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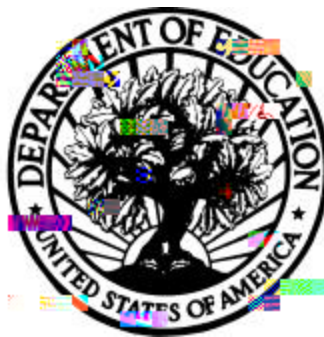
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**REVISED SEXUAL HARASSMENT GUIDANCE:  
HARASSMENT OF STUDENTS  
BY SCHOOL EMPLOYEES, OTHER STUDENTS,  
OR THIRD PARTIES**

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**TITLE IX**



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**January 2001**

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



official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment. In Davis, the Court announced that a school also may be liable for monetary damages if one



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

Commenters uniformly agreed with OCR that the Court limited the liability standards established in Gebser and Davis to private actions for monetary damages. See, e.g., Gebser, 524 U.S. 283, and Davis, 526 U.S. at 639. Commenters also agreed that the administrative enforcement standards reflected in the 1997 guidance remain valid in OCR enforcement actions.<sup>2</sup> Finally, commenters agreed that the proposed revisions provided important clarification to schools regarding the standards that OCR will use and that schools should use to determine compliance with Title IX as a condition of the receipt of Federal financial assistance in light of Gebser and Davis.

### **Harassment by Teachers and Other School Personnel**

Most commenters agreed with OCR's interpretation of its regulations regarding a school's responsibility for harassment of students by teachers and other school employees. These commenters agreed that Title IX's prohibitions against discrimination are not limited to official policies and practices governing school programs and activities. A school also engages in sex-based discrimination if its employees, in the context of carrying out their day-to-day job responsibilities for providing aid, benefits, or services to students (such as teaching, counseling, supervising, and advising students) deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex. Under the Title IX regulations, the school is responsible for discrimination in these cases, whether or not it knew or should have known about it, because the discrimination occurred as part of the school's undertaking to provide nondiscriminatory aid, benefits, and services to students. The revised guidance distinguishes these cases from employee harassment that, although taking place in a school's program, occurs outside of the context of the employee's provision of aid, benefits, and services to students. In these latter cases, the school's responsibilities are not triggered until the school knew or should have known about the harassment.

One commenter expressed concern that it was inappropriate ever to find a school out of compliance for harassment about which it knew nothing. We reiterate that, although a school may in some cases be responsible for harassment caused by an employee that occurred before other responsible employees of the school knew or should have known about it, OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation. This is consistent with the Court's underlying concern in Gebser and Davis.

Most commenters acknowledged that OCR has provided useful factors to determine whether harassing conduct took place "in the context of providing aid, benefits, or services." However, some commenters stated that additional clarity and examples regarding the issue were needed. Commenters also suggested clarifying

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<sup>2</sup> It is the position of the United States that the standards set out in OCR's guidance for finding a violation and seeking voluntary corrective action also would apply to private actions for injunctive and other equitable relief. See brief of the United States as Amicus Curiae in Davis v. Monroe County.

references to quid pro quo and hostile environment harassment as these two concepts, though useful, do not determine the issue of whether the school itself is considered responsible for the harassment. We agree with these concerns and have made significant revisions to the sections “Harassment that Denies or Limits a Student’s Ability to Participate in or Benefit from the Education Program” and “Harassment by Teachers and Other Employees” to clarify the guidance in these respects.

### **Gender-based Harassment, Including Harassment Predicated on Sex-stereotyping**

Several commenters requested that we expand the discussion and include examples of gender-based harassment predicated on sex stereotyping. Some commenters also argued that gender-based harassment should be considered sexual harassment, and that we have “artificially” restricted the guidance only to harassment in the form of conduct of a sexual nature, thus, implying that gender-based harassment is of less concern and should be evaluated differently.

We have not further expanded this section because, while we are also concerned with the important issue of gender-based harassment, we believe that harassment of a sexual nature raises unique and sufficiently important issues that distinguish it from other types of gender-based harassment and warrants its own guidance.

Nevertheless, we have clarified this section of the guidance in several ways. The guidance clarifies that gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim’s failure to conform to stereotyped notions of masculinity and femininity. Although this type of harassment is not covered by the guidance, if it is sufficiently serious, gender-based harassment is a school’s responsibility, and the same standards generally will apply. We have also added an endnote regarding Supreme Court precedent for the proposition that sex stereotyping can constitute sex discrimination.

Several commenters also suggested that we state that sexual and non-sexual (but gender-based) harassment should not be evaluated separately in determining whether a hostile environment exists. We note that both the proposed revised guidance and the final revised guidance indicate in several places that incidents of sexual harassment and non-sexual, gender-based harassment can be combined to determine whether a hostile environment has been created. We also note that sufficiently serious harassment of a sexual nature remains covered by Title IX, as explained in the guidance, even though the hostile environment may also include taunts based on sexual orientation.

### **Definition of Harassment**

One commenter urged OCR to provide distinct definitions of sexual harassment to be used in administrative enforcement as distinguished from criteria used to maintain private actions for monetary damages. We disagree. First, as discussed in the preamble to the proposed revised guidance, the definition of hostile environment sexual harassment used by the Court in Davis is consistent with the definition found in the proposed guidance. Although the terms used by the Court in Davis are in some ways different from

the words used to define hostile environment harassment in the 1997 guidance (see, e.g., 62 FR 12041, “conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment”), the definitions are consistent. Both the Court’s and the Department’s definitions are contextual descriptions intended to capture the same concept -- that under Title IX, the conduct must be sufficiently serious that it adversely affects a student’s ability to participate in or benefit from the school’s program. In determining whether harassment is actionable, both Davis and the Department tell schools to look at the “constellation of surrounding circumstances, expectations, and relationships” (526 U.S. at 651 (citing Oncale)), and the Davis Court cited approvingly to the underlying core factors described in the 1997 guidance for evaluating the context of the harassment. Second, schools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose.

Several commenters suggested that we develop a unique Title IX definition of harassment that does not rely on Title VII and that takes into account the special relationship of schools to students. Other commenters, by contrast, commended OCR for recognizing that Gebser and Davis did not alter the definition of hostile environment sexual harassment found in OCR’s 1997 guidance, which derives from Title VII caselaw, and asked us to strengthen the point. While Gebser and Davis made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the Davis Court also indicated, th (D2vrht asugtaiciee ffengts, o stTiTj 271.6 TD 0.0330 Tc 0.-033

individuals, including teachers, accused of sexual harassment by a student, to obtain information about the identity of the complainant and the nature of the allegations.

FERPA generally forbids disclosure of information from a student's "education record" without the consent of the student (or the student's parent). Thus, FERPA may be relevant when the person found to have engaged in harassment is another student, because written information about the complaint, investigation, and outcome is part of the harassing student's education record. Title IX is also relevant because it is an important part of taking effective responsive action for the school to inform the harassed student of the results of its investigation and whether it counseled, disciplined, or otherwise sanctioned the harasser. This information can assure the harassed student that the school has taken the student's complaint seriously and has taken steps to eliminate the hostile environment and prevent the harassment from recurring.

The Department currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim. It has been the Department's position that there is a potential conflict between FERPA and Title IX regarding disclosure of sanctions, and that FERPA generally prevents a school from disclosing to a student who complained of harassment information about the sanction or discipline imposed upon a student who was found to have engaged in that harassment.<sup>3</sup>

There is, however, an additional statutory provision that may apply to this situation. In 1994, as part of the Improving America's Schools Act, Congress amended the General Education Provisions Act (GEPA) -- of which FERPA is a part -- to state that nothing in GEPA "shall be construed to affect the applicability of ... title IX of the Education Amendments of 1972..."<sup>4</sup> The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. The Department is in the process of developing a consistent approach and specific factors for implementing this provision. OCR and the Department's Family Policy Compliance Office (FPCO) intend to issue joint guidance, discussing specific areas of potential conflict between FERPA and Title IX.

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<sup>3</sup> Exceptions include the case of a sanction that directly relates to the person who was harassed (e.g., an order that the harasser stay away from the harassed student), or sanctions related to offenses for which there is a statutory exception, such as crimes of violence or certain sex offenses in postsecondary institutions.

<sup>4</sup> 20 U.S.C. 1221(d). A similar amendment was originally passed in 1974 but applied only to Title VI of the Civil Rights Act of 1964 (prohibiting race discrimination by recipients). The 1994 amendments also extended 20 U.S.C. 1221(d) to Section 504 of the Rehabilitation Act of 1973 (prohibiting disability-based discrimination by recipients) and to the Age Discrimination Act.



FERPA is also relevant when a student accuses a teacher or other employee of sexual harassment, because written information about the allegations is contained in the student's education record. The potential conflict arises because, while FERPA protects the privacy of the student accuser, the accused individual may need the name of the accuser and information regarding the nature of the allegations in order to defend against the charges. The 1997 guidance made clear that neither FERPA nor Title IX override any federally protected due process rights of a school employee accused of sexual harassment.

Several commenters urged the Department to expand and strengthen this discussion. They argue that in many instances a school's failure to provide information about the name of the student accuser and the nature of the allegations seriously undermines the fairness of the investigative and adjudicative process. They also urge the Department to include a discussion of the need for confidentiality as to the identity of the individual accused of harassment because of the significant harm that can be caused by false accusations. We have made several changes to the guidance, including an additional discussion regarding the confidentiality of a person accused of harassment and a new heading entitled "Due Process Rights of the Accused," to address these concerns.

**REVISED SEXUAL HARASSMENT GUIDANCE:  
HARASSMENT OF STUDENTS<sup>1</sup>  
BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES**

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## I. Introduction

Title IX of the Education Amendments of 1972 (Title IX) and the Department of Education's (Department) implementing regulations prohibit discrimination on the basis of sex in federally assisted education programs and activities.<sup>2</sup> The Supreme Court, Congress, and Federal executive departments and agencies, including the Department, have recognized that sexual harassment of students can constitute discrimination prohibited by Title IX.<sup>3</sup> This guidance focuses on a school's<sup>4</sup> fundamental compliance responsibilities under Title IX and the Title IX regulations to address sexual harassment of students as a condition of continued receipt of Federal funding. It describes the

<sup>2</sup> 20 U.S.C. § 1681-1683; 34 C.F.R. § 101.33-101.35; 34 C.F.R. § 101.36-101.39; 34 C.F.R. § 101.40-101.43; 34 C.F.R. § 101.44-101.46; 34 C.F.R. § 101.47-101.49; 34 C.F.R. § 101.50-101.52; 34 C.F.R. § 101.53-101.55; 34 C.F.R. § 101.56-101.58; 34 C.F.R. § 101.59-101.61; 34 C.F.R. § 101.62-101.64; 34 C.F.R. § 101.65-101.67; 34 C.F.R. § 101.68-101.70; 34 C.F.R. § 101.71-101.73; 34 C.F.R. § 101.74-101.76; 34 C.F.R. § 101.77-101.79; 34 C.F.R. § 101.80-101.82; 34 C.F.R. § 101.83-101.85; 34 C.F.R. § 101.86-101.88; 34 C.F.R. § 101.89-101.91; 34 C.F.R. § 101.92-101.94; 34 C.F.R. § 101.95-101.97; 34 C.F.R. § 101.98-101.100; 34 C.F.R. § 101.101-101.103; 34 C.F.R. § 101.104-101.106; 34 C.F.R. § 101.107-101.109; 34 C.F.R. § 101.110-101.112; 34 C.F.R. § 101.113-101.115; 34 C.F.R. § 101.116-101.118; 34 C.F.R. § 101.119-101.121; 34 C.F.R. § 101.122-101.124; 34 C.F.R. § 101.125-101.127; 34 C.F.R. § 101.128-101.130; 34 C.F.R. § 101.131-101.133; 34 C.F.R. § 101.134-101.136; 34 C.F.R. § 101.137-101.139; 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34 C.F.R. § 101.665-101.667; 34 C.F.R. § 101.668-101.670; 34 C.F.R. § 101.671-101.673; 34 C.F.R. § 101.674-101.676; 34 C.F.R. § 101.677-101.679; 34 C.F.R. § 101.680-101.682; 34 C.F.R. § 101.683-101.685; 34 C.F.R. § 101.686-101.688; 34 C.F.R. § 101.689-101.691; 34 C.F.R. § 101.692-101.694; 34 C.F.R. § 101.695-101.697; 34 C.F.R. § 101.698-101.700; 34 C.F.R. § 101.701-101.703; 34 C.F.R. § 101.704-101.706; 34 C.F.R. § 101.707-101.709; 34 C.F.R. § 101.710-101.712; 34 C.F.R. § 101.713-101.715; 34 C.F.R. § 101.716-101.718; 34 C.F.R. § 101.719-101.721; 34 C.F.R. § 101.722-101.724; 34 C.F.R. § 101.725-101.727; 34 C.F.R. § 101.728-101.730; 34 C.F.R. § 101.731-101.733; 34 C.F.R. § 101.734-101.736; 34 C.F.R. § 101.737-101.739; 34 C.F.R. § 101.740-101.742; 34 C.F.R. § 101.743-101.745; 34 C.F.R. § 101.746-101.748; 34 C.F.R. § 101.749-101.751; 34 C.F.R. § 101.752-101.754; 34 C.F.R. § 101.755-101.757; 34 C.F.R. § 101.758-101.760; 34 C.F.R. § 101.761-101.763; 34 C.F.R. § 101.764-101.766; 34 C.F.R. § 101.767-101.769; 34 C.F.R. § 101.770-101.772; 34 C.F.R. § 101.773-101.775; 34 C.F.R. § 101.776-101.778; 34 C.F.R. § 101.779-101.781; 34 C.F.R. § 101.782-101.784; 34 C.F.R. § 101.785-101.787; 34 C.F.R. § 101.788-101.790; 34 C.F.R. § 101.791-101.793; 34 C.F.R. § 101.794-101.796; 34 C.F.R. § 101.797-101.799; 34 C.F.R. § 101.800-101.802; 34 C.F.R. § 101.803-101.805; 34 C.F.R. § 101.806-101.808; 34 C.F.R. § 101.809-101.811; 34 C.F.R. § 101.812-101.814; 34 C.F.R. § 101.815-101.817; 34 C.F.R. § 101.818-101.820; 34 C.F.R. § 101.821-101.823; 34 C.F.R. § 101.824-101.826; 34 C.F.R. § 101.827-101.829; 34 C.F.R. § 101.830-101.832; 34 C.F.R. § 101.833-101.835; 34 C.F.R. § 101.836-101.838; 34 C.F.R. § 101.839-101.841; 34 C.F.R. § 101.842-101.844; 34 C.F.R. § 101.845-101.847; 34 C.F.R. § 101.848-101.850; 34 C.F.R. § 101.851-101.853; 34 C.F.R. § 101.854-101.856; 34 C.F.R. § 101.857-101.859; 34 C.F.R. § 101.860-101.862; 34 C.F.R. § 101.863-101.865; 34 C.F.R. § 101.866-101.868; 34 C.F.R. § 101.869-101.871; 34 C.F.R. § 101.872-101.874; 34 C.F.R. § 101.875-101.877; 34 C.F.R. § 101.878-101.880; 34 C.F.R. § 101.881-101.883; 34 C.F.R. § 101.884-101.886; 34 C.F.R. § 101.887-101.889; 34 C.F.R. § 101.890-101.892; 34 C.F.R. § 101.893-101.895; 34 C.F.R. § 101.896-101.898; 34 C.F.R. § 101.899-101.901; 34 C.F.R. § 101.902-101.904; 34 C.F.R. § 101.905-101.907; 34 C.F.R. § 101.908-101.910; 34 C.F.R. § 101.911-101.913; 34 C.F.R. § 101.914-101.916; 34 C.F.R. § 101.917-101.919; 34 C.F.R. § 101.920-101.922; 34 C.F.R. § 101.923-101.925; 34 C.F.R. § 101.926-101.928; 34 C.F.R. § 101.929-101.931; 34 C.F.R. § 101.932-101.934; 34 C.F.R. § 101.935-101.937; 34 C.F.R. § 101.938-101.940; 34 C.F.R. § 101.941-101.943; 34 C.F.R. § 101.944-101.946; 34 C.F.R. § 101.947-101.949; 34 C.F.R. § 101.950-101.952; 34 C.F.R. § 101.953-101.955; 34 C.F.R. § 101.956-101.958; 34 C.F.R. § 101.959-101.961; 34 C.F.R. § 101.962-101.964; 34 C.F.R. § 101.965-101.967; 34 C.F.R. § 101.968-101.970; 34 C.F.R. § 101.971-101.973; 34 C.F.R. § 101.974-101.976; 34 C.F.R. § 101.977-101.979; 34 C.F.R. § 101.980-101.982; 34 C.F.R. § 101.983-101.985; 34 C.F.R. § 101.986-101.988; 34 C.F.R. § 101.989-101.991; 34 C.F.R. § 101.992-101.994; 34 C.F.R. § 101.995-101.997; 34 C.F.R. § 101.998-101.1000.

whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

A student may be sexually harassed by a school employee,<sup>9</sup> another student, or a non-employee third party (e.g., a visiting speaker or visiting athletes). Title IX protects any “person” from sex discrimination. Accordingly, both male and female students are protected from sexual harassment<sup>10</sup> engaged in by a school’s employees, other students, or third parties. Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex.<sup>11</sup> An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.<sup>12</sup>

Although Title IX does not prohibit discrimination on the basis of sexual orientation,<sup>13</sup> sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance.<sup>14</sup> For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim’s ability to participate in or benefit from the school’s program, the school would



## **V. Determining a School's Responsibilities**

In assessing sexually harassing conduct, it is important for schools to recognize that two distinct issues are considered. The first issue is whether, considering the types of harassment discussed in the following section, the conduct denies or limits a student's ability to participate in or benefit from the program based on sex. If it does, the second

sexual harassment and conduct that does not rise to that level. Relevant factors include the following:

- The degree to which the conduct affected one or more students' education. OCR assesses the effect of the harassment on the student to determine whether it has denied or limited the student's ability to participate in or benefit from the school's program. For example, a student's grades may go down or the student may be forced to withdraw from school because of the harassing behavior.<sup>41</sup>

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

- The number of individuals involved. Sexual harassment may be committed by an individual or a group. In some cases, verbal comments or other conduct from one



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

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

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

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

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

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

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## 1. Harassment by Teachers and Other Employees

Sexual harassment of a student by a teacher or other school employee can be discrimination in violation of Title IX.<sup>60</sup> Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence. A school also may be responsible for remedying the effects of the harassment on the student who was harassed. The extent of a recipient's responsibilities if an employee sexually harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students.

A recipient is responsible under the Title IX regulations for the nondiscriminatory provision of aid, benefits, and services to students. Recipients generally provide aid, benefits, and services to students through the responsibilities they give to employees. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment – generally this means harassment that is carried out during an employee's performance of his or her responsibilities in relation to students, including teaching, counseling, supervising, advising, and transporting students – and the harassment denies or limits a student's ability to participate in or benefit from a school program on the basis of sex,<sup>61</sup> the recipient is responsible for the discriminatory conduct.<sup>62</sup> The recipient is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. This is true whether or not the recipient has “notice” of the harassment. (As explained in the section on “Notice of Employee, Peer, or Third Party Harassment,” for purposes of this guidance, a school has notice of harassment if a responsible school employee actually knew or, in the exercise of reasonable care, should have known about the harassment.) Of course, under OCR's administrative enforcement, recipients always receive actual notice and the opportunity to take appropriate corrective action before any finding of violation or possible loss of federal funds.

Whether or not sexual harassment of a student occurred within the context of an  
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- as applicable, whether, in light of the student's age and educational level and the way the school is run, it would be reasonable for the student to believe that the employee was in a position of responsibility over the student, even if the employee was not.

These factors are applicable to all recipient educational institutions, including elementary and secondary schools, colleges, and universities. Elementary and secondary schools, however, are typically run in a way that gives teachers, school officials, and other school employees a substantial degree of supervision, control, and disciplinary authority over the conduct of students.<sup>63</sup> Therefore, in cases involving allegations of harassment of elementary and secondary school-age students by a teacher or school administrator during any school activity,<sup>64</sup> consideration of these factors will generally lead to a conclusion that the harassment occurred in the context of the employee's provision of aid, benefits, or services.

For example, a teacher sexually harasses an eighth-grade student in a school hallway. Even if the student is not in any of the teacher's classes and even if the teacher is not designated as a hall monitor, given the age and educational level of the student and the status and degree of influence of teachers in elementary and secondary schools, it would be reasonable for the student to believe that the teacher had at least informal disciplinary authority over students in the hallways. Thus, OCR would consider this an example of conduct that is occurring in the context of the employee's responsibilities to provide aid, benefits, or services.

Other examples of sexual harassment of a student occurring in the context of an employee's responsibilities for providing aid, benefits, or services include, but are not limited to -- a faculty member at a university's medical school conditions an intern's evaluation on submission to his sexual advances and then gives her a poor evaluation for rejecting the advances; a high school drama instructor does not give a student a part in a play because she has not responded to sexual overtures from the instructor; a faculty member withdraws approval of research funds for her assistant because he has rebuffed her advances; a journalism professor who supervises a college newspaper continually and inappropriately touches a student editor in a sexual manner, causing the student to resign from the newspaper staff; and a teacher repeatedly asks a ninth grade student to stay after class and attempts to engage her in discussions about sex and her personal experiences while they are alone in the classroom, causing the student to stop coming to class. In each of these cases, the school is responsible for the discriminatory conduct, including taking prompt and effective action to end the harassment, prevent it from recurring, and remedy the effects of the harassment on the victim.

Sometimes harassment of a student by an employee in the school's program does not take place in the context of the employee's provision of aid, benefits, or services, but nevertheless is sufficiently serious to create a hostile educational environment. An example of this conduct might occur if a faculty member in the history department at a university, over the course of several weeks, repeatedly touches and makes sexually suggestive remarks to a graduate engineering student while waiting at a stop for the university shuttle bus, riding on the bus, and upon exiting the bus. As a result, the student stops using the campus shuttle and walks the very long distances between her classes. In this case, the school is not directly responsible for the harassing conduct because it did not occur in the context of the employee's responsibilities for the provision

of aid, benefits, or services to students. However, the conduct is sufficiently serious to deny or limit the student in her ability to participate in or benefit from the recipient's program. Thus, the school has a duty, upon notice of the harassment,<sup>65</sup> to take prompt and effective action to stop the harassment and prevent its recurrence.

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

## **2. Harassment by Other Students or Third Parties**

If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school ~~knows~~ or reasonably should know<sup>66</sup> about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.<sup>67</sup> As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility u2D /F1 Tc 0.23 fpool has-ability to

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the student's ability to participate in or benefit from the education program.<sup>71</sup> In this case, the school is responsible for taking corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had the school responded promptly and effectively.

### **C. Notice of Employee, Peer, or Third Party Harassment**

As described in the section on "Harassment by Teachers and Other Employees," schools may be responsible for certain types of employee harassment that occurred before the school otherwise had notice of the harassment. On the other hand, as described in that section and the section on "Harassment by Other Students or Third Parties," in situations involving certain other types of employee harassment, or harassment by peers or third parties, a school will be in violation of the Title IX regulations if the school "has notice" of a sexually hostile environment and fails to take immediate and effective corrective action.<sup>72</sup>

A school has notice if a responsible employee "knew, or in the exercise of reasonable care should have known," about the harassment.<sup>73</sup> A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.<sup>74</sup> Accordingly, schools need to ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials. Training for employees should include practical information about how to identify harassment and, as applicable, the person to whom it should be reported.

A school can receive notice of harassment in many different ways. A student may have filed a grievance with the Title IX coordinator<sup>75</sup> or complained to a teacher or other responsible employee about fellow students harassing him or her. A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, affirmative action officer, or staff in the office of student affairs. A teacher or other responsible employee of the school may have witnessed the harassment. The school may receive notice about harassment in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The school also may have learned about the harassment from flyers about the incident distributed at the school or posted around the school. For the purposes of compliance with the Title IX regulations, a school has a duty to respond to harassment about which it reasonably should have known, i.e., if it would have learned of the harassment if it had exercised reasonable care or made a "reasonably diligent inquiry."<sup>76</sup>

For example, in some situations if the school knows of incidents of harassment, the exercise of reasonable care should trigger an investigation that would lead to a discovery of additional incidents.<sup>77</sup> In other cases, the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment — if the harassment is widespread, openly practiced, or well-known to students and staff

(such as sexual harassment occurring in the hallways, graffiti in public areas, or harassment occurring during recess under a teacher's supervision.)<sup>78</sup>

If a school otherwise knows or reasonably should know of a hostile environment and fails to take prompt and effective corrective action, a school has violated Title IX even if the student has failed to use the school's existing grievance procedures or

in which the school was in violation of the Title IX regulations (e.g., a teacher sexually harassed a student in the context of providing aid, benefits, or services to students), as well as those in which there has been no violation of the regulations (e.g., in a peer sexual harassment situation in which the school took immediate, reasonable steps to end the harassment and prevent its recurrence). This is because, even if OCR identifies a violation, Title IX requires OCR to attempt to secure voluntary compliance.<sup>85</sup> Thus, because a school will have the opportunity to take reasonable corrective action before OCR issues a formal finding of violation, a school does not risk losing its Federal funding solely because discrimination occurred.

## **VII. Recipient's Response**

Once a school has notice of possible sexual harassment of students — whether carried out by employees, other students, or third parties — it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps

reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. These steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.<sup>86</sup> As described in the next section, in appropriate circumstances the school will also be responsible for taking steps to remedy the effects of the harassment on the individual student or students who were harassed. What constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances.

### **A. Response to Student or Parent Reports of Harassment; Response to Direct Observation of Harassment by a Responsible Employee**

If a student or the parent of an elementary or secondary student provides information or complains about sexual harassment of the student, the school should initially discuss what actions the student or parent is seeking in response to the harassment. The school should explain the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works. If a responsible school employee has directly observed sexual harassment of a student, the school should contact the student who was harassed (or the parent, depending upon the age of the student),<sup>87</sup> explain that the school is responsible for taking steps to correct the harassment, and provide the same information described in the previous sentence.

Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student's behalf (including in cases involving direct observation by a responsible employee), the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial. (Requests by the student who



was harassed for confidentiality or for no action to be taken, responding to notice of harassment from other sources, and the components of a prompt and equitable grievance procedure are discussed in subsequent sections of this guidance.)

It may be appropriate for a school to take interim measures during the investigation of a complaint. For instance, if a student alleges that he or she has been sexually assaulted by another student, the school may decide to place the students immediately in separate classes or in different housing arrangements on a campus, pending the results of the school's investigation. Similarly, if the alleged harasser is a teacher, allowing the student to transfer to a different class may be appropriate. In cases involving potential criminal conduct, school personnel should determine whether appropriate law enforcement authorities should be notified. In all cases, schools should make every effort to prevent disclosure of the names of all parties involved -- the complainant, the witnesses, and the accused -- except to the extent necessary to carry out an investigation.

If a school determines that sexual harassment has occurred, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation.<sup>88</sup> Appropriate steps should be taken to end the harassment. For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both.<sup>89</sup> A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.<sup>90</sup> In some cases, it may be appropriate to further separate the harassed student and the harasser, e.g., by changing housing arrangements<sup>91</sup> or directing the harasser to have no further contact with the harassed student. Responsive measures of this type should be designed to minimize, as much as possible, the burden on the student who was harassed. If the alleged harasser is not a student or employee of the recipient, OCR will consider the level of control the school has over the harasser in determining what response would be appropriate.<sup>92</sup>

Steps should also be taken to eliminate any hostile environment that has been created. For example, if a female student has been subjected to harassment by a group of other students in a class, the school may need to deliver special training or other interventions for that class to repair the educational environment. If the school offers the student the option of withdrawing from a class in which a hostile environment occurred, the school should assist the student in making program or schedule changes and ensure that none of the changes adversely affect the student's academic record. Other measures may include, if appropriate, directing a harasser to apologize to the harassed student. If a hostile environment has affected an entire school or campus, an effective response may need to include dissemination of information, the issuance of new policy statements, or other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports that conduct.

In some situations, a school may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student.<sup>93</sup> For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances, the school may be required to make arrangements for an independent reassessment of the student's work, if feasible, and change the grade accordingly; make arrangements for the student to take the course again

with a different instructor; provide tutoring; make tuition adjustments; offer reimbursement for professional counseling; or take other measures that are appropriate to the circumstances. As another example, if a school delays responding or responds inappropriately to information about harassment, such as a case in which the school ignores complaints by a student that he or she is being sexually harassed by a classmate, the school will be required to remedy the effects of the harassment that could have been prevented had the school responded promptly and effectively.

Finally, a school should take steps to prevent any further harassment<sup>94</sup> and to prevent any retaliation against the student who made the complaint (or was the subject of the harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses.<sup>95</sup> At a minimum, this includes making sure that the harassed students and their parents know how to report any subsequent problems and making follow-up inquiries to see if there have been any new incidents or any retaliation. To prevent recurrences, counseling for the harasser may be appropriate to ensure that he or she understands what constitutes harassment and the effects it can have. In addition, depending on how widespread the harassment was and whether there have been any prior incidents, the school may need to provide training for the larger school community to ensure that students, parents, and teachers can recognize harassment if it recurs and know how to respond.<sup>96</sup>

### **B. Confidentiality**

The scope of a reasonable response also may depend upon whether was the subject of n wh7osD1

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accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.<sup>97</sup>

Similarly, a school should be aware of the confidentiality concerns of an accused employee or student. Publicized accusations of sexual harassment, if ultimately found to be false, may nevertheless irreparably damage the reputation of the accused. The accused individual's need for confidentiality must, of course, also be evaluated based on the factors discussed in the preceding paragraph in the context of the school's responsibility to ensure a safe environment for students.

Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual complaint of harassment, other means may be available to address the harassment. There are steps a recipient can take to limit the effects of the alleged harassment and prevent its recurrence without initiating formal action against the alleged harasser or revealing the identity of the complainant. Examples include conducting sexual harassment training for the school site or academic department where the problem occurred, taking a student survey concerning any problems with harassment, or implementing other systemic measures at the site or department where the alleged harassment has occurred.

In addition, by investigating the complaint to the extent possible — including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX — the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual. In some situations there may be prior reports by former students who now might be willing to come forward and be identified, thus providing a basis for further corrective action. In instances affecting a number of students (for example, a report from a student that an instructor has repeatedly made sexually explicit remarks about his or her personal life in front of an entire class), an individual can be put on notice of allegations of harassing behavior and counseled appropriately without revealing, even indirectly, the identity of the student who notified the school. Those steps can be very effective in preventing further harassment.

### **C. Response to Other Types of Notice**

The previous two sections deal with situations in which a student or parent of a student who was harassed reports or complains of harassment or in which a responsible school employee directly observes sexual harassment of a student. If a school learns of harassment through other means, for example, if information about harassment is received from a third party (such as from a witness to an incident or an anonymous letter or telephone call), different factors will affect the school's response. These factors include the source and nature of the information; the seriousness of the alleged incident; the specificity of the information; the objectivity and credibility of the source of the report; whether any individuals can be identified who were subjected to the alleged harassment; and whether those individuals want to pursue the matter. If, based on these factors, it is reasonable for the school to investigate and it can confirm the allegations, the considerations described in the previous sections concerning interim measures and appropriate responsive action will apply.

For example, if a parent visiting a school observes a student repeatedly harassing a group of female students and reports this to school officials, school personnel can speak with the female students to confirm whether that conduct has occurred and whether they view it as unwelcome. If the school determines that the conduct created a hostile environment, it can take reasonable, age-appropriate steps to address the situation. If on the other hand, the students in this example were to ask that their names not be disclosed or indicate that they do not want to pursue the matter, the considerations described in the previous section related to requests for confidentiality will shape the school's response.

In a contrasting example, a student newspaper at a large university may print an anonymous letter claiming that a professor is sexually harassing students in class on a daily basis, but the letter provides no clue as to the identity of the professor or the department in which the conduct is allegedly taking place. Due to the anonymous source and lack of specificity of the information, a school would not reasonably be able to investigate and confirm these allegations. However, in response to the anonymous letter, the school could submit a letter or article to the newspaper reiterating its policy against sexual harassment, encouraging persons who believe that they have been sexually harassed to come forward, and explaining how its grievance procedures work.

## **VIII. Prevention**

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

prohibited sex discrimination, a school's general policy and procedures relating to sex discrimination complaints will not be considered effective.<sup>101</sup>

OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the procedures provide for —

- Notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;
- Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- Designated and reasonably prompt timeframes for the major stages of the complaint process;
- Notice to the parties of the outcome of the complaint;<sup>102</sup> and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.<sup>103</sup>

Many schools also provide an opportunity to appeal the findings or remedy, or both. In addition, because retaliation is prohibited by Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry.

Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience. In addition, whether complaint resolutions are timely will vary depending on the complexity of the investigation and the severity and extent of the harassment. During the investigation it is a good practice for schools to inform students who have alleged harassment about the status of the investigation on a periodic basis.

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

A school must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities.<sup>104</sup> The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated.<sup>105</sup> Because it is possible that an employee designated to handle Title IX complaints may himself or herself engage in harassment, a school may want to designate more than one employee to be responsible for handling complaints in order to ensure that students have an effective means of reporting harassment.<sup>106</sup> While a school may choose to have a number of employees responsible for Title IX matters, it is also advisable to give one official responsibility for overall coordination and oversight of all sexual harassment complaints to ensure consistent practices and standards in handling complaints. Coordination of recordkeeping (for instance, in a confidential log maintained by the Title IX coordinator) will also ensure that the school can and will resolve recurring problems and identify students or employees who have multiple complaints filed against them.<sup>107</sup> 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.<sup>108</sup>

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so.<sup>109</sup> OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis. Title IX also permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirement of affording a complainant a “prompt and equitable” resolution of the complaint.

In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.<sup>110</sup> Similarly, schools are cautioned about using the results of insurance company investigations of sexual harassment allegations. The purpose of an insurance investigation is to assess liability under the insurance policy, and the applicable standards may well be different from those under Title IX. In addition, a school is not relieved of its responsibility to respond to a sexual harassment complaint filed under its grievance procedure by the fact that a complaint has been filed with OCR.<sup>111</sup>

## **X. Due Process Rights of the Accused**

A public school's employees have certain due process rights under the United States Constitution. The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding. Furthermore, the Family Educational Rights and Privacy Act (FERPA) does not override federally protected due process rights of persons accused of sexual harassment. Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions. Of course, schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant. In both public and private schools, additional or separate rights may be created for employees or students by State law, institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements. Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment.

## **XI. First Amendment**

In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved.<sup>112</sup> Free speech rights apply in the classroom (e.g., classroom lectures and discussions)<sup>113</sup> and in all other education programs and activities of public schools (e.g., public meetings and speakers on campus;

sexual conduct, including scenes that depict women in submissive and demeaning roles. The professor also assigns students to write their own materials, which are read in class.

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## Endnotes

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(professor's spanking of university student may constitute sexual conduct under Title IX); Doe v. Petaluma, 830 F.Supp. 1560, 1564-65 (N.D. Cal. 1996) (sexually derogatory taunts and innuendo can be the basis of a harassment claim); Denver School Dist. #2, OCR Case No. 08-92-1007 (same to allegations of vulgar language and obscenities, pictures of nude women on office walls and desks, unwelcome touching, sexually offensive jokes, bribery to perform sexual acts, indecent exposure); Nashoba Regional High School, OCR Case No. 01-92-1377 (same as to year-long campaign of derogatory, sexually explicit graffiti and remarks directed at one student).

<sup>7</sup> See also Shoreline School Dist., OCR Case No. 10-92-~~1007~~ 1007, 10-92-1007, Title IX 68, employees 05

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which the harasser only harasses members of the opposite sex. See 34 CFR 106.31. In Oncale v. Sundowner Offshore Services, Inc. the Supreme Court held unanimously that sex discrimination consisting of same-sex sexual harassment can violate Title VII's prohibition against discrimination because of sex. 523 U.S. 75, 82 (1998). The Supreme Court's holding in Oncale is consistent with OCR policy, originally stated in its 1997 guidance, that Title IX prohibits sexual harassment regardless of whether the harasser and the person being harassed are members of the same sex. 62 FR 12039. See also Kinman v. Omaha Public School Dist., 94 F.3d 463, 468 (8<sup>th</sup> Cir. 1996), rev'd on other grounds, 171 F.3d 607 (1999) (female student's allegation of sexual harassment by female teacher sufficient to raise a claim under Title IX); Doe v. Petaluma, 830 F.Supp. 1560, 1564-65, 1575 (N.D. Cal. 1996) (female junior high student alleging sexual harassment by other students, including both boys and girls, sufficient to raise a claim under Title IX); John Does 1, 884 F.Supp. at 465 (same as to male students' allegations of sexual harassment and abuse by a male teacher.) It can also occur in certain situations if the harassment is directed at students of both sexes. Chiapuzo v. BLT Operating Corp., 826 F.Supp. 1334, 1337 (D.Wyo. 1993) (court found that if males and females were subject to harassment, but harassment was based on sex, it could violate Title VII); but see Holman v. Indiana, 211 F.3d 399, 405 (7<sup>th</sup> Cir. 2000) (if male and female both subjected to requests for sex, court found it could not violate Title VII).

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

In yet other circumstances, the conduct will be on the basis of sex in that the student's sex was a factor in or affected the nature of the harasser's conduct or both. Thus, in Chiapuzo, a supervisor made demeaning remarks to both partners of a married couple working for him, e.g., as to sexual acts he wanted to engage in with the wife and how he would be a better lover than the husband. In both cases, according to the court, the remarks were based on sex in that they were made with an intent to demean each member of the couple because of his or her respective sex. 826 F.Supp. at 1337. See also Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463-64 (9<sup>th</sup> Cir. 1994), cert. denied, 115 S.Ct. 733 (1995); but see Holman, 211 F.3d at 405 (finding that if male and female both subjected to requests for sex, Title VII could not be violated).

<sup>12</sup> Nashoba Regional High School, OCR Case No. 01-92-1397. In Conejo Valley School Dist., OCR Case No. 09-93-

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<sup>13</sup> See Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8<sup>th</sup> Cir. 1989, cert. denied 493 U.S. 1089 (1990)); DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327, 329-30 (9<sup>th</sup> Cir. 1979)(same); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5<sup>th</sup> Cir. 1979)(same).

<sup>14</sup> It should be noted that some State and local laws may prohibit discrimination on the basis of sexual orientation. Also, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other Federal legal authority. See Nabozny v. Podlesny, 92 F.3d 446, 460 (7<sup>th</sup> Cir. 1996) (holding that a gay student could maintain claims alleging discrimination based on both gender and sexual orientation under the Equal Protection Clause of the United States Constitution in a case in which a school district failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student's gender and sexual orientation).

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

<sup>16</sup> See also, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (where an accounting firm denied partnership to a female candidate, the Supreme Court found Title VII prohibits an employer from evaluating employees by assuming or insisting that they match the stereotype associated with their sex).

<sup>17</sup> See generally Gebser; Davis; See also Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65-66 (1986); Harris v. Forklift Systems Inc., 510 U.S. 14, 22 (1993); see also Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10<sup>th</sup> Cir. 1987) (concluding that harassment based on sex may be discrimination whether or not it is sexual in nature); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (physical, but nonsexual, assault could be sex-based harassment if shown to be unequal treatment that would not have taken place but for the employee's sex); Cline v. General Electric Capital Auto Lease, Inc., 757 F.Supp. 923, 932-33 (N.D. Ill. 1991).

<sup>18</sup> See, e.g., sections on "P1A r60heac (see a,ions on "P1A 0372eT 16z 8.25 u991).) Tn1 32 stereoty

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may be actionable even if the harassment is not sexual in nature); Hicks, 833 F.2d at 1415; Eden Prairie Schools, Dist. #272, OCR Case No. 05-92-1174 (the boys made lewd comments about male anatomy and tormented the girls by pretending to stab them with rubber knives; while the stabbing was not sexual conduct, it was directed at them because of their sex, i.e., because they were girls).

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<sup>26</sup> 34 CFR 106.31(b)(4).

<sup>27</sup> 34 CFR 106.31(b)(6).

<sup>28</sup> 34 CFR 106.31(b)(7).

<sup>29</sup> 34 CFR 106.3(a).

<sup>30</sup> 34 CFR 106.9.

<sup>31</sup> 34 CFR 106.8(b).

<sup>32</sup> 34 CFR 106.8(a).

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

<sup>34</sup> See Alexander v. Yale University, 459 F.Supp. 1, 4 (D.Conn. 1977), aff'd, 631 F.2d 178 (2<sup>nd</sup> Cir. 1980)(stating that a claim “that academic advancement was conditioned upon submission to sexual demands constitutes [a claim of] sex discrimination in education...”);

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conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." 510 U.S. at 21-22.

<sup>39</sup> See Davis, 526 U.S. at 650 (conduct must be "objectively offensive" to trigger liability for money damages); Elgamil v. Syracuse University, 2000 U.S. Dist. LEXIS 12598 at 17 (N.D.N.Y. 2000) (citing Harris); Booher v. Board of Regents, 1998 U.S. Dist. LEXIS 11404 at 25 (E.D. Ky. 1998) (same). See Oncale, 523 U.S. at 81, in which the Court "emphasized ... that the objective severity of harassment should be judged from the perspective of a reasonable person in the [victim's] position, considering 'all the circumstances,'" and citing Harris, 510 U.S. at 20, in which the Court indicated that a "reasonable person" standard should be used to determine whether sexual conduct constituted harassment. This standard has been applied under Title VII to take into account

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<sup>45</sup> 34 CFR 106.31(b). See Vance v. Spencer County Public School District, 231 F.3d 253 (6<sup>th</sup> Cir. 2000); Doe v. School Admin. Dist. No. 19



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<sup>52</sup> In addition, incidents of racial or national origin harassment directed at a particular individual may also be aggregated with incidents of sexual or gender harassment directed at that individual in determining the existence of a hostile environment. Hicks, 833 F.2d at 1416; Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025, 1032 (5<sup>th</sup> Cir. 1980).

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factors such as the age and education level of the student, the type of position held by the employee, and school practices and procedures, both formal and informal. The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. Gebser, 524 U.S. at 290, and Davis, 526 U.S. at 642. The concept of a “responsible employee” under our guidance is broader. That is, even if a responsible employee does not have the authority to address the discrimination and take corrective action, he or she does have the obligation to report it to appropriate school officials.

<sup>75</sup> The Title IX regulations require that recipients designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulations, including complaint investigations. 34 CFR 106.8(a).

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

<sup>77</sup> For example, a substantiated report indicating that a high school coach has engaged in inappropriate physical conduct of a sexual nature in several instances with different students may suggest a pattern of conduct that should trigger an inquiry as to whether other students have been sexually harassed by that coach. See also Doe v. School Administrative Dist. No. 19, 66 F.Supp.2d 57, 63-64 and n.6 (D.Me. 1999) (in a private lawsuit for money damages under Title IX in which a high school principal had notice

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<sup>79</sup> 34 CFR 106.9 and 106.8(b).

<sup>80</sup> 34 CFR 106.8(b) and 106.31(b).

<sup>81</sup> 34 CFR 106.9.

<sup>82</sup> 34 CFR 106.8(b).

<sup>83</sup> 34 CFR 106.31.

<sup>84</sup> 34 CFR 106.31 and 106.3. Gebser, 524 U.S. at 288 (“In the event of a violation, [under OCR’s administrative enforcement scheme] a funding recipient may be required to take ‘such remedial action as [is] deem[ed] necessary to overcome the effects of [the] discrimination.’ §106.3.”).

<sup>85</sup> 20 U.S.C. 1682. In the event that OCR determines that voluntary compliance cannot be secured, OCR may take steps that may result in termination of Federal funding through administrative enforcement, or, alternatively, OCR may refer the case to the Department of Justice for judicial enforcement.

<sup>86</sup> Schools have an obligation to ensure that the educational environment is free of discrimination and cannot fulfill this obligation without determining if sexual harassment complaints have merit.

<sup>87</sup> In some situations, for example, if a playground supervisor observes a young student repeatedly engaging in conduct toward other students that is clearly unacceptable under the school’s policies, it may be appropriate for the school to intervene without contacting the other students. It still may be necessary for the school to talk with the students (and parents of elementary and secondary students) afterwards, e.g., to determine the extent of the harassment and how it affected them.

<sup>88</sup> Gebser, 524 U.S. at 288; Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981) (employers should take corrective and preventive measures under Title VII); accord, Jones v. Flagship Int’l, 793 F.2d 714, 719-720 (5<sup>th</sup> Cir. 1986) (employer should take prompt remedial action under Title VII).

<sup>89</sup> See Doe ex rel. Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380 (5<sup>th</sup> Cir. 2000) (citing Waltman); Waltman, 875 F.2d at 479 (appropriateness of employer’s remedial action under Title VII will depend on the “severity and persistence of the harassment and the effectiveness of any initial remedial steps”); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309-10 (5<sup>th</sup> Cir. 1987); holding that a company’s quick decision to remove the harasser from the victim was adequate remedial action).

<sup>90</sup> See Intlekofer v. Turnage, 973 F.2d 773, 779-780 (9<sup>th</sup> Cir. 1992)(holding that the employer’s response was insufficient and that more severe disciplinary action was



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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.

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<sup>109</sup> Indeed, in University of Maine at Machias, OCR Case No. 01-94-6001, OCR found the school's procedures to be inadequate because only formal complaints were investigated. While a school isn't required to have an established procedure for resolving informal complaints, they nevertheless must be addressed in some way. However, if there are indications that the same individual may be harassing others, then it may not be appropriate to resolve an informal complaint without taking steps to address the entire situation.

<sup>110</sup> Academy School Dist. No 20, OCR Case No. 08-93-1023 (school's response determined to be insufficient in a case in which it stopped its investigation after complaint filed with police); Mills Public School Dist., OCR Case No. 01-93-1123, (not sufficient for school to wait until end of police investigation).

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

<sup>112</sup> 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.

<sup>113</sup> See, e.g., George Mason University, OCR Case No. 03-94-2086 (law professor's use of a racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment); Portland School Dist. 1J, OCR Case No. 10-94-1117 (reading teacher's choice to substitute a less offensive term for a racial slur when reading an historical novel aloud in class constituted an academic decision on presentation of curriculum, not racial harassment).

<sup>114</sup> See Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386 (4<sup>th</sup> Cir. 1993) (fraternity skit in which white male student dressed as an offensive caricature of a black female constituted student expression).

<sup>115</sup> See Florida Agricultural and Mechanical University, OCR Case No. 04-92-2054 (no discrimination in case in which campus newspaper, which welcomed individual opinions of all sorts, printed article expressing one student's viewpoint on white students on campus.)

<sup>116</sup> Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (neither students nor teachers shed their constitutional rights to freedom of expression at the schoolhouse gates); Cf. Cohen v. San Bernardino Valley College, 92 F.3d 968, 972 (9<sup>th</sup> Cir. 1996) (holding that a college professor could not be punished for his longstanding teaching methods, which included discussion of controversial subjects such as obscenity and consensual sex with children, under an unconstitutionally vague sexual harassment policy); George Mason University, OCR Case No. 03-94-2086 (law professor's use of a

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racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment.)

<sup>117</sup> 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.)

<sup>118</sup> See Meritor, 477 U.S. at 67 (the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to a sufficient degree to violate Title VII), quoting Henson, 682 F.2d at 904; cf. R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (citing with approval EEOC's sexual harassment guidelines); Monteiro, 158 F.3d at 1032-34 (9<sup>th</sup> Cir. 1998) (citing with approval OCR's racial harassment investigative guidance).  
approval OCR's racial harassment investigative guidance).

<sup>119</sup> 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,