harassment of Students by School Employees

ACTION: Request for comments.

SUMMARY: The Assistant Secretary for Civil Rights issues a draft document entitled ''Sexual Harassment Guidance: Harassment of Students by School Employees'' (Guidance).

The Guidance provides educational institutions with information regarding the standards used by the Office for Civil Rights (OCR) to investigate and resolve cases involving claims that sexual harassment of students by employees has created a hostile environment in violation of Title IX of the Education Amendments of 1972. Title IX prohibits gender discrimination in education programs that receive Federal financial assistance.

The Assistant Secretary solicits from all interested parties written comments on the clarity and completeness of the Guidance, which is appended to this notice as Appendix One.

DATES: Comments on the Guidance must be received on or before November 18, 1996.

ADDRESSES: All comments concerning the Guidance should be addressed to Howard I. Kallem, U.S. Department of Education, 600 Independence Avenue, S.W., Room 5414 Switzer Building, Washington, D.C. 20202–1174. Telephone: (202) 205–9641.

FOR FURTHER INFORMATION CONTACT: Howard I. Kallem. Telephone (202) 205–9641. Individuals who use a telecommunications device for the deaf (TDD) may call the TDD number at (202) 205–9683 or 1–800–421–3481. Internet: Howard __Kallem@ed.gov

SUPPLEMENTARY INFORMATION: The purpose of the Guidance is to inform educational institutions that receive Federal financial assistance regarding the standards that OCR follows, and that the institutions should follow, when investigating allegations that Title IX has been violated because of sexual harassment of students by employees. Consistent with the Supreme Court's decision in *Franklin* v. *Gwinnett County Public Schools,* 503 U.S. 60 (1992) (holding that a student may sue a school district for damages based on sexual harassment by a teacher), OCR has applied Title IX to prohibit sexual harassment of students by school employees. The standards in the Guidance reflect OCR's longstanding nationwide practice and reflect well established legal principles developed under Title VII of the Civil Rights Act of 1964, which prohibits gender discrimination in employment. The Department is accepting public comment on whether the Guidance in Appendix One is clear and complete.

On August 16, 1996, the Assistant Secretary published a notice in the Federal Register (61 FR 42728) announcing the availability, upon request, of a document entitled ''Sexual Harassment Guidance: Peer Sexual Harassment'' and invited comments on the document. A copy of the Peer Harassment Guidance is appended to this notice as Appendix Two for the convenience of the readers of the Guidance issued today.

Once the comments are assessed, OCR plans to publish a single document in the Federal Register combining the guidance found in Appendix One and Appendix Two.

Invitation to Comment

Interested persons are invited to submit comments and recommendations on the clarity and completeness of the Guidance in Appendix One.

All comments submitted in response to this notice will be available for public inspection, during and after the comment period, in Room 5414, 330 C Street, S.W., Washington, D.C., between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

Dated: September 27, 1996.

Norma V. Cantú,

Assistant Secretary for Civil Rights.

Appendix One—Sexual Harassment Guidance: Harassment of Students by School Employees

This guidance discusses the analysis that the Office for Civil Rights (OCR) follows, and that school districts, colleges, and other recipients of Federal funding (referred to in this guidance as ''schools'') should use, when investigating allegations of sexual harassment of students in a school's educational program by a school's employees.[1] This guidance is based on legal principles detailed in the endnotes accompanying the document.

This guidance supplements and should be read in conjunction with OCR's policy guidance: ''Sexual Harassment Guidance: Peer Harassment,'' issued for comment on August 16, 1996 (Peer Harassment Guidance). Many of the issues discussed in the Peer Harassment Guidance are applicable to investigations of alleged harassment of students by a school's employees. Additional issues related to sexual harassment by employees are discussed below.

Introduction

Under Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations, no individual may be discriminated against on the basis of sex in any education program or activity receiving Federal financial assistance.[2] Sexual harassment of students by a school employee is a form of prohibited sex discrimination in the following circumstances:[3]

Quid Pro Quo Harassment—A school employee explicitly or implicitly conditions a student's participation in an education program or school activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.[4] *Quid pro quo* harassment is equally unlawful whether the student resists and suffers the threatened harm or submits and thus avoids the threatened harm.

Hostile Environment Harassment—Sexually harassing conduct by an employee (that can include unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature[5]) is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.[6]

As discussed in the Peer Harassment Guidance, Title IX's prohibition of sexual harassment does not extend to nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment.[7] However, gender-based harassment—that is, acts of verbal or physical aggression, intimidation, or hostility based on sex but not involving sexual activity or language—is a form of discrimination prohibited by Title IX. Such incidents, combined with incidents of sexual harassment, could create a hostile environment, even if each by itself would not be sufficient.[8]

As noted previously, many of the principles set out in the Peer Harassment Guidance apply to sexual harassment of students by school employees. Those principles are not repeated in this document. In particular, the principles in that Guidance relating to the applicability of Title IX, notice and grievance procedures, and the recipient's response to and prevention of sexual harassment all apply to sexual harassment of students by school employees.

Liability of a School for Sexual Harassment by its Employees

A school's liability for sexual harassment by its employees is

determined by application of agency principles,[9] i.e., by principles governing the delegation of authority to or authorization of another person to act on one's behalf. Accordingly, a school will always be liable for even one instance of *quid pro quo* harassment by a school employee in a position of authority, such as a teacher or administrator, whether or not it knew, should have known, or approved of the harassment at issue.[10] Under agency principles if a teacher or other employee uses the authority he or she is given (e.g., to assign grades) to force a student to submit to sexual demands, the employee ''stands in the shoes'' of the school and the school will be responsible for the use of its authority by the employee/agent.[11]

A school will also be liable for hostile environment sexual harassment by its employees, i.e., for harassment that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive environment if the employee—(1) Acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority); [12] or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution.[13] For example, a school will be liable if a teacher abuses his or her delegated authority over a student to create a hostile environment, such as if the teacher explicitly or implicitly threatens to fail a student unless the student responds to his or her sexual advances, even though the teacher fails to carry out the threat.[14]

As this example illustrates, in many cases the line between *quid pro quo* and hostile environment discrimination will be blurred, and the employee's conduct may constitute both types of harassment. However, what is important is that the school is liable for that conduct under application of agency principles, regardless of whether it is labeled as *quid pro quo* or hostile environment harassment.

Whether other employees, such as a janitor or cafeteria worker, are in positions of authority—or whether it would be reasonable for the student to believe they are, even if not (i.e., apparent authority)—will depend on factors such as the authority actually given to the employee [15] (e.g., in some elementary schools, a cafeteria worker may have authority to impose discipline) and the age of the student (the younger the student, the more likely it is that he or she will consider any adult employee to be in a position of authority).

Even in situations not involving (i) *quid pro quo* harassment, (ii) creation of a hostile environment through an employee's apparent authority, or (iii) creation of a hostile environment in which the employee is aided in carrying out the sexual harassment by his or her position of authority, a school will be liable for sexual harassment of its students by its employees if the school has notice of the harassment (i.e., knew or should have known of the harassment) but failed to take immediate and appropriate steps to remedy it.[16] Determining when a school has notice of sexual harassment is discussed in the Peer Harassment Guidance.[17]

Finally, schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination.[18] If a school fails to do so, it will be liable under Title IX for the lack of grievance procedures, regardless of whether sexual harassment occurred. In addition, if OCR determines that harassment occurred, the school may be in violation of Title IX as to the harassment, under the agency principles previously discussed, because a school's failure to implement effective policies and procedures against discrimination may create apparent authority for school employees to harass students.[19]

In all cases of alleged harassment by employees investigated by OCR, OCR will determine whether a school has taken immediate and appropriate steps reasonably calculated to end any harassment that has occurred, remedy its effects, and prevent harassment from occurring again. If the school has done so, OCR will consider the case against that school resolved and will take no further action. This is true in cases in which the school was in violation of Title IX,[20] as well as those in which there has been no violation of Federal law.[21]

Welcomeness

In order to be actionable as harassment, sexual conduct must be unwelcome. Issues regarding credibility determinations and whether conduct is in fact unwelcome, notwithstanding a student's acquiescence or failure to complain, are discussed in the Peer Harassment Guidance. Schools should be particularly concerned about this issue when the harasser is in a position of authority. For instance, because students may be encouraged to believe that a teacher has absolute authority over the operation of his or her classroom, a student may not object to a teacher's sexually harassing comments during class; [22] however, this does not necessarily mean that the conduct was welcome. Instead, the student may believe that any objections would be ineffective in stopping the harassment or may fear that by making objections he or she will be singled out for harassing comments or other retaliation.

In addition, OCR must consider particular issues of welcomeness if the alleged harassment relates to alleged ''consensual'' sexual relationships between adult employees of elementary and secondary schools and students in those schools. If elementary students are involved, welcomeness will not be an issue: OCR will never view sexual conduct between an adult school employee and an elementary school student as consensual. In cases involving secondary students, there will be a strong presumption that sexual conduct between an adult school employee and a student is not consensual. However, if that presumption is challenged for older secondary students, and for post-secondary students, OCR will consider a number of factors in determining whether sexual advances or other sexual conduct could be considered welcome:

—The nature of the conduct and the relationship of the school employee to the student, including the degree of influence (which could, at least in part, be affected by the student's age), authority, or control the employee has over the student.

—Whether the student was legally or practically unable to consent to the sexual conduct in question with an adult school employee. A student's age or disability would affect his or her ability to do so.[23]

Severe, Persistent, or Pervasive

Even a single instance of *quid pro quo* harassment is a violation of Title IX. In determining whether an employee's sexual harassment of a student created a hostile environment, i.e., whether it was sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment, OCR considers the factors discussed in the Peer Harassment Guidance.[24] An additional factor to consider if a student is harassed by a school employee is the identity and relationship of the individuals involved. For example, due to the power that a professor or teacher has over a student, sexually based conduct by that person toward a student

may be more likely to create a hostile environment than similar conduct by another student.[25]

Prompt and Equitable Grievance Procedures

Title IX's requirement that schools adopt and publish grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex is also applicable to complaints of harassment of students by a school's employees.[26] Thus, a school's grievance procedures must also apply to those complaints.

In addition, because it is possible that an employee designated to handle Title IX complaints may him or herself engage in harassment, it may be necessary for the school to designate more than one employee as responsible for handling these complaints in order to ensure that students have an effective means of reporting harassment.[27]

As in the case of students accused of harassment, a school's employees may have certain due process rights.[28] Procedures that ensure the Title IX rights of the complainant, while at the same time according due process rights to the parties involved, will lead to sound and supportable decisions. The rights established under Title IX must be interpreted consistently with any applicable federally guaranteed rights involved in a complaint. Schools should ensure that steps to accord due process rights do not obstruct or delay the protections provided by Title IX to the complainant.

Notice of Outcome and FERPA

As discussed in the Peer Harassment Guidance, the Title IX grievance process should provide for notice of the outcome and disposition of a complaint if doing so is consistent with a school's obligations under the Family Educational Rights and Privacy Act (FERPA) and its regulations.[29] FERPA generally prohibits a school from releasing personally identifiable information from a student's education record without the consent of the student (or his or her parents, if the student is a minor).[30] Thus, if the alleged harasser is a teacher, administrator, or other non-student employee, FERPA would not limit the school's ability to inform the complainant of any disciplinary action taken.

First Amendment

Just as with peer harassment, in cases of alleged harassment by employees, the protections of the First Amendment must be considered if issues of speech or expression are involved.[31] Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. This is a particularly important consideration in classroom and related activities by teachers. Thus, in regulating the conduct of its faculty to prevent or respond to sexual harassment, a school must formulate, interpret, and apply its rules so as to protect free speech rights.[32]

Footnotes

1. The term ''employee'' refers to employees and agents of a school. This includes persons with whom the school contracts to provide services for the school. *See Brown* v. *Hot, Sexy, and Safer Productions, Inc.,* 68 F.3d 525 (1st Cir. 1995) (Title IX sexual harassment claim brought for school's role in permitting contract consultant hired by it to create allegedly hostile environment). In addition, while the standards contained in the Department's Peer Harassment Guidance are generally applicable to claims of student-on-student harassment, schools will be liable for the sexual harassment of one student by another student under the standards contained in this Guidance if a student engages in sexual harassment as an agent or employee of a school.

For instance, a school would be liable under the standards applicable to *quid pro quo* harassment if a student teaching assistant, who has been given authority to assign grades, requires a student in his or her class to submit to sexual advances in order to obtain a certain grade in the class. Finally, this Guidance does not address employee-on-employee sexual harassment, even though that conduct is prohibited by Title IX. If employees bring sexual harassment claims under Title IX, case law applicable to sexual harassment in the work place under Title VII of the Civil Rights Act of 1964, and Equal Employment Opportunity (EEOC) guidelines will apply. See 28 CFR 42.604 (Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance).

2. 20 U.S.C. § 1681, *et seq.,* as amended; 34 CFR 106.31(b).

3. For over a decade, the Department has applied Title IX to prohibit sexual harassment. As in the Peer Harassment Guidance, the Department also applies many of the principles developed in the case law governing sexual harassment in the workplace, under Title VII, as appropriate to the educational context. Similarly, many of the principles applicable to racial harassment under Title VI of the Civil Rights Act of 1964 also apply to sexual harassment under Title IX. *See* Department's Notice of Investigative Guidance for Racial Harassment, 59 FR 11448 (1994).

4. *Alexander* v. *Yale University,* 459 F. Supp 1, 4 (D.Conn 1977), *aff'd,* 631 F.2d 178 (2nd Cir. 1980) (a claim that academic advancement was conditioned upon submission to sexual demands constitutes a claim of sex discrimination in education); *Kadiki* v. *Virginia Commonwealth University,* 892 F. Supp 746, 752 (E.D. Va. 1995) (reexamination in a course conditioned on college student's agreeing to be spanked should she not attain a certain grade may constitute *quid pro quo* harassment); *see also Karibian* v. *Columbia University,* 14 F.3d 773, 777–79 (2nd Cir. 1994) (Title VII case).

5. *See* Peer Harassment Guidance at n. 5 (describing conduct found to be of a sexual nature).

6. *Doe* v. *Petaluma City School Dist.,* 830 F. Supp. 1560, 1571–73 (N.D. Cal. 1993), *motion for reconsideration granted* (July 22, 1996) (reaffirming Title IX liability for peer harassment); *Moire* v. *Temple University School of Medicine,* 613 F. Supp. 1360, 1366 (E.D. Pa. 1985), *aff'd mem.,* 800 F.2d 1136 (3d Cir. 1986); *see also Meritor Savings Bank, FSB* v. *Vinson,* 477 U.S. 57, 67 (1986) (Title VII case).

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

8. *See* Peer Harassment Guidance at notes 9, 41, and 42 and accompanying text.

9. The Supreme Court has ruled that agency principles apply in determining an employer's liability under Title VII for the harassment of its employees by supervisors. *See Vinson,* 477 U.S. at 72. These principles would govern in Title IX cases involving employees who are harassed by their supervisors. *See* 28 CFR 42.604 (regulations providing for handling employment discrimination complaints by Federal agencies; requiring agencies to apply Title VII law where applicable). These same principles should govern the liability of educational institutions under Title IX for the harassment of students by teachers and other school employees in positions of authority. *See Franklin* v. *Gwinnett County Public Schools,* 503 U.S. 60, 75 (1992).

10. The Supreme Court in *Vinson* did not alter the standard developed in the lower Federal courts whereby an institution is absolutely liable for *quid pro quo* sexual harassment whether or not it knew, should have known, or approved of the harassment at issue. 477 U.S. at 70–71; *see also Lipsett* v. *University of Puerto Rico,* 864 F.2d 881, 901 (1st Cir. 1988); EEOC Notice N–915–050, March 1990, Policy Guidance on Current Issues of Sexual Harassment, at p. 21. This standard applies in the school context as well. *Kadiki,* 892 F. Supp. at 752 (for purposes of *quid pro quo* harassment of a student, professor is in similar position as work place supervisor).

11. *Kadiki,* 892 F. Supp. at 754–755; *cf. Martin* v. *Cavalier Hotel Corp.,* 48 F.3d 1343, 1351 n. 3 (4th Cir. 1995) (Title VII case); *Karibian,* 14 F.3d at 777–78; *Henson* v. *City of Dundee,* 682 F.2d 897, 910 (11th Cir. 1982) (Title VII case).

12. Restatement (Second) Agency § 219(2)(d); *Martin* v. *Cavalier Hotel Corp.*, 48 F.3d at 1352 (finding an employer liable under Title VII for its General Manager's sexual harassment of an employee where the Manager used his apparent authority to commit the harassment; the Manager was delegated the full authority to hire, fire, promote, and discipline employees and used the authority to accomplish the harassment; and company policy required employees to report harassment to the Manager with no other grievance process made available to them).

13. *See* Restatement (Second) of Agency § 219(2)(d); EEOC Policy Guidance on Current Issues of Sexual Harassment at p. 28; Karibian, 14 F.3d at 780; *Hirschfeld* v. *New Mexico Corrections Dept.*, 916 F.2d 572, 579 (10th Cir. 1990) (Title VII case); *Martin* v. *Cavalier Hotel Corp.*, 48 F.3d at 1352.

14. *Karibian*, 14 F.3d at 780 (employer would be liable for hostile environment harassment where allegations were that a supervisor coerced employee into a sexual relationship by, among other things, telling her she "'owed him' for all he was doing for her as her supervisor"); *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558–60) (11th Cir. 1987) (Title VII case holding employer liable for sexually hostile environment created by supervisor who repeatedly reminded the harassed employee that he could fire her if she did not comply with his sexual advances).

15. *Cf. Karibian*, 14 F.3d at 780.

16. *Id.*

17. *See* Peer Harassment Guidance at pp. 6–7.

18. 34 CFR 106.8(b).

19. EEOC Policy Guidance at p. 25 ("* * * in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management.").

20. If OCR finds a violation of Title IX, it will seek to obtain an agreement with the school to voluntarily correct the violation. The agreement will set out the specific steps the school will take and provide for monitoring by OCR to ensure that the school complies with the agreement.

21. However, schools should note that the Supreme Court has held that, should a student file a private lawsuit under Title IX, monetary damages are available as a remedy if there has been a violation of Title IX. *Franklin*, 503 U.S. at 76. Of course, a school's immediate and appropriate remedial actions are relevant in determining the extent and nature of the damages suffered by a plaintiff.

22. *See Leija* v. *Cantutillo Independent School Dist.*, 887 F. Supp. 947, 954 (N.D. Tex. 1993) ("young children, taught to respect their teachers and follow their teacher's request, often do not know what to do when abuse occurs").

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

24. These factors include the type, frequency, and duration of the conduct; the number of individuals involved; the age and sex of the individuals involved; the size of the school, the location of the incidents, and the context in which they occurred; any other incidents at the school; and any incidents of gender-based, but non-sexual harassment. Note that, as with peer harassment, a single instance of severe harassment may be sufficient to create a hostile environment. Peer Harassment Guidance at p. 5 and n.35; Racial Harassment Investigative Guidance at 11449; *Brock* v. *United States*, 64 F. 3d 1421, 1423 (9th Cir. 1995) (Title VII case); *Simon* v. *Morehouse Sch. of Medicine*, 908 F. Supp. 959, 969–970 (N.D. Ga. 1995) (Title VII case); *Al-Dabbagh* v. *Greenpeace, Inc.*, 873 F. Supp. 1105, 1111–12 (N.D. Ill. 1994) (Title VII case); *Watts* v. *N.Y.C. Police Dept.*, 724 F. Supp. 99 (S.D.N.Y. 1989) (Title VII case).

25. *Patricia H.*, 830 F. Supp. at 1297 ("grave disparity in age and power" between teacher and student contributed to the creation of a hostile environment); *Summerfield Schools*, OCR Case No. 15–92–1929 ("impact of the * * * remarks was heightened by the fact that the coach is an adult in a position of authority"); *cf. Doe* v. *Taylor I.S.D.*, 15 F.3d 443 (5th Cir. 1994), *cert. denied*,—U.S.—, 115 S.Ct. 70 (1994) (Sec. 1983 case; in finding that a sexual relationship between a high school teacher and a student was unlawful, court considered the influence that the teacher had over the student by virtue of his position of authority).

26. At the elementary and secondary level, this responsibility generally lies with the school district. At the post-secondary level, there may be a procedure for a particular campus or college or for an entire university system. Moreover, while a school is required to have a grievance procedure under which complaints of sex discrimination (including sexual harassment) can be filed, the same procedure may also be used to address other forms of discrimination.

27. *See Meritor*, 477 U.S. at 72–73.

28. These rights may be derived from the United States Constitution, State law, collective bargaining agreements, or institutional regulations and policies, such as faculty handbooks.

29. *See* 20 U.S.C. § 1232g; 34 CFR Part 99.

30. *Id.*

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

32. For an example of the application of First Amendment principles to alleged sexual harassment by a school employee, *see Silva* v. *University of New Hampshire*, 883 F. Supp. 293 (D.N.H. 1994) (finding that a university professor was wrongly disciplined when he was fired for using classroom examples that seemed sexual in nature to some students, based on an impermissibly subjective sexual harassment policy). *See also George Mason University*, OCR Case No. 03–94–2086 (law professor's use of a racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment); *Portland School Dist. 1J*, OCR Case No. 10–94–1117 (reading teacher's choice to substitute a less offensive term for a racial slur when reading an historical novel aloud in class constituted an academic decision on presentation of curriculum, not racial harassment).

Appendix Two—Sexual Harassment Guidance: Peer Harassment

This guidance discusses the analysis that the Office for Civil Rights (OCR) follows, and that recipients of Federal funding should use, when investigating allegations that sexual harassment of a student or students by another student or group of students (peer harassment) has created a hostile environment at an educational institutions that receive Federal financial assistance.[1] This guidance is based on existing legal principles, which are detailed in the endnotes accompanying the document.

Introduction

Under Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations, no individual may be discriminated against on the basis of sex in education programs receiving Federal financial assistance.[2] Peer sexual harassment is a form of prohibited sex discrimination where the harassing conduct creates a hostile environment.[3] *Thus, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature*[4] *constitutes sexual harassment when the conduct is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment.*[5]

OCR finds a school to be in violation of Title IX for peer hostile environment sexual harassment where a school knows of but fails to remedy the harassment in its education programs or activities.[6] Title IX does not make a school responsible for the actions of the harassing students, but rather for its own discrimination in permitting the harassment to continue once the school has notice of it. A school will have notice of a hostile environment when it knew or should have known of the harassment.[7] Moreover, schools are required by the Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination by other students, including sexual harassment.[8]

It is important to recognize that Title IX's prohibition of sexual harassment does not extend to nonsexual touching

or other nonsexual conduct.[9] For example, one student's demonstration of a sports maneuver requiring contact with another student will not be considered sexual harassment.[10]

Finally, where the alleged harassment involves issues of speech or expression, a school's obligations may be affected by application of First Amendment principles.

These issues are discussed in more detail below.

Applicability of Title IX

Title IX applies to all public and private educational institutions that receive Federal funds, including elementary and secondary schools, school districts, proprietary schools, colleges and universities. This guidance uses the term ''schools'' to refer to all such institutions. The ''education program'' of a school includes all of the school's operations.[11] This means that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

Title IX protects any ''person'' from sex discrimination; accordingly both male and female students are protected from sexual harassment by their peers.[12] Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, e.g., even where the harasser and the person being harassed are members of the same sex.[13] One example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.[14] Title IX does not, however, apply to discrimination on the basis of sexual orientation,[15] although such conduct may be prohibited by State or local laws.

Liability of a School for Peer Sexual Harassment

A school will be liable for the conduct of its students that creates a sexually hostile environment where (i) a hostile environment exists, (ii) the school knows (''has notice'') of the harassment, and (iii) the school fails to take immediate and appropriate steps to remedy it. Under such circumstances, a school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX.[16]

For the same reason, a school will be liable for sexual harassing conduct of third parties, who are not themselves students at the school (e.g., members of a visiting athletic club), where the conduct creates a sexually hostile environment in the school's programs or activities, if the school has notice of the harassment but fails to take appropriate steps to remedy it.[17] In determining whether the school took appropriate measures to remedy the sexual harassment in these cases, OCR will consider the level of control that the school has over the alleged harasser.[18]

Welcomeness

In order to be actionable as harassment, sexual conduct must be unwelcome. Conduct is unwelcome when the student being harassed did not ''solicit or incite it'' and ''regarded the conduct as undesirable or offensive.'' [19] Mere acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome.[20] For example, a student may decide not to resist sexual advances of another student or may not file a complaint out of fear. In addition, a student may not object to a pattern of sexually demeaning comments directed at him or her by a group of students out of a concern that objections might cause the harassers to make more comments. The fact that a student may have accepted the conduct does not mean that he or she welcomed it.[21] Also, the fact that a student willingly participated in conduct on one occasion does not prevent him or her from indicating that the same conduct has become unwelcome on a subsequent occasion. On the other hand, where a student actively participates in sexual banter and discussions and gives no indication that he or she doesn't like it, then the evidence generally will not support a conclusion that the conduct was unwelcome.[22]

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

If there is a dispute about whether the harassment occurred or whether it was welcome—in a case where it is appropriate to consider whether the conduct could be welcome—determinations should be made based on the totality of the circumstances. While this is not an exhaustive list, the following types of information may be helpful in resolving the dispute:

—Statements by any witnesses to the alleged incident.

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

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

—Evidence of the allegedly harassed student's reaction or behavior immediately after the alleged harassment. For example, were there witnesses who saw the student immediately after the alleged incident who say that the student appeared to be upset?

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

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

Severe, Persistent, or Pervasive

Peer sexual harassment is created when conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment. In deciding whether conduct is sufficiently severe, persistent or pervasive, the conduct should be considered from both a subjective [23] and objective [24] perspective. In making this determination, all relevant circumstances should be considered: [25]

The degree to which the conduct affected one or more students' education. For a hostile environment to exist, the conduct must have limited the ability of a student to participate in or benefit from his or her education, or altered the conditions of the student's educational environment.[26]

—Many hostile environment cases involve tangible or obvious injuries.[27] For example

a student's grades may go down or the student may be forced to withdraw from school.[28] A student may also suffer physical injuries and mental or emotional distress.[29]

—However, a hostile environment may exist even where there is no tangible injury to the student.[30] For example, a student may have been able to keep up his or her grades and continue to attend school even though it was more difficult for him or her to do so.[31] A student may be able to remain on a sports team, despite feeling humiliated or angered by harassment that creates a hostile environment.[32] Harassing conduct in these examples alters the student's educational environment on the basis of sex.

—A hostile environment can occur even where the harassment is not targeted specifically at the individual complainant.[33] For example, where a student or group of students regularly directs sexual comments towards a particular student, a hostile environment may be created not only for the targeted student, but for others who witness the conduct.

The type, frequency and duration of the conduct. In most cases, a hostile environment will exist where there is a pattern or practice of harassment, or where the harassment is sustained and nontrivial.[34] For instance, where a young woman is taunted by one or more young men about her breasts and/or genital area, OCR may find that a hostile environment has been created, particularly where the conduct has gone on for some time, takes place throughout the school, or where the taunts are made by a number of students. The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true when the harassment is physical. For instance, where the conduct is more severe, e.g., attempts to grab a female student's breasts, genital area, or buttocks, it need not be as persistent or pervasive in order to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.[35] On the other hand, conduct that is not severe, persistent or pervasive will not create a hostile environment; e.g., a comment by one student to another student that she has a nice figure. Indeed, depending on the circumstances this may not even be conduct of a sexual nature.[36] Similarly, because students date one another, a request for a date or a gift of flowers, even if unwelcome, would not create a hostile environment, However, where it is clear that the conduct is unwelcome, repeated requests for dates or attempts to make contact could create a hostile environment.

The number of individuals involved. For example, sexual harassment may be committed by an individual or a group. In some cases, verbal comments or other conduct from one person might not be sufficient to create a hostile environment, but could be if done by a group. Similarly, while harassment can be directed towards an individual or a group,[37] the effect of the conduct towards a group may vary, depending on the type of conduct and the context. For certain types of conduct, there may be ''safety in numbers.'' For example, following an individual student and making sexual taunts to him or her may be very intimidating to that student but, in certain circumstances, less so to a group of students. On the other hand, persistent unwelcome sexual conduct still may create a hostile environment when directed towards a group.

The age and sex of the alleged harasser and the subject(s) of the harassment. For example, in the case of younger students, sexually harassing conduct may be more intimidating when coming from an older student.[38]

The size of the school, location of the incidents, and context in which they occurred. Depending on the circumstances of a particular case, fewer incidents may have a greater effect at a small college than at a large university campus. Harassing conduct occurring on a school bus may be more intimidating than similar conduct on a school playground because the restricted area makes it impossible for the students to avoid their harassers.[39] Harassing conduct in a personal or secluded area such as a dormitory room or residence hall can also have a greater effect (e.g., be seen as more threatening) than would similar conduct in a more public area. On the other hand, harassing conduct in a public place may be more humiliating. Each incident must be judged individually.

Other incidents at the school. A series of instances at the school, not involving the same students, could—taken together—create a hostile environment, even if each by itself would not be sufficient.[40]

Incidents of gender-based, but non-sexual harassment. Acts of verbal or physical aggression, intimidation, or hostility based on sex, but not involving sexual activity or language, is a form of discrimination and is unlawful if it is ''sufficiently patterned or pervasive'' and directed at individuals because of their sex.[41] Such incidents, combined with incidents of sexual harassment, could create a hostile environment, even if each by itself would not be sufficient.[42]

Notice and Grievance Procedures

A school will be in violation of Title IX for peer sexual harassment occurring in its programs or activities if the school ''has notice'' of a sexually hostile environment and fails to take immediate and appropriate corrective action. A school will have notice when it actually ''knew, or in the exercise of reasonable care, should have known'' about the harassment. In addition, so long as an agent or responsible employee of the recipient received notice, that notice will be imputed to the recipient.

A recipient can receive notice in many different ways. Because schools are required to have Title IX grievance procedures, a student may have filed a grievance or complained to a teacher about fellow students sexually harassing him or her. A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, an affirmative action officer, or staff in the office of student affairs. An agent or responsible employee of the institution may have witnessed the harassment. The recipient may receive notice in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The recipient also may have received notice from flyers about the incident(s) posted around the school.[43]

Constructive notice exists when the school ''should have'' known about the harassment—when the school would have found out about the harassment through a ''reasonably diligent inquiry.''[44] For example, where a school knows of some incidents of harassment, there may be situations where it will be charged with notice of others—where the known incidents should have triggered an investigation that would have led to a discovery of the additional incidents. In other cases, the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment—where the harassment is widespread, openly practiced, or well-known to students and staff (such as sexual harassment occurring in hallways, graffiti in public areas, or harassment occurring during recess under a teacher's supervision).[45]

Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination.[46] These procedures provide a school with a mechanism for

discovering sexual harassment as early as possible and for effectively correcting problems, as required by Title IX. By having accessible, effective, and fairly applied grievance procedures (*see* discussion below), a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.

Accordingly, where a school has failed to provide this mechanism for notice of and resolving complaints, it will be liable under Title IX for the lack of grievance procedures, regardless of whether sexual harassment occurred.[47] Moreover, in the absence of effective grievance procedures, if OCR determines that the alleged harassment was sufficiently severe, persistent or pervasive to create a hostile environment, a school will be in violation of Title IX as to the existence of a hostile environment, even if the school was not aware of the harassment and thus failed to remedy it.[48]

In addition, where a school otherwise has actual or constructive notice of a hostile environment (as discussed above), and fails to remedy the harassment, then OCR will find a violation even if the student fails to use the school's existing grievance procedures.

Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, as discussed in more detail below, Title IX grievance procedures must provide an effective means for responding to alleged sex discrimination at the school. Thus, where, because of the lack of a policy or procedures specifically addressing sexual harassment, students are unaware of what constitutes sexual harassment, or that such conduct is prohibited sex discrimination, OCR will not consider the school's general policy and procedures relating to sex discrimination complaints to be effective.[49]

Recipient's Response

What constitutes a reasonable response to information about possible sexual harassment will differ. Where a student, parent, or other individual has filed a complaint or otherwise reported incidents of harassment, the school must investigate and determine appropriate steps to resolve the situation.[50] Where information about possible harassment is less direct, the school's response to the information may vary depending upon factors such as: the source and nature of the information; the seriousness of the alleged harassment; whether any individuals can be identified who were subjected to the harassment, and their age; whether those individuals want to pursue the matter; whether there have been other complaints or reports of harassment by the alleged harasser; the specificity of the information; and the objectivity and credibility of the source of the report. It may be appropriate for a school to take interim measures. For instance, where a student alleges that she has been sexually assaulted by another student, it may be appropriate for the school to immediately separate the two students pending the results of the school's investigation.

Where a school determines that sexual harassment has occurred, it should take reasonable, timely and effective corrective action, including steps tailored to the specific situation.[51] As discussed above, where the harasser is not a student of the recipient, OCR will consider the level of control the school has over the harasser in determining what response would be appropriate.

First, appropriate steps should be taken to end the harassment. For example, a school may need to counsel, warn or even take disciplinary action against the harasser, based on the severity of the harassment and/or any record of prior incidents.[52] In some cases, it may be appropriate to separate the harassed student and the harasser, e.g., by changing housing arrangements[53] or directing the student harasser to have no further contact with the harassed student. It may also be appropriate to direct the harasser to apologize to the harassed student. Counseling for the harasser may be appropriate, as to what constitutes harassment and the effects it can have.

In addition, corrective action should address the effects on those who have been subject to harassment. For example, if a student was forced to withdraw from a class because of harassment from fellow students, he or she should be given the opportunity to take the class again. In some instances, a school may be required to provide or reimburse the student for professional counseling or other services necessary to address the effects of the harassment on the person subjected to it.[54]

Finally, a school should take steps to prevent any further harassment.[55] At a minimum, this includes making sure that the harassed students and their parents know how to report any further problems and making follow-up inquiries to see if there have been any further incidents or any retaliation. In addition, depending on how widespread the harassment was and whether there had been any prior incidents, the school may need to provide training for the larger educational community to prevent any future incidents and ensure that students, parents, and teachers can recognize any that do occur and know how to respond.[56] A school must always ensure that there is no retaliation against a student for raising a sexual harassment complaint.

Where a student reporting harassment asks that his or her name not be disclosed, or even that nothing be done about the alleged harassment, the school should try to determine whether the student is afraid of reprisals from the alleged harasser, and inform the student that Title IX prohibits this sort of retaliation and that the school will take strong responsive steps if it occurs. The school must then takes steps to ensure that no retaliation occurs.

Should the student continue to ask for confidentiality, the school should take all possible steps to investigate and respond to the complaint consistent with that request. While confidentiality may limit the school's ability to fully respond to the complaint—for example, the school may not be able to find out the alleged harasser's version of events without at least indirectly revealing the complainant's name—the school may still be able to take steps to address the harassment. For example, the school may be able to counsel the student or provide general training about sexual harassment to the school or portion of the school where the problem was raised. In addition, by investigating the complaint to the extent possible—including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX—the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual.

Prevention

Adopting and publicizing a policy specifically prohibiting sexual harassment and having separate grievance procedures available for violations of that policy can help ensure that all students and employees understand the nature of sexual harassment and that the school will not tolerate it. Indeed, they might even bring conduct of a sexual nature to the school's attention so that the school can address it *before* it becomes sufficiently severe, persistent or pervasive to create a hostile environment. Further, a school can provide training to administrators, teachers, and staff, and age-appropriate classroom information to students, to ensure that they understand what types

of conduct can cause sexual harassment and that they know how to respond.

Prompt and Equitable Grievance Procedures

Schools are required to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex.[57] In the context of peer harassment, OCR has examined a number of elements in determining whether a school's grievance procedures are prompt and equitable, including whether the procedures provide for:

(1) Notice of the procedure to students, parents, and employees;

(2) Application of the procedure to complaints alleging harassment by students;

(3) Adequate and reliable investigation of complaints by an impartial investigator, including the opportunity to present witnesses and other evidence;

(4) Designated time frames for the major stages of the complaint process;

(5) Notice to the parties of the disposition of the complaint;

(6) Steps to prevent recurrence of any harassment and to correct its effects on the complainant and others.

In addition, many schools also provide an opportunity to appeal the findings and/or remedy. Procedures adopted by schools will vary considerably in specificity and components, reflecting different audiences, sizes, administrative structures, state or local legal requirements, and past experience. In addition, whether procedures are timely will vary depending on the complexity and severity of the harassment.

A grievance procedure applicable to peer sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school's students, easily understood and widely disseminated. Distributing the procedures to administrators, or putting them in the school's administrative or policy manual, may not be an effective way of providing notice, as these publications are usually not widely circulated to and understood by all members of the school community. Many schools ensure adequate notice to students by: having copies of the procedures available at various locations throughout the school or campus; publishing the procedures as a separate document; including a summary of the process in *all* major publications issued by the school (handbooks or catalogs for students, parents, faculty, staff); and identifying individuals who can explain how the procedure works.

A college or school district must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities.[58] The school must notify all of its students and employees of the name, office address and telephone number of the employee(s) designated.[59] While a school may choose to have a number of employees responsible for Title IX matters, it is advisable to give one official responsibility for overall coordination and oversight of all sexual harassment complaints to ensure consistent practices and standards in the handling of all complaints. Coordination in terms of recordkeeping is also essential to ensure that the school can and will identify and resolve recurring problems and the problem of repeat offenders.[60] Finally, the school must make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment, and are able to explain how the grievance procedure operates.[61]

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints, to be used where the parties agree to do so.[62] OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the student alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, where appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint resolution process. Title IX also permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirement of affording a complainant a ''prompt and equitable'' resolution of the complaint. In some instances, a complaint may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact-gathering. However, because they use different standards they may not be dispositive under Title IX, and do not relieve the school of its duty to respond promptly.[63] Similarly, schools are cautioned about using the results of insurance company investigations of sexual harassment allegations. The purpose of an insurance investigation is to determine liability under the insurance policy, and the applicable standards (the insurance contract and applicable state or Federal insurance law) may well be different from those under Title IX. In addition, a school is not relieved of its responsibility to respond to a sexual harassment complaint filed under its grievance procedure by the fact that a complaint has been filed with OCR.[64]

Finally, the United States Constitution guarantees due process to public school students accused of infractions such as sexual harassment. Similarly, state laws may provide additional rights to students, even at private schools. Schools should be aware of these rights and their legal responsibilities to those students accused of harassment. Indeed, procedures that ensure the Title IX rights of the complainant while at the same time according due process to the individual accused of harassment will lead to sound and supportable decisions. The rights established under Title IX must be interpreted consistently with any federally guaranteed rights involved in a complaint. Recipients should ensure that steps to accord due process rights to the accused do not obstruct or delay the protections provided by Title IX to the complainant.

Notice of Outcome and FERPA

The Title IX grievance process should provide for notice of the outcome and disposition of a complaint[65] where doing so is consistent with a school's obligations under the Family Educational Rights and Privacy Act (FERPA) and its regulations.[66] The parties to a complaint need information such as whether or not sexual harassment was found to have occurred and, if so, the steps that the school has taken or will take to correct the discrimination in order to know if the complaint has been resolved equitably.

When determining what information will be provided to and about students, however, a school must consider the requirements of FERPA. FERPA generally prohibits a school from releasing personally identifiable information from a student's education record without the consent of the student (or his or her parents, if the student is a minor).[67] Thus, FERPA's requirements may prevent a school from informing a complainant of any sanction or discipline imposed on a student found guilty of harassment, where that information is contained in the student's education record.[68]

FERPA provides that the complainant may learn of actions taken against

another student in certain limited circumstances. Under FERPA, a student has the right to inspect and review any personally identifiable information contained in the education record of another student if that information is directly related to the first student.[69] For example, in the case of a disciplinary record or order requiring the student harasser not to have contact with the complainant, the complainant would be entitled to review that portion of the record that contains this information; thus, it would not be a violation of FERPA for the school to tell the complainant of the order. Also, where the harassment involves a crime of violence or a sexual assault, postsecondary schools are permitted and may even be required to disclose the results to the complainant.[70]

FERPA is enforced by the Department through its Family Policy Compliance Office, U.S. Department of Education, Washington, D.C. 20202.

First Amendment

In cases of alleged harassment, the protections of the First Amendment must be considered where issues of speech or expression are involved. Free speech rights apply in the classroom (e.g., classroom lectures and discussions)[71] and in all other education programs and activities of public schools (e.g., public meetings and speakers on campus; campus debates, school plays and other cultural events[72]; and student newspapers, journals and other publications[73]).

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.[74] In order to establish a violation of Title IX, the harassment must be sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment.[75]

Moreover, in regulating the conduct of its students to prevent or redress discrimination prohibited by Title IX (e.g., in responding to peer harassment that is sufficiently severe as to create a hostile environment), a school must formulate, interpret and apply its rules so as to protect free speech rights. For instance, while the First Amendment may prohibit a school from restricting the right of students to express opinions about one sex that may be viewed as derogatory, the school can take steps to denounce such opinions and ensure that competing views are heard. It can also take other measures to prevent and eliminate a sexually hostile environment, such as instituting restrictions related to disorderly or disruptive conduct. Moreover, the age of the students involved and the location or forum may affect how the school can respond consistent with the First Amendment.[76]

Footnotes

1. This guidance is limited to peer sexual harassment that creates a hostile environment. Where a student engages in sexual harassment as an agent or employee of an educational institution, for instance where a student teaching assistant requires a student in his or her class to submit to his or her sexual advances in order to obtain a certain grade in the course, this conduct also would violate Title IX; however, these types of situations are not addressed in this guidance.

2. 20 U.S.C. § 1681 *et seq.* See also 34 C.F.R. § 106.31(b). In analyzing sexual harassment claims, the Department also applies, as appropriate to the educational context, many of the legal principles applicable to sexual harassment in the work place, developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a). *See Franklin* v. *Gwinnett County Public Schools,* 503 U.S. 60, 75 (1992) (applying Title VII principles in determining that a student was entitled to protection from sexual harassment by a teacher in school under Title IX); *Murray* v. *New York University College of Dentistry,* 57 F.3d 243, 249 (2d Cir. 1995) (same); *Doe* v. *Petaluma City School Dist.,* 830 F. Supp. 1560, 1571–72 (N.D. Cal. 1993) (same), *rev'd in part on other grounds,* 54 F.3d 1447 (9th Cir. 1995).

In addition, many of the principles applicable to racial harassment under Title VI of the Civil Rights Act, 42 U.S.C. § 2000d *et seq.,* and Title VII also apply to sexual harassment under Title IX. Indeed, Title IX was modeled on Title VI, *Cannon* v. *University of Chicago,* 441 U.S. 677, 694 (1979). For information on racial harassment, see the Department's Notice of Investigative Guidance for Racial Harassment, 59 Fed. Reg. 11,448 (1994).

3. Consistent with Supreme Court decisions, *see Franklin,* 503 U.S. at 75 (expressly ruling that the sexual harassment of a student by a teacher violates Title IX), the Department has interpreted Title IX as prohibiting sexual harassment for over a decade. Moreover, it has been OCR's longstanding practice to apply Title IX to peer harassment. *See also Bosley* v. *Kearney R–1 School Dist.,* 904 F. Supp. 1006, 1023 (W.D. Mo. 1995); *Doe* v. *Petaluma,* 830 F. Supp at 1575–76, *motion for reconsideration granted* (July 22, 1996) (reaffirming Title IX liability for peer harassment where the school knows of the hostile environment but fails to take remedial action; applying Title VII standard, i.e., no additional, separate intent requirement); *Burrow* v. *Postville Community School District,* No. C94–1031, 1996 U.S. Dist LEXIS 9147 at *34 (N.D. Iowa June 17, 1996) (student may bring Title IX cause of action against a school for its knowing failure to take appropriate remedial action in response to the hostile environment created by students at the school); *Oona R.-S.* v. *Santa Rosa City Schools,* 890 F. Supp. 1452 (N.D. Cal. 1995); *Davis* v. *Monroe County Bd. of Education,* 74 F.3d 1186, 1193 (11th Cir. 1996) (as Title VII is violated where a sexually hostile working environment is created by co-workers and tolerated by the employer, Title IX is violated where a sexually hostile educational environment is created by a fellow student or students and the supervising authorities knowingly failed to act to eliminate the harassment), *vacated, reh'g granted; cf. Murray* v. *New York University,* 57 F.3d at 249 (while court finds no notice to school, assumes a Title IX cause of action for sexual harassment of a medical student by a patient visiting school clinic).

One Federal court decision, *Rowinsky* v. *Bryan Independent School District,* 80 F.3d 1006 (5th Cir. 1996), *petition for cert. filed* (July 1, 1996), has held to the contrary. In that case, over a strongly worded dissent, the court rejected the authority of other Federal courts and OCR's longstanding construction of Title IX, and held that a school district is not liable under Title IX for peer harassment unless ''the school district itself directly discriminated based on sex,'' i.e., the school responded differently to sexual harassment claims of girls versus boys.

The *Rowinsky* decision misunderstands a school's liability under Title IX. Title IX does not make a school responsible for the actions of the harassing student, but rather for its own discrimination in failing to act and permitting the harassment to continue once a school official knows that it is happening. When a student is sexually harassed by a fellow student, and a school official knows about it but does not stop it, the school is permitting an atmosphere of sexual discrimination to permeate the educational program. The school is liable for its own action, or lack of action, in response to this discrimination. Title VII cases making employers responsible for remedying hostile environment harassment of one worker by a coworker apply this same standard. *See, e.g., Ellison* v. *Brady,* 924 F.2d at 881–82; *Hall* v. *Gus Construction Co.,* 842 F.2d 1010 (8th Cir. 1988); *Hunter* v. *Allis-Chalmers Corp.,* 797 F.2d 1417 (7th Cir. 1986); *Snell* v. *Suffolk,* 782 F.2d 1094 (2nd Cir. 1986); *Robinson* v. *Jacksonville Shipyards,* 760 F. Supp. 1486 (M.D. Fla. 1991).

The petition for certiorari in the *Rowinsky* case (July 1, 1996) will likely be ruled on this fall.

See e.g., Franklin, 503 U.S. at 63 (conduct of a sexual nature found to support a sexual harassment claim under Title IX included kissing, sexual intercourse); *Meritor Savings Bank FSB* v. *Vinson,* 477 U.S. 57, 60–61 (1986) (demands for sexual favors, sexual advances, fondling, indecent exposure, sexual intercourse, rape sufficient to raise hostile environment claim under Title VII); *Harris* v. *Forklift Systems, Inc.,* 510 U.S. ____, 114 S.Ct. 367 (1993) (sexually derogatory comments and innuendo may support a sexual harassment claim under Title VII); *Ellison* v. *Brady,* 924 F.2d 872, 873–74, 880 (9th Cir. 1991) (allegations sufficient to state

a sexual harassment claim under Title VII included repeated requests for dates, letters making explicit references to sex and describing the harasser's feelings for plaintiff); *Lipsett* v. *University of Puerto Rico,* 864 F. 2d 881, 903–4 (1st Cir. 1988) (sexually derogatory comments, posting of sexually explicit drawing of plaintiff, sexual advances may support sexual harassment claim); *Kadiki* v. *Virginia Commonwealth University,* 892 F. Supp. 746, 751 (E.D. Va. 1995) (professor's spanking of a university student may constitute sexual conduct under Title IX); *Doe* v. *Petaluma,* 830 F. Supp. at 1564–65 (sexually derogatory taunts and innuendo can be the basis of a harassment claim); *Denver School Dist.* #1, OCR Case No. 08–92–1007 (same as to allegations of vulgar language and obscenities, pictures of nude women on office walls and desks, unwelcome touching, sexually offensive jokes, bribery to perform sexual acts, indecent exposure); *Nashoba Regional High School,* OCR Case No. 01–92–1377 (same as to year-long campaign of derogatory, sexually explicit graffiti and remarks directed at one student).

Davis v. *Monroe County,* 74 F.3d at 1194, *vacated, reh'g granted; Doe* v. *Petaluma City School Dist.,* 830 F. Supp. at 1571–73; *Moire* v. *Temple University School of Medicine,* 613 F. Supp. 1360, 1366 (E.D. Pa. 1985), aff'd mem., 800 F.2d 1136 (3d Cir. 1986); *see also Vinson,* 477 U.S. at 67; *Lipsett,* 864 F.2d at 901.

Davis v. *Monroe County,* 74 F.3d at 1193–94, *vacated, reh'g granted;* Racial Harassment Guidance, 59 Fed. Reg. at 11,449–50.

As explained in *Rosa H.* v. *San Elizario Ind. School Dist.,* 887 F. Supp. 140, 143 (W.D. Tex. 1995):

[T]he school district is in the best position to be on the lookout for discriminatory conduct * * * A ''knew or should have known'' requirement mandates that the school district monitor its employees and students and prevents a situation where the district, through its employees or policies, turns a blind eye toward discriminatory conduct.

8. 34 CFR § 106.8(b).

9. However, gender-based peer harassment—that is acts of verbal or physical aggression, intimidation, or hostility based on sex but not involving sexual activity or language—is a form of discrimination (just as in the case of harassment based on race or national origin). *Hicks* v. *Gates Rubber Co.,* 833 F.2d 1406, 1416 (10th Cir. 1987) (Title VII case); *McKinney* v. *Dole,* 765 F.2d 1129, 1138 (D.C. Cir. 1985) (Title VII case; assault could be sex-based harassment if shown to be unequal treatment that would not have taken place but for the employee's sex).

10. *Cf. Dartmouth Public Schools,* OCR Case No. 01–90–1058 (contact between high school coach and students not conduct of a sexual nature); *Analy Union High School Dist.,* OCR Case No. 09–92–1249 (same as to drama instructor who put his arms around both male and female students who confided in him); *San Francisco State University,* OCR Case No. 09–94–2038 (same as to faculty advisor placing her arm around graduate student's shoulder in posing for a picture).

11. 20 U.S.C. § 1687 (codification of the Title IX part of the Civil Rights Restoration Act of 1987); *Leija* v. *Cantutillo Ind. School Dist.,* 887 F. Supp. 947, 957 (W.D. Tex. 1995).

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

13. Title IX and the regulations implementing it prohibit discrimination ''on the basis of sex;'' they do not restrict sexual harassment to those circumstances in which the harasser only harasses members of the opposite sex. *See* 34 C.F.R. § 106.31. In order for hostile environment harassment to be actionable under Title IX, it must create a hostile or abusive environment. This can occur when a student harasses a member of the same sex. *See Doe* v. *Petaluma,* 830 F. Supp. at 1564–65, 1575 (female junior high school student alleging sexual harassment by other students, including both boys and girls, sufficient to raise claim under Title IX). *Cf John Does 1,* 884 F. Supp. at 465 (same as to male students' allegations of sexual harassment and abuse by male teacher). It can also occur in certain situations when the harassment is directed at students of both sexes. *Chiapuzo* v. *BLT Operating Co.,* 826 F. Supp. 1334 (D. Wyo. 1993) (court found that such harassment could violate Title VII).

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

In yet other circumstances, the conduct will be on the basis of sex in that the student's sex was a factor in and/or affected the nature of the harasser's conduct. Thus, in *Chiapuzo,* a supervisor made demeaning remarks to both partners of a married couple working for him, e.g., as to sexual acts he wanted to engage in with the wife and how he would be a better lover than the husband. In both cases, according to the court, the remarks were gender-driven in that they were made with an intent to demean each member of the couple because of his or her respective sex. *See also Steiner* v. *Showboat Operating Co.,* 25 F.3d 1458, 1463–64 (9th Cir. 1994) (Title VII case).

14. *Nashoba Regional High School,* OCR Case No. 01–92–1397. In *Conejo Valley School Dist.,* OCR Case No. 09–93–1305 (5/27/94), female students allegedly taunted another female student about engaging in sexual activity; OCR found that the alleged comments were sexually explicit and, if true, would be sufficiently severe, persistent and pervasive to create a hostile environment.

15. *Williamson* v. *A.G. Edwards & Sons, Inc.,* 876 F.2d 69 (8th Cir. 1989), (Title VII case) *cert. denied* 493 U.S. 1089 (1994); *DeSantis* v. *Pacific Tel. & Tel. Co., Inc.,* 608 F.2d 327 (9th Cir. 1979) (same); *Blum* v. *Gulf Oil Corp.,* 597 F.2d 936 (5th Cir. 1979) (same).

16. *See* note 3.

17. As with peer harassment by its own students, a school's liability for the harassment of its students by others is based on its obligation to provide an environment free of discrimination. Racial Harassment Investigative Guidance, 59 Fed. Reg. at 11,450 (referring to harassment by neighborhood teenagers, guest speaker, and parents); *Murray,* 57 F.3d at 250 (student participating in university dental clinic providing services to the public alleged harassment by a patient; while court ruled in defendant's favor because of lack of notice, it considered such a claim actionable under Title IX).

18. For example, where athletes from a visiting team harass the home school's students, the home school may not be able to discipline the students. However, it could encourage the athletes' school to take appropriate action to prevent further incidents; if necessary, the home school may choose not to invite the athletes' school back. *Cf. Danna* v. *New York Telephone Co,* 752 F. Supp. 594, 611 (S.D.N.Y. 1990) (telephone company in violation of Title VII for not taking sufficient action to protect its own employee from sexually explicit graffiti at airport where she was assigned to work, e.g., contacting airport management to see what remedial measures could be taken).

19. *Henson* v. *City of Dundee,* 682 F.2d 897, 903 (11th Cir. 1982) (Title VII case).

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

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

22. *Reed* v. *Shepard,* 939 F.2d 484, 486–87, 491–92 (7th Cir. 1991) (no harassment

found under Title VII where female employees not only tolerated, but also participated and instigated the suggestive joking activities about which she was now complaining); *Weinsheimer* v. *Rockwell Int'l Corp.,* 754 F. Supp. 1559, 1563–64 (D. Fl. 1990) (same, where general shop banter was full of vulgarity and sexual innuendo by men and women alike, and plaintiff contributed her share to this atmosphere).

23. *Davis* v. *Monroe County,* 74 F.3d at 1126 (when interpreting the requirement in *Harris* that the harassment must unreasonably interfere with the plaintiff's performance, 114 S.Ct. at 371, the court stated: ''* * * if the plaintiff does not subjectively perceive the environment to be abusive, then the conduct has not actually altered the conditions of her learning environment, and there is no Title IX violation''), *vacated, reh'g granted.*

24. The Supreme Court used a ''reasonable person'' standard in *Harris,* 114 S.Ct. at 370–71 to determine whether sexual conduct constituted harassment. This standard has been applied under Title VII to take into account the sex of the subject of the harassment, *see, e.g., Ellison* v. *Brady,* 924 F.2d at 878–79 (applying a ''reasonable women'' standard to sexual harassment), and has been adapted to sexual harassment in education, *Davis* v. *Monroe County,* 74 F.3d at 1126 (relying on *Harris* to adopt an objective, reasonable person standard), *vacated, reh'g granted; Patricia H.* v. *Berkeley Unified School Dist.,* 830 F. Supp. 1288, 1296 (N.D. Cal. 1993) (adopting a ''reasonable victim'' standard and referring to OCR's use of it); Racial Harassment Guidance, 59 Fed. Reg. at 11,452 (the standard must take into account the characteristics and circumstances of victims on a case-by-case basis, particularly the victim's race and age).

25. *Harris,* 114 S.Ct. at 371; Racial Harassment Guidance, 59 Fed. Reg. at 11449 and 11452.

26. *Davis* v. *Monroe County,* 74 F.3d at 1126 (no Title IX violation unless the conduct has ''actually altered the conditions of [the student's] learning environment''), *vacated, reh'g granted; Lipsett,* 864 F.2d at 898 (''altered'' the educational environment); *Patricia H.,* 830 F. Supp. at 1297 (sexual harassment could be found where conduct interfered with student's ability to learn); *see also Andrews,* 895 F.2d at 1482 (Title VII case).

27. *Harris,* 114 S.Ct. at 371.

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

29. *Doe* v. *Petaluma,* 830 F. Supp. at 1566.

30. *See Harris,* 114 S.Ct. at 371, where the Court held that tangible harm is not required. In determining whether harm is sufficient, several factors are to be considered, including frequency, severity, whether the conduct was threatening or humiliating versus a mere offensive utterance, and whether it unreasonably interfered with work performance. No single factor is required; similarly, psychological harm, while relevant, is not required.

31. *See Modesto City Schools,* OCR Case No. 09–93–1391 (evidence showed that several girls were afraid to go to school because of the harassment).

32. *Summerfield Schools,* OCR Case No. 15–92–1029.

33. *See Waltman* v. *Int'l Paper Co.,* 875 F.2d 468, 477 (5th Cir. 1989) (Title VII case); *see also Hall* v. *Gus Construction Co.,* 842 F.2d at 1015 (evidence of sexual harassment directed at others is relevant to show hostile environment under Title VII); Racial Harassment Investigative Guidance, 59 Fed. Reg. at 11,453.

34. *See, e.g., Andrews,* 895 F.2d at 1484 (''Harassment is pervasive when 'incidents of harassment occur either in concert or with regularity'.''); *Moylan* v. *Maries County,* 792 F.2d 746, 749 (8th Cir. 1986) (Title VII case); *Downes* v. *Federal Aviation Administration,* 775 F.2d 288, 293 (D.C. Cir. 1985) (same); *cf. Scott* v. *Sears, Roebuck and Co.,* 798 F.2d 210, 214 (7th Cir. 1986) (Title VII case; conduct was not pervasive or debilitating).

35. The U.S. Equal Employment Opportunity Commission (EEOC) has stated: ''The Commission will presume that the unwelcome, intentional touching of [an employee's] intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.'' EEOC Policy Guidance on Current Issues of Sexual Harassment, p. 17. *See also Barrett* v. *Omaha National Bank,* 584 F. Supp. 22, 30 (D. Neb. 1983), *aff'd,* 726 F.2d 424 (8th Cir. 1984) (hostile environment created under Title VII by isolated events, i.e., occurring while traveling to and during a two day conference, including the coworker's talking to plaintiff about sexual activities and touching her in offensive manner while they were inside a vehicle from which she could not escape).

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

37. *See, e.g., McKinney,* 765 F.2d at 1138–40; *Robinson* v. *Jacksonville Shipyard,* 760 F. Supp. at 1522.

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

39. *See also Barrett* v. *Omaha National Bank,* 584 F. Supp. at 24 (harassment occurring in a car from which the plaintiff could not escape was deemed particularly severe).

40. *Midwest City-Del City Public Schools,* OCR Case No. 06–92–1012 (finding of racially hostile environment based in part on several racial incidents at school shortly before incidents in complaint, a number of which involved the same student involved in the complaint). *See also Hall* v. *Gus Construction Co.* 842 F.2d at 1015 (incidents of sexual harassment directed at other employees); *Hicks* v. *Gates Rubber,* 833 F.2d at 1415–16 (same).

41. *See Vinson,* 477 U.S. at 65–66; *Harris,* 114 S. Ct. at 370–371; *see also Hicks* v. *Gates Rubber Co.,* 833 F.2d 1406, 1416 (10th Cir. 1987) (Title VII case).

42. *See Harris,* 114 S. Ct. at 370–71; *Andrews* v. *City of Philadelphia,* 895 F.2d 1469, 1485–86 (3rd Cir. 1990) (Title VII case; court directed trial court to consider sexual conduct as well as theft of female employees' files and work, destruction of property, and anonymous phone calls in determining if there had been sex discrimination); *see also Hall* v. *Gus Construction Co.,* 842 F.2d 1094, 1014 (8th Cir. 1988) (Title VII case); *Hicks,* 833 F.2d at 1415; *Eden Prairie Schools, Dist.* #272, OCR Case No. 05–92–1174 (the boys made lewd comments about male anatomy *and* tormented the girls by pretending to stab them with rubber knives; while the stabbing was not sexual conduct, it was directed at them because of their sex, i.e., because they were girls). In addition, incidents of racial or national origin harassment directed at a particular individual may also be aggregated with incidents of sexual or gender harassment directed at that individual in determining the existence of a hostile environment. *Hicks* v. *Gates Rubber Co.,* 833 F.2d at 1416; *Jefferies* v. *Harris Community Action Ass'n,* 615 F.2d 1025, 1032 (5th Cir. 1980) (Title VII case).

43 Racial Harassment Guidance, 59 Fed. Reg. at 11450 (discussing how a school may receive notice).

44. *See Yates* v. *Avco Corp.,* 819 F.2d 630, 634–36 (6th Cir. 1987) (Title VII case); *Katz* v. *Dole,* 709 F.2d 251, 256 (4th Cir. 1983) (same); *See also* Racial Harassment Investigative Guidance, 59 Fed. Reg. at 11,450.

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

students may not have been aware that the conduct was offensive or abusive).

46. *See* 34 C.F.R. § 106.8(b). Moreover, schools have an obligation to ensure that the educational environment is free of harassment, and cannot fulfill this obligation without determining whether sexual harassment complaints have merit.

47. *Fenton Community High School Dist.* #100, OCR Case No. 05–92–1104.

48. *See* Racial Harassment Investigative Guidance, 59 Fed. Reg. at 11,450.

49. *See Vinson,* 477 U.S. at 72–73.

50. Schools have an obligation to ensure that the educational environment is free of harassment, and cannot fulfill this obligation without determining where sexual harassment complaints have merit. Moreover, failure to respond to a complaint does not meet the ''prompt and equitable'' requirements for grievance procedures under Title IX.

51. *Cf. Bundy* v. *Jackson,* 641 F.2d 934, 947 (D.C. Cir. 1981) (employers should take corrective and preventive measures under Title VII); *accord, Jones* v. *Flagship Int'l,* 793 F.2d 714, 719–720 (5th Cir. 1986) (employer should take prompt remedial action under Title VII). Racial Harassment Investigative Guidance, 59 Fed. Reg. at 11,450.

52. *Waltman* v. *Int'l Paper Co.,* 875 F.2d at 479 (appropriateness of employer's remedial action under Title VII will depend on the severity and persistence of the harassment and the effectiveness of any initial remedial steps); *Dornhecker* v. *Malibu Grand Prix Corp.,* 828 F.2d 307, 309–10 (5th Cir. 1987) (Title VII case; employer arranged for victim to no longer work with alleged harasser).

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

54. *Leija,* 878 F. Supp. at 957 (medical and mental health treatment and any special education needed as a result of the harassment); *University of California at Santa Cruz,* OCR Case No. 09–93–2141 (extensive individual and group counseling); *Eden Prairie Schools, Dist.* #272, OCR Case No. 05–92–1174 (counseling).

55. Even if the harassment stops without the school's involvement, the school may still need to take steps to prevent or deter any future harassment—to inform the school community that harassment will not be tolerated. *Fuller* v. *City of Oakland,* 47 F.3d 1522, 1528–29 (9th Cir. 1995).

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

57. 34 C.F.R § 106.8(b). This requirement has been part of the Title IX regulations, since their inception in 1975. Thus, schools have been required to have these procedures in place since that time. At the elementary and secondary level, this responsibility generally lies with the school district. At the postsecondary level, there may be a procedure for a particular campus or college, or for an entire university system.

58. 34 C.F.R. § 106.8(a).

59. *Id.*

60. *University of California, Santa Cruz,* OCR Case No. 09–93–2141; *Sonoma State University,* OCR Case No. 09–93–2131. This is true for formal as well as informal complaints. *See University of Maine at Machias,* OCR Case No. 01–94–6001 (school's new procedures not found in violation of Title IX in part because they require written records for informal as well as formal resolutions). These records need not be kept in a student's individual file.

61. For example, in *Cape Cod Community College,* OCR Case No. 01–93–2047, the College was found to have violated Title IX in part because the person identified by the school as the Title IX coordinator was unfamiliar with Title IX, had no training, and did not even realize he was the coordinator.

62. Indeed, in *University of Maine at Machias,* OCR Case No. 01–94–6001, OCR found the school's procedures to be inadequate because only formal complaints were investigated. While a school isn't required to have an established procedure for resolving informal complaints, they nevertheless must be addressed in some way. However, where there are indications that the same individual may be harassing others, then it may not be appropriate to resolve an informal complaint without taking steps to address the entire situation.

63. *Academy School Dist. No. 20,* OCR Case No. 08–93–1023 (school's response determined to be insufficient where it stopped its investigation after complaint filed with police); *Mills Public School Dist.,* OCR Case No. 01–93–1123 (not sufficient for school to wait until end of police investigation).

64. *Cf. EEOC* v. *Board of Governors of State Colleges and Universities,* 957 F.2d 424 (7th Cir.) (Title VII case), *cert. denied,* 113 S.Ct. 299 (1992); *Johnson* v. *Palma,* 931 F.2d 203 (2nd Cir. 1991) (same).

65. *University of California, Santa Cruz,* OCR Case No. 09–93–2141; *Cerro Cosa Community College,* OCR Case No. 09–92–2120.

66. *See* 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

67. *Id.*

68. Under FERPA, education records are defined as records, documents, or other materials maintained by a school that contain information directly related to a student. 20 U.S.C. § 1232(g)(4).

69. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.12(a).

70. Colleges and other postsecondary schools are required to disclose the outcome in cases involving sexual assault, 20 U.S.C. § 1092(f). In addition, information about ''crimes of violence'' can be disclosed to the complainant consistent with FERPA, 20 U.S.C. § 1232(g)(b)(6).

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

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

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

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

75. *Cf. Vinson,* 477 U.S. at 67 (the ''mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee'' would not affect the conditions of employment to a sufficient degree to violate Title VII), quoting *Henson,* 682 F.2d at 904.

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

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