DEPARTMENT OF EDUCATION

Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Request for comments.

SUMMARY: The Assistant Secretary for Civil Rights, U.S. Department of Education (Department), is proposing to issue a new document that would replace the 1997 document entitled ''Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,'' issued by the Office for Civil Rights (OCR) on March 13, 1997 (1997 guidance). We are revising the guidance in limited respects in light of recent Supreme Court cases relating to sexual harassment in schools.

We intend the proposed revised guidance to serve the same purpose as the 1997 guidance. It continues to provide educational institutions with guidance about the standards under Title IX of the Education Amendments of 1972 (Title IX) that we use, and that institutions should use, to investigate and resolve allegations of sexual harassment of students.

We request from all interested parties written comments on the portions of the guidance revised to address the Supreme Court decisions.

DATES: We must receive your comments on or before December 4, 2000.

ADDRESSES: Address all comments regarding the revised guidance to Jeanette J. Lim, U.S. Department of Education, Office for Civil Rights, 400 Maryland Avenue, SW., room 5036 Switzer Building, Washington, DC 20202–1100. For all comments submitted by letter, you must include the term ''Sexual Harassment Guidance Comments.'' If you prefer to send your comments through the Internet, use the following address: ocr@ed.gov.

You must include the term ''Sexual Harassment Guidance Comments'' in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: Jeanette J. Lim. Telephone: (202) 205–5557 or 1–800–421–3481. If you use a telecommunications device for the deaf (TDD), you may call the TDD number at (202) 260–0471.

For additional copies of this document, individuals may call OCR's Customer Service Team at (202) 205–5557 or toll-free at 1–800–421–3481.

Individuals with disabilities may obtain this document in an alternative format (*e.g.,* Braille, large print, audiotape, or computer diskette) on request to OCR's Customer Service Team listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION:

Invitation To Comment

We invite you to submit comments regarding the proposed revised guidance in Appendix A that relates to the revisions made to address recent Supreme Court decisions.

During and after the comment period, you may inspect all public comments about this proposed revised guidance in room 5036, 330 C Street, SW., Washington, DC, between the hours of 9:30 a.m. and 5:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Public Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public record for this proposed guidance. If you want to schedule an appointment for this type of aid, you may call (202) 205–8113 or (202) 260–9895. If you use a TDD, you may call the Federal Information Relay Service at 1–800–877–8339.

Purpose and Scope of the Revised Guidance

In March 1997, we published ''Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties'' (62 FR 12034). We issued the guidance pursuant to our authority under Title IX, and our Title IX implementing regulations, to eliminate discrimination based on sex in education programs and activities receiving Federal financial assistance. It was grounded in longstanding legal authority establishing that sexual harassment of students can be a form of sex discrimination and is covered by Title IX. It was the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers regarding the realities of sexual harassment and best practices for responding to and preventing sexual harassment. We also made the document available for public comment.

Since the issuance of the guidance, the Supreme Court (Court) has issued several important decisions in sexual harassment cases, including two decisions specifically addressing sexual harassment of students: *Gebser* v. *Lago Vista Independent School District* (*Gebser*), 524 U.S. 274 (1998), and *Davis* v. *Monroe County Board of Education* (*Davis*), 526 U.S. 629 (1999). In an August 1998 letter to school superintendents and a January 1999 letter to college and university presidents, the Secretary of Education informed school officials that the *Gebser* decision did not change schools' obligations to take reasonable steps to prevent and eliminate sexual harassment as a condition of their receipt of Federal funding. In most important respects, the substance of the 1997 guidance was reaffirmed in the Court's opinions in *Gebser* and *Davis*, but we have determined that in certain areas the 1997 guidance could be strengthened by further clarification and explanation of the regulatory basis for the guidance.

We are, therefore, issuing this proposed revised guidance. The scope of the revisions is limited. They are intended to reaffirm our standards regarding sexual harassment, to clarify the regulatory basis for the 1997 guidance, and to illustrate how and why the administrative enforcement of Title IX's nondiscrimination requirements differs from private lawsuits for money damages. In making clarifications to the guidance flowing from the Supreme Court decisions, we also have taken the opportunity to make a few additional clarifications that we believe will be helpful to schools, including clarifying some examples from the 1997 guidance and adding some additional examples to illustrate the Title IX standards discussed in the guidance. It is important to note that these are just examples. Neither they nor the proposed revised guidance create new Title IX standards.

Title IX Compliance Standard

In *Gebser* and *Davis*, the Supreme Court addressed for the first time the appropriate standards for determining when a school district is liable under Title IX for money damages in a private lawsuit brought by a student who has been sexually harassed.

- The Court held in *Gebser* that a school can be liable for monetary damages if a teacher sexually harasses a student, an 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 student sexually harasses another student in the recipient's program and the conditions of *Gebser* are met, *i.e.,* an official who has authority to address the harassment

has actual knowledge of the harassment and is deliberately indifferent in responding to the harassment. The Court also clarified that deliberate indifference means that ''the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.'' *Davis*, 526 U.S. at 648.

The Court was explicit in *Gebser* and *Davis* that the liability standards established in these cases are limited to private actions for monetary damages. See, *e.g., Gebser*, 524 U.S. 283, and *Davis*, 526 U.S. at 639. The Court acknowledged, by contrast, the power of Federal agencies such as the Department to ''promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate,'' even in circumstances that would not give rise to a claim for money damages. See *Gebser*, 524 U.S. at 292.

The *Gebser* Court further explained that the standard for obtaining damages in private actions was grounded in its ''central concern'' arising out of the contractual nature of Title IX—that by accepting Federal funds, a recipient does not unintentionally expose itself to a large monetary damage award for discrimination of which it was unaware and which it would have been willing to correct (524 U.S. at 287). Under the Court's rulings, liability for money damages arising out of sexual harassment of students, either by employees or by other students, cannot arise unless the school has actual notice of the harassing conduct and is deliberately indifferent in response.

The *Gebser* Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX by Federal agencies, such as the Department's Office for Civil Rights (OCR). Under our Title IX regulations, we must first investigate complaints and determine whether our investigation ''indicates a failure to comply'' with the statute or regulations. If it does, we must attempt to secure compliance by voluntary means. This may include requiring the school to take remedial action necessary to overcome the effects of the discrimination (*Gebser*, 524 U.S. at 288 (citing the Department's regulations in 34 CFR 106.3)). Only if that fails, and the recipient is provided both an opportunity for a hearing and express findings of its failure to comply, will the recipient face the possibility of the loss of continued Federal funding. See 34 CFR 106.71, 100.8, 100.9. In contrast to the Court's concerns in *Gebser* about the possibility of an award of money damages in a private lawsuit for harassment the recipient had not known about, fund termination under administrative enforcement comes only after the recipient has notice of a violation and an opportunity to correct it (*Gebser*, 524 U.S. at 289). In addition, the financial sanction under administrative enforcement is limited to termination of, or refusal to grant or continue, Federal assistance (*Gebser*, 524 U.S. at 290). As recognized by the Court in *Gebser*, 524 U.S. at 287–292, our enforcement actions, therefore, do not raise the Court's concern that a school district not be held liable for large damage awards for past acts of which it was unaware.[1] Moreover, the Court's discussion makes clear that under this incremental administrative enforcement scheme, we identify a violation of Title IX or the Title IX regulations, and a school is obligated to take corrective action in response to this violation, at a point before either the statutorily required conditions applicable to termination of funds or the Court-mandated conditions applicable to obtaining money damages in private litigation have necessarily been satisfied. See *Gebser*, 524 U.S. at 287–292.

Accordingly, our proposed revised guidance does not change the standards that we use, and that a school district should use, to determine the school district's responsibility for sexual harassment of students. Rather, the proposed revised guidance clarifies that these standards apply to our ability to find a violation and seek corrective action in administrative enforcement of Title IX.

Because the focus of the guidance is on a school's administrative responsibilities under the nondiscrimination requirements of the Title IX statute and regulations, rather than its liability to private litigants, the proposed revised guidance no longer describes a school's compliance obligations in terms of ''liability'' or ''Title VII agency law.'' Instead, the proposed revised guidance explains the regulatory basis for a school's Title IX responsibilities to take effective action to prevent, eliminate, and remedy sexual harassment occurring in its program.

The Court Confirmed Important Principles From the 1997 Guidance

In *Davis*, *Gebser*, and a third opinion, *Oncale* v. *Sundowner Offshore Services, Inc.* (*Oncale*), 523 U.S. 75 (1998) (a sexual harassment case decided under Title VII of the Civil Rights Act of 1964 (Title VII)), the Supreme Court confirmed several fundamental principles articulated by the Department in the 1997 guidance. In these areas, no changes in the guidance are necessary. The Court—

- Endorsed the Department's power to set regulatory requirements under Title IX. The Court held that, for example, a school district's failure to promulgate a grievance procedure, as required by the Title IX regulations, does not constitute unlawful discrimination, but, nevertheless, such a regulatory requirement can be administratively enforced by the Department (*Gebser,* 524 U.S. at 292).
- Affirmed the Department's interpretation that student-on-student (peer) harassment is covered by Title IX and resolved a circuit court split on this issue (*Davis,* 526 U.S. at 633).
- Described the type of conduct that rises to the level of peer sexual harassment in a manner consistent with our guidance. The Court explained that conduct had to adversely affect the student's educational benefits or opportunities, such that the victim is effectively denied equal access to these benefits and opportunities (*Davis,* 526 U.S. at 648–651).
- Held that not all conduct of a sexual nature rises to the level of sexual harassment, *Davis,* 526 U.S. at 648–651, thus affirming our guidance to schools that teachers and school administrators need to use common sense and good judgment in responding appropriately to allegations of sexual harassment. See also *Oncale,* 523 U.S. at 79–82.
- Affirmed our position that the context of the behavior at issue is crucial in determining whether sexual harassment has occurred. See, *e.g., Davis,* 526 U.S. at 650 (citing our 1997 sexual harassment guidance); *Oncale,* 523 U.S. at 81.
- Held that sexual harassment may constitute discrimination under Title VII even if the harasser and victim of harassment are of the same sex (*Oncale,* 523 U.S. at 79–82). This is consistent with the Department's position in the 1997 guidance that same-sex sexual harassment can constitute discrimination under Title IX.
- Made clear that, although the applicability of Title VII agency principles in private Title IX lawsuits for money damages is limited, it is still appropriate to look to Title VII principles in determining what constitutes sexual harassment (*Davis,* 526 U.S. at 651, citing *Meritor Savings*

[1] It is the position of the United States Government 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.*

Bank, FSB v. *Vinson* (*Meritor*), 477 U.S. 57, 67 (1986) (Title VII case)).

Discussion of Important Clarifications

I. Liability Section Deleted and Guidance Refocused: Basis for School's Responsibility Is the Title IX Regulations, Not Title VII Agency Law

The 1997 guidance contained a section titled ''Liability of a School for Sexual Harassment.'' To the extent this section could be interpreted as being applicable to a school's liability in a private lawsuit for monetary damages, the proposed revised guidance clarifies that the guidance addresses the Department's administrative enforcement of Title IX; it does not address standards applicable to private litigation for monetary damages. Accordingly, the proposed guidance replaces this section with a new section that focuses on a school's responsibilities to prevent and eliminate sexual harassment discrimination in its programs as a condition of its receipt of Federal financial assistance, as summarized in the following section.

A. Sexual Harassment by Employees

The 1997 guidance indicated that when teachers or other employees, when providing aid, benefits, or services to students, abuse or take advantage of their status as a person of authority to engage in sexual harassment, a school is responsible for that harassment even if other school officials did not find out until later that the harassment occurred.[2] The 1997 guidance described determinations about a school's responsibility in these cases, in part, in terms of the Title VII agency-derived concept that if a teacher or other employee abuses the authority given him or her by the school, it is as if the school itself harassed the student (62 FR 12039). The Gebser Court rejected Title VII's agency principles for the purpose of determining a school's liability for monetary damages under Title IX.[3] However, the concept that in some cases a school must take action to remedy the effects of an employee's discrimination exists in the longstanding Title IX regulations without reliance on Title VII agency law.[4]

The Department's Title IX implementing regulations prohibit sex-based discrimination in the operation of the recipient's programs and activities.[5] Among other things, a recipient cannot, on the basis of sex, treat students differently; provide different aid, benefits, or services to students; deny or limit aid, benefits, or services to students; or otherwise limit a student's enjoyment of a right, privilege, or opportunity (34 CFR 106.31). (For brevity and clarity, the regulatory requirements are generally summarized as a school's obligation to ensure that a student is not denied or limited in his or her ability to participate in or benefit from the school's program on the basis of sex.) The Department has historically interpreted the regulatory requirements to reflect Congress' understanding that Title IX's prohibitions against discrimination are not limited to official policies and practices established by the school district or high-level officials to govern school programs, activities, benefits, and services. Sex-based discrimination against individual students can also occur if employees, as they are carrying out their day-to-day job responsibilities for providing aid, benefits, or services to students, (1) condition these benefits on the student's submission to sexual advances, or (2) otherwise take advantage of their position of responsibility to engage in actions that deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex. (For brevity and clarity, the proposed revised guidance generally refers to these types of employee harassment as harassment that occurs in the context of providing aid, benefits, or services to students and causes a denial or limitation of a benefit.)

Thus, the regulations do not distinguish discrimination by the recipient directly, *e.g.*, actions by the school board or high-level school officials, from discrimination that occurs if an employee is acting in the context of providing aid, benefits, or services to students and the employee engages in actions that deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex. This is because a school, in large part, can only operate its programs and activities through the responsibilities it gives its teachers and other employees. The key under the Title IX regulations is that the recipient cannot discriminate in providing aid, benefits, or services to students. See 34 CFR 106.31(b). If the recipient provides aid, benefits, or services to students through its employees, and an employee, in the context of providing these to students, engages in actions that deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex, the recipient is responsible for the discrimination.

What does it mean to be responsible for the discrimination? The Title IX regulations require a written assurance from every recipient stating that all of its education programs and activities will be operated in compliance with Title IX and the regulations, including committing itself to take whatever remedial action is necessary to eliminate discrimination in its programs (34 CFR 106.4(a) (citing the remedial requirements of 106.3(a))). Section 106.3(a) of the regulations requires that

---

[2] This did not mean that, when the school only became aware of this type of harassment after it occurred, the school was at risk of losing its Federal funding solely because the harassing conduct had occurred. As required by the statute, OCR always provides schools with the opportunity to take reasonable steps to end the harassment, prevent its recurrence, and remedy the effects of the harassment once the school learns about the harassment—either through a student complaint, notice from OCR, or other means discussed in the guidance under ''Notice of Employee, Peer, or Third Party Harassment.'' This issue is discussed further in the section of the proposed revised guidance entitled ''OCR Case Resolution.''

[3] As discussed in part II of this notice regarding the definition of harassment, the Supreme Court's distinction between Title IX and Title VII is limited to liability standards. The Title VII law continues to be useful in determining what conduct constitutes discrimination on the basis of sex under Title IX.

[4] 34 CFR 106.3. Several days after the *Gebser* decision, the Court handed down two decisions in Title VII sexual harassment cases: *Burlington Industries, Inc.* v. *Ellerth,* 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton,* 524 U.S. 775 (1998). These cases affirmed that under Title VII agency principles, employers are liable in monetary damages for the acts of their supervisors who sexually harass subordinate employees. The Court also held that if the victim does not suffer a tangible, adverse employment action as a result of the harassment, the employer can assert an affirmative defense if it can show both—(1) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) that the employee unreasonably failed to take advantage of these preventative or corrective opportunities provided by the employer or to avoid harm otherwise. These decisions do not affect OCR standards for several reasons. The Court in *Gebser* was clear that its liability analysis under Title VII agency law does not apply to Title IX, nor, more generally, do standards for private monetary relief apply to OCR's administrative enforcement of the civil rights laws. Moreover, whether or not the victim of harassment uses available grievance procedures is different in the school context where the degree of influence of the employee harasser and the age of the student may prevent effective use of grievance procedures. Finally, the administrative enforcement process itself makes this type of affirmative defense inapplicable. As is discussed in more detail in the section of the guidance entitled ''OCR Case Resolution,'' if an OCR investigation reveals that a school has taken all appropriate, timely corrective action in response to information about sexual harassment by its employees—whether it learned about the harassment from the victim, from OCR, or some other way—OCR will consider the case resolved and will take no further action against the school.

[5] Title IX covers all of the operations of federally assisted educational institutions and entities (20 U.S.C. 1687). The guidance addresses harassment that occurs in education programs and activities covered by Title IX and, thus, assumes in all cases that the harassment occurs in connection with the academic, educational, extracurricular, athletic, and other programs of the school. For more information about the scope of coverage, see 65 FR 26426 (May 5, 2000).

if a recipient discriminates on the basis of sex, it must take action necessary to overcome the effects of the discrimination. The *Gebser* Court expressly affirmed this type of remedial action required under our regulations, including remedying the effects of the harassment on the victim (524 U.S. at 288). Thus, under the regulations, if the recipient discriminates against a student, the recipient must remedy the effects of that discrimination on the victim. As previously discussed, this includes situations in which discrimination occurred because an employee of the recipient, in the context of providing aid, benefits, or services to students, took action that denied or limited a student's ability to participate in or benefit from the school's program.

It has been our longstanding interpretation of the civil rights statutes and our regulations that the school's responsibility to take reasonable steps to remedy the effects of its discrimination is triggered when the violation occurs (*e.g.*, a school employee, in the context of providing aid, benefits, or services to students, engages in action that denies or limits the student's ability to participate in or benefit from the school's program), regardless of how or at what point other school authorities learned of the discrimination. For instance, if we investigated a complaint and found that a teacher of an advanced placement math class routinely and without an educational basis gave female students lower grades than their male counterparts, we would find that the school has discriminated against students on the basis of sex and that corrective action is required. In order to resolve the discrimination in providing aid, benefits, or services, of which other school officials subsequently became aware through our investigation, we would not only require a recipient to take proactive steps to end the discrimination and prevent its recurrence, but would also require the recipient to remedy the effects of the discrimination, including effects on the victims.

Thus, the proposed revised guidance clarifies that the school discriminates if a teacher or other employee, in the context of providing aid, benefits, or services to students, engages in harassing conduct that causes a denial or limitation of a student's ability to participate in or benefit from the school's program on the basis of sex. The proposed revised guidance also clarifies that, because the school is responsible for this discrimination, the school is responsible both for taking reasonable proactive steps to end the harassment and prevent its recurrence and for remedying any effects of the sexual harassment on the victim.

If, on the other hand, an employee harassed a student outside of this context, *i.e.,* the harassment occurred in the school's program, but not in the context of providing aid, benefits, or services to students, the school is responsible for the sexual harassment under the same standards that apply to peer and third party sexual harassment. These have not changed from the 1997 guidance. In these instances, if the harassment was sufficiently serious to effectively limit or deny a benefit, but the school took prompt, effective steps once it learned or should have learned of the harassment to end it and prevent its recurrence, the school has avoided violating Title IX.

In determining whether an employee's harassing conduct occurs in the context of providing aid, benefits, or services to students, it is important to consider all the circumstances related to the harassment, including the position of the harasser and the age and level of education of the students involved. The Court recognized in *Davis* that school officials and employees have a great degree of supervision, control, and disciplinary authority over all aspects of elementary and secondary school-age children's conduct (526 U.S. at 646). Moreover, school-age children are generally expected and required to obey adults as part of their participation in school programs and activities.

Thus, the proposed revised guidance outlines factors that we will consider in determining whether the harassing conduct occurred within the context of the employee's provision of aid, benefits, or services to students. These factors include the age of the student, the authority generally given to the harassing employee, the actual degree of influence of the harassing employee over the student, as well as the place, time, and nature of the harassing conduct. These determinations regarding the context of the harassment need to be made on a case-by-case basis.

B. Peer and Third Party Sexual Harassment

The standards described in the 1997 guidance applicable to peer and third party harassment are the same in the proposed revised guidance.

C. Effect of Grievance Procedures

The discussion of liability in the 1997 guidance contained a section on the effect of grievance procedures. To the extent this section could be interpreted to guide courts regarding liability for monetary damages, this section was affected by *Gebser* and *Davis.* This proposed revised guidance clarifies that its focus is on the effect of grievance procedures in our enforcement actions.

Schools are required by the Title IX regulations to disseminate a policy against sex discrimination and to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment. The *Gebser* Court specifically affirmed the Department's authority to enforce this requirement administratively in order to carry out Title IX's nondiscrimination mandate (524 U.S. at 292). Strong policies and effective grievance procedures are essential in order to let students and employees know that sexual harassment will not be tolerated, to ensure that they know how to report it, and to let students and employees know that students can report harassment without fear of adverse consequences.

If a school does not have effective policies and procedures, as required by the Title IX regulations, its own inaction may hamper early notification and intervention and may permit a sexually hostile environment to exist in its program and activities. In this case, we would require the school to take corrective action, including remedying the effects of the harassment on the victim.

D. OCR Case Resolution

The 1997 guidance discussion of liability contained a subsection titled ''OCR Case Resolution.'' Because the focus of the proposed revised guidance is specifically OCR enforcement, this section has been retained and clarified. This section lets schools know that, even if the school discriminates, the school does not immediately lose Federal funds on that basis alone. Consistent with the Title IX statute, we provide recipients with the opportunity to take timely and effective corrective action before issuing a formal finding of violation.

E. Notice of Harassment

The ''notice'' section has been moved up in the proposed revised guidance to reflect its connection to the discussion of a school's responsibility for remedying sexual harassment. For the reasons discussed in the following paragraphs, although additional clarification has been provided, this section has not been substantively revised.

i. In Cases in Which Notice is Required To Trigger a School's Responsibility, a School Will Be Responsible if It Knew or Should Have Known About the Harassment

The 1997 guidance stated that a school has ''notice'' of sexual harassment if it ''knew, or in the exercise of reasonable care should have known,'' about the harassment. The proposed revised guidance retains this notice standard. The type of constructive notice described in the 1997 guidance has historically been the way we hold recipients responsible for complying with the civil rights laws, and it is a reasonable basis for holding a school responsible for taking appropriate action in response to sexual harassment. It does not require a school to predict future behavior or to be aware that harassment is occurring or has occurred if there is no reasonable basis for the school to know about it. Instead, the guidance describes a reasonable duty to fully investigate if there are obvious problems, such as the report of some incidents of harassment or a widespread graffiti campaign in public areas.

The *Gebser* Court rejected a constructive notice, or ''should have known'' standard, as the basis for imposing monetary damages because of its central concern that a recipient should not be exposed to large damage awards for discrimination of which it was unaware. This aspect of the *Gebser* opinion, however, is not relevant in our enforcement actions in which recipients voluntarily take corrective action as a condition of continued receipt of Federal funds. Moreover, as stated previously in the section entitled ''Title IX Compliance Standard,'' under our administrative enforcement, recipients are always given actual notice and an opportunity to take appropriate corrective action before facing the possible loss of Federal funds.

ii. Notice Can Be Provided to Any Responsible School Employee

Under *Gebser,* in order to receive monetary damages, notice of sexual harassment must be given ''at a minimum, [to] an official of the recipient entity with authority to take corrective action to end the discrimination'' (524 U.S. at 290). The 1997 guidance, however, specifically rejected the position suggested by some parties that notice must be given to managerial or designated employees. In fact, the 1997 guidance made clear that an employee who receives notice of the harassment, if he or she does not have the authority to address the harassment, may still be required to report the harassment to the appropriate school official with authority to take corrective action.

The proposed revised guidance retains and clarifies this position as a condition for continued receipt of Federal funds. For purposes of our administrative enforcement of Title IX, the Department will consider a school to have notice of harassment and a duty to respond if a responsible school employee has notice of the harassment. A responsible school employee would include any employee who either has the authority to take action to address harassment or has the duty to report sexual harassment or other misconduct by students or employees to appropriate school authorities, as well as an individual who a student could reasonably believe has the authority to either address the harassment or the responsibility to report it to someone with the authority to address it. This interpretation of the regulations is fully consistent with *Gebser* and *Davis.* As previously discussed, the *Gebser* Court recognized that Title IX responsibilities to respond to harassment can be triggered before all statutorily required conditions for fund termination have been satisfied, including the condition requiring formal notice of violation to appropriate school officials.

In addition, this requirement is based on a reasonable expectation of what steps a school can and should take to fulfill its responsibilities under the regulations to respond to and prevent discrimination in its education program. As the 1997 guidance recognized, it is reasonable to expect that teachers and other employees will see, or be told, that sexual harassment is occurring, and, thus, schools should make sure that their employees at least report what they see or what is told to them. Moreover, young children may not understand the formal status of, or lines of authority of, school employees and may reasonably believe that an adult, such as a teacher or school nurse, is a person that they can and should tell about incidents of sexual harassment.

II. Definition of Sexual Harassment

The section from the 1997 guidance titled ''Severe, Persistent, or Pervasive'' has been re-titled ''Factors Used to Evaluate Sexual Harassment.'' It now contains four subsections:

A. Types of Harassment

In the 1997 guidance, we described two different types of sexual harassment: *quid pro quo* and hostile environment (62 FR 12038). As discussed in the following paragraphs, our description of these terms in the 1997 guidance is consistent with our regulations and with applicable case law, and, therefore, these terms have been retained for their usefulness in determining whether conduct is sexual harassment. We have modified the proposed revised guidance to better represent these concepts, and the discussion of *quid pro quo* and hostile environment harassment has been moved from the introduction to this section.

In *Burlington Industries, Inc.* v. *Ellerth (Ellerth),* 524 U.S. 742 (1998)—a Title VII sexual harassment case—the Court discussed the usefulness of the distinction between *quid pro quo* and hostile environment harassment. The Court held that this distinction continues to be relevant in determining whether conduct rises to the level of discrimination. The Court found that *quid pro quo* harassment requires a tangible employment action to result from the harassment. If this is not the case, *e.g.,* a harasser threatens but does not take action if the victim refuses to succumb to the harasser's sexual advances, the conduct is considered hostile environment harassment. The conduct must then be sufficiently serious to alter the conditions of the victim's employment. Our description of these terms in the 1997 guidance is consistent with our regulations and with the Court's holdings in *Ellerth,* and, therefore, these terms have been retained for their usefulness in determining whether conduct is sexual harassment. The proposed revised guidance has modified the discussion of the basis of a school's responsibility for harassment by teachers and other employees, including both *quid pro quo* and hostile environment harassment, to clarify the regulatory basis for that responsibility.

B. Quid Pro Quo Harassment

In addition to the clarifications previously outlined, the section from the 1997 guidance titled ''Recipient's Response'' has been modified slightly to eliminate references to *quid pro quo* harassment because, in determining an appropriate response, the proposed revised guidance focuses instead on whether or not the harassment by a teacher or other employee occurred in the context of the employee's provision of aid, benefits, or services to students.

C. Hostile Environment Harassment

As explained in the following paragraphs, in the proposed revised guidance the definition of conduct that creates a hostile environment is substantively the same as in the 1997

guidance, but the discussion contains several revisions to clarify that the *Davis* definition and the guidance definition are consistent.

The *Davis* Court concluded that student-on-student sexual harassment ''if sufficiently severe can likewise rise to the level of discrimination actionable under the statute'' (526 U.S. at 650). The Court held that to support a claim for damages, student-on-student sexual harassment must be ''so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits'' (*Davis,* 526 U.S. at 650). However, physical exclusion is not necessary; it is enough if the student victims of sexual harassment can show that the harassment ''so undermined and detracts from the victims'' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.'' *Id.* (citing *Meritor,* 477 U.S. at 67).

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. The Court's definition, like the Department's 1997 guidance, is a contextual description 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. See 62 FR 12045 (the conduct must have limited the student's ability to participate or altered the conditions of the student's educational environment); 34 CFR 106.31(b) (prohibiting recipients from denying or limiting a student's ability to participate in or benefit from the school's program).

This requirement is consistent with *Meritor,* a Title VII case cited approvingly by the *Davis* Court, which requires sexual harassment to be ''sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment' '' (477 U.S. at 67).[6] See also *Harris* v. *Forklift Systems, Inc.,* 510 U.S. 17, 22 (1993) (which applied *Meritor* to hold that a victim need not show serious psychological injury as long as she can show the conduct created an abusive or hostile environment). The proposed revised guidance clarifies some examples given in the 1997 guidance to make clear that peer-on-peer acts are not sexual harassment under Title IX if they merely make the student victim feel upset. As the discussion in 62 FR 12041 makes clear, our definition reflects a continuum of severity. The ''or'' merely indicated that a particularly severe incident may not need to be persistent to be a problem under Title IX.

Under *Davis,* determining whether harassment is actionable ''depends on a constellation of surrounding circumstances, expectations, and relationships'' (526 U.S. at 651 (citing *Oncale,* a Title VII case)). Similarly, the core of the 1997 guidance's definition of harassment is the detailed discussion of these underlying factors (for example, the age, relationship, and numbers of people involved), and the *Davis* Court cites the factors in the 1997 guidance approvingly (526 U.S. at 651).

In addition, like the Court in *Davis,* we require schools to respond to conduct that, from an objective perspective, is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program (62 FR 12041). In *Oncale,* 523 U.S. at 82, the Court emphasized that the objective severity of harassment is to be based on the perspective of a reasonable person in the victim's position '' 'considering all the circumstances' '' (citing *Harris,* 510 U.S. at 23, in which the Court used a ''reasonable person'' standard to determine whether sexual conduct constituted sexual harassment).

Finally, even looking only at the words the Court used in *Davis,* this would not change our compliance standard for administrative enforcement in cases of peer harassment. That is, we will always determine whether the conduct is objectively offensive, and some level of severity is always required in order to limit or deny a student's ability to participate in or benefit from a school's program. In addition, a recipient's obligation, upon notice of peer harassment, to stop the harassment and prevent its recurrence is related to the pervasiveness of the harassment.

Thus, although the Court referred to the conduct as being ''severe, pervasive, and objectively offensive'' and the 1997 guidance referred to the conduct as being ''severe, persistent, or pervasive . . . from both a subjective and objective perspective,'' both inform a contextual description intended to identify elements to evaluate whether the conduct is sufficiently serious that it can affect a student's rights under Title IX.

D. Welcomeness

This section from the 1997 guidance has been moved, but remains the same in substance.

III. FERPA

The Department administers the Family Educational Rights and Privacy Act (FERPA), which establishes requirements pertaining to disclosure of information from a student's ''education records'' without the consent of the student. Thus, the requirements of FERPA are involved if there are questions about disclosure of information from a student's ''education records'' in cases of student-on-student harassment. As noted in the 1997 guidance, the Department interprets FERPA generally to prevent 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. There are exceptions in the case of a sanction that directly relates to the person who was harassed, such as an order that the harasser stay away from the victim, or sanctions related to offenses for which there is a statutory exception, such as crimes of violence or certain sex offenses in postsecondary institutions. Furthermore, if we are conducting a civil rights investigation, FERPA does not prohibit schools from disclosing to us information from a student's ''education records,'' including information about applicable sanctions or discipline (20 U.S.C. 1232g(b)(1)(C)).

The 1997 guidance promised additional guidance in this area. Accordingly, the revised guidance clarifies that the Department interprets FERPA to permit a student who filed a harassment complaint to learn the outcome of his or her complaint, *i.e.,* to learn whether the complaint was investigated and whether harassment was found—because this information directly relates to the victim. However, it remains the Department's position that FERPA prevents a school from disclosing to a victim the sanction or discipline imposed upon the student found to have harassed the victim (unless, as previously described, the sanction is directly related to the victim or there is a statutory exception). The

[6] In fact, the cites to Title VII cases by the *Davis* Court throughout its discussion of actionable harassment under Title IX indicate that the Court did not intend to change the definition of sexual harassment but that the Court did intend that Title VII law continue to be relevant in determining what constitutes sexual harassment under title IX.

Department recognizes that information about the sanctions is important to the victim's remedy because this information enables the victim to determine whether the school responded appropriately to the complaint. Thus, the Department has proposed and supported a statutory amendment to FERPA to permit this disclosure.

Reiteration of Important Aspects of the 1997 Guidance

A. Importance of Common Sense and Judgment

As with the 1997 guidance, the proposed revised guidance focuses on the school's responsibility, and important role, in taking reasonable steps to eliminate and prevent sexual harassment. A significant number of students, both male and female, have experienced sexual harassment, which can interfere with a student's academic performance and emotional and physical well-being. Preventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn. The proposed revised guidance is important because school personnel who understand their obligations under Title IX are in the best position to prevent harassment and to lessen the harm to students if, despite their best efforts, harassment occurs.

Several sexual harassment issues involving young students that were widely reported in the press at the time the 1997 guidance was being developed were discussed in the preamble to the guidance. The preamble noted that these incidents provide a good example of how the guidance can assist schools in understanding what is sexual harassment and in formulating appropriate responses. As the Department stated then, a kiss on the cheek by a first grader does not constitute sexual harassment.

Since the 1997 guidance was published, we have heard from educators, parents, and other interested parties that some schools continue to overreact to incidents of childish behavior or immature conduct that do not rise to the level of sexual harassment. Accordingly, the proposed revised guidance, like the 1997 guidance, illustrates that in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX. School personnel should consider the age and maturity of students in responding to allegations of sexual harassment. For example, age is relevant to determining whether a student welcomed the conduct and to determining whether the conduct is serious enough to rise to the level of sexual harassment. Age is a factor to be considered by school personnel when determining how best to inform students about a school's policies and procedures in order to prevent sexual harassment from occurring.

However, we have also learned that some schools, perhaps out of confusion regarding the legal standards for liability for money damages for sexual harassment, or perhaps out of a misplaced notion that ''kids will be kids,'' continue to avoid responding to serious incidents of sexual harassment. If harassment has occurred, the critical issue under Title IX is whether the school recognized that sexual harassment can constitute sex discrimination and whether the school took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, address the effects of the harassment. As the proposed revised guidance makes clear, if harassment has occurred, doing nothing is always the wrong response. However, depending on the circumstances, there may be more than one right way to respond. The important thing is for school employees or officials to pay attention to the school environment and not be afraid to act in a reasonable, commonsense manner in response to sexual harassment, often responding as they would to other types of serious misconduct. Accordingly, important discussions from the 1997 guidance regarding the recipient's response, requests for confidentiality, prevention strategies, and effective grievance procedures remain intact in the proposed guidance.

In addition, in describing the obligation of the school to take action when harassment occurs, in the proposed revised guidance the term ''effective'' has generally been substituted for the term ''appropriate.'' This is a clarification intended to underscore the need for action to be effective and does not represent a change from the 1997 guidance. This clarification should be read consistently with the need to use common sense and good judgment. It does not mean that there is any need for schools to overreact and impose the most severe sanctions, *e.g.,* suspension or expulsion of students who have engaged in harassment, if other sanctions are consistent with the nature of the misconduct and can reasonably be expected to be effective. As recognized in the guidance, if a school's initial steps are ineffective, a series of escalating steps may be necessary in order for the action to be effective in responding to the harassment.

B. Applicability of Guidance to Same-Sex Harassment

The 1997 guidance explained that Title IX protects any ''person'' from sex discrimination. Thus, Title IX protects both male and female students from sexual harassment, and schools have an obligation to deal with complaints of sexual harassment equally whether the complainant is male or female. Additionally, the guidance explained that Title IX prohibits sexual harassment regardless of whether the harasser and the person being harassed are members of the same sex, a position subsequently supported by the Supreme Court's 1998 decision under Title VII in *Oncale.* The 1997 guidance explained that all students, regardless of their sexual orientation, are protected from sexual harassment under Title IX, and this remains our position in the proposed revised guidance. By promptly and effectively addressing sexual harassment discrimination occurring in education programs or activities, school personnel are in the best position to ensure a safe and nondiscriminatory learning environment for every student. The focus of the proposed revised guidance, like the 1997 guidance, is harassment involving conduct of a sexual nature; thus, both explain that gender-based harassment is beyond their scope. Of course, gender-based harassment, including harassment based on sex-stereotyping, can also be a violation of Title IX.

The harassment of students on the basis of sexual orientation is a serious problem. As noted in the 1997 guidance and in the proposed revised guidance, some State and local laws may prohibit discrimination on the basis of sexual orientation, and, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other Federal legal authority. In January 1999 we joined with the National Association of Attorneys General in issuing the publication ''Protecting Students from Harassment and Hate Crime, A Guide for Schools'' (Guide). The Guide provides educators with practical guidance for protecting students from all forms of harassment, including harassment on the basis of sexual orientation. As the Secretary of Education, Richard Riley, stated in the introduction to the Guide: ''Our schools owe students a safe environment that is conducive to learning and that affords

all students an equal opportunity to achieve high educational standards. Harassment and hate crimes undermine these purposes and may cause serious harm to the development of students who are victimized by this behavior.'' The Guide is a useful resource that school officials may use to ensure that all students attend schools in a safe environment free from all forms of harassment. The Guide is available on our web page at:

http://www.ed.gov/pubs/Harassment.

C. Additional Information on the Development of the 1997 Guidance

Because the substance of the revised guidance has not changed significantly, many of the comments that we received from interested parties in response to a draft of the 1997 guidance, and our responses to those comments, remain relevant and unchanged. We, therefore, are attaching that portion of the 1997 **Federal Register** notice as Appendix B to this document.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF), on the Internet at either of the following sites:

http://ocfo.ed.gov/fedreg.htm
http://www.ed.gov/news.html

To use PDF, you must have Adobe Acrobat Reader, which is available free at either of the previous sites. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this notice is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: http://www.acess.gpo.gov/nara/index.html.

Dated: October 26, 2000.

Norma V. Cantu,

Assistant Secretary for Civil Rights.

Appendix A—Sexual Harassment Guidance: Harassment of Students [1] by School Employees, Other Students, or Third Parties Summary of Contents

First Amendment

Introduction. Title IX of the Education Amendments of 1972 (Title IX) and the Department of Education's implementing regulations prohibit discrimination on the basis of sex in federally assisted education programs and activities.[2] The Supreme Court, the Congress, and Federal executive departments and agencies, including the Department of Education, have recognized that sexual harassment of students can constitute discrimination prohibited by Title IX.[3] This guidance focuses on a school's 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.

Sexual harassment can include unwelcome verbal, nonverbal, or physical conduct of a sexual nature. If a student is sexually harassed, the harassing conduct can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program. This guidance describes the regulatory basis for a school's compliance responsibilities under Title IX, outlines the circumstances under which sexual harassment may constitute discrimination prohibited by the statute and regulations, and provides information about actions that schools should take to prevent sexual harassment or to remedy it effectively if it does occur.

Applicability of Title IX. Title IX applies to all public and private educational institutions that receive Federal funds, *i.e.,* recipients, including, but not limited to, elementary and secondary schools, school districts, proprietary schools, colleges, and universities. The guidance uses the terms ''recipients'' and ''schools'' interchangeably to refer to all of those institutions. The ''education program or activity'' of a school includes all of the school's operations.[4] This means that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, 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.

It is important to recognize that Title IX's prohibition against sexual harassment does not extend to legitimate nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment.[5] Similarly, one student's demonstration of a sports maneuver or technique requiring contact with another student will not be considered sexual harassment. However, in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment.

A student may be sexually harassed by a school employee,[6] 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 [7] 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.[8] An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.[9]

Although Title IX does not prohibit discrimination on the basis of sexual orientation,[10] [11] sexual harassment directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX. For example, if students heckle another student with comments based on the student's sexual orientation (*e.g.,* ''gay students are not welcome at this table in the cafeteria''), but their actions do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX. On the other hand, harassing conduct of a sexual nature directed toward gay or lesbian students (*e.g.,* if a male student or a group of male students target a gay student for physical sexual advances) may create a sexually hostile environment and, therefore, may be prohibited by Title IX.

Although a comprehensive discussion of gender-based harassment is beyond the scope of this guidance, it is also important to recognize that gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, may be a form of sex discrimination that violates Title IX and the Title IX regulations if it rises to a level that denies or interferes with benefits, services, or opportunities and is directed at individuals because of their sex.[12] For example, the repeated sabotaging of female graduate students' laboratory experiments by male students in the class could be the basis of a violation of Title IX. In assessing all related circumstances to determine whether a hostile environment exists, incidents of gender-based harassment combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual

harassment alone would be sufficient to do so.[13]

Title IX Regulatory Compliance Responsibilities. As a condition of receiving funds from the Department, a school is required to comply with Title IX and the Department's Title IX regulations, which spell out prohibitions against sex discrimination. The law is clear that sexual harassment may constitute sex discrimination under Title IX.[14]

Recipients specifically agree, as a condition for receiving Federal financial assistance from the Department, to comply with Title IX and the Department's Title IX regulations. The regulatory provision requiring this agreement, known as an assurance of compliance, specifies that recipients must agree that education programs or activities operated by the recipient will be operated in compliance with the Title IX regulations, including taking any action necessary to remedy its discrimination or the effects of its discrimination in its programs.[15]

The regulations set out the basic Title IX responsibilities a recipient undertakes when it accepts Federal financial assistance, including the following specific obligations.[16] A recipient agrees that, in providing any aid, benefit, or service to students, it will not, on the basis of sex—

- Treat one student differently from another in determining whether the student satisfies any requirement or condition for the provision of any aid, benefit, or service; [17]
- Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; [18]
- Deny any student any such aid, benefit, or service; [19]
- Subject students to separate or different rules of behavior, sanctions, or other treatment; [20]
- Aid or perpetuate discrimination against a student by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any benefit, service, or opportunity to students; [21] and
- Otherwise limit any student in the enjoyment of any right, privilege, advantage, or opportunity.[22]

For the purposes of brevity and clarity, this proposed revised guidance generally summarizes this comprehensive list by referring to a school's obligation to ensure that a student is not denied or limited in the ability to participate in or benefit from the school's program on the basis of sex.

The regulations also specify that, if a recipient discriminates on the basis of sex, the school must take remedial action to overcome the effects of the discrimination.[23]

In addition, the regulations establish procedural requirements that are important for the prevention of, or correction of, sex discrimination, including sexual harassment. These requirements include issuance of a policy against sex discrimination [24] and adoption and publication of grievance procedures providing for prompt and equitable resolution of complaints of sex discrimination.[25] The regulations also require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance.[26]

As explained in this guidance, based on these regulatory requirements, schools need to recognize and respond to sexual harassment of students by teachers and other employees, by other students, and by third parties. This guidance explains how the requirements of the Title IX regulations apply to situations involving sexual harassment of a student and outlines measures that schools should take to ensure compliance with these requirements.

Harassment by Teachers and Other Employees. Sexual harassment of a student by a teacher or other school employee may be discrimination in violation of Title IX.[27] This guidance outlines the circumstances under which an employee's actions can cause discrimination and trigger the school's responsibility for taking effective corrective action. In sum, a recipient's responsibility for employee harassment is distinguishable based on whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students. If the answer is yes, as described in the next paragraph, this triggers the recipient's responsibilities. What this means for purposes of OCR's administrative requirements is that the recipient must take reasonable steps to eliminate the hostile environment caused by the harassment, to prevent its recurrence, and to remedy its effects. (Of course, under OCR's administrative enforcement, a recipient will always have actual notice and an opportunity to take appropriate corrective action before facing the loss of Federal funds.) By contrast, if the harassment occurs in the school's program, but not in the context of the employee's provision of aid, benefits, or services to students, the recipient's responsibility is not triggered until it has notice. Thus, if upon notice, it takes prompt and effective steps to end the harassment and prevent its recurrence, it has satisfied its obligations under the Title IX regulations, and the recipient is not responsible for the effects of the harassment on the victim that occurred prior to notice.

When is an employee acting in the context of providing aid, benefits, or services to students? A recipient is responsible for the nondiscriminatory provision of aid, benefits, or services to students, and a recipient generally provides these to students through the responsibilities it gives its employees. If an employee, in the context of providing aid, benefits, or services to students, takes advantage of his or her position of responsibility over students and engages in actions that deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex,[28] the recipient is responsible for the discrimination.[29]

For example, in some instances, an employee will condition the provision of aid, benefits, or services to a student on submission to sexual harassment. In other instances, an employee's conduct is sufficiently serious that it creates a hostile environment in a situation in which an employee takes advantage of the responsibilities given to him or her by the school to provide aid, benefits, or services to students to engage in harassment, or, because of the way the school is run, the employee reasonably appears to be taking advantage of this position of responsibility when engaging in the harassment. (For more information see ''Types of Harassment: *Quid Pro Quo* Harassment and Hostile Environment Harassment,'' as well as the paragraphs that follow in this section.) For brevity and clarity, this proposed revised guidance generally refers to the types of employee harassment described in this paragraph as causing a denial or limitation of a benefit that occurred in the context of the employee's provision of aid, benefits, or services to students. Factors to be considered in determining whether an employee's harassing conduct occurred in the context of providing aid, benefits, or services to students are outlined in the following paragraphs of this section. In the situations described in this paragraph, because the school is responsible for the denial or limitation of the student's ability to participate in or benefit from the school's program on the basis of sex, the school is responsible for taking timely and effective action to end the harassment, prevent its recurrence, and remedy its effect on the victim.

On the other hand, if a teacher or other school employee engages in harassment of a student outside of this context, *i.e.*, if the harassment occurs in the school's program, but not in the context of the employee's provision of aid, benefits, or services to students, and if the harassment is sufficiently serious to create a hostile environment, the school is responsible, upon notice of the harassment, for taking prompt and effective action to stop the harassment and prevent its recurrence.[30] (This is the same standard applicable to peer and third party harassment, which is discussed in the following section.) As explained in ''Notice of Employee, Peer, or Third Party Harassment,'' for the 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. If, upon notice, the school takes immediate and effective action reasonably calculated to end the harassment, eliminate the hostile environment, and prevent its recurrence, it has avoided violating the Title IX regulations. If, upon notice,[31] the school fails to take prompt and effective action, its own 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. If this occurs, the school is then responsible for taking corrective action to remedy the effects of the harassment on the victim that could have been prevented if the school had responded promptly and effectively, as well as taking corrective action to stop the harassment and prevent its recurrence. (See the sections on ''OCR Case Resolution'' and ''Recipient's Response.'')

In assessing a school's responsibility under the Title IX regulations for an employee's sexual harassment of a student, OCR considers whether or not the sexual

harassment occurred in the context of the employee's provision of aid, benefits, or services to students. In determining this, OCR will consider on a case-by-case basis the nature and circumstances of the harassing conduct as it relates to the employee's provision of aid, benefits, or services to students in the school's program. If an employee engages in *quid pro quo* harassment, *i.e.*, the employee conditions an educational benefit or decision on a student's submission to sexual conduct, the student clearly is being denied or limited in his or her ability to participate in or benefit from the school's program on the basis of sex. In addition, the harassment is clearly occurring in the context of the employee's provision of aid, benefits, or services to students. An example would be a teacher who conditions a student's grade on submission to sexual advances and then gives the student a poor grade for rejecting the harassment. In situations that do not involve *quid pro quo* harassment, but in which an employee's sexually harassing conduct is sufficiently serious to create a hostile environment, OCR will consider the following interrelated factors in determining whether the harassment occurred in the context of the employee's provision of aid, benefits, or services to students:

- The degree of responsibility given to the employee, including informal and formal authority to provide aid, benefits, or services to students, to direct and control student conduct, or to discipline students generally;
- The degree of influence the employee has over the particular student involved, including in the context in which the harassment took place;
- Where and when the harassment occurred; and
- The age and educational level of the student involved, and, as applicable, whether, due to the student's age and educational level and the way the school is run, it would be reasonable for a 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.

In cases involving allegations of harassment of elementary and secondary school-age students by a teacher or school administrator during any school activity,[32] 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. This is because elementary and secondary schools are typically run in a way that gives teachers, school officials, and certain other school employees a substantial degree of supervision, control, and disciplinary authority over the conduct of students.[33] For example, a teacher may sexually harass 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 a designated hallway 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. Similarly, a high school coach may require an athlete to come to his office for a post-game discussion of the athlete's performance and then use this meeting to make sexual advances. In these examples, all the factors (nature and circumstances of the harassment, age and education level of the student, employee's position of responsibility, employee's degree of influence over the student, and where and when the harassment occurred) would indicate that the harassment occurred in the context of the employee's provision of aid, benefits, or services to students. With respect to other types of employees, *e.g.*, custodial employees, these same factors would be considered to determine whether or not it would be reasonable for the student to believe that the employee had a position of responsibility over him or her and, thus, was in a position to take advantage of that responsibility to limit or deny aid, benefits, or services to the student.

On the other hand, consider the case in which a university custodian sexually harasses a graduate student in the hallway of a university building. Based on the considerations set out in the factors listed previously, even though the harassment occurred in the hallway of a university building, due to the age and education level of the student, taken together with the employee's lack of authority or influence over that student, OCR would conclude that the harassment did not occur in the context of the employee's provision of aid, benefits, or services to students. Thus, as previously described, the university's obligation to respond promptly and effectively would be triggered when it knew or should have known of the harassment.

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[34] about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.[35] 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 under the Title IX regulations. On the other hand, if, upon notice, the school fails to take prompt, effective action, the school's own action has permitted the student 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 on the basis of sex.[36] In this case, the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy its effects on the victim.

Similarly, sexually harassing conduct by third parties, who are not themselves employees or students at the school (*e.g.*, a visiting speaker or members of a visiting athletic team), may also be of a sufficiently serious nature as to interfere with a student's ability to participate in or benefit from the education program. As previously outlined in connection with peer harassment, if the school knows or should know[37] of the harassment, the school is responsible for taking prompt and effective action to eliminate the hostile environment and prevent its recurrence. The type of appropriate steps that the school should take will differ depending on the level of control that the school has over the third party harasser.[38] For example, if athletes from a visiting team harass the home school's students, the home school may not be able to discipline the athletes. However, it could encourage the other school to take appropriate action to prevent further incidents; if necessary, the home school may choose not to invite the other school back. This issue is discussed more fully in ''Recipient's Response.'' If, upon notice, the school fails to take prompt and effective corrective action, its own failure has permitted the student to be subjected to a hostile environment that limits the student's ability to participate in or benefit from the education program.[39] In this case, the school is responsible for taking corrective actions to stop the harassment, prevent its recurrence, and remedy its effects on the victim.

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 other school officials had notice of harassment, as described in this section. 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.[40] A school has notice if a responsible employee ''knew, or in the exercise of reasonable care should have known,'' about the harassment.[41] 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.[42] Accordingly, schools need to ensure that employees are trained so that employees 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[43] 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 that it reasonably should have known about, *i.e.*, if it would have learned of the harassment if it had exercised reasonable care or made a ''reasonably diligent inquiry.''[44] 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.[45] 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.)[46]

If a school otherwise knows or reasonably should know of a hostile environment and fails to take immediate 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 otherwise inform the school of the harassment.

Grievance Procedures. Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination.[47] (These issues are discussed in the section on ''Prompt and Equitable Grievance Procedures.'') These procedures provide a school with a mechanism for discovering sexual harassment as early as possible and for effectively correcting problems, as required by the Title IX regulations. By having a strong policy against sex discrimination and accessible, effective, and fairly applied grievance procedures, a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.

Without a policy and procedure, a student does not know either of the school's obligation to address this form of discrimination or how to report harassment so that it can be remedied. If the alleged harassment is sufficiently serious to create a hostile environment and it is the school's failure to comply with the procedural requirements of the Title IX regulations that hampers early notification and intervention and permits sexual harassment to deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex,[48] the school will be responsible under the Title IX regulations, once informed of the harassment, to take corrective action, including stopping the harassment, preventing its recurrence, and remedying the effects of the harassment on the victim.

OCR Case Resolution. If OCR is asked to investigate or otherwise resolve incidents of sexual harassment of students, including incidents caused by employees, other students, or third parties, OCR will consider whether—(1) The school has a policy prohibiting sex discrimination under Title IX[49] and effective grievance procedures;[50] (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment;[51] and (3) the school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.[52] (Issues related to appropriate investigative and corrective actions are discussed in detail in the section on ''Recipient's Response.'')

If the school has taken each of these steps, OCR will consider the case against the school resolved and will take no further action, other than monitoring compliance with an agreement, if any, between the school and OCR. This is true in cases 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.[53] 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.

Factors Used To Evaluate Sexual Harassment

Types of Harassment: Quid Pro Quo Harassment and Hostile Environment Harassment. Sexual harassment may constitute sex discrimination prohibited by Title IX and the Title IX regulations. As outlined in the following paragraphs, sexual harassment may be categorized as either *quid pro quo* harassment or hostile environment harassment.[54] Sexually harassing conduct can include unwelcome sexual advances, requests for sexual favors, and other physical, verbal, or nonverbal conduct of a sexual nature.[55]

It is important to recognize that the line between *quid pro quo* and hostile environment sexual harassment is often blurred, and the prohibited conduct may involve elements of both. What is important is determining whether sexual harassment has denied or limited a student's ability to participate in or benefit from the school's programs or activities based on sex, regardless of whether it is labeled *quid pro quo* or hostile environment harassment.

Quid Pro Quo Harassment. Quid pro quo harassment occurs whenever a school employee[56] explicitly or implicitly conditions a student's participation in an education program or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other physical, verbal, or nonverbal conduct of a sexual nature. When *quid pro quo* harassment occurs, whether the student resists and suffers the threatened harm or submits and thus avoids the threatened harm, the student has been treated differently or the student's ability to participate in or benefit from the school's program has been denied or limited based on sex.[57]

Hostile Environment Harassment. A sexually hostile environment is created if sexually harassing conduct by an employee, by another student, or by a third party is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program based on sex.[58]

As outlined in the following paragraphs, OCR considers a variety of related factors to evaluate the severity and pervasiveness of the conduct. OCR considers the conduct from both a subjective[59] and objective[60] perspective. In evaluating the severity and pervasiveness of the conduct, OCR considers all relevant circumstances, *i.e.,* ''the constellation of surrounding circumstances, expectations, and relationships.''[61] Schools should also use these factors to evaluate conduct in order to draw commonsense distinctions between conduct that constitutes 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.* In considering the effect of the harassment on the student in terms of whether it has denied or limited the student's ability to participate in or benefit from the school's program, OCR assesses both tangible and intangible effects. Many hostile environment cases involve tangible or obvious injuries.[62] For example, a student's grades may go down or the student may be forced to withdraw from school because of the harassing behavior.[63] A student may also suffer physical injuries or mental or emotional distress.[64] In other cases a hostile environment may exist even if there is no tangible injury to the student.[65] For example, a student may have been able to keep up his or her grades and continue to attend school even though it was very difficult for him or her to do so because of the teacher's repeated sexual advances. Similarly, a student may be able to remain on a sports team, despite experiencing great difficulty performing at practices and games from the humiliation and anger caused by repeated sexual advances and intimidation by several team members that create a hostile environment. Harassing conduct in these examples would alter a reasonable student's educational environment and adversely affect the student's ability to participate in or benefit from the school's program on the basis of sex.

A hostile environment can occur even if the harassment is not targeted specifically at the individual complainant.[66] For example, if a student, group of students, or a teacher regularly directs sexual comments toward a

particular student, a hostile environment may be created not only for the targeted student, but also for others who witness the conduct.

• *The type, frequency, and duration of the conduct.* In most cases, a hostile environment will exist if there is a pattern or practice of harassment, or if the harassment is sustained and nontrivial.[67] For instance, if a young woman is taunted by one or more young men about her breasts or genital area or both, OCR may find that a hostile environment has been created, particularly if the conduct has gone on for some time, or takes place throughout the school, or if the taunts are made by a number of students. The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, *e.g.,* attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks, it need not be as persistent to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.[68] On the other hand, conduct that is not severe will not create a hostile environment; *e.g.,* a comment by one student to another student that she has a nice figure. Indeed, depending on the circumstances, this may not even be conduct of a sexual nature.[69] Similarly, because students date one another, a request for a date or a gift of flowers, even if unwelcome, would not create a hostile environment. However, there may be circumstances in which repeated, unwelcome requests for dates or similar conduct could create a hostile environment. For example, a person, who has been refused previously, may request dates in an intimidating or threatening manner.

• *The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.* A factor to be considered, especially in cases involving allegations of sexual harassment of a student by a school employee, is the identity of 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.[70]

• *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 person might not be sufficient to create a hostile environment, but could be if done by a group. Similarly, while harassment can be directed toward an individual or a group,[71] the effect of the conduct toward a group may vary, depending on the type of conduct and the context. For certain types of conduct, there may be ''safety in numbers.'' For example, following an individual student and making sexual taunts to him or her may be very intimidating to that student, but, in certain circumstances, less so to a group of students. On the other hand, persistent unwelcome sexual conduct still may create a hostile environment if directed toward a group.

• *The age and sex of the alleged harasser and the subject or subjects of the harassment.* For example, in the case of younger students, sexually harassing conduct is more likely to be intimidating if coming from an older student.[72]

• *The size of the school, location of the incidents, and context in which they occurred.* Depending on the circumstances of a particular case, fewer incidents may have a greater effect at a small college than at a large university campus. Harassing conduct occurring on a school bus may be more intimidating than similar conduct on a school playground because the restricted area makes it impossible for students to avoid their harassers.[73] Harassing conduct in a personal or secluded area, such as a dormitory room or residence hall, can have a greater effect (*e.g.*, be seen as more threatening) than would similar conduct in a more public area. On the other hand, harassing conduct in a public place may be more humiliating. Each incident must be judged individually.

• *Other incidents at the school.* A series of incidents at the school, not involving the same students, could—taken together—create a hostile environment, even if each by itself would not be sufficient.[74]

• *Incidents of gender-based, but nonsexual harassment.* Acts of verbal, nonverbal or physical aggression, intimidation or hostility based on sex, but not involving sexual activity or language, can be combined with incidents of sexual harassment to determine if the incidents of sexual harassment are sufficiently serious to create a sexually hostile environment.[75]

It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists. Consequently, in using the factors discussed previously to evaluate incidents of alleged harassment, it is always important to use common sense and reasonable judgement in determining whether a sexually hostile environment has been created.

Welcomeness. In order for conduct of a sexual nature to be sexual harassment, it must be unwelcome. Conduct is unwelcome if the student did not request or invite it and ''regarded the conduct as undesirable or offensive.'' [76] Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome.[77] 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.[78] 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.[79]

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,[80] OCR will consider a number of factors in determining whether a school employee's sexual advances or other sexual conduct could be considered welcome.[81] In addition, OCR will consider these factors in all cases involving postsecondary students in making those determinations.[82] 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:

• Statements by any witnesses to the alleged incident.

• Evidence about the relative credibility of the allegedly harassed student and the alleged harasser. For example, the level of

detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth. Another way to assess credibility is to see if corroborative evidence is lacking where it should logically exist. However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.

• Evidence that the alleged harasser has been found to have harassed others may support the credibility of the student claiming the harassment; conversely, the student's claim will be weakened if he or she has been found to have made false allegations against other individuals.

• Evidence of the allegedly harassed student's reaction or behavior after the alleged harassment. For example, were there witnesses who saw the student immediately after the alleged incident who say that the student appeared to be upset? However, it is important to note that some students may respond to harassment in ways that do not manifest themselves right away, but may surface several days or weeks after the harassment. For example, a student may initially show no signs of having been harassed, but several weeks after the harassment, there may be significant changes in the student's behavior, including difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school.

• Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the complainant may not be believed rather than that the alleged harassment did not occur.

• Other contemporaneous evidence. For example, did the student claiming harassment write about the conduct and his or her reaction to it soon after it occurred (*e.g.,* in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

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 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.[83] 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.

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),[84] 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, 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.[85] 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.[86] A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.[87] In some cases, it may be appropriate to further separate the harassed student and the harasser, e.g., by changing housing arrangements[88] 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.[89]

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.[90] For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances, as discussed in the section on ''Harassment by Teachers and Other Employees,'' the employee engaged in the harassment in the context of providing aid, benefits, or services to students. Because the school is responsible for the discriminatory denial or limitation of a benefit to the student, the school is responsible for taking appropriate corrective action, including remedying the effects of the harassment on the victim. Thus, 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[91] 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.[92] 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.[93]

Requests by the Harassed Student for Confidentiality. The scope of a reasonable response also may depend upon whether a student, or parent of a minor student, reporting harassment asks that the student's name not be disclosed to the harasser or that nothing be done about the alleged harassment. In all cases, a school should discuss confidentiality standards and concerns with the complainant initially. The school should inform the student that the request may limit the school's ability to respond. The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint consistent with that request as long as doing so does not preclude the school from responding effectively to the harassment and preventing harassment of other students. Thus, for example, a reasonable response would not require disciplinary action against an alleged harasser if a student, who was the only student harassed, insists that his or her name not be revealed, and the alleged harasser could not respond to the charges of sexual harassment without that information.

At the same time, a school should evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. The factors that a school may consider in this regard include the seriousness of the alleged harassment, the age of the student harassed, whether there have been other complaints or reports of harassment against the alleged harasser, and the rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.[94]

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.

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.

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 cause sexual harassment and that they know how to respond.

Prompt and Equitable Grievance Procedures. Schools are required by the Title IX regulations to adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex.[95] Accordingly, regardless of whether harassment occurred, a school violates this requirement of the Title IX regulations if it does not have those procedures and policy in place.[96]

A school's sex discrimination grievance procedures must apply to complaints of sex discrimination in the school's education programs and activities filed by students against school employees, other students, or third parties.[97] Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, its nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment. Thus, if, because of the lack of a policy or procedure specifically addressing sexual harassment, students are unaware of what kind of conduct constitutes sexual harassment or that such conduct is prohibited sex discrimination, a school's general policy and procedures relating to sex discrimination complaints will not be considered effective.[98]

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; [99] 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.[100]

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 elementary and secondary students, faculty, and staff; and identifying individuals who can explain how the procedures work.

A school must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities.[101] The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated.[102] 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.[103] 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.[104] 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.[105]

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so.[106] 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.[107] 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.[108]

Finally, a public school's employees may 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 consistently with any federally guaranteed rights involved in a complaint proceeding. 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 those accused of harassment. Indeed, 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. 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.

First Amendment. In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved.[109] Free speech rights apply in the classroom (*e.g.*, classroom lectures and discussions)[110] and in all other education programs and activities of public schools (*e.g.*, public meetings and speakers on campus; campus debates, school plays and other cultural events [111]; and student newspapers, journals, and other publications [112]). In addition, First Amendment rights apply to the speech of students and teachers.[113]

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. 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 sexually hostile environment under Title IX.[114] In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program.[115]

Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (*e.g.,* in responding to harassment that is sufficiently serious as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights. For instance, while the First Amendment may prohibit a school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard. The age of the students involved and the location or forum may affect how the school can respond consistently with the First Amendment.[116] As an example of the application of free speech rights to allegations of sexual harassment, consider the following:

Example 1: In a college level creative writing class, a professor's required reading list includes excerpts from literary classics that contain descriptions of explicit 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. Some of the student essays contain sexually derogatory themes about women. Several female students complain to the Dean of Students that the materials and related classroom discussion have created a sexually hostile environment for women in the class. What must the school do in response?

Answer: Academic discourse in this example is protected by the First Amendment even if it is offensive to individuals. Thus, Title IX would not require the school to discipline the professor or to censor the reading list or related class discussion.

Example 2: A group of male students repeatedly targets a female student for harassment during the bus ride home from school, including making explicit sexual comments about her body, passing around drawings that depict her engaging in sexual conduct, and, on several occasions, attempting to follow her home off the bus. The female student and her parents complain to the principal that the male students' conduct has created a hostile environment for girls on the bus and that they fear for their daughter's safety. What must a school do in response?

Answer: Threatening and intimidating actions targeted at a particular student or group of students, even though they contain elements of speech, are not protected by the First Amendment. The school must take reasonable and appropriate actions against the students, including disciplinary action if necessary, to remedy the hostile environment and prevent future harassment.

Footnotes

[1] This guidance does not address sexual harassment of employees, although that conduct may be prohibited by Title IX. 20 U.S.C. 1681 *et seq.*; 34 CFR part 106, subpart E. If employees file Title IX sexual harassment complaints with OCR, the complaints will be processed pursuant to the Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance. 28 CFR 42.604.

[2] 20 U.S.C. 1681; 34 CFR part 106.

[3] See, *e.g., Davis* v. *Monroe County Bd. of Educ.,* 526 U.S. 629, 649–50 (1999); *Gebser* v. *Lago Vista Ind. Sch. Dist.,* 524 U.S. 274, 281 (1998); *Franklin* v. *Gwinnett County Pub. Sch.,* 503 U.S. 60, 75 (1992); S. REP. NO. 100–64, 100th Cong., 1st Sess. 14 (1987); *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,* (1997 guidance), 62 FR 12034 (1997).

[4] 20 U.S.C. 1687 (codification of the amendment to Title IX regarding scope of jurisdiction, enacted by the Civil Rights Restoration Act of 1987). See 65 FR 26464 (May 5, 2000) (Department's proposed rulemaking to amend the Title IX regulations to incorporate the statutory definition of ''program or activity'').

[5] See also *Shoreline School Dist.,* OCR Case No. 10–92–1002 (a teacher's patting a student on the arm, shoulder, and back, and restraining the student when he was out of control, not conduct of a sexual nature); *Dartmouth Public Schools,* OCR Case No. 01–90–1058 (same as to contact between high school coach and students); *San Francisco State University,* OCR Case No. 09–94–2038 (same as to faculty advisor placing her arm around a graduate student's shoulder in posing for a picture); *Analy Union High School Dist.,* OCR Case No. 09–92–1249 (same as to drama instructor who put his arms around both male and female students who confided in him).

[6] If a school contracts with persons or organizations to provide benefits, services, or opportunities to students as part of the school's program, and those persons or employees of those organizations sexually harass students, OCR will consider the harassing individual in the same manner that it considers the school's employees, as described in this guidance. (See section on ''Harassment by Teachers and Other Employees.'') See *Brown* v. *Hot, Sexy, and Safer Products, Inc.,* 68 F.3d 525, 529 (1st Cir. 1995) (Title IX sexual harassment claim brought for school's role in permitting contract consultant hired by it to create allegedly hostile environment).

In addition, if a student engages in sexual harassment as an employee of the school, OCR will consider the harassment under the standards described for employees. (See section on ''Harassment by Teachers and Other Employees.'') For example, OCR would consider it harassment by an employee if a student teaching assistant who is responsible for assigning grades in a course, *i.e.,* for providing aid, benefits, or services to students under the recipient's program, required a student in his or her class to submit to sexual advances in order to obtain a certain grade in the class.

[7] *Cf. John Does 1* v. *Covington County Sch. Bd.,* 884 F.Supp. 462, 464–65 (M.D. Ala. 1995) (male students alleging that a teacher sexually harassed and abused them stated cause of action under Title IX).

[8] Title IX and the regulations implementing it prohibit discrimination ''on the basis of sex;'' they do not restrict sexual harassment to those circumstances in 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 *Kinman* v. *Omaha Public School Dist.,* 94 F.3d 463, 468 (8th Cir. 1996) (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 (7th 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 (9th Cir. 1994), *cert. denied,* 115 S.Ct. 733 (1995) (Title VII case); 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).

[9] *Nashoba Regional High School,* OCR Case No. 01–92–1397. In *Conejo Valley School Dist.,* OCR Case No. 09–93–1305, female students allegedly taunted another female student about engaging in sexual activity; OCR found that the alleged comments were sexually explicit and, if true, would be sufficiently severe, persistent, and pervasive to create a hostile environment.

[10] See *Williamson* v. *A.G. Edwards & Sons, Inc.,* 876 F2d 69, 70 (8th Cir. 1989, *cert. denied* 493 U.S. 1089 (1990) (Title VII case); *DeSantis* v. *Pacific Tel. & Tel. Co., Inc.,* 608 F.2d 327, 329–30 (9th Cir. 1979) (same); *Blum* v. *Gulf Oil Corp.,* 597 F.2d 936, 938 (5th Cir. 1979) (same).

[11] 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 (7th 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).

[12] See *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 (10th Cir. 1987) (Title VII case; 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) (Title VII case; 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) (Title VII case).

[13] See *Harris,* 510 U.S. at 23; *Andrews* v. *City of Philadelphia,* 895 F.2d 1469, 1485–86 (3rd Cir. 1990) (Title VII case; court directed trial court to consider sexual conduct as well as theft of female employees' files and work, destruction of property, and anonymous phone calls in determining if there had been sex discrimination); see also *Hall* v. *Gus Construction Co.,* 842 F.2d 1010, 1014 (8th Cir. 1988) (Title VII case; affirming that harassment due to the employee's sex 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).

[14] Davis, 526 U.S. at 650 (''Having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.''); *Franklin,* 503 U.S. at 75 (''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.'' (citation omitted))

OCR's longstanding interpretation of its regulations is that sexual harassment may constitute a violation. 34 CFR 106.31; See *Sexual Harassment Guidance,* 62 FR 12034 (1997). When Congress enacted the Civil Rights Restoration Act of 1987 to amend Title IX to restore institution-wide coverage over federally assisted education programs and activities, the legislative history indicated not only that Congress was aware that OCR interpreted its Title IX regulations to prohibit sexual harassment, but also that one of the reasons for passing the Restoration Act was to enable OCR to investigate and resolve cases involving allegations of sexual harassment. S. REP. NO. 64, 100th Cong., 1st Sess. at 12 (1987). The examples of discrimination that Congress intended to be remedied by its statutory change included sexual harassment of students by professors, *id.* at 14, and these examples demonstrate congressional recognition that discrimination in violation of Title IX can be carried out by school employees who are providing aid, benefits, or services to students. Congress also intended that if discrimination occurred, recipients needed to implement effective remedies. S. REP. NO. 64 at 5.

[15] 34 CFR 106.4.

[16] These are the basic regulatory requirements. 34 CFR 106.31(a)(b). Depending upon the facts, sexual harassment may also be prohibited by more specific regulatory prohibitions. For example, if a college financial aid director told a student that she would not get the student financial assistance for which she qualified unless she slept with him, that also would be covered by the regulatory provision prohibiting discrimination on the basis of sex in financial assistance, 34 CFR 106.37(a).

[17] 34 CFR 106.31(b)(1).

[18] 34 CFR 106.31(b)(2).

[19] 34 CFR 106.31(b)(3).

[20] 34 CFR 106.31(b)(4).

[21] 34 CFR 106.31(b)(6).

[22] 34 CFR 106.31(b)(7).

[23] 34 CFR 106.3(a).

[24] 34 CFR 106.9.

[25] 34 CFR 106.8(b).

[26] 34 CFR 106.8(a).

[27] *Gebser,* 524 U.S. at 281 (''*Franklin* * * * establishes that a school district can be held liable in damages [in an implied action under Title IX] in cases involving a teacher's sexual harassment of a student * * *.''); 34 CFR 106.31; See *1997 Sexual Harassment Guidance,* 62 FR 12034.

[28] For this reason, harassment of a student by a teacher is more likely than harassment by a fellow student to constitute the type of effective denial of equal access to educational benefits that can breach the requirements of Title IX. See *Davis,* 526 U.S. at 653.

[29] 34 CFR 106.31(b). *Cf. Gebser,* 524 U.S. at 283–84 (Court recognized in an implied right of action for money damages for teacher sexual harassment of a student that the question of whether a violation of Title IX occurred is a separate question from the scope of appropriate remedies for a violation).

[30] See section on ''Notice of Employee, Peer, or Third Party Harassment.''

[31] See section on ''Notice of Employee, Peer, or Third Party Harassment.''

[32] See section on ''Applicability of Title IX'' for scope of coverage.

[33] *Davis,* 526 U.S. at 646.

[34] See section on ''Notice of Employee, Peer, or Third Party Harassment.''

[35] 34 CFR 106.31(b).

[36] 34 CFR 106.31(b).

[37] See section on ''Notice of Employee, Peer, or Third Party Harassment.''

[38] *Cf. Davis,* 526 U.S. at 646.

[39] 34 CFR 106.31(b).

[40] 34 CFR 106.31(b).

[41] Consistent with its obligation under Title IX to protect students, *cf. Gebser,* 524 U.S. at 287, OCR interprets its regulations to ensure that recipients take reasonable action to address, rather than neglect, reasonably obvious discrimination. *Cf. Gebser,* 524 U.S. at 287–88; *Davis,* 526 U.S. at 650 (actual notice standard for obtaining money damages in private lawsuit).

[42] Whether an employee is a responsible employee or whether it would be reasonable for a student to believe the employee is, even if the employee is not, will vary depending on 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.

Although there is some overlap between individuals who are ''responsible employees'' for the purposes of receiving notice about alleged harassment as described in this guidance and individuals who are appropriate school officials with authority to address the alleged discrimination and take corrective action, and, thus, receive actual notice for the purposes of private lawsuits for money damages as specified by the Court in *Gebser,* 524 U.S. at 290, and *Davis,* 526 U.S. at 642, the concept of responsible employee 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.

[43] 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).

[44] 34 CFR 106.31. See *Yates* v. *Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987) (Title VII case); *Katz* v. *Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (same).

[45] 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 that a teacher may be engaging in a sexual relationship with one underage student and did not investigate, and then the same teacher allegedly engaged in sexual intercourse with another student, who did not report the incident, the court indicated that the school's knowledge of the first relationship may be sufficient to serve as actual notice of the second incident).

[46] *Cf. Katz,* 709 F.2d at 256 (finding that the employer ''should have been aware of the problem both because of its pervasive character and because of [the employee's] specific complaints * * *''); *Smolsky* v. *Consolidated Rail Corp.*, 780 F.Supp. 283, 293 (E.D. Pa. 1991), *reconsideration denied*, 785 F.Supp. 71 (E.D. Pa. 1992) ''where the harassment is apparent to all others in the work place, supervisors and coworkers, this may be sufficient to put the employer on notice of the sexual harassment'' under Title VII); *Jensen* v. *Eveleth Taconite Co.*, 824 F.Supp. 847, 887 (D.Minn. 1993) (Title VII case; ''[s]exual harassment * * * was so

pervasive that an inference of knowledge arises.* * * The acts of sexual harassment detailed herein were too common and continuous to have escaped Eveleth Mines had its management been reasonably alert.''); *Cummings* v. *Walsh Construction Co.*, 561 F.Supp. 872, 878 (S.D. Ga. 1983) (''* * * allegations not only of the [employee] registering her complaints with her foreman * * * but also that sexual harassment was so widespread that defendant had constructive notice of it'' under Title VII); but see *Murray* v. *New York Univ. College of Dentistry*, 57 F.3d 243, 250–51 (2nd Cir. 1995) (concluding that other students' knowledge of the conduct was not enough to charge the school with notice, particularly because these students may not have been aware that the conduct was offensive or abusive).

[47] 34 CFR 106.9 and 106.8(b).

[48] 34 CFR 106.8(b) and 106.31(b).

[49] 34 CFR 106.9.

[50] 34 CFR 106.8(b).

[51] 34 CFR 106.31.

[52] 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.'').

[53] 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.

[54] The terms *quid pro quo* and ''hostile environment'' sexual harassment do not appear in the Title IX statutory text or regulations, but were first used by the courts in the context of Title VII and then Title IX. See *Meritor Savings Bank*, 477 U.S. at 65 (finding that both *quid pro quo* and hostile environment claims are cognizable under Title VII); *Burlington Industries, Inc.* v. *Ellereth*, 524 U.S. 742, 752 (1998) ''The principal significance of the distinction between [*quid pro quo* and hostile environment sexual harassment] is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive''). While Title VII agency principles are not applicable to a finding of liability for monetary damages for sexual harassment in a private lawsuit under Title IX, see *Gebser*, 524 U.S. at 228, Title VII case law remains useful in determining conduct that constitutes sexual harassment under Title IX. *Davis*, 526 U.S. at 651.

[55] See, *e.g., Davis*, 526 U.S. at 653 (alleged conduct of a sexual nature that would support a sexual harassment claim included verbal harassment and ''numerous acts of objectively offensive touching;'' *Franklin*, 503 U.S. at 63 (conduct of a sexual nature found to support a sexual harassment claim under Title IX included kissing, sexual intercourse); *Meritor Savings Bank*, 477 U.S. at 60–61 (demands for sexual favors, sexual advances, fondling, indecent exposure, sexual intercourse, rape, sufficient to raise hostile environment claim under Title VII); *Harris*, 510 U.S. at 20 (sexually derogatory comments and innuendo may support a sexual harassment claim under Title VII); *Ellison* v. *Brady*, 924 F.2d 872, 873–74, 880 (9th Cir. 1991) (allegations sufficient to state sexual harassment claim under Title VII included repeated requests for dates, letters making explicit references to sex and describing the harasser's feelings for plaintiff); *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881, 904–5 (1st Cir. 1988) (sexually derogatory comments, posting of sexually explicit drawing of plaintiff, sexual advances may support sexual harassment claim); *Kadiki* v. *Virginia Commonwealth University*, 892 F.Supp. 746, 751 (E.D. Va. 1995) (professor's spanking of university student may constitute sexual conduct under Title IX); *Doe* v. *Petaluma*, 830 F.Supp. at 1564–65 (sexually derogatory taunts and innuendo can be the basis of a harassment claim); *Denver School Dist. #2*, OCR Case No. 08–92–1007 (same as 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.)

[56] See note 6.

[57] 34 CFR 106.31. See *Alexander* v. *Yale University*, 459 F.Supp. 1, 4 (D.Conn. 1977), *aff'd*, 631 F.2d 178 (2nd Cir. 1980) (stating that a claim ''that academic advancement was conditioned upon submission to sexual demands constitutes [a claim of] sex discrimination in education * * *''); *Crandell* v. *New York College, Osteopathic Medicine*, 87 F.Supp.2d 304, 318 (S.D.N.Y. 2000) (finding that allegations that a supervisory resident physician demanded that a student physician spend time with him and have lunch with him or receive a poor evaluation, in light of the totality of his alleged sexual comments and other inappropriate behavior, constituted a claim of *quid pro quo* harassment); *Kadiki*, 892 F.Supp. at 752 (reexamination in a course conditioned on a college student's agreeing to be spanked should she not attain a certain grade may constitute *quid pro quo* harassment). While recognizing the differences between students in schools and employees in the workplace, including age and other factors, *quid pro quo* harassment of students by their teachers or other school employees is analogous to harassment of employees by their supervisors where, as described in *Ellerth*, 524 U.S. at 753–54, 761–62, the employee suffers a tangible employment action.

[58] 34 CFR 106.31(b). See *Davis*, 526 U.S. at 650 (concluding that allegations of student-on-student sexual harassment that is ''so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits'' supports a claim for money damages in an implied right of action).

[59] In *Harris*, the Supreme Court explained the requirement for considering the ''subjective perspective'' when determining the existence of a hostile environment. The Court stated— ''* * * if the victim does not subjectively perceive the environment to be abusive, the 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.

[60] See *Davis*, 526 U.S. at 650 (conduct must be ''objectively offensive'' to trigger liability for money damages). 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 the sex of the subject of the harassment, see, *e.g., Ellison*, 924 F.2d at 878–79 (applying a ''reasonable woman'' standard to sexual harassment), and has been adapted to sexual harassment in education under Title IX, *Patricia H.* v. *Berkeley Unified School Dist.*, 830 F.Supp. 1288, 1296 (N.D. Cal. 1993) (adopting a ''reasonable victim'' standard and referring to OCR's use of it).

[61] See *Davis*, 526 U.S. at 651, citing both *Oncale*, 523 U.S. at 82, and OCR's 1997 guidance (62 FR 12041–12042).

[62] *Harris*, 510 U.S. at 23.

[63] See, *e.g., Davis*, 526 U.S. at 634 (as a result of the harassment, student's grades dropped and she wrote a suicide note); *Doe* v. *Petaluma*, 830 F. Supp. at 1566 (student so upset about harassment by other students that she was forced to transfer several times, including finally to a private school); *Modesto City Schools*, OCR Case No. 09–93–1391 (evidence showed that one girl's grades dropped while the harassment was occurring); *Weaverville Elementary School*, OCR Case No. 09–91–1116 (students left school due to the harassment). *Compare with College of Alameda*, OCR Case No. 09–90–2104 (student not in instructor's class and no evidence of any effect on student's educational benefits or service, so no hostile environment).

[64] *Doe* v. *Petaluma*, 830 F.Supp. at 1566.

[65] See *Harris*, 510 U.S. at 22 (holding that tangible harm is not required). In determining whether harm is sufficient, several factors are to be considered, including frequency, severity, whether the conduct was threatening or humiliating versus a mere offensive utterance, and whether it unreasonably interfered with work performance. No single factor is required; similarly, psychological harm, while relevant, is not required. *See id.*

[66] See *Waltman* v. *Int'l Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) (Title VII case; holding that although not specifically directed at the plaintiff, sexually explicit graffiti on the walls was ''relevant to her claim''); *see also Hall*, 842 F.2d at 1015 (evidence of sexual harassment directed at others is relevant to show hostile environment under Title VII).

[67] See, *e.g., Andrews*, 895 F.2d at 1484 (''Harassment is pervasive when 'incidents of harassment occur either in concert or with

regularity' ''); *Moylan* v. *Maries County*, 792 F.2d 746, 749 (8th Cir. 1986) (Title VII case).

[68] 34 CFR 106.31(b). See also statement of the U.S. Equal Employment Opportunity Commission (EEOC): ''The Commission will presume that the unwelcome, intentional touching of [an employee's] intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.'' EEOC Policy Guidance on Current Issues of Sexual Harassment, 17. *Barrett* v. *Omaha National Bank*, 584 F.Supp. 22, 30 (D. Neb. 1983), *aff'd*, 726 F.2d 424 (8th Cir. 1984) (finding that hostile environment was created under Title VII by isolated events, *i.e.*, occurring while traveling to and during a two-day conference, including the co-worker's talking to plaintiff about sexual activities and touching her in an offensive manner while they were inside a vehicle from which she could not escape).

[69] See also *Ursuline College*, OCR Case No. 05–91–2068 (a single incident of comments on a male student's muscles arguably not sexual; however, assuming they were, not severe enough to create a hostile environment).

[70] *Davis*, 526 U.S. at 653 (''The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less like to satisfy these requirements than is teacher student harassment.''); *Patricia H.*, 830 F. Supp. at 1297 (stating that the ''grave disparity in age and power'' between teacher and student contributed to the creation of a hostile environment); *Summerfield Schools*, OCR Case No. 15–92–1929 (''impact of the * * * remarks was heightened by the fact that the coach is an adult in a position of authority''); *cf. Doe* v. *Taylor I.S.D.*, 15 F.3d 443, 460 (5th Cir. 1994) (Sec. 1983 case; taking into consideration the influence that the teacher had over the student by virtue of his position of authority to find that a sexual relationship between a high school teacher and a student was unlawful).

[71] See, *e.g., McKinney*, 765 F.2d at 1138–49; *Robinson* v. *Jacksonville Shipyards*, 760 F.Supp. 1486, 1522 (M.D. Fla. 1991).

[72] *Cf. Patricia H.*, 830 F.Supp. at 1297.

[73] See, *e.g., Barrett*, 584 F.Supp. at 30 (finding harassment occurring in a car from which the victim could not escape particularly severe).

[74] See *Hall*, 842 F.2d at 1015 (stating that ''evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile environment'') (citing Hicks, 833 F.2d, 1415–16). *Cf. Midwest City-Del City Public Schools*, OCR Case No. 06–92–1012 (finding of racially hostile environment based in part on several racial incidents at school shortly before incidents in complaint, a number of which involved the same student involved in the complaint).

[75] 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 (5th Cir. 1980) (Title VII case).

[76] *Henson* v. *City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) (Title VII case).

[77] See *Meritor Savings Bank,* 477 U.S. at 68. ''[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. * * * The correct inquiry is whether [the subject of the harassment] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.''

[78] *Lipsett,* 864 F.2d at 898 (while, in some instances, a person may have the responsibility for telling the harasser ''directly'' that the conduct is unwelcome, in other cases a ''consistent failure to respond to suggestive comments or gestures may be sufficient. * * *''); *Danna* v. *New York Tel. Co.,* 752 F.Supp. 594, 612 (despite a female employee's own foul language and participation in graffiti writing, her complaints to management indicated that the harassment was not welcome); see also *Carr* v. *Allison Gas Turbine Div. GMC.,* 32 F.3d 1007, 1011 (7th Cir. 1994) (Title VII case; finding that cursing and dirty jokes by a female employee did not show that she welcomed the sexual harassment, given her frequent complaints about it: ''Even if * * * [the employee's] testimony that she talked and acted as she did [only] in an effort to be one of the boys is * * * discounted, her words and conduct cannot be compared to those of the men and used to justify their conduct. * * * The asymmetry of positions must be considered. She was one woman; they were many men. Her use of [vulgar] terms * * * could not be deeply threatening * * *'').

[79] See *Reed* v. *Shepard,* 939 F.2d 484, 486–87, 491–92 (7th Cir. 1991) (no harassment found under Title VII in a case in which a female employee not only tolerated, but also instigated the suggestive joking activities about which she was now complaining); *Weinsheimer* v. *Rockwell Int'l Corp.,* 754 F.Supp. 1559, 1563–64 (M.D. Fla. 1990) (same, in case in which general shop banter was full of vulgarity and sexual innuendo by men and women alike, and plaintiff contributed her share to this atmosphere.) However, even if a student participates in the sexual banter, OCR may in certain circumstances find that the conduct was nevertheless unwelcome if, for example, a teacher took an active role in the sexual banter and a student reasonably perceived that the teacher expected him or her to participate.

[80] The school bears the burden of rebutting the presumption.

[81] Of course, nothing in Title IX would prohibit a school from implementing policies prohibiting sexual conduct or sexual relationships between students and adult employees.

[82] See note 81.

[83] 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.

[84] 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.

[85] *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 (5th Cir. 1986) (employer should take prompt remedial action under Title VII).

[86] See *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 (5th Cir. 1987) (Title VII case; holding that a company's quick decision to remove the harasser from the victim was adequate remedial action).

[87] See *Intlekofer* v. *Turnage,* 973 F.2d 773, 779–780 (9th Cir. 1992) (Title VII case) (holding that the employer's response was insufficient and that more severe disciplinary action was necessary in situations in which counseling, separating the parties, and warnings of possible discipline were ineffective in ending the harassing behavior).

[88] Offering assistance in changing living arrangements is one of the actions required of colleges and universities by the Campus Security Act in cases of rape and sexual assault. See 20 U.S.C. 1092(f).

[89] See section on ''Harassment by Other Students or Third Parties.''

[90] *University of California at Santa Cruz,* OCR Case No. 09–93–2141 (extensive individual and group counseling); *Eden Prairie Schools, Dist. #272,* OCR Case No. 05–92–1174 (counseling).

[91] Even if the harassment stops without the school's involvement, the school may still need to take steps to prevent or deter any future harassment—to inform the school community that harassment will not be tolerated. *Fuller* v. *City of Oakland,* 47 F.3d 1522, 1528–29 (9th Cir. 1995).

[92] 34 CFR 106.8(b) and 106.71, incorporating by reference 34 CFR 100.7(e). The Title IX regulations prohibit intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX.

[93] *Tacoma School Dist. No. 10,* OCR Case No. 10–94–1079 (due to the large number of students harassed by an employee, the extended period of time over which the harassment occurred, and the failure of several of the students to report the harassment, the school committed as part of

corrective action plan to providing training for students); *Los Medanos College,* OCR Case No. 09–84–2092 (as part of corrective action plan, school committed to providing sexual harassment seminar for campus employees); *Sacramento City Unified School Dist.,* OCR Case No. 09–83–1063 (same as to workshops for management and administrative personnel and in-service training for non-management personnel).

[94] In addition, if information about the incident is contained in an ''education record'' of the student alleging the harassment, as defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, the school should consider whether FERPA would prohibit the school from disclosing information without the student's consent. *Id.* In evaluating whether FERPA would limit disclosure, the Department does not interpret FERPA to override any federally protected due process rights of a school employee accused of harassment.

[95] 34 CFR 106.8(b). This requirement has been part of the Title IX regulations since their inception in 1975. Thus, schools have been required to have these procedures in place since that time. At the elementary and secondary level, this responsibility generally lies 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.

[96] *Fenton Community High School Dist. #100,* OCR Case 05–92–1104.

[97] While a school is required to have a grievance procedure under which complaints of sex discrimination (including sexual harassment) can be filed, the same procedure may also be used to address other forms of discrimination.

[98] See generally *Meritor,* 477 U.S. at 72–73 (holding that ''mere existence of a grievance procedure'' for discrimination does not shield an employer from a sexual harassment claim).

[99] The Family Educational Rights and Privacy Act (FERPA) does not prohibit a student from learning the outcome of her complaint, *i.e.*, whether the complaint was found to be credible and whether harassment was found to have occurred. It is the Department's current position under FERPA that a school cannot release information to a complainant regarding disciplinary action imposed on a student found guilty of harassment if that information is contained in a student's education record unless—(1) the information directly relates to the complainant (*e.g.*, an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a postsecondary institution. *See* note 94. If the alleged harasser is a teacher, administrator, or other non-student employee, FERPA would not limit the school's ability to inform the complainant of any disciplinary action taken.

[100] The section in the guidance on ''Recipient's Response'' provides examples of reasonable and appropriate corrective action.

[101] 34 CFR 106.8(a).

[102] *Id.*

[103] See *Meritor,* 477 U.S. at 72–73.

[104] *University of California, Santa Cruz,* OCR Case No. 09–93–2131. This is true for formal as well as informal complaints. *See University of Maine at Machias,* OCR Case No. 01–94–6001 (school's new procedures not found in violation of Title IX in part because they require written records for informal as well as formal resolutions). These records need not be kept in a student's or employee's individual file, but instead may be kept in a central confidential location.

[105] For example, in *Cape Cod Community College,* OCR Case No. 01–93–2047, the College was found to have violated Title IX in part because the person identified by the school as the Title IX coordinator was unfamiliar with Title IX, had no training, and did not even realize he was the coordinator.

[106] 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.

[107] *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).

[108] *Cf. EEOC* v. *Board of Governors of State Colleges and Universities,* 957 F.2d 424 (7th Cir. 1992) (Title VII case), *cert. denied,* 506 U.S. 906 (1992).

[109] 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.

[110] 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).

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

[112] 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.)

[113] *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 (9th 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 racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment.)

[114] 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.)

[115] 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 sufficent 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).

[116] *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, noting that ''[t]he undoubted freedom to advocate unpopular and controversial issues in schools must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.''), *with Iota Xi,* 993 F.2d 386 (holding that, notwithstanding a university's mission to create a culturally diverse learning environment and its substantial interest in maintaining a campus free of discrimination, it could not punish students who engaged in an offensive skit with racist and sexist overtones).

Appendix B

This Appendix B provides the text, except as specifically noted, of our analysis of comments received from interested parties in response to a draft of the 1997 guidance, and our response to those comments (62 FR 12035). This text is included for the convenience of interested persons who may not be familiar with the issues that were resolved in 1997. As specifically noted, we are not including the 1997 discussion regarding a conflict among the Federal circuit courts because that conflict was resolved by the Supreme Court in Davis v. Monroe County Board of Education, 526 U.S. 629 (1999). Also, where the 1997 text uses the terms ''liable'' or ''liability,'' the reader is directed to consult the discussion in the **SUPPLEMENTARY INFORMATION** section of this notice under the heading Title IX Compliance Standard, which explains the

scope of the proposed revised guidance and why these terms are not used in the proposed revised guidance.

Analysis of Comments and Changes

In response to the Assistant Secretary's invitations to comment, OCR received approximately 70 comments on the Peer Guidance and approximately 10 comments on the Employee Guidance. Many commenters stated that the guidance documents provided comprehensive, clear, and useful information to schools. For instance, one commenter stated that the Peer Guidance was ''a godsend * * * in one convenient place [it provides] the clear implications of the statutes, regulations, and case law.'' Another commenter stated that the Guidance ''will assist universities * * * in maintaining a harassment-free educational environment.''

Commenters also provided many specific suggestions and examples regarding how the final Guidance could be more complete and clearer. Many of these suggested changes have been incorporated into the Guidance.

The preamble discusses recurring and significant recommendations regarding the clarity and completeness of the document. While the invitations to comment on the Peer Guidance and Employee Guidance did not request substantive comments regarding OCR's longstanding policy and practice in the area of sexual harassment, some commenters did provide these comments. In instances in which OCR could provide additional useful information to readers related to these comments, it has done so in the preamble. Comments are grouped by subject and are discussed in the following sections.

The Need for Additional Guidance

Comments: Many commenters agreed that a document combining the Peer Guidance and the Employee Guidance would provide more clarity to schools. Commenters disagreed, however, regarding whether, and what type of, additional information is needed to enhance schools' understanding of their legal obligations under Title IX. Some commenters asked for more detailed analysis regarding the applicable legal standards, including hard and fast rules for determining what is harassment and how a school should respond. Other commenters, by contrast, found OCR's guidance documents, including the extensive legal citations, to be too detailed and ''legalistic.'' They expressed a need for a document that is simpler and more accessible to teachers, parents, school administrators, and others who need to know how to recognize, report, or respond to sexual harassment.

Discussion: As the Guidance makes clear, it is impossible to provide hard and fast rules applicable to all instances of sexual harassment. Instead, the Guidance provides factors to help schools make appropriate judgments.

In response to concerns for more analysis of the legal standards, OCR has provided additional examples in the Guidance to illustrate how the Title IX legal standards may apply in particular cases. It is important to remember that examples are just that; they do not cover all the types of situations that may arise. Moreover, they may not illustrate the only way to respond to sexual harassment of students because there is often no one right way to respond.

OCR also believes that there is a legitimate concern that school administrators, teachers, students, and parents need an accessible document to assist them in recognizing and appropriately responding to sexual harassment. Accordingly, OCR has developed, in addition to the final Guidance, a pamphlet for conveying basic information regarding parties' rights and responsibilities under Title IX. The pamphlet includes information from the Guidance that would be most useful to these groups as they confront issues of sexual harassment. Concurrent with the issuance of this Guidance, the pamphlet will be issued with copies available from all OCR offices and an electronic posting on OCR's website. For a copy of the pamphlet, individuals may call OCR's Customer Service Team at [(202) 205–5557] or toll-free 1–800–421–3481. Copies will also be available from all OCR enforcement offices, and the pamphlet will be posted on OCR's site on the Internet at URL http://www.ed.gov/offices/OCR/ocrpubs.html.

Additional Guidance on the First Amendment

Comments: Many commenters asked OCR to provide additional guidance regarding the interplay of academic freedom and free speech rights with Title IX's prohibition of sexual harassment. Several of these commenters wanted OCR to announce hard and fast rules in this area, although commenters disagreed on what those rules should be. For instance, one commenter requested that OCR tell schools that the First Amendment does not prevent schools from punishing speech that has no legitimate pedagogical purpose. Another commenter, by contrast, wanted OCR to state that classroom speech simply can never be the basis for a sexual harassment complaint. Other commenters requested that OCR include specific examples regarding the application of free speech rights.

Discussion: As the documents published for comment indicated, the resolution of cases involving potential First Amendment issues is highly fact- and context-dependent. Thus, hard and fast rules are not appropriate.

However, in order to respond to concerns that schools need assistance in making these determinations, OCR has provided additional examples in the Guidance regarding the application of the First Amendment principles discussed there.

Application of Guidance to Harassment by Third Parties

Comments: Several commenters stated that it was unclear whether the Guidance applies if a student alleges harassment by a third party, *i.e.,* by someone who is not an employee or student at the school.

Discussion: The Guidance clarifies that the principles in the Guidance apply to situations in which, for example, a student alleges that harassment by a visiting professional speaker or members of a visiting athletic team created a sexually hostile environment. The Peer Guidance did, in fact, discuss the standards applicable to the latter situation in which students from another school harassed the school's students.

The applicable standards have not changed, but the final Guidance clarifies that the same standards also apply if adults who are not employees or agents of the school engage in harassment of students.

Application of Guidance to Harassment Based on Sexual Orientation

Comments: Several commenters indicated that, in light of OCR's stated policy that Title IX's prohibition against sexual harassment applies regardless of the sex of the harassed student or of the sex of the alleged harasser, the Guidance was confusing regarding the statement that Title IX does not apply to discrimination on the basis of sexual orientation.

Discussion: The Guidance has been clarified to indicate that if harassment is based on conduct of a sexual nature, it may be sexual harassment prohibited by Title IX even if the harasser and the harassed are the same sex or the victim of harassment is gay or lesbian. If, for example, harassing conduct of a sexual nature is directed at gay or lesbian students, it may create a sexually hostile environment and may constitute a violation of Title IX in the same way that it may for heterosexual students. The Guidance provides examples to illustrate the difference between this type of conduct, which may be prohibited by Title IX, and conduct constituting discrimination on the basis of sexual orientation, which is not prohibited by Title IX. The Guidance also indicates that some State or local laws or other Federal authority may prohibit discrimination on the basis of sexual orientation.

The Effect on the Guidance of Conflicting Federal Court Decisions

[The text presented in the 1997 document under this heading (62 FR 12036) is not included here because it became outdated when, following the issuance of the 1997 guidance, the conflict among the circuit courts was resolved by the Supreme Court's decision in *Davis* v. *Monroe County Board of Education,* 526 U.S. 629 (1999).]

Notice

Comments: Several commenters recommended that additional guidance be provided regarding the types of employees through which a school can receive notice of sexual harassment. Commenters disagreed, however, on who should be able to receive notice. For instance, some commenters stated that OCR should find that a school has received notice only if ''managerial'' employees, ''designated'' employees, or employees with the authority to correct the harassment receive notice of the harassment. Another commenter suggested, by contrast, that any school employee should be considered a responsible employee for purposes of notice.

Discussion: The Guidance states that a school has actual notice of sexual harassment if an agent or responsible employee of the school receives notice. An exhaustive list of employees would be inappropriate, however, because whether an employee is an agent or

responsible school employee, or whether it would be reasonable for a student to believe the employee is an agent or responsible employee, even if the employee is not, will vary depending on factors such as the authority actually given to the employee and the age of the student. Thus, the Guidance gives examples of the types of employees that can receive notice of harassment. In this regard, it is important for schools to recognize that the Guidance does not necessarily require that any employee who receives notice of the harassment also be responsible for taking appropriate steps to end the harassment or prevent its recurrence. An employee may be required only to report the harassment to other school officials who have the responsibility to take appropriate action.

OCR does not agree with those commenters who recommend that a school can receive notice only through managerial or designated employees. For example, young students may not understand those designations and may reasonably believe that an adult, such as a teacher or the school nurse, is a person they can and should tell about incidents of sexual harassment regardless of that person's formal status in the school administration.

Comments: Several commenters stated that constructive notice, or the ''should have known'' standard, puts schools in the untenable position of constantly monitoring students and employees to seek out potential harassers.

Discussion: Constructive notice is relevant only if a school's liability depends on notice and conduct has occurred that is sufficient to trigger the school's obligation to respond. As the examples in the Guidance indicate, constructive notice is applicable only if a school ignores or fails to recognize overt or obvious problems of sexual harassment. Constructive notice does not require a school to predict aberrant behavior.

Remedying the Effects of Harassment on Students

Comments: Several commenters expressed concern regarding the Guidance's statement that schools may be required to pay for professional counseling and other services necessary to remedy the effects of harassment on students. Some comments indicated confusion over the circumstances under which the responsibility for those costs would exist and concern over the financial responsibility that would be created. Others stated that schools should not be liable for these costs if they have taken appropriate responsive action to eliminate the harassing environment, or if the harassers are non-employees.

Discussion: The final Guidance provides additional clarification regarding when a school may be required to remedy the effects on those who have been subject to harassment. For instance, if a teacher engages in *quid pro quo* harassment against a student, a school is liable under Title IX for the conduct and its effects. Thus, appropriate corrective action could include providing counseling services to the harassed student or paying other costs necessary to remedy the effects of the teacher's harassment. On the other hand, if a school's liability depends on its failure to take appropriate action after it receives notice of the harassment, *e.g.*, in cases of peer harassment, the extent of a school's liability for remedying the effects of the harassment will depend on the speed and efficacy of the school's response once it receives notice. For instance, if a school responds immediately and appropriately to eliminate harassment of which it has notice and to prevent its recurrence, it will not be responsible for remedying the effects of harassment, if any, on the individual. By contrast, if a school ignores complaints by a student that he or she is persistently being sexually harassed by another student in his or her class, the school will be required to remedy those effects of the harassment that it could have prevented if it had responded appropriately to the student's complaints, including, if appropriate, the provision of counseling services.

Confidentiality

Comments: Many commenters recommended additional clarification regarding how schools should respond if a harassed student requests that his or her name not be disclosed. Some commenters believe that, particularly in the elementary and secondary school arena, remedying harassment must be the school's first priority, even if that action results in a breach of a request for confidentiality. These commenters were concerned that, by honoring requests for confidentiality, schools would not be able to take effective action to remedy harassment. Other commenters believe that if requests for confidentiality are not honored, students may be discouraged from reporting harassment. These commenters, therefore, argue that declining to honor these requests would be less effective in preventing harassment than taking whatever steps are possible to remedy harassment, while maintaining a victim's confidentiality. Finally, some commenters were concerned that withholding the name of the victim of harassment would interfere with the due process rights of the accused.

Discussion: The Guidance strikes a balance regarding the issue of confidentiality: encouraging students to report harassment, even if students wish to maintain confidentiality, but not placing schools in an untenable position regarding their obligations to remedy and prevent further harassment, or making it impossible for an accused to adequately defend himself or herself. The Guidance encourages schools to honor a student's request that his or her name be withheld, if this can be done consistently with the school's obligation to remedy the harassment and take steps to prevent further harassment. (The Guidance also notes that schools should consider whether the Family Educational Rights and Privacy Act (FERPA) would prohibit a school from disclosing information from a student's education record without the consent of the student alleging harassment.) In addition, OCR has provided clarification by describing factors schools should consider in making these determinations. These factors include the nature of the harassment, the age of the students involved, and the number of incidents and students involved. These factors also may be relevant in balancing a victim's need for confidentiality against the rights of an accused harasser.

The Guidance also has been clarified to acknowledge that, because of the sensitive nature of incidents of harassment, it is important to limit or prevent public disclosure of the names of both the student who alleges harassment and the name of the alleged harasser. The Guidance informs schools that, in all cases, they should make every effort to prevent public disclosure of the names of all parties involved, except to the extent necessary to carry out a thorough investigation.

FERPA

Comments: Several commenters stated that the Department should change its position that FERPA could prevent a school from informing a complainant of the sanction or discipline imposed on a student found guilty of harassment. Some commenters argued that information regarding the outcome of a sexual harassment complaint is not an education record covered by FERPA. Other commenters argued alternatively that any information regarding the outcome of the proceedings is ''related to'' the complainant and, therefore, the information can be disclosed to him or her consistent with FERPA. In addition, some commenters asked for clarification that FERPA does not limit the due process rights of a teacher who is accused of harassment to be informed of the name of the student who has alleged harassment.

Discussion: As these comments indicate, the interplay of FERPA and Title IX raises complex and difficult issues. Regarding requests for clarification on the interplay of FERPA and the rights of an accused employee, the Guidance clarifies that the Department does not interpret FERPA to override any federally protected due process rights of a school employee accused of harassment.

Regarding whether FERPA prohibits the disclosure of any disciplinary action taken against a student found guilty of harassment, it is the Department's current position that FERPA prohibits a school from releasing information to a complainant if that information is contained in the other student's education record unless—(1) the information directly relates to the complainant (for example, an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or sex offense in a postsecondary institution. However, in light of the comments received on this issue, the Department has determined that its position regarding the application of FERPA to records and information related to sexual harassment needs further consideration. Accordingly, the section on ''Notice of Outcome and FERPA'' has been removed from the Guidance. Additional guidance on FERPA will be forthcoming.

Does Title IX Require Schools to Have a Sexual Harassment Policy

Comments: Several commenters requested additional clarity regarding whether Title IX requires schools to have a policy explicitly

prohibiting sexual harassment or to have grievance procedures specifically intended to handle sexual harassment complaints, or both.

Discussion: Title IX requires a recipient of Federal funds to notify students and parents of elementary and secondary students of its policy against discrimination based on sex and have in place a prompt and equitable procedure for resolving sex discrimination complaints. Sexual harassment can be a form of sexual discrimination. The Guidance clearly states that, while a recipient's policy and procedure must meet all procedural requirements of Title IX and apply to sexual harassment, a school does not have to have a policy and procedure specifically addressing sexual harassment, as long as its nondiscrimination policy and procedures for handling discrimination complaints are effective in eliminating all types of sex discrimination. OCR has found that policies and procedures specifically designed to address sexual harassment, if age appropriate, are a very effective means of making students and employees aware of what constitutes sexual harassment, that that conduct is prohibited sex discrimination, and that it will not be tolerated by the school. That awareness, in turn, can be a key element in preventing sexual harassment.

[FR Doc. 00–27910 Filed 11–1–00; 8:45 am]

BILLING CODE 4000–01–P