UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

May 20, 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 follow up letter to Secretary John B. King, Jr., dated March 4, 2016, in response to my February 17, 2016 letter on the legal authority of the Department's Office for Civil Rights (OCR) to issue certain policy guidance interpreting Title IX of the Education Amendments of 1972 (Title IX) and the Department's implementing regulations.[1] On March 11, 2016, the Department provided a letter describing steps the Department will take to increase transparency and public input concerning the Department's guidance documents. I am pleased to respond more fully to your March 4 letter requesting additional background on behalf of the Secretary.

The Department appreciates your agreement that sexual harassment and violence as a form of sex discrimination must not be tolerated. Your letter expresses concern that the examples used in the 2010 Dear Colleague Letter (2010 DCL) on Harassment and Bullying of conduct that "can" constitute sexual harassment could lead a reader to believe that the conduct need not be unwelcome and create a hostile environment in order to obligate a school to respond under Title IX. As you know, this letter lists the examples of conduct that "can" constitute sexual harassment, while also specifying that sexual harassment is "unwelcome conduct of a sexual nature," and describing how hypothetical facts may establish that the "conduct was clearly unwelcome" and "sufficiently serious that it limited the student's ability to participate in and benefit from the school's education program." The 2010 DCL explains that all these factors are relevant in determining unlawful sexual harassment. Indeed, the same letter starts on page one with the statement that schools "may violate these civil rights statutes and the Department's implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees." Each of the five hypothetical examples of harassment in the 2010 DCL makes clear that to constitute

[1] 20 U.S.C. §§ 1681-1688; 34 C.F.R. Part 106.

unlawful harassment, the harassment must create a hostile environment that interferes with a student's ability to participate in the school's education programs and activities.[2]

At the same time, the Department's 2010 DCL addressed the concern some have expressed regarding an individual's speech protected by the First Amendment. It did so by cautioning schools that "[s]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression" and pointed to OCR's 2003 Dear Colleague Letter regarding the First Amendment.[3] More recently, OCR's April 29, 2014 Questions and Answers on Title IX and Sexual Violence confirmed that "OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title IX."[4] And the 2014 document reaffirmed the 2003 DCL and reinforced the valuable truism that schools "must respect the free-speech rights of students, faculty, and other speakers."[5]

Your letter also requests further clarification concerning what statutory or regulatory authority the 2010 DCL is construing when it describes the types of conduct that can constitute unlawful sexual harassment. The 2010 DCL provides guidance regarding the same statutory language that the Supreme Court has determined made peer sexual harassment actionable in some instances.[6] The Supreme Court held that Title IX's statutory language prohibiting a person from being "subjected to discrimination" includes "student-on-student sexual harassment, if sufficiently severe;" and that the statutory language prohibiting a person from being "excluded from participation in" and "denied the benefits of" an education program or activity "makes clear that, whatever else [Title IX] prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender."[7] The Supreme Court's ruling on the meaning of this text is of course dispositive for all recipients nationwide and the 2010 DCL provides description and

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[2] 2010 DCL at 4 ("The nature of the harassment, the number of incidents, and the students' safety concerns demonstrate that there was a racially hostile environment that interfered with the students' ability to participate in the school's education programs and activities."), 5-6 ("the harassment negatively affected the ability and willingness of Jewish students to participate fully in the school's education programs and activities (e.g., by causing some Jewish students to avoid the library and computer lab)" and therefore "discipline alone was likely insufficient to remedy a hostile environment."), 7 ("The conduct was clearly unwelcome, sexual (e.g., sexual rumors and name calling), and sufficiently serious that it limited the student's ability to participate in and benefit from the school's education program (e.g., anxiety and declining class participation)."), 8 ("The harassment created a hostile environment that limited the student's ability to participate in the school's education program (e.g., access to the drama club)."), 9 (The harassing conduct included behavior based on the student's disability, and limited the student's ability to benefit fully from the school's education program (e.g., absenteeism).").

[3] 2010 DCL at 2, note 8; Dear Colleague Letter: First Amendment (July 28, 2003).

[4] Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014) at 44.

[5] *Id.* at 43.

[6] Section 901 of Title IX provides that no person shall, on the basis of sex, may be "excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity." 20 U.S.C. § 1681.

[7] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999); *see also Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) ("Unquestionably, Title IX placed on the [school] the duty not to discriminate on the basis of sex, and when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex. We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.") (some quotation marks and internal citations omitted).

examples of how such harassment might manifest itself to aid schools in satisfying this statutory mandate. In addition, the 2010 DCL provides guidance regarding the Title IX regulations that 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 basis of sex.[8]

With regard to the April 4, 2011 Dear Colleague Letter on Sexual Violence (2011 DCL), your letter reiterates your concerns about that DCL's clarification that a school must use a preponderance-of-the-evidence standard of proof in its Title IX grievance procedures. Your letter says OCR's interpretation of the regulatory language requiring schools to provide for "equitable" resolution of complaints[9] is neither a necessary interpretation nor a well-advised one. The test courts apply when reviewing agency construction of regulatory language is whether the agency interpretation "sensibly conforms to the purpose and wording of the regulations."[10] OCR's interpretation of the regulatory term sensibly conforms with the word "equitable" because the preponderance-of-the-evidence standard "allows the parties to share the risk of error in roughly equal fashion;"[11] and it is consistent with the purpose of the regulation because it aligns with the Supreme Court case law on the appropriate standard of evidence applied in civil litigation and cases involving violations of civil rights laws.[12] Additionally, as a matter of practice, OCR's experience investigating Title IX complaints over decades, bolstered by the fact that most schools that had adopted a standard of proof prior to the 2011 DCL had used a preponderance-of-the-evidence standard in sexual violence cases,[13] has led OCR to believe that this interpretation is both well-advised and workable.[14]

Further, OCR made clear in the 2011 DCL—and continues to make clear in guidance and case resolution documents—that schools must apply Title IX consistently with due process rights. Specifically, the 2011 DCL outlines numerous protections for both parties, including equal access to and participation of counsel, and equal opportunities to present witnesses and evidence. The 2011 DCL also calls on schools to provide impartial investigations and hearings, to disclose any actual or potential conflicts of interest between the fact-finder or decision-maker and the parties, and to maintain documentation of all proceedings. In addition, the 2011 DCL notes that all persons involved in implementing the procedures (*e.g.,* Title IX coordinators, investigators, and adjudicators) must have training or experience handling complaints of sexual harassment and sexual violence, as well as employing the school's grievance procedures more generally. These

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[8] 34 C.F.R. § 106.31(b).

[9] 34 C.F.R. § 106.8(b).

[10] *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991); *see also Perez v. Mortgage Bankers Ass'n*, 575 U.S. ___, 135 S. Ct. 1199, 1209 (2015) (confirming that courts review agency decision making under the arbitrary and capricious standard).

[11] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (quotation marks and internal citations omitted).

[12] See 2011 DCL at 11, note 26; Feb. 17 response at 4, note 18.

[13] Feb. 17 response at 4, note 19; Heather Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 122 (Oct. 2002), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.

[14] In my February 17 letter, I identified some examples of times during multiple past administrations dating back to 1995 when OCR's enforcement practice concluded that colleges had violated Title IX by failing to employ the preponderance of the evidence standard of review in the colleges' investigations of sexual harassment and sexual violence. These examples demonstrate that OCR has long interpreted Title IX and its implementing regulations to require use of the preponderance of the evidence standard.

affirmative protections, of which the standard of proof is one component, comprise a system to ensure that proceedings are unbiased and equitable for all parties, and that they result in decisions that are supported by fair consideration of all the evidence.

As noted in my February 17 letter, the Department does not view OCR's Dear Colleague letters as having the force and effect of 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 which of their policies and practices are inconsistent with OCR's interpretations of the law and regulations. OCR's issuance of guidance documents like the 2010 DCL and 2011 DCL is consistent with the Administrative Procedure Act (APA), which authorizes agencies to issue guidance "to advise the public of the agency's construction of the statutes and rules which it administers" without engaging in notice-and-comment rulemaking.[15]

Again, I appreciate your careful attention to civil rights in our Nation's schools. If you have additional questions or concerns, please do not hesitate to 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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[15] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. at __, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995)); 5 U.S.C. § 553(b)(3)(A).