UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

February 17, 2016

Honorable James Lankford
Chairman
Subcommittee on Regulatory Affairs
and Federal Management
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Lankford:

Thank you for your letter to Acting Secretary John B. King, Jr., requesting information about policy guidance issued by the U.S. Department of Education's Office for Civil Rights (OCR). I am pleased to respond on behalf of the Acting Secretary.

The Department shares your belief that no student should be subjected to sex-based bullying, harassment, or sexual violence. Unfortunately, we know that these forms of discrimination persist at some of our nation's colleges and universities and other educational settings. Title IX of the Education Amendments of 1972 (Title IX)[1] plays a critical role in the Department's efforts to ensure that all schools that accept Federal financial assistance prevent and redress sexual harassment (including sexual violence) that creates a hostile environment for a student or set of students.[2] Title IX governs because sexual harassment that creates a hostile environment denies students, on the basis of sex, the benefits of the school's educational program in violation of Title IX. The Supreme Court has repeatedly confirmed that proposition, acknowledging OCR's guidance in its most recent Title IX sexual harassment decision.[3]

The Department's predecessor, the Department of Health, Education, and Welfare, promulgated its Title IX regulations in 1975 after notice-and-comment rulemaking. Those regulations, among other matters, prohibit educational institutions that receive Federal financial assistance from "[d]eny[ing] any person any such aid, benefit, or service" on the basis of sex or "[o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity" on the

[1] 20 U.S.C. §§ 1681-1688.

[2] In addition to Title IX, the Department's administration and enforcement of the Jeanne Clery Disclosure of Campus Security and Crime Statistics Act (Clery Act), which requires institutions that participate in the Federal student aid programs to provide an accurate and realistic view of crime on campus and in the surrounding community, is dedicated to improving campus safety for our nation's students and educators.

[3] *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 647-648, 651 (1999) (citing OCR's Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (March 13, 1997)).

basis of sex.[4] The regulations also require those educational institutions to adopt "grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [these regulations]."[5]

The same Title IX regulations adopt portions of the Department's regulations enforcing Title VI of the Civil Rights Act of 1964, which provide that whenever a complaint by any person or other information received by OCR "indicates a possible failure to comply with [these regulations]," OCR "will make a prompt investigation;" and that if the investigation "indicates a failure to comply" with the regulations, OCR "will so inform the recipient and the matter will be resolved by informal means whenever possible."[6] If OCR determines that the matter cannot be resolved voluntarily by informal means (after sending a letter of finding to the recipient describing the facts determined and the regulations and legal standards applied), then OCR must initiate proceedings in front of a neutral, independent Department hearing officer to terminate Federal financial assistance or seek compliance through any means otherwise authorized by law (such as referring the matter to the Department of Justice for initiating a lawsuit).[7] If the hearing officer agrees with OCR, the recipient has additional opportunities to challenge that officer's finding both within the Department and then in court.[8]

Instead of requiring recipients and members of the public to discern for themselves solely from the text of the regulations what Title IX requires as applied to particular facts and what actions would result in OCR initiating proceedings to terminate Federal financial assistance, if voluntary resolution by informal means was not possible, OCR has elected to issue additional types of written materials as authorized by Federal law. OCR issues guidance documents -- including interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice -- in order to further assist schools in understanding what policies and practices will lead OCR to initiate proceedings to terminate Federal financial assistance (absent resolution by voluntary means) under existing regulations implemented to effectuate Title IX and other civil rights laws. As you note, the Supreme Court unanimously confirmed in March 2015 that, under the Administrative Procedure Act, agencies may issue such guidance without notice-and-comment procedures because such guidance does not have the force and effect of law and is therefore expressly exempt from those requirements.[9] The Department does not view such guidance to have the force and effect of law. Instead, OCR's guidance is issued to advise the public of its construction of the statutes and regulations it administers and enforces.

Your letter asks the Department to clarify the legal authority for certain statements made in two OCR "Dear Colleague" guidance letters. First, your letter asks for the legal basis for the statement on page 6 of OCR's October 26, 2010, Dear Colleague letter on harassment and

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[4] 34 C.F.R. § 106.31(b).
[5] 34 C.F.R. § 106.8(b).
[6] 34 C.F.R. § 106.71 (incorporating, among other provisions, 34 C.F.R. § 100.7(c)-(d)).
[7] 34 C.F.R. § 106.71 (incorporating, among other provisions, 34 C.F.R. §§ 100.8, 100.9(a)); *see* 20 U.S.C. § 1682 (permitting termination of funds only if the Department has "advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means"); *see also* OCR, Case Processing Manual §§ 303(b), 305 (Feb. 2015) (describing what must be included in an OCR letter of finding and OCR letter of impending enforcement action).
[8] 34 C.F.R. § 106.71 (incorporating, among other provisions, 34 C.F.R. §§ 101.104, 106); 20 U.S.C. § 1683.
[9] *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); 5 U.S.C. § 553(b)(3)(A).

bullying (2010 DCL) that provided examples of conduct that can constitute "sexual harassment." The legal standards for identifying conduct that could constitute sexual harassment described in the 2010 DCL are the same standards that were set forth by OCR in 1997 in a guidance document that went through notice-and-comment and, as noted earlier, was acknowledged and cited by the Supreme Court.[10] That guidance document was replaced with a revised guidance in 2001 that also went through notice-and-comment.[11] Both the 1997 and 2001 documents included extensive citations to relevant Federal case law discussing the types of conduct that could constitute sexual harassment.[12] In 2006, the prior Administration reissued the 2001 document.[13] In 2008, the prior Administration published a pamphlet on sexual harassment that used the same examples that your letter cites.[14] OCR repeated these examples again in 2010 to help schools understand the types of conduct that constitute sexual harassment covered by Title IX, citing repeatedly to the 2001 document.[15] In each of these documents, OCR has also consistently made clear that such conduct, even if characterized as sexual harassment, is not prohibited by Title IX as unlawful sexual harassment unless it creates or contributes to a hostile environment and the educational institution fails to take prompt and effective steps reasonably calculated to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

Your letter also asks about the statement in OCR's April 4, 2011, Dear Colleague Letter on Sexual Violence (2011 DCL) regarding educational institutions using the preponderance-of-the-evidence standard to resolve complaints of sexual violence. The guidance reminded schools that the requirements of Title IX for addressing sexual harassment also cover sexual violence and reminded schools of their responsibilities to take immediate and effective steps to respond to sexual violence in accordance with the requirements of Title IX. The standards outlined in the 2011 DCL stem from the Department's Title IX regulations, including, but not limited to, the requirement that educational institutions adopt "grievance procedures providing for prompt and equitable resolution" of complaints.[16] Prior to the 2011 DCL, OCR had determined in letters of findings issued during multiple Administrations that in order for a recipient's procedures to be "equitable," they must use the preponderance of the evidence standard (i.e., more likely than not) to determine whether sexual violence has occurred.[17] As OCR's practice in these cases confirms, it is Title IX and the regulation, which has the force and effect of law, that OCR enforces, not OCR's 2011 (or any other) DCL. OCR's 2011 DCL simply serves to advise the public of the construction of the regulation it administers and enforces.

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[10] Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 61 Fed. Reg. 42728 (August 16, 1996), 61 Fed. Reg. 52172 (October 4, 1996), and 62 Fed. Reg. 12034 (March 13, 1997).

[11] Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 66092 (November 2, 2000) and 66 Fed. Reg. 5512 (January 19, 2001).

[12] *See, e.g.*, 1997 Sexual Harassment Guidance, 62 Fed. Reg. at 12046-47 n.6; 2001 Revised Sexual Harassment Guidance at 24 n.6, available at www.ed.gov/ocr/docs/shguide.pdf.

[13] *See* Dear Colleague Letter: Sexual Harassment Issues (January 25, 2006), available at www.ed.gov/ocr/letters/sexhar-2006.html.

[14] *See Sexual Harassment: It's Not Academic* at 3-4 (September 2008), available at www.ed.gov/ocr/docs/ocrshpam.pdf.

[15] *See* 2010 DCL at 2 n.8, 7 n.16, 8 n.17, 9-10.

[16] 34 C.F.R. §106.8(b).

[17] *See, e.g.*, Letter from OCR to Georgetown Univ. (May 5, 2004), available at ncherm.org/documents/199-GeorgetownUniversity--11032017DeGeoia.pdf; Letter from OCR to The Evergreen State College (Apr. 4, 1995), available at www.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf.

OCR's construction of the Title IX regulation is reasonable and, as explained in the 2011 DCL, is based on case law, mainly under Title VII of the Civil Rights Act of 1964 (prohibiting sex discrimination in the employment context), which courts have relied upon in analyzing Title IX.[18] The construction is also practicable, as evidenced by the fact that, even before 2011, most colleges and universities were already using the preponderance-of-the-evidence standard for sexual violence cases.[19]

I appreciate your careful attention to civil rights in our Nation's schools.

If you have additional questions or concerns, do not hesitate to have your staff contact Lloyd Horwich, Acting Assistant Secretary for the Department's Office of Legislation and Congressional Affairs, at (202) 401-0020.

Sincerely,

Catherine E. Lhamon
Assistant Secretary for Civil Rights

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[18] *See* 2011 DCL at 11 n.26. The Supreme Court has found the preponderance of the evidence standard sufficient for civil rights cases, *see Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983) (in weighing the balance of interests for each party, the "interests of defendants in a securities case do not differ qualitatively from the interests of defendants sued for violations of other federal statutes such as the antitrust or civil rights laws, for which proof by a preponderance of the evidence suffices"), and State courts have applied the preponderance of the evidence standard in civil cases involving sexual assault. *See. e.g. Jordan v. McKenna*, 573 So.2d 1371, 1376 (Miss 1990); *Ashmore v. Hilton*, 834 So. 2d 1131, 1134 (La Ct. App. 2002).

[19] The Foundation for Individual Rights in Education, for example, found that prior to the issuance of the 2011 DCL, 80 percent (135 of 168) of institutions that specified an evidentiary standard for adjudicating allegations of sexual harassment and sexual assault used the preponderance-of-the-evidence standard or lower. http://www.thefire.org/pdfs/8d799cc3bcca596e58e0c2998e6b2ce4.pdf.