

Practical Implication of OCR's Title IX "Dear Colleague" Letter

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All public school districts, colleges and universities that receive federal financial assistance ("schools") are required to comply with Title IX, a law that prohibits all forms of sex discrimination, including sexual harassment. The three fundamental requirements of Title IX are that schools (1) disseminate a notice of nondiscrimination; (2) designate at least one employee to coordinate Title IX responsibilities; and, (3) adopt and publish grievance procedures for student and employee sex discrimination complaints.

The Office of Civil Rights (OCR) of the United States Department of Education recently issued a "Dear Colleague" letter clarifying Title IX's requirements for schools to address sexual harassment. The letter provides significant guidance for creating and implementing a sexual harassment policy that will meet Title IX's standards as viewed by OCR.

OCR's letter first reminds schools that Title IX protects students from sexual harassment in academic, extracurricular, athletic, and other programs, on buses, during field trips, and in classes or training programs that take place off school grounds. The letter also explains that student-on-student sexual harassment that occurs outside of school programming may have effects within the school, such that schools are required to consider whether those situations create a hostile environment on campus. Additionally, OCR states that, regardless of whether anyone files a complaint about sexual harassment, a school must investigate any situation involving possible sexual harassment of which it is aware. In short, OCR takes a broad view of schools' responsibilities to protect students against sexual harassment.

OCR recognizes that an informal resolution process can be appropriate for some claims of sexual harassment. However, a student complainant must be notified of the right to have the complaint proceed according to a formal process outlined in a school's policies. The Dear Colleague letter emphasizes that sexual harassment policies must contain the following elements:

- an investigation process that is prompt, thorough, and impartial and that affords the complainant a prompt and equitable resolution
- a hearing during which both parties have the right to present witnesses

- the “preponderance of the evidence” standard, not a higher standard, must be used at any hearings (i.e. “it is more likely than not that sexual harassment occurred”)
- the complainant and the alleged perpetrator must have similar access to any information that may be used at the hearing, must have equal rights to present character witnesses, and rules for the participation of lawyers and advocates must apply equally to both parties.

As it has in prior guidance, OCR emphasizes the importance of schools providing information and training about sexual harassment to school students, faculty, coaches, and administrators. Schools must develop written materials that define what constitutes sexual harassment, state to whom sexual harassment should be reported, explain how to file a complaint, and provide the time frames within which the school will conduct a full investigation and provide notice of the outcome. Those materials must be distributed to students and/or their parents, published on school websites, and widely posted in school buildings.

Effective implementation of sound sexual harassment policies is required to ensure legal compliance and it is likely to reduce incidents of sexual harassment by defining conduct that is inappropriate and by emphasizing that such conduct will not be tolerated. The Education Law Group of McNees Wallace & Nurick LLC is available to assist schools with questions regarding Title IX and sexual harassment policies.

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