



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

July 15, 2016

Honorable John Kline  
Chairman  
House Committee on Education and the Workforce  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Kline:

Thank you for your letter dated June 30, 2016, requesting information regarding the definition of sexual harassment used by the Department's Office for Civil Rights (OCR) in its administrative enforcement of Title IX. I am sending an identical response to the cosigners of your letter.

The Department appreciates your agreement that addressing sexual harassment in our schools and institutions of higher education is a vital priority. Your letter expresses concern that OCR's letters resolving sexual violence cases against the University of Montana (UM) in 2013 and The Ohio State University (OSU) in 2014 conflict with the definition articulated by the Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), as to what constitutes unlawful sexual harassment.

OCR's definition of unlawful sexual harassment as articulated in guidance documents and resolution letters and agreements is consistent with the standards set forth in *Davis*. OCR's guidance documents issued subsequent to *Davis* by this and the prior two Administrations have made clear both that sexual harassment is "unwelcome conduct of a sexual nature"<sup>1</sup> and that sexual harassment is not actionable under Title IX unless it creates a "hostile environment."<sup>2</sup> In determining whether the sexual harassment creates a hostile environment, OCR has treated the phrase used to articulate the definition in *Davis* ("severe, pervasive, and objectively offensive") as consistent with the definition articulated by OCR ("sufficiently severe, persistent, or pervasive"). As OCR explained in the preamble to its 2001 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 [OCR] guidance ..., 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

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<sup>1</sup> Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (January 19, 2001) (2001 Revised Guidance) at 2, 7, [www.ed.gov/ocr/docs/shguide.pdf](http://www.ed.gov/ocr/docs/shguide.pdf); Dear Colleague Letter: Sexual Harassment Issues (January 25, 2006) (2006 DCL) (enclosing the 2001 Guidance and explaining that "the guidance outlines standards applicable to OCR's enforcement of compliance in cases raising sexual harassment issues"), [www.ed.gov/ocr/letters/sexhar-2006.pdf](http://www.ed.gov/ocr/letters/sexhar-2006.pdf); Dear Colleague Letter on Sexual Violence (April 4, 2011) (2011 DCL) at 3, [www.ed.gov/ocr/letters/colleague-201104.pdf](http://www.ed.gov/ocr/letters/colleague-201104.pdf); Questions and Answers on Title IX and Sexual Violence (April 29, 2014) (2014 Q&A) at 1 (A2, A3), [www.ed.gov/ocr/docs/qa-201404-title-ix.pdf](http://www.ed.gov/ocr/docs/qa-201404-title-ix.pdf).

<sup>2</sup> 2001 Revised Guidance at 5; 2011 DCL at 3; 2014 Q&A at 1 (A2, A-3).

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" [internal cite omitted], and the *Davis* Court cited approvingly to the underlying core factors described in [OCR's prior] guidance for evaluating the context of the harassment.<sup>3</sup>

Further, as articulated in the 2001 Guidance, OCR considers a variety of factors to determine if a hostile environment has been created and views the conduct from both a subjective and objective perspective.<sup>4</sup> The conduct can constitute a hostile environment only when, "judged from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances" it is "sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's education program."<sup>5</sup> OCR has consistently rejected the view that subjective offense to sexual harassment is sufficient to establish a Title IX violation. As stated in the 2001 Guidance and reiterated most recently in the 2014 Q&A, "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."<sup>6</sup>

The resolution letters and agreements in both the UM and OSU cases reiterate and apply these standards.<sup>7</sup> Based on evidence of under-reporting of sexual harassment and assault at UM, the resolution agreement in that case aimed to create a process for students to raise concerns and report complaints of sexual harassment and assault without feeling they bore the burden themselves of determining whether the sexual harassment they experienced created a hostile environment to a reasonable person in their circumstances. As a result, the resolution agreement called for UM's policies to clarify that reports of "unwelcome conduct of a sexual nature" can be made. Under the resolution agreement, when someone reports an incident of sexual harassment, that report triggers "an adequate, reliable, prompt, and impartial investigation" to determine whether the harassment created a hostile environment.<sup>8</sup> The UM resolution letter noted, "whether conduct is objectively offensive is a factor used to determine if a hostile environment has been created . . . the United States considers a variety of factors, from both a subjective and objective perspective, to determine if a hostile environment has been created."<sup>9</sup>

The resolution letter in OSU likewise stated that "[u]nder OCR policy, in determining whether a hostile environment has been created, the conduct in question must be considered from both a subjective and an objective perspective of a reasonable person in the alleged victim's position,

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<sup>3</sup> 2001 Guidance at vi (quoting *Davis*, 526 U.S. at 651 (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998))).

<sup>4</sup> 2001 Guidance at 5, n.38, n.39; 2014 Q&A at 1 (A-2, A-3).

<sup>5</sup> 2001 Guidance at 5, 22; 2014 Q&A at 1 (A-2, A-3).

<sup>6</sup> See 2001 Guidance at 22; 2014 Q&A at 44 (L-1).

<sup>7</sup> UM Resolution Letter at 4-5, 8-9, [www.ed.gov/documents/press-releases/montana-missoula-letter.pdf](http://www.ed.gov/documents/press-releases/montana-missoula-letter.pdf); UM Resolution Agreement at 2, <http://www2.ed.gov/documents/press-releases/montana-missoula-resolution-agreement.pdf>; OSU Resolution Letter at 2-3, 25-26, [www.ed.gov/documents/press-releases/ohio-state-letter.pdf](http://www.ed.gov/documents/press-releases/ohio-state-letter.pdf); OSU Resolution Agreement at 9, [www.ed.gov/documents/press-releases/ohio-state-agreement.pdf](http://www.ed.gov/documents/press-releases/ohio-state-agreement.pdf).

<sup>8</sup> UM Resolution Agreement at ¶ II.A.8.

<sup>9</sup> UM Resolution Letter at 9.

considering all the circumstances.”<sup>10</sup> The letter simply found that an OSU website that stated that “conduct alleged to constitute harassment is evaluated from the perspective of a reasonable person” was incomplete because OSU’s definition of sexual harassment “does not include a subjective (as well as objective) perspective.”<sup>11</sup>

Again, I appreciate your careful attention to addressing sexual harassment in our schools and institutions of higher education. 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,

A handwritten signature in black ink, appearing to read 'C. Lhamon', with a long horizontal flourish extending to the right.

Catherine E. Lhamon  
Assistant Secretary for Civil Rights

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<sup>10</sup> OSU Resolution Letter at 25.

<sup>11</sup> *Id.* at 26.