Nos. 13-15444-AA, 14-12481-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES HILL, as guardian and next friend of BHJ, a minor,

Plaintiff-Appellant

v.

MADISON COUNTY SCHOOL BOARD, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL

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Hill v. *Madison County School Board, et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for the United States files this Certificate Of Interested Persons And Corporate Disclosure Statement. The following persons may have an interest in the outcome of this case:

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INTEREST OF THE UNITED STATES

The Department of Education (ED) oversees funding recipients' compliance with Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (Title IX) and promulgates regulations and issues guidance regarding Title IX's prohibition against sexual discrimination. See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997), amended by the Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees,

Other Students, or Third Parties (Jan. 19, 2001) (2001 ED Guidance) (Attachment A). The Department of Justice (DOJ) shares authority with ED's Office of Civil Rights for enforcing Title IX and may initiate an investigation or compliance review of schools receiving federal financial assistance and file Title IX sex discrimination cases referred by ED. DOJ may also bring discrimination suits against public schools under Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c *et seq.*

STATEMENT OF THE ISSUES

1. Whether plaintiff raised a genuine issue of material fact that school administrators with knowledge of a student's extensive history of sexual and violent misconduct at school had "actual notice" that the student posed a substantial risk under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (Title IX).

2. Whether plaintiff raised a genuine issue of material fact that school administrators were deliberately indifferent to a student's extensive history of sexual and violent misconduct under Title IX.

STATEMENT OF THE CASE

1. Facts

a. Discipline And Records At Sparkman Middle School

This case emanates from the sexual assault of BHJ, a 14-year-old special needs student, by CJC, a 16-year-old student with a long history of sexual and violent misconduct at school. During the relevant time frame, Principal Ronnie Blair and Vice-Principals Jeanne Dunaway and Teresa Terrell handled all Sparkman Middle School's (Sparkman) student disciplinary matters referred to the front office. Upon receipt of a student-on-student misconduct complaint, an administrator typically requested a written statement from the alleged victim and then investigated. Doc.87-2, at 29; Doc.87-8, at 13. If there was neither corroboration nor admission, the allegation was considered unproven, the student was not punished, and all related records were promptly discarded. Doc.87-2, at 10, 14, 27; Doc.87-8, at 16; Doc.87-9, at 118.

When misconduct was proven, all documentation and information was placed in the student's file. Doc.87-2, at 13; Doc.87-8, at 8-9, 13. At the conclusion of each school year, all students' disciplinary files were shredded. Doc.87-2, at 8; Doc.87-8, at 13. A secretary recorded each proven offense on a student's computerized disciplinary report, along with the date it occurred, a brief descriptive note, a code reflecting its severity, and the punishment. Doc.87-7, at 9;

Doc.87-8, at 31. See Doc.87-4, at 35-48; Doc.87-5, at 2. Nothing was noted on a student's disciplinary report about unsubstantiated complaints. Doc.87-2, at 32-33, 41. The only disciplinary records available during 2009-2010, related to proven infractions for that school year. Doc.87-2, at 32; Doc.87-7, at 12.

As to CJC, the only disciplinary records currently available, besides statements about his sexual assault of BHJ that precipitated this lawsuit, are his computerized disciplinary reports. Doc.87-2, at 35; Doc.87-8, at 36; see note 1, *infra*, at 6. All underlying documentation relating to his other proven offenses was shredded at the end of each school year and records of unsubstantiated complaints were never maintained. Doc.87-2, at 8. Other than CJC's sexual assault of BHJ, no administrator can recall pertinent details as to any of CJC's proven or alleged infractions. See, *e.g.*, Doc.87-2, at 32-33, 44; Doc.87-7, at 11, 21; Doc.87-8, at 23-24, 26, 29, 31.

Administrators claimed to evaluate the circumstances, seriousness, and cumulative nature of misconduct when imposing punishment. Vice-Principal Terrell explained that information about allegations and proven infractions provided "insight" and "aid[ed] * * * judgment" when making disciplinary decisions. Doc.87-8, at 33. Because of the destruction of and failure to maintain disciplinary records, however, school administrators relied on memory, which admittedly was "flawed," for information about unsubstantiated complaints or

proven infractions beyond the current school year. Doc.87-8, at 17; see Doc.87-8, at 33.

Punishment for proven infractions typically included one or more of the following: notification of parents, counseling, in-school suspension, suspension from school for up to five days, or a hearing to expel or transfer the student to an alternative educational program. Doc.87-2, at 9, 18; Doc.87-8, at 16. Students in in-school suspension, sometimes referred to as appropriate alternative placement (AAP), were not allowed to attend classes and worked on assignments in a designated classroom supervised by a teacher. Doc.87-8, at 48-49. They were escorted to the cafeteria and ate lunch in their supervised classroom. Doc.87-8, at 49. At the principal's discretion, an AAP student was allowed to assist custodians with clean-up duties; the student was not closely monitored then, and had unsupervised access to other students. Doc.87-2, at 12, 40; Doc.87-8, at 49-50, 53.

b. CJC's Sexual And Other Misconduct In School

1. During the beginning of the 2008-2009 school year, CJC was in seventh grade at Ardmore High School, outside Madison County. On September 24, 2008, CJC "touch[ed] girls in inappropriate places" and wrote an "inappropriate note"

asking them to have sex.[1] As a result, he was given in-school suspension for five days. On October 22, 2008, CJC hit a student and received in-school suspension for three days. Doc.87-9, at 66-67.

During the school year, CJC transferred to Sparkman. Principal Blair was aware of his misconduct at Ardmore. Doc.87-9, at 28, 35, 66-67. On December 17, 2008, after transferring to Sparkman, CJC repeatedly hit a student and was suspended from school. On February 4, 2009, CJC was suspended for "sexual harassment" for "[m]aking inappropriate comments." On April 10, 2009, CJC received three days of in-school suspension for misbehaving and disrespecting a teacher. Doc.87-4, at 35-36.

During the 2009-2010, CJC was in eighth grade and according to Vice-Principal Terrell, "a constant behavior problem." Doc.87-9, at 81. On September 23, 2009, CJC "[o]ffered to pay another student to beat up a girl" and stated that "he would like to kill her." CJC was suspended for three days for harassment. On September 29, 2009, CJC misbehaved and was ordered to leave school and given in-school suspension for an additional day.

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[1] Unless otherwise noted, information regarding CJC's misconduct comes from CJC's computerized disciplinary reports. See Doc.87-4, at 35-48; Doc.87-5, at 2; Doc.87-9, at 66-67.

On October 16, 2009, CJC had a verbal altercation with a student and was assigned to in-school suspension for the rest of the day. On October 23, 2009, CJC said "[f] * * * [y]ou" to the school bus driver and was suspended from the bus for ten days. On October 28, 2009, CJC "[i]nappropriate[ly] touch[ed]" a student and received in-school suspension for three days. Two days later, CJC was disrespectful and disruptive and suspended for a day.

On November 18, 2009, CJC was barred from the school bus for 24 days after refusing to "keep [his] hands off a female student" and obey the bus driver. A week later, CJC received a two-day in-school suspension for "[k]issing." On December 15, 2009, CJC verbally argued with a student and received a one-day in-school suspension. Three days later, CJC threatened another student and was suspended for two days.

On January 13, 2010, Vice-Principals Dunaway and Terrell received a complaint that CJC inappropriately touched a female student. Finding no eyewitnesses to corroborate the victim's accusation, they concluded that CJC was not guilty but nonetheless discussed punishment. Doc.87-8, at 37, 39; Doc.87-7, at 7, 13. Dunaway never looked at CJC's disciplinary file to learn the details of CJC's prior infractions and admitted that the information on CJC's computerized disciplinary report did not impact her decision about what to do. Doc.87-7, at 12. Blair assigned CJC to in-school suspension for 20 days, but allowed him to

participate in clean-up duties with unsupervised access to other students. Doc.87-2, at 13. The administrators insisted that in-school suspension was merely "precautionary" because of CJC's failing grades. Doc.87-2, at 12; see Doc.87-8, at 38, 51. Blair stated that CJC likely would have received harsher punishment had the accusation been proven. Doc.87-2, at 40. According to Terrell, the episode was listed on CJC's computerized disciplinary report as "[d]isobedience" and "constant distraction" because the investigation took most of the day and disrupted learning. Doc.87-4, at 41; Doc.87-8, at 38.

According to Principal Blair, a few days later, June Simpson, a teacher's aide, reported that for several weeks, CJC had repeatedly been trying to get girls into the boys' bathroom and in fact had sex with a student in the bathroom on the special needs students' corridor. Doc.87-2, at 23, 39, 45; Doc.87-5, at 8; Doc.87-9, at 29. Blair interviewed CJC and the student allegedly involved and both denied anything happened. Doc.87-2, at 10, 39. Blair did not consider these incidents related to the "inappropriate touching" complaint a few days before and never reviewed CJC's prior proven sexual harassment infraction as to this or any other complaints involving CJC. Doc.87-2, at 12, 45. Blair also rejected Simpson's recommendation that CJC be "constantly monitored," and told Simpson that CJC could not be punished because he had not been "caught in the act," short-hand for the school's policy that students could not be disciplined without substantiation of

student-on-student misconduct. Doc.87-2, at 40; Doc.87-9, at 3. Blair redirected a security camera, which had an unmonitored screen in the front office, towards the boys' bathroom on the special needs corridor and alerted administrators and faculty to watch CJC. Doc.87-2, at 10-11; Doc.87-8, at 43; Doc.87-9, at 29. Blair, however, did not look at CJC's disciplinary record and continued to allow CJC to assist custodians and have unsupervised access to other students. Doc.87-2, at 11-12.

On January 22, 2010, while assisting custodians near the end of the day, CJC approached BHJ, a 14-year-old girl, who had already rebuffed his recent, repeated propositions to meet in the boys' bathroom for sex. BHJ immediately reported the incident to Simpson, a teacher's aide, who suggested that BHJ meet CJC in the bathroom where teachers could be positioned to catch him "in the act" before anything happened. BHJ initially refused, but then acquiesced. Simpson and BHJ then went to Vice-Principal Dunaway's office, where Simpson told Dunaway about her plan to use BHJ as bait to catch CJC. Dunaway did not respond with any advice or directive. Doc.87-1, at 14-18; Doc.87-5, at 8-9; Doc.87-9, at 32, 34. Principal Blair admitted that, assuming that Dunaway knew about the plan, she should have intervened and notified him. Doc.87-9, at 35-36.

BHJ left Dunaway's office, found CJC in the hallway, and agreed to meet him for sex. CJC told BHJ to go to the sixth grade boys' bathroom and she

complied. No teachers were in the bathroom to intervene, and CJC sodomized BHJ. Doc.87-1, at 18-19, 21.

That afternoon, BHJ, CJC, and Simpson gave written and oral statements to school administrators. See Doc.87-5, at 3-5, 8-9. BHJ reported that CJC anally raped and "stuck" her about six times in the rectum; CJC claimed that he had only kissed BHJ; and Simpson described alerting Dunaway to the plan. Doc.87-5, at 3, 9; see Doc.87-2, at 18. That evening, medical personnel found anal bleeding, trauma, and tearing consistent with BHJ's being sodomized. BHJ withdrew from Sparkman, received counseling, and stopped participating in various extracurricular activities. Doc.87-1, at 10-11; Doc.87-2, at 25.

Sparkman listed the sexual assault as "[i]nappropriate touching a female in boys bathroom" on CJC's computerized disciplinary report. Doc.87-4, at 42. Even after reviewing photographs of BHJ's injuries, Vice-Principal Terrell testified that she did not know whether BHJ had consented to the assault. Doc.87-8, at 48. Vice-Principal Dunaway testified that BHJ was responsible for herself once she entered the bathroom. Doc.87-7, at 25. Following a five-day suspension and a hearing, CJC was sent to an alternative school, but returned to Sparkman after approximately 20 days. Doc.87-2, at 25; Doc.87-7, at 22.

SUMMARY OF ARGUMENT

A school board cannot avoid summary judgment as a matter of law when a school administrator willfully ignores a plan to use a 14-year-old special needs student as bait to catch a student with a known history of sexual and violent misconduct, and as a result, the student is sodomized. As to "actual notice," the district court applied the wrong legal standard, failed to consider relevant evidence, and erred in granting defendant summary judgment when school administrators knew the student's extensive history of sexual and violent misconduct and were alerted to the substantial risk he posed to other students.

A school district also cannot avoid a jury trial when school administrators shred the disciplinary files of such a student and fail to maintain any records of unsubstantiated complaints against him. The absence of such documentation, here, made it impossible for the district court to accurately assess the number, nature, severity, and pattern of CJC's violent and sexual transgressions much less hold that the school district's response to those circumstances was not deliberately indifferent as a matter of law.

Regardless whether CJC's disciplinary records were properly maintained, the district court erred in granting summary judgment because a jury could easily conclude that the school acted with deliberate indifference when, despite two sexual misconduct complaints against CJC days before he sodomized BHJ, it

provided him unsupervised access to students and failed to protect BHJ. Accordingly, *both* the facts and law compel reversal.

ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING THE SCHOOL BOARD SUMMARY JUDGMENT ON PLAINTIFF'S TITLE IX CLAIM

Title IX provides that "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to the discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681. It makes a recipient of federal funds, here, the school district, "liable for [its] deliberate indifference to known acts of peer sexual harassment." *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648, 119 S. Ct. 1661, 1673 (1999). See *Williams* v. *Board of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1293 (11th Cir. 2007). To prevail on a Title IX student-on-student sexual harassment claim, a plaintiff must establish that: (1) defendant receives federal funding; (2) an "appropriate" school official had actual knowledge of the offender's harassment; (3) defendant "act[ed] with deliberate indifference to known acts of [sexual] harassment"; and (4) the offender's sexual misconduct was "so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to education[] opportunit[ies] or benefit[s]." *Ibid.* (citation omitted).

A. Plaintiff Raised A Genuine Issue Of Material Fact As To Whether School Administrators Had Actual Notice Of The Substantial Risk CJC Posed To Students

1. This Court has repeatedly recognized that a defendant can have "actual notice" when an appropriate "school official" is aware of an offender's history or pattern of sexual misconduct. See, *e.g.*, *J.F.K.* v. *Troup Cnty. Sch. Dist.*, 678 F.3d 1254, 1260 (11th Cir. 2012); *Doe* v. *School Bd. of Broward Cnty., Fla.*, 604 F.3d 1248, 1257-1259 (11th Cir. 2010); *Williams*, 477 F.3d at 1288-1290, 1294.[2] In *Williams*, this Court reversed the dismissal of a Title IX claim of a college student, who was assaulted and raped by a basketball player in his dorm room. It ruled that she sufficiently alleged "actual knowledge" because appropriate university officials knew that two years before, at another college, the student-athlete had groped two employees by "putting his hands down their pants" and "whistled at and made lewd suggestions to a female store clerk." *Id*. at 1290, 1293-1294. The Court concluded that university officials' knowledge of the athlete's prior sexual misconduct was "relevant" and "sufficient" to establish that defendants had "actual notice" because it alerted them that the athlete presented a danger to female

[2] The district court correctly concluded that Sparkman's administrators were "appropriate persons" to receive notice for the School District – that is, that they were authorized to take action to address sexual harassment. Defendant below never claimed that they were not, and the evidence, consistent with the district court's finding, demonstrates that they were. See *Davis*, 526 U.S. at 653-654, 119 S. Ct. at 1676 (allowing for liability where principal had notice); *Doe*, 604 F.3d at 1256 (accepting concession that principal could receive notice for school board).

students. *Id.* at 1293-1294. See *id.* at 1305 (Jordan, J., concurring) (there is Title IX liability if, with "prior knowledge of a * * * student's or teacher's * * * sexual misconduct," a school "plac[es] other students in serious danger" of sexual harassment).

Three years later, relying on *Williams*, this Court reversed a decision granting a school district summary judgment and held that the district had "actual notice" when the principal knew that two students had previously accused a teacher of sexual misconduct, even though their complaints were investigated and closed without a finding. Those complaints included allegations that the teacher made inappropriate comments, raised a female student's shirt, and told another student to do the same. See *Doe*, 604 F.3d at 1257-1259. This Court reasoned that "[e]ven if prior complaints" "are not clearly credible" and involve "lesser harassment," "at some point 'a supervisory school official ... knows that [an accused] is a substantial risk to sexually abuse'" other students. *Id.* at 1258-1259 (quoting *Escue* v. *North Okla. Coll.*, 450 F.3d 1146, 1154 (10th Cir. 2006)). This Court held that "[t]he simple fact that * * * prior incidents [are] unconfirmed and d[o] not escalate to a violent sexual assault akin to plaintiff's," "cannot as a matter of law absolve [a] [s]chool [b]oard of Title IX liability." *Doe*, 604 F.3d at 1250 n.1, 1259. Accordingly, a plaintiff raises a genuine issue of material fact as to actual notice when appropriate school officials know of complaints that "when

viewed collectively," reflect a "pattern of sexual misconduct" that alerts them that an offender poses a risk to students. *Id.* at 1259, 1263.

Other courts of appeals have likewise held that a district has "actual notice" when appropriate school officials are aware of a history or alleged pattern of sexual misconduct that alerts them that an offender poses a "substantial risk of sexual abuse to children in the school district." *Williams* v. *Paint Valley Local Sch. Dist.*, 400 F.3d 360, 363 (6th Cir. 2005).[3] Courts have reached that conclusion without addressing whether an offender's past sexual abuse was severe or persistent or resulted in a denial of educational opportunities. Moreover, physically aggressive or violent behavior, combined with sexual misconduct, can provide notice that an offender is a substantial risk to other students. See *Vance* v. *Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2009) (combining violent nonsexual behavior with sexual misconduct to conclude that harassment was severe and pervasive); *Hicks* v. *Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (aggregating racial or national origin harassment with gender harassment against victim to

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[3] See *Bostic* v. *Smyrna Sch. Dist.*, 418 F.3d 355, 361 (3d Cir. 2005) ("An educational institution has 'actual knowledge' if [an appropriate person] [has knowledge of] facts, indicating sufficiently substantial danger to [a] student[]," so that the institution can reasonably be said to be "aware of the danger.") (quoting 3C Kevin F. O'Malley, *et al.*, *Federal Jury Practice & Instruction* § 177.36 (5th ed. 2001)); *Baynard* v. *Malone*, 268 F.3d 228, 240 (4th Cir. 2001) (a school district cannot "escape liability * * * if an appropriate school official [was on notice of] warning flags of substantial risk").

determine existence of hostile environment). See also 2001 ED Guidance 7 (Attachment A) ("[a]cts 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 create a sexually hostile environment). Consequently, to satisfy Title IX's actual notice requirement when there has been a known history of physical sexual misconduct, a plaintiff need only show that prior allegations alerted appropriate school officials that an alleged offender posed a substantial risk to students.

2. The district court here applied the wrong legal standard, failed to consider relevant evidence, and erred in granting defendant summary judgment on the issue of notice. First, while the district court correctly found that appropriate school officials knew of CJC's "troublesome" disciplinary record over the past 14 months, it erred in concluding that CJC's past sexual misconduct "must [have] rise[n] to the level of being so severe, pervasive, and objectively offensive that it acts to deprive students of educational opportunities or benefits" for the defendant to have "actual knowledge" of his risk to other students. *Hill* v. *Madison Cnty. Sch. Bd.*, 957 F. Supp. 2d 1320, 1333-1334 (N.D. Ala. 2013).[4] As stated above, a school district

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[4] If sufficiently serious, a single incident of sexual harassment may satisfy Title IX's "severe, pervasive, and objectively offensive" requirement. See *Vance*, 231 F.3d at 259; *Cherry* v. *Shaw Coastal, Inc.*, 668 F.3d 182, 189 (5th Cir.), cert. denied, 133 S. Ct. 162 (2012); see also 2001 ED Guidance 6 (Attachment A).

has actual notice when an offender's known record, or complaints of sexual and violent misconduct, alert appropriate school officials that the offender poses a substantial risk to other students. That standard does not require a plaintiff to have been previously attacked or show the specific nature of, or level of harm suffered by past victims, so long as the past harassment involved more than innocuous, inadvertent physical contact. *Doe*, 604 F.3d at 1257; *Williams*, 477 F.3d at 1288-1290, 1294-1295. See *Escue*, 450 F.3d at 1154; *Baynard*, 268 F.3d at 238. To conclude otherwise, as the district court did here, wrongly suggests that Title IX imposes no obligation on a school to provide protection from a student with a known history of violent and sexual misconduct. See *Davis*, 526 U.S. at 643 ("Title IX '[u]nquestionably ... placed on [the school district] the duty not' to permit * * * harassment in schools.") (quoting *Franklin* v. *Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75, 112 S. Ct. 1028, 1037 (1992)); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 300 (1998) ("Congress included the prohibition against discrimination on the basis of sex in Title IX: to induce school boards to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to" sexual abuse); *J.F.K.*, 678 F.3d at 1260 (quoting *Doe*, 605 F.3d at 1258 and citing *Broward Cnty.*, 604 F.3d at 1254) (lesser harassment may provide actual notice of sexually violent conduct, for it is the "risk of such conduct that a Title IX recipient has the duty to deter").

Moreover, contrary to *Williams*, the district court wrongly suggested that misconduct in a different school system is irrelevant to the issue of notice. See *Hill*, 957 F. Supp. 2d at 1333. An offender's pattern of sexual and violent misconduct at a prior school, even when dissimilar to and less serious than a plaintiff's subsequent, violent sexual assault, can obviously alert administrators that the offender poses a substantial risk to their students. See *Doe*, 604 F.3d at 1258-1259. Consequently, the district court should have considered CJC's misconduct at Ardmore when deciding whether defendant had actual notice.

Applying the correct legal standard and considering all relevant evidence, the district court erred in concluding that CJC's extensive history of sexual and violent misconduct was legally insufficient to raise a genuine issue of material fact as to whether administrators, and thus the school district, had "actual notice." Administrators knew that CJC had engaged in 15 proven incidents of misconduct during the 14 months of school prior to his sodomizing BHJ. See Attachment B. Of those 15 infractions, 5 involved sexual misconduct and 4 others included violent or threatening misbehavior. *Ibid.* More specifically, in February 2009, Sparkman suspended CJC for "sexual harassment," which by its own policy is misconduct that "creates an intimidating hostile, or offensive environment" or "interferes with a student's educational environment or personal well being." Doc.87-4, at 27. CJC's four other sex-related offenses all included physical

misconduct; at least two were particularly serious, while three of CJC's violent infractions were sufficiently dangerous to warrant school suspensions.

Administrators also had "actual notice" that CJC had allegedly engaged in a significant pattern of *sexual* misconduct. On January 13, 2010, only ten days before CJC sodomized BHJ, Vice-Principals Dunaway and Terrell investigated a complaint that CJC inappropriately touched a female student. While both claimed that they could not recall the details of, or locate eyewitnesses to the incident (Doc.87-7, at 11; Doc.87-8, at 37-38) they learned enough for CJC to be given 20 days in-school suspension and Principal Blair to admit that CJC would likely have received more severe punishment had the infraction been proven. Doc.87-2, at 40. Further, according to Blair, a few days later, Simpson reported that for several weeks CJC had repeatedly been trying to get girls to the boys' bathroom, and in fact had sex there with a student. Doc.87-5, at 8. Both complaints involved sexual misconduct that was consistent with and the same as CJC's known, sustained pattern of proven sexual misbehavior. By January 2010, administrators knew that CJC had sexually harassed a young girl, "inappropriate[ly] touched" or failed to "keep [his] hands off" female students at least three times, and been propositioning girls in school since his days at Ardmore. Thus, assessed under the proper standard, a jury could easily conclude that the district had "actual notice" because a series of proven and alleged infractions "when viewed collectively," showed an

extensive and persistent pattern of serious sexual and violent misconduct that alerted school officials that CJC posed a substantial risk to other students. *Doe*, 604 F.3d at 1259.

In addition, the record, particularly when viewing all reasonable inferences in plaintiff's favor, demonstrates that administrators not only knew that CJC was a danger, but minimized the appearance of what they knew. Their description of BHJ's rape significantly understates the facts so as to make it difficult for future administrators to know what CJC did and his dangerousness. While the physical evidence and BHJ's consistent written and oral statements establish that CJC brutally sodomized BHJ, his computerized disciplinary report merely describes the infraction as an "[i]nappropriate touching [of] a female in the boys bathroom." Doc.87-4, at 42.

The description of the January 13 complaint is equally misleading. Even though CJC was accused of inappropriately touching a female student, his disciplinary report hides the sexual nature of the allegation and describes the alleged infraction as "[d]isobedience" and "continued disruption of learning," supposedly because "[t]he bickering that ensue[d] among students" from the investigation "was a distraction." Doc.87-4, at 41; Doc.87-8, at 38. Similarly, CJC's computerized report for February 2009, states only that CJC "ma[de] [i]nappropriate comments to a young lady" even though he was *suspended from*

school for sexual harassment. Doc.87-4, at 35. Given that CJC received only *one day in-school suspensions* for two other verbal altercations, it is likely that the sexual harassment infraction involved far more serious conduct than verbal remarks. See Doc.87-5 at 2. The generic, sanitized description of CJC's misconduct in October 2009, as "[i]nappropriate touching" -- the same language used to document BHJ's sexual assault -- also conceals the details and seriousness of that transgression. Doc.87-4, at 38. In fact, Sparkman's practice of recording unrevealing and misleading descriptions of past incidents, coupled with its failure to maintain any record of unsubstantiated complaints and documentation for proven infractions beyond the current academic year, amounts to intentionally closing its eyes to CJC's dangerousness. Thus, the district court erred in awarding summary judgment due to a lack of "evidence concerning the nature and severity of [CJC's] actual conduct." *Hill*, 957 F. Supp. 2d at 1333.

3. Even if CJC had no history of sexual misconduct, the district court erred in granting summary judgment on the issue of notice. It is undisputed that minutes *before* CJC sodomized BJH, Vice-Principal Dunaway was alerted to Simpson's plan for BHJ to meet CJC in the boys' bathroom for sex. At that point, appropriate school officials clearly had actual notice that CJC was going to engage in sexual misconduct and an obligation, as acknowledged by Blair, to intervene.

Consequently, the School Board was not entitled to summary judgment on the issue of notice.

B. Plaintiff Raised A Genuine Issue Of Material Fact As To Whether School Administrators Were Deliberately Indifferent To CJC's History Of Sexual And Violent Misconduct

1. A recipient of federal funds is "liable for [its] deliberate indifference to known acts of peer sexual harassment." *Davis*, 526 U.S. at 648, 119 S. Ct. at 1673. Deliberate indifference "'is an official decision ... not to remedy the violation' or a refusal to take action to comply with Title IX" that "at a minimum, cause[s] students to undergo harassment or make them liable or vulnerable to it." *Dale* v. *White Cnty., Ga. Sch. Dist.*, 238 F. App'x 481, 484 (11th Cir. 2007) (quoting *Gebser*, 524 U.S. at 290, 118 S. Ct. at 1993), cert. denied, 552 U.S. 1231, 128 S. Ct. 1446 (2008); *Davis*, 526 U.S. at 644-645, 119 S. Ct. at 1671-1672 (internal quotation marks omitted). That standard, while "exacting," does not allow funding recipients to avoid liability as a matter of law merely because school administrators "simply do *something* in response to sexual harassment." *Doe*, 604 F.3d at 1259, 1263. Rather, it requires school officials to respond "in a manner that is not 'clearly unreasonable in light of the *known* circumstances,'" which necessarily requires consideration of known circumstances, including the nature, pattern, circumstances and seriousness of the misconduct and the risk the offender poses to others, including whether he is a "known serial harasser." *Id.* at 1263 (quoting

Davis, 526 U.S. at 648, 119 S. Ct. at 1674); *Hawkins* v. *Anheuser-Busch, Inc.*, 517 F.3d 321, 341 (6th Cir. 2008) (Title VII case). See *Williams*, 400 F.3d at 363-364 (school district may be liable if it remains "deliberately indifferent to a substantial risk of sexual abuse").

Consistent with that standard, this Court has recognized that school officials can be deliberately indifferent and violate Title IX when they "ignore an alleged pattern of sexual misconduct" or fail to adequately supervise a student with a known history of sexual transgressions. *Doe*, 604 F.3d at 1263; *Williams*, 477 F.3d at 1296. That is so even when school officials conduct thorough investigations that are ultimately inconclusive as to whether prior alleged misconduct occurred. Because "inconclusive investigations are common, especially when alleged harassment occurs behind closed doors * * * a reasonable response under the known circumstances may include taking informal corrective action in an abundance of caution to ensure that future misconduct does not occur." *Doe*, 604 F.3d at 1262. Further, where an appropriate school official has "knowledge that its remedial action [has been] inadequate and ineffective," a school district is "required to take reasonable action in light of those circumstances to eliminate the behavior." *Id.* at 1261 (quoting *Vance*, 231 F.3d at 261). Consequently, once school officials with "authority to * * * institute corrective measures" have "actual notice" of multiple allegations and fail to evaluate or respond to the known

circumstances as to "the risk faced by [their] students," there is "a genuine issue of material fact" as to whether they were deliberately indifferent. *Gebser*, 524 U.S. at 290, 118 S. Ct. at 1999; *Doe*, 604 F.3d at 1261-1262.

2a. The district court erred in awarding defendant summary judgment for multiple reasons. First, a reasonable jury could easily conclude that the district was deliberately indifferent when Vice-Principal Dunaway failed to respond or do anything to protect BHJ after learning of Simpson's plan for BHJ to meet CJC in the boys' bathroom for sex. In *Davis*, 526 U.S. at 654, 119 S. Ct. at 1676, the Supreme Court concluded that a plaintiff sufficiently alleged deliberate indifference when a school district "made no effort whatsoever either to investigate or to put an end to the harassment." If Title IX imposes *any* responsibility on school officials to prevent sexual harassment, it surely requires a response when they learn, as here, that a 14-year-old special needs student is about to be used as bait to catch a 16-year-old student with an extensive history of sexual and violent misconduct.

2b. The district court also erred in concluding that defendant was not deliberately indifferent as a matter of law when Principal Blair allowed CJC to participate in clean-up duties with unsupervised access to other students despite (1) a January 13, 2010 complaint that CJC had inappropriately touched a female student; and (2) a complaint, a few days later according to Blair, that CJC had

repeatedly tried to get girls to the boys' bathroom for sex and in fact had consensual sex there with a student.

First, the district court should not have ruled that Sparkman's response to those complaints was reasonable as a matter of law "in light of known circumstances" because the very circumstances essential to make that determination are unknown due to school administrators' destruction of and failure to maintain appropriate records. *Doe*, 604 F.3d at 1259 (quoting *Davis*, 526 U.S. at 648, 119 S. Ct. at 1674). The record reflects that prior to BHJ's sexual assault, school administrators knew that CJC was a serial harasser who had engaged in 15 proven offenses -- including 5 sexual misconduct infractions, or sexual harassment and 4 other sex-related offenses involving physical misbehavior, 4 other incidents of violent or threatening misconduct, and recently had twice been accused of a significant pattern of sexual misbehavior that was reminiscent of his prior proven transgressions. The details and severity of CJC's disciplinary problems are unavailable because school administrators shredded his disciplinary files and failed to maintain records of unsubstantiated accusations. Absent appropriate documentation and crucial information providing some details of CJC's proven and alleged misbehavior, the district court could not accurately assess the number, nature, severity, and pattern of his transgressions much less hold, as it erroneously

did here, that the School District's response to those circumstances was not deliberately indifferent as a matter of law.

To conclude otherwise would allow, or worse still, encourage a school district to avoid Title IX liability by destroying all records of an offender's misconduct and then claiming that no one has a recollection of the offender's history. It would also wrongly suggest that school officials have no obligation under Title IX to make an informed decision as to appropriate "cautionary measures" when they know, as here, that an offender has committed or been accused of multiple acts of sexual and violent misconduct. *Doe*, 604 F.3d at 1262.

The creation and retention of disciplinary records is crucial to a school district's obligations under Title IX. The Education Department has twice issued guidance stressing the necessity of appropriate recordkeeping relating to student discipline in order for a school district to demonstrate compliance with Titles IX, IV, and VI. See Dear Colleague Letter 2014 Guidance 20 (Attachment C) (mandating that "a school * * * collect accurate and complete data" and "upon request, to provide records that will enable [ED and DOJ] to ascertain whether the administration of student discipline policies and practices complies with the requirements of Title IV and VI"); 2001 ED Guidance 21 (explaining that the "[c]oordination of recordkeeping * * * will also ensure that the school can and will resolve recurring problems and identify students or employees who have

multiple complaints filed against them") (Attachment A). See also 28 C.F.R. 42.106(b) and (c) and 34 C.F.R. 100.6(b).

Moreover, in *Doe*, 604 F.3d at 1261-1262, this Court held that a principal's failure to "draw a connection" between "material details" relating to two unsubstantiated sexual misconduct complaints against the same teacher "create[d] a genuine issue of material fact as to whether [the principal's] response to [those] complaints * * * was clearly unreasonable in light of the known circumstances." This Court explained that "we cannot say that as a matter of law it was reasonable for [the principal] to ignore an alleged pattern of sexual misconduct," for "[t]o do so would permit future school districts to satisfy their obligations under Title IX without ever evaluating the known circumstances at all." *Id.* at 1263.

This case is far more compelling than *Doe* because Sparkman failed to retain any records of proven offenses beyond the current school year, or of unsubstantiated complaints regardless of when they occurred. As a result, school administrators could not consider patterns of prior accusations and were forced to rely largely on memory, which they admitted was "flawed" when deciding appropriate corrective measures for repeat offenders, like CJC. Doc.87-8, at 16. When school officials responded to the two complaints accusing CJC of sexual misconduct ten days before he sodomized BHJ, they had no records relating to his February 2009 sexual harassment infraction, his suspension in December 2008 for

repeatedly hitting a student, or any unsubstantiated accusations of sexual or violent behavior in the preceding 14 months of school aside from the two January 2010 sexual misconduct complaints. Doc.87-2, at 32; Doc.87-7, at 12. Thus, a reasonable jury could easily conclude that the administrators' responses to the two January 2010 sexual misconduct complaints were "clearly unreasonable in light of the known circumstances" at least in part because school officials failed to maintain complete, accurate disciplinary records. Consequently, the district court erred in holding that "despite serious deficiencies" in Sparkman's recordkeeping, "the School Board's response was not deliberately indifferent as a matter of law." *Doe*, 604 F.3d at 1259 (quoting *Davis*, 526 U.S.at 648, 119 S. Ct. at 1674); *id.* at 1263.

2c. Regardless of the destruction of CJC's disciplinary records, the district court erred in granting summary judgment. A reasonable jury could easily conclude that school officials were "clearly unreasonable in light of *known* circumstances" when they ignored and failed to consider readily available and significant facts when responding to two complaints accusing CJC of sexual misconduct ten days before he sodomized BHJ. *Doe*, 604 F.3d at 1263 (quoting *Davis*, 526 U.S. at 648, 119 S. Ct. at 1674). First, if as they say, CJC was assigned to in-school suspension merely as a precautionary measure and because of his grades, school administrators not only "ignore[d] an alleged pattern of sexual

misconduct" as in *Doe*, 604 F.3d 1263, but disregarded a sustained pattern of proven sexual misbehavior that involved multiple incidents and had been ongoing since seventh grade. Principal Blair also admitted that he never considered the two January sexual misconduct complaints, which occurred only days apart, to be related, never reviewed CJC's February 2009 sexual harassment infraction when deciding how to respond to *any* accusation against CJC, and never looked at CJC's computerized disciplinary report in response to Simpson's complaint that CJC had repeatedly been trying to get girls to the boys' bathroom for sex. Doc.87-2, at 11-12, 45. Vice-Principal Dunaway also acknowledged that she never looked at CJC's disciplinary file to learn the details of CJC's prior infractions and that CJC's computerized disciplinary record did not affect her decision about how to respond. Doc.87-7, at 12. Consequently, because administrators clearly ignored crucial known circumstances when allowing CJC to assist custodians with access to other students, defendant, under this Court's precedent, was not entitled to summary judgment.

2d. Finally, the district court erred in concluding that Sparkman was not deliberately indifferent as a matter of law when Principal Blair allowed CJC to participate in unsupervised clean-up duties with access to other students after receiving two successive complaints of sexual misconduct involving CJC in January 2010. In addition to the fact that the allegations were sexual in nature and

in quick succession, CJC, during the prior three and half months, had been suspended from school three times, twice been barred from riding the school bus for a total of 34 days, and engaged in 10 proven incidents of misconduct, 5 of which involved sexual or violent misbehavior. Thus, the evidence raised a genuine issue of fact as to whether "failing to supervise him in any way * * * substantially increased the risk faced by female students." *Doe*, 604 F.3d at 1262-1263 (quoting *Williams*, 477 F.3d at 1296).

CJC's assignment to 20 days in-school suspension in response to the January 13 complaint confirms that conclusion. Even though all three administrators insisted that they could not recall details of the accusation but were certain that CJC was not involved in any wrongdoing, they imposed a penalty that was nearly seven times longer than any previously ordered for CJC's 14 prior, proven infractions. This punishment strongly suggests that they knew that CJC was dangerous, needed to be separated from other students, and constantly supervised. Blair admitted CJC's dire risk to other students when he acknowledged that CJC likely would have received a harsher penalty had the January 13 complaint been substantiated. Doc.87-2, at 40. Accordingly, because a reasonable jury could conclude that Blair was deliberately indifferent to the danger CJC posed to other students when, following the January accusations he allowed

CJC to assist custodians with unsupervised access to other students, the district court erred in awarding summary judgment.

2e. There are also significant, genuine issues of material fact regarding the credibility of school officials' testimony, that demonstrate, particularly when viewed in the light most favorable to plaintiff, that the district court erred in granting summary judgment. For example, all three administrators insisted there was no evidence to prove the January 13 complaint. However, CJC's assignment to 20 days in-school suspension defies that conclusion, as does the listing of the incident on CJC's computerized disciplinary report, which all three agreed includes only proven infractions. All three administrators also claimed not to recall the details of the complaint even though they all had significant roles in handling the matter. Vice-Principals Dunaway and Terrell investigated the "inappropriate touching" "in great detail for a great amount of the day," but claimed not to recall the names or races of any of the five witnesses they interviewed, or any meaningful details about the episode -- other than that "someone said" that CJC had "rubbed up against a thigh, or something like that." Doc.87-8, at 37-38; see Doc.87-7, at 11-12. Similarly, Blair could not provide any details about what happened even though he met with CJC's mother about the incident. Doc.87-2, at 12. Further, Terrell, after reviewing photographs of BHJ's injuries, went so far as to claim that she did not know whether BHJ consented to the sexual assault. Doc.87-8, at 48.

Dunaway also claimed that 14-year-old BHJ was responsible for herself once she entered the boys' bathroom even though Simpson had promised that teachers would intervene and protect her. Doc.87-7, at 25; see Doc.87-1, at 23; Doc.87-5, at 6.

Accordingly, the district court erred in concluding that the School District's response was not deliberately indifferent as a matter of law.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2007 and contains 6969 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

s/ Lisa J. Stark
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Dated: September 17, 2014

CERTIFICATE OF SERVICE

I certify that on September 17, 2014, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL with the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system and that seven paper copies of the electronically-filed brief were sent to the Clerk of the Court by First Class mail. I further certify that counsel of record are CM/ECF registered and will be served via the appellate CM/ECF system.

s/ Lisa J. Stark
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ATTACHMENT A

REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES

TITLE IX

January 2001

U.S. Department of Education
Office for Civil Rights

PREAMBLE

Summary

The Assistant Secretary for Civil Rights, U.S. Department of Education (Department), issues a new document (revised guidance) that replaces 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 revised the guidance in limited respects in light of subsequent Supreme Court cases relating to sexual harassment in schools.

The revised guidance reaffirms the compliance standards that OCR applies in investigations and administrative enforcement of Title IX of the Education Amendments of 1972 (Title IX) regarding sexual harassment. The revised guidance re-grounds these standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages and clarifying their regulatory basis as distinct from Title VII of the Civil Rights Act of 1964 (Title VII) agency law. In most other respects the revised guidance is identical to the 1997 guidance. Thus, we intend the revised guidance to serve the same purpose as the 1997 guidance. It continues to provide the principles that a school[1] should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance.

Purpose and Scope of the Revised Guidance

In March 1997, we published in the Federal Register "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 covered by Title IX. The guidance was the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers. We also made the document available for public comment.

Since the issuance of the 1997 guidance, the Supreme Court (Court) has issued several important decisions in sexual harassment cases, including two decisions specifically addressing sexual harassment of students under Title IX: 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). The Court held in Gebser that a school can be liable for monetary damages if a teacher sexually harasses a student, an

[1] As in the 1997 guidance, the revised guidance uses the term "school" to refer to all schools, colleges, universities, and other educational institutions that receive Federal funds from the Department.

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 school's program and the conditions of Gebser are met.

The Court was explicit in Gebser and Davis that the liability standards established in those 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.

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 a school's obligations to take reasonable steps under Title IX and the regulations to prevent and eliminate sexual harassment as a condition of its receipt of Federal funding. The Department also determined that, although in most important respects the substance of the 1997 guidance was reaffirmed in Gebser and Davis, certain areas of the 1997 guidance could be strengthened by further clarification and explanation of the Title IX regulatory basis for the guidance.

On November 2, 2000, we published in the Federal Register a notice requesting comments on the proposed revised guidance (62 FR 66092). A detailed explanation of the Gebser and Davis decisions, and an explanation of the proposed changes in the guidance, can be found in the preamble to the proposed revised guidance. In those decisions and a third opinion, Oncale v. Sundowner Offshore Services, Inc. (Oncale), 523 U.S. 75 (1998) (a sexual harassment case decided under Title VII), the Supreme Court confirmed several fundamental principles we articulated in the 1997 guidance. In these areas, no changes in the guidance were necessary. A notice regarding the availability of this final document appeared in the Federal Register on January 19, 2001.

Enduring Principles from the 1997 Guidance

It continues to be the case that 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 ensuring a safe environment in which students can learn. As with the 1997 guidance, the revised guidance applies to students at every level of education. School personnel who understand their obligations under Title IX, e.g., understand that sexual harassment can be sex discrimination in violation of Title IX, are in the best position to prevent harassment and to lessen the harm to students if, despite their best efforts, harassment occurs.

One of the fundamental aims of both the 1997 guidance and the revised guidance has been to emphasize 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.

A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. 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 to hesitate to respond to sexual harassment in the same reasonable, commonsense manner as they would to other types of serious misconduct.

It is also important that schools not overreact to behavior that does not rise to the level of sexual harassment. As the Department stated in the 1997 guidance, a kiss on the cheek by a first grader does not constitute sexual harassment. School personnel should consider the age and maturity of students in responding to allegations of sexual harassment.

Finally, we reiterate the importance of having well- publicized and effective grievance procedures in place to handle complaints of sex discrimination, including sexual harassment complaints. Nondiscrimination policies and procedures are required by the Title IX regulations. In fact, the Supreme Court in Gebser 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 to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it.

Analysis of Comments Received Concerning the Proposed Revised Guidance and the Resulting Changes

In response to the Assistant Secretary's invitation to comment, OCR received approximately 11 comments representing approximately 15 organizations and individuals. Commenters provided specific suggestions regarding how the revised guidance could be clarified. Many of these suggested changes have been incorporated. Significant and recurring issues are grouped by subject and discussed in the following sections:

Distinction Between Administrative Enforcement and Private Litigation for Monetary Damages

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 or on behalf of a student who has been sexually harassed. As explained in the preamble to the proposed revised guidance, 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. at 283, and Davis, 526 U.S. at 639. The Gebser Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX. In Gebser, the Court was concerned with the possibility of a money damages award against a school for harassment about which it had not known. In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools

aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.

Commenters uniformly agreed with OCR that the Court limited the liability standards established in Gebser and Davis to private actions for monetary damages. See, e.g., Gebser, 524 U.S. 283, and Davis, 526 U.S. at 639. Commenters also agreed that the administrative enforcement standards reflected in the 1997 guidance remain valid in OCR enforcement actions.[2] Finally, commenters agreed that the proposed revisions provided important clarification to schools regarding the standards that OCR will use and that schools should use to determine compliance with Title IX as a condition of the receipt of Federal financial assistance in light of Gebser and Davis.

Harassment by Teachers and Other School Personnel

Most commenters agreed with OCR's interpretation of its regulations regarding a school's responsibility for harassment of students by teachers and other school employees. These commenters agreed that Title IX's prohibitions against discrimination are not limited to official policies and practices governing school programs and activities. A school also engages in sex-based discrimination if its employees, in the context of carrying out their day-to-day job responsibilities for providing aid, benefits, or services to students (such as teaching, counseling, supervising, and advising students) deny or limit a student's ability to participate in or benefit from the schools program on the basis of sex. Under the Title IX regulations, the school is responsible for discrimination in these cases, whether or not it knew or should have known about it, because the discrimination occurred as part of the school's undertaking to provide nondiscriminatory aid, benefits, and services to students. The revised guidance distinguishes these cases from employee harassment that, although taking place in a school's program, occurs outside of the context of the employee's provision of aid, benefits, and services to students. In these latter cases, the school's responsibilities are not triggered until the school knew or should have known about the harassment.

One commenter expressed concern that it was inappropriate ever to find a school out of compliance for harassment about which it knew nothing. We reiterate that, although a school may in some cases be responsible for harassment caused by an employee that occurred before other responsible employees of the school knew or should have known about it, OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation. This is consistent with the Court's underlying concern in Gebser and Davis.

Most commenters acknowledged that OCR has provided useful factors to determine whether harassing conduct took place "in the context of providing aid, benefits, or services." However, some commenters stated that additional clarity and examples regarding the issue were needed. Commenters also suggested clarifying

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[2] It is the position of the United States 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.

references to quid pro quo and hostile environment harassment as these two concepts, though useful, do not determine the issue of whether the school itself is considered responsible for the harassment. We agree with these concerns and have made significant revisions to the sections "Harassment that Denies or Limits a Student's Ability to Participate in or Benefit from the Education Program" and "Harassment by Teachers and Other Employees" to clarify the guidance in these respects.

Gender-based Harassment, Including Harassment Predicated on Sex-stereotyping

Several commenters requested that we expand the discussion and include examples of gender-based harassment predicated on sex stereotyping. Some commenters also argued that gender-based harassment should be considered sexual harassment, and that we have "artificially" restricted the guidance only to harassment in the form of conduct of a sexual nature, thus, implying that gender-based harassment is of less concern and should be evaluated differently.

We have not further expanded this section because, while we are also concerned with the important issue of gender-based harassment, we believe that harassment of a sexual nature raises unique and sufficiently important issues that distinguish it from other types of gender-based harassment and warrants its own guidance.

Nevertheless, we have clarified this section of the guidance in several ways. The guidance clarifies that gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim's failure to conform to stereotyped notions of masculinity and femininity. Although this type of harassment is not covered by the guidance, if it is sufficiently serious, gender-based harassment is a school's responsibility, and the same standards generally will apply. We have also added an endnote regarding Supreme Court precedent for the proposition that sex stereotyping can constitute sex discrimination.

Several commenters also suggested that we state that sexual and non-sexual (but gender-based) harassment should not be evaluated separately in determining whether a hostile environment exists. We note that both the proposed revised guidance and the final revised guidance indicate in several places that incidents of sexual harassment and non-sexual, gender-based harassment can be combined to determine whether a hostile environment has been created. We also note that sufficiently serious harassment of a sexual nature remains covered by Title IX, as explained in the guidance, even though the hostile environment may also include taunts based on sexual orientation.

Definition of Harassment

One commenter urged OCR to provide distinct definitions of sexual harassment to be used in administrative enforcement as distinguished from criteria used to maintain private actions for monetary damages. We disagree. First, as discussed in the preamble to the proposed revised guidance, the definition of hostile environment sexual harassment used by the Court in Davis is consistent with the definition found in the proposed guidance. Although the terms used by the Court in Davis are in some ways different from

the words used to define hostile environment harassment in 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. Both the Court's and the Department's definitions are contextual descriptions intended to capture the same concept -– that under Title IX, the conduct must be sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program. In determining whether harassment is actionable, both Davis and the Department tell schools to look at the "constellation of surrounding circumstances, expectations, and relationships" (526 U.S. at 651 (citing Oncale)), and the Davis Court cited approvingly to the underlying core factors described in the 1997 guidance for evaluating the context of the harassment. Second, schools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose.

Several commenters suggested that we develop a unique Title IX definition of harassment that does not rely on Title VII and that takes into account the special relationship of schools to students. Other commenters, by contrast, commended OCR for recognizing that Gebser and Davis did not alter the definition of hostile environment sexual harassment found in OCR's 1997 guidance, which derives from Title VII caselaw, and asked us to strengthen the point. While Gebser and Davis made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the Davis Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX. We also believe that the factors described in both the 1997 guidance and the revised guidance to determine whether sexual harassment has occurred provide the necessary flexibility for taking into consideration the age and maturity of the students involved and the nature of the school environment.

Effective Response

One commenter suggested that the change in the guidance from "appropriate response" to "effective response" implies a change in OCR policy that requires omniscience of schools. We disagree. Effectiveness has always been the measure of an adequate response under Title IX. This does not mean a school must overreact out of fear of being judged inadequate. Effectiveness is measured based on a reasonableness standard. Schools do not have to know beforehand that their response will be effective. However, if their initial steps are ineffective in stopping the harassment, reasonableness may require a series of escalating steps.

The Relationship Between FERPA and Title IX

In the development of both the 1997 guidance and the current revisions to the guidance, commenters raised concerns about the interrelation of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and Title IX. The concerns relate to two issues: (1) the harassed student's right to information about the outcome of a sexual harassment complaint against another student, including information about sanctions imposed on a student found guilty of harassment; and (2) the due process rights of

individuals, including teachers, accused of sexual harassment by a student, to obtain information about the identity of the complainant and the nature of the allegations.

FERPA generally forbids disclosure of information from a student's "education record" without the consent of the student (or the student's parent). Thus, FERPA may be relevant when the person found to have engaged in harassment is another student, because written information about the complaint, investigation, and outcome is part of the harassing student's education record. Title IX is also relevant because it is an important part of taking effective responsive action for the school to inform the harassed student of the results of its investigation and whether it counseled, disciplined, or otherwise sanctioned the harasser. This information can assure the harassed student that the school has taken the student's complaint seriously and has taken steps to eliminate the hostile environment and prevent the harassment from recurring.

The Department currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim. It has been the Department's position that there is a potential conflict between FERPA and Title IX regarding disclosure of sanctions, and that FERPA generally prevents 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.[3]

There is, however, an additional statutory provision that may apply to this situation. In 1994, as part of the Improving America's Schools Act, Congress amended the General Education Provisions Act (GEPA) -- of which FERPA is a part -- to state that nothing in GEPA "shall be construed to affect the applicability of … title IX of the Education Amendments of 1972…."[4] The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. The Department is in the process of developing a consistent approach and specific factors for implementing this provision. OCR and the Department's Family Policy Compliance Office (FPCO) intend to issue joint guidance, discussing specific areas of potential conflict between FERPA and Title IX.

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[3] Exceptions include the case of a sanction that directly relates to the person who was harassed (e.g., an order that the harasser stay away from the harassed student), or sanctions related to offenses for which there is a statutory exception, such as crimes of violence or certain sex offenses in postsecondary institutions.

[4] 20 U.S.C. 1221(d). A similar amendment was originally passed in 1974 but applied only to Title VI of the Civil Rights Act of 1964 (prohibiting race discrimination by recipients). The 1994 amendments also extended 20 U.S.C. 1221(d) to Section 504 of the Rehabilitation Act of 1973 (prohibiting disability-based discrimination by recipients) and to the Age Discrimination Act.

FERPA is also relevant when a student accuses a teacher or other employee of sexual harassment, because written information about the allegations is contained in the student's education record. The potential conflict arises because, while FERPA protects the privacy of the student accuser, the accused individual may need the name of the accuser and information regarding the nature of the allegations in order to defend against the charges. The 1997 guidance made clear that neither FERPA nor Title IX override any federally protected due process rights of a school employee accused of sexual harassment.

Several commenters urged the Department to expand and strengthen this discussion. They argue that in many instances a school's failure to provide information about the name of the student accuser and the nature of the allegations seriously undermines the fairness of the investigative and adjudicative process. They also urge the Department to include a discussion of the need for confidentiality as to the identity of the individual accused of harassment because of the significant harm that can be caused by false accusations. We have made several changes to the guidance, including an additional discussion regarding the confidentiality of a person accused of harassment and a new heading entitled "Due Process Rights of the Accused," to address these concerns.

REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS[1] BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES

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I. Introduction

Title IX of the Education Amendments of 1972 (Title IX) and the Department of Education's (Department) implementing regulations prohibit discrimination on the basis of sex in federally assisted education programs and activities.[2] The Supreme Court, Congress, and Federal executive departments and agencies, including the Department, have recognized that sexual harassment of students can constitute discrimination prohibited by Title IX.[3] This guidance focuses on a school's[4] 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. It 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 address it effectively if it does occur.[5]

II. Sexual Harassment

Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.[6] Sexual harassment of a student 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. Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance.

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.[7] 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.

III. 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.[8] 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.

A student may be sexually harassed by a school employee,[9] 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[10] 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.[11] An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.[12]

Although Title IX does not prohibit discrimination on the basis of sexual orientation,[13] sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance.[14] For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, 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 conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.[15]

Though beyond the scope of this guidance, gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping,[16] but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program.[17] 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. A school must respond to such harassment in accordance with the standards and procedures described in this guidance.[18] 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.[19]

IV. 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.[20]

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.[21]

The regulations set out the basic Title IX responsibilities a recipient undertakes when it accepts Federal financial assistance, including the following specific obligations.[22] 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;[23]
- Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;[24]
- Deny any student any such aid, benefit, or service;[25]
- Subject students to separate or different rules of behavior, sanctions, or other treatment;[26]
- 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 aid, benefit, or service to students;[27] and
- Otherwise limit any student in the enjoyment of any right, privilege, advantage, or opportunity.[28]

For the purposes of brevity and clarity, this 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.[29]

In addition, the regulations establish procedural requirements that are important for the prevention or correction of sex discrimination, including sexual harassment. These requirements include issuance of a policy against sex discrimination[30] and adoption and publication of grievance procedures providing for prompt and equitable resolution of complaints of sex discrimination.[31] 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.[32]

To comply with 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.

V. Determining a School's Responsibilities

In assessing sexually harassing conduct, it is important for schools to recognize that two distinct issues are considered. The first issue is whether, considering the types of harassment discussed in the following section, the conduct denies or limits a student's ability to participate in or benefit from the program based on sex. If it does, the second issue is the nature of the school's responsibility to address that conduct. As discussed in a following section, this issue depends in part on the identity of the harasser and the context in which the harassment occurred.

A. Harassment that Denies or Limits a Student's Ability to Participate in or Benefit from the Education Program

This guidance moves away from specific labels for types of sexual harassment.[33] In each case, the issue is whether the harassment rises to a level that it denies or limits a student's ability to participate in or benefit from the school's program based on sex. However, an understanding of the different types of sexual harassment can help schools determine whether or not harassment has occurred that triggers a school's responsibilities under, or violates, Title IX or its regulations.

The type of harassment traditionally referred to as quid pro quo harassment occurs if a teacher or other employee conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct.[34] Whether the student resists and suffers the threatened harm or submits and 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, on the basis of sex in violation of the Title IX regulations.[35]

By contrast, sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct. Harassment of this type is generally referred to as hostile environment harassment.[36] This type of harassing conduct requires a further assessment of whether or not the conduct is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program based on sex.[37]

Teachers and other employees can engage in either type of harassment. Students and third parties are not generally given responsibility over other students and, thus, generally can only engage in hostile environment harassment.

1. Factors Used to Evaluate Hostile Environment Sexual Harassment

As outlined in the following paragraphs, OCR considers a variety of related factors to determine if a hostile environment has been created, i.e., if sexually harassing conduct by an employee, another student, or 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. OCR considers the conduct from both a subjective[38] and objective[39] 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."[40] 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. OCR assesses the effect of the harassment on the student to determine whether it has denied or limited the student's ability to participate in or benefit from the school's program. For example, a student's grades may go down or the student may be forced to withdraw from school because of the harassing behavior.[41] A student may also suffer physical injuries or mental or emotional distress.[42] In another situation, 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.[43] 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.[44] 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.[45] 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.[46] 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.[47]

- 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,[48] 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.[49]

- 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.[50] 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.[51]

- 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.[52]

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.

2. Welcomeness

The section entitled "Sexual Harassment" explains that 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."[53] Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome.[54] 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.[55] 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.[56]

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,[57] OCR will consider a number of factors in determining whether a school employee's sexual advances or other sexual conduct could be considered welcome.[58] In addition, OCR will consider these factors in all cases involving postsecondary students in making those determinations.[59] 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?

B. Nature of the School's Responsibility to Address Sexual Harassment

A school has a responsibility to respond promptly and effectively to sexual harassment. In the case of harassment by teachers or other employees, the nature of this responsibility depends in part on whether the harassment occurred in the context of the employee's provision of aid, benefits, or services to students.

1. Harassment by Teachers and Other Employees

Sexual harassment of a student by a teacher or other school employee can be discrimination in violation of Title IX.[60] Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence. A school also may be responsible for remedying the effects of the harassment on the student who was harassed. The extent of a recipient's responsibilities if an employee sexually harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students.

A recipient is responsible under the Title IX regulations for the nondiscriminatory provision of aid, benefits, and services to students. Recipients generally provide aid, benefits, and services to students through the responsibilities they give to employees. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment – generally this means harassment that is carried out during an employee's performance of his or her responsibilities in relation to students, including teaching, counseling, supervising, advising, and transporting students – and the harassment denies or limits a student's ability to participate in or benefit from a school program on the basis of sex,[61] the recipient is responsible for the discriminatory conduct.[62] The recipient is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. This is true whether or not the recipient has "notice" of the harassment. (As explained in the section on "Notice of Employee, Peer, or Third Party Harassment," for 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.) Of course, under OCR's administrative enforcement, recipients always receive actual notice and the opportunity to take appropriate corrective action before any finding of violation or possible loss of federal funds.

Whether or not sexual harassment of a student occurred within the context of an employee's responsibilities for providing aid, benefits, or services is determined on a case-by-case basis, taking into account a variety of factors. If an employee conditions the provision of an aid, benefit, or service that the employee is responsible for providing on a student's submission to sexual conduct, i.e., conduct traditionally referred to as <u>quid pro quo</u> harassment, the harassment is clearly taking place in the context of the employee's responsibilities to provide aid, benefits, or services. In other situations, i.e., when an employee has created a hostile environment, OCR will consider the following factors in determining whether or not the harassment has taken place in this context, including:

- The type and degree of responsibility given to the employee, including both formal and informal authority, to provide aids, 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 circumstances in which the harassment took place;
- where and when the harassment occurred;
- the age and educational level of the student involved; and

- as applicable, whether, in light of the student's age and educational level and the way the school is run, it would be reasonable for the 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. Elementary and secondary schools, however, are typically run in a way that gives teachers, school officials, and other school employees a substantial degree of supervision, control, and disciplinary authority over the conduct of students.[63] Therefore, in cases involving allegations of harassment of elementary and secondary school-age students by a teacher or school administrator during any school activity,[64] 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.

For example, a teacher sexually harasses 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 designated as a hall 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. Thus, OCR would consider this an example of conduct that is occurring in the context of the employee's responsibilities to provide aid, benefits, or services.

Other examples of sexual harassment of a student occurring in the context of an employee's responsibilities for providing aid, benefits, or services include, but are not limited to -- a faculty member at a university's medical school conditions an intern's evaluation on submission to his sexual advances and then gives her a poor evaluation for rejecting the advances; a high school drama instructor does not give a student a part in a play because she has not responded to sexual overtures from the instructor; a faculty member withdraws approval of research funds for her assistant because he has rebuffed her advances; a journalism professor who supervises a college newspaper continually and inappropriately touches a student editor in a sexual manner, causing the student to resign from the newspaper staff; and a teacher repeatedly asks a ninth grade student to stay after class and attempts to engage her in discussions about sex and her personal experiences while they are alone in the classroom, causing the student to stop coming to class. In each of these cases, the school is responsible for the discriminatory conduct, including taking prompt and effective action to end the harassment, prevent it from recurring, and remedy the effects of the harassment on the victim.

Sometimes harassment of a student by an employee in the school's program does not take place in the context of the employee's provision of aid, benefits, or services, but nevertheless is sufficiently serious to create a hostile educational environment. An example of this conduct might occur if a faculty member in the history department at a university, over the course of several weeks, repeatedly touches and makes sexually suggestive remarks to a graduate engineering student while waiting at a stop for the university shuttle bus, riding on the bus, and upon exiting the bus. As a result, the student stops using the campus shuttle and walks the very long distances between her classes. In this case, the school is not directly responsible for the harassing conduct because it did not occur in the context of the employee's responsibilities for the provision

of aid, benefits, or services to students. However, the conduct is sufficiently serious to deny or limit the student in her ability to participate in or benefit from the recipient's program. Thus, the school has a duty, upon notice of the harassment,[65] to take prompt and effective action to stop the harassment and prevent its recurrence.

If the school takes these steps, it has avoided violating Title IX. If the school fails to take the necessary steps, however, its 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. The school, therefore, has engaged in its own discrimination. It then becomes responsible, not just for stopping the conduct and preventing it from happening again, but for remedying the effects of the harassment on the student that could reasonably have been prevented if the school had responded promptly and effectively. (For related issues, see the sections on "OCR Case Resolution" and "Recipient's Response.")

2. 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[66] about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.[67] 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 inaction 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.[68] In this case, the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.

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 to deny or limit 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[69] 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.[70] 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 the section on "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.[71] In this case, the school is responsible for taking corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had the school responded promptly and effectively.

C. 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 the school otherwise had notice of the harassment. 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.[72]

A school has notice if a responsible employee "knew, or in the exercise of reasonable care should have known," about the harassment.[73] 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.[74] Accordingly, schools need to ensure that employees are trained so that those 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[75] 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 about which it reasonably should have known, i.e., if it would have learned of the harassment if it had exercised reasonable care or made a "reasonably diligent inquiry."[76]

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.[77] 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.)[78]

If a school otherwise knows or reasonably should know of a hostile environment and fails to take prompt 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.

D. The Role of 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.[79] (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 disseminated policy and procedure, a student does not know either of the school's policy against and 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,[80] 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 that could reasonably have been prevented if the school's failure to comply with the procedural requirements had not hampered early notification.

VI. 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 disseminated policy prohibiting sex discrimination under Title IX[81] and effective grievance procedures;[82] (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment;[83] 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.[84] (Issues related to appropriate investigative and corrective actions are discussed in detail in the section on "Recipient's Response.")

If the school has taken, or agrees to take, 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.[85] 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.

VII. 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 prompt and effective 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.[86] 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.

A. 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),[87] 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 -– the complainant, the witnesses, and the accused -- 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.[88] 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.[89] A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.[90] In some cases, it may be appropriate to further separate the harassed student and the harasser, e.g., by changing housing arrangements[91] 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.[92]

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.[93] For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances, 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[94] 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.[95] 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.[96]

B. 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 a confidentiality 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 the student's request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students.

OCR enforces Title IX consistent with the federally protected due process rights of public school students and employees. Thus, for example, 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, in evaluating the school's response, OCR would not expect disciplinary action against an alleged harasser.

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.[97]

Similarly, a school should be aware of the confidentiality concerns of an accused employee or student. Publicized accusations of sexual harassment, if ultimately found to be false, may nevertheless irreparably damage the reputation of the accused. The accused individual's need for confidentiality must, of course, also be evaluated based on the factors discussed in the preceding paragraph in the context of the school's responsibility to ensure a safe environment for students.

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.

C. 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.

VIII. 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.

IX. 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.[98] 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.[99]

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.[100] 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.[101]

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;[102] 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.[103]

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.[104] The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated.[105] 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.[106] 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.[107] 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.[108]

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so.[109] 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 and effectively.[110] 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.[111]

X. Due Process Rights of the Accused

A public school's employees 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 consistent with any federally guaranteed due process rights involved in a complaint proceeding. Furthermore, the Family Educational Rights and Privacy Act (FERPA) does not override federally protected due process rights of persons accused of sexual harassment. 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. Of course, 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. 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 individuals accused of harassment.

XI. First Amendment

In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved.[112] Free speech rights apply in the classroom (e.g., classroom lectures and discussions)[113] 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[114]; and student newspapers, journals, and other publications[115]). In addition, First Amendment rights apply to the speech of students and teachers.[116]

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.[117] 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.[118]

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.[119] As an example of the application of free speech rights to allegations of sexual harassment, consider the following:

<u>Example 1</u>: 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 prompt and effective actions, including disciplinary action if necessary, to stop the harassment and prevent future harassment.

Endnotes

[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. Employees are also protected from discrimination on the basis of sex, including sexual harassment, by Title VII of the Civil Rights Act of 1964. For information about Title VII and sexual harassment, see the Equal Employment Opportunity Commission's (EEOC's) Guidelines on Sexual Harassment, 29 CFR 1604.11, for information about filing a Title VII charge with the EEOC, see 29 CFR 1601.7–1607.13, or see the EEOC's website at www.eeoc.gov.

[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] As described in the section on "Applicability," this guidance applies to all levels of education.

[5] For practical information about steps that schools can take to prevent and remedy all types of harassment, including sexual harassment, see "Protecting Students from Harassment and Hate Crime, A Guide for Schools," which we issued jointly with the National Association of Attorneys General. This Guide is available at our web site at: www.ed.gov/pubs/Harassment.

[6] 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, FSB v. Vinson, 477 U.S. 57, 60-61 (1986) (demands for sexual favors, sexual advances, fondling, indecent exposure, sexual intercourse, rape, sufficient to raise hostile environment 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. 1560, 1564-65 (N.D. Cal. 1996) (sexually derogatory taunts and innuendo can be the basis of a harassment claim); Denver School Dist. #2, OCR Case No. 08-92-1007 (same 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.

[7] 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).

[8] 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 68049 (November 13, 2000) (Department's amendment of the Title IX regulations to incorporate the statutory definition of "program or activity").

[9] 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.

[10] 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).

[11] Title IX and the regulations implementing it prohibit discrimination "on the basis of sex;" they do not restrict protection from 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 also Kinman v. Omaha Public School Dist., 94 F.3d 463, 468 (8th Cir. 1996), rev'd on other grounds, 171 F.3d 607 (1999) (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); 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).

[12] 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.

[13] See Williamson v. A.G. Edwards & Sons, Inc., 876 F2d 69, 70 (8th Cir. 1989, cert. denied 493 U.S. 1089 (1990); 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).

[14] 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).

[15] However, sufficiently serious sexual harassment is covered by Title IX even if the hostile environment also includes taunts based on sexual orientation.

[16] See also, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (where an accounting firm denied partnership to a female candidate, the Supreme Court found Title VII prohibits an employer from evaluating employees by assuming or insisting that they match the stereotype associated with their sex).

[17] See generally Gebser; Davis; See also 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) (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) (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).

[18] See, e.g., sections on "Harassment by Teachers and Other Employees," "Harassment by Other Students or Third Parties," "Notice of Employee, Peer, or Third Party Harassment," "Factors Used to Evaluate a Hostile Environment," "Recipient's Response," and "Prompt and Equitable Grievance Procedures."

[19] See Lipsett, 864 F.2d at 903-905 (general antagonism toward women, including stated goal of eliminating women from surgical program, statements that women shouldn't be in the program, and assignment of menial tasks, combined with overt sexual harassment); Harris, 510 U.S. at 23; Andrews v. City of Philadelphia, 895 F.2d 1469, 1485-86 (3rd Cir. 1990) (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) (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).

[20] 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.

[21] 34 CFR 106.4.

[22] 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).

[23] 34 CFR 106.31(b)(1).

[24] 34 CFR 106.31(b)(2).

[25] 34 CFR 106.31(b)(3).

[26] 34 CFR 106.31(b)(4).

[27] 34 CFR 106.31(b)(6).

[28] 34 CFR 106.31(b)(7).

[29] 34 CFR 106.3(a).

[30] 34 CFR 106.9.

[31] 34 CFR 106.8(b).

[32] 34 CFR 106.8(a).

[33] The 1997 guidance referred to quid pro quo harassment and hostile environment harassment. 62 FR 12038–40.

[34] 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 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 college student's agreeing to be spanked should she not attain a certain grade may constitute quid pro quo harassment).

[35] 34 CFR 106.31(b).

[36] Davis, 526 U.S. at 651 (confirming, by citing approvingly both to Title VII cases (Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57,67 (1986) (finding that hostile environment claims are cognizable under Title VII), and Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998)) and OCR's 1997 guidance, 62 FR at 12041-42, that determinations under Title IX as to what conduct constitutes hostile environment sexual harassment may continue to rely on Title VII caselaw).

[37] 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).

[38] 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.

[39] See Davis, 526 U.S. at 650 (conduct must be "objectively offensive" to trigger liability for money damages); Elgamil v. Syracuse University, 2000 U.S. Dist. LEXIS 12598 at 17 (N.D.N.Y. 2000) (citing Harris); Booher v. Board of Regents, 1998 U.S. Dist. LEXIS 11404 at 25 (E.D. Ky. 1998) (same). 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).

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

[41] 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).

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

[43] See Waltman v. Int'l Paper Co., 875 F.2d 468, 477 (5th Cir. 1989) (holding that although not specifically directed at the plaintiff, sexually explicit graffiti on the walls was "relevant to her claim"); Monteiro v. Tempe Union High School, 158 F.3d 1022, 1033-34 (9th Cir. 1998) (Title VI racial harassment case, citing Waltman; see also Hall, 842 F. 2d at 1015 (evidence of sexual harassment directed at others is relevant to show hostile environment under Title VII).

[44] See, e.g., Elgmil 2000 U.S. Dist. LEXIS at 19 ("in order to be actionable, the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive"); 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).

[45] 34 CFR 106.31(b). See Vance v. Spencer County Public School District, 231 F.3d 253 (6th Cir. 2000); Doe v. School Admin. Dist. No. 19, 66 F.Supp.2d 57, 62 (D. Me. 1999). 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).

[46] 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).

[47] 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 likely 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).

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

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

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

[51] 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).

[52] 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).

[53] Does v. Covington Sch. Bd. of Educ., 930 F.Supp. 554, 569 (M.D. Ala. 1996); Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

[54] 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."

[55] 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) (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....").

[56] 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.

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

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

[59] See note 58.

[60] 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.

[61] See Davis, 526 U.S. at 653 (stating that 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).

[62] 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).

[63] Davis, 526 U.S. at 646.

[64] See section on "Applicability of Title IX" for scope of coverage.

[65] See section on "Notice of Employee, Peer, or Third Party Harassment."

[66] See section on "Notice of Employee, Peer, or Third Party Harassment."

[67] 34 CFR 106.31(b).

[68] 34 CFR 106.31(b).

[69] See section on "Notice of Employee, Peer, or Third Party Harassment."

[70] Cf. Davis, 526 U.S. at 646.

[71] 34 CFR 106.31(b).

[72] 34 CFR 106.31(b).

[73] 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).

[74] 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.
The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. Gebser, 524 U.S. at 290, and Davis, 526 U.S. at 642. The concept of a "responsible employee" under our guidance 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.

[75] 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).

[76] 34 CFR 106.31. See Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987); Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983).

[77] 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).

[78] 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); "[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).

[79] 34 CFR 106.9 and 106.8(b).

[80] 34 CFR 106.8(b) and 106.31(b).

[81] 34 CFR 106.9.

[82] 34 CFR 106.8(b).

[83] 34 CFR 106.31.

[84] 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.").

[85] 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.

[86] 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.

[87] 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.

[88] Gebser, 524 U.S. at 288; 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).

[89] See Doe ex rel. Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380 (5th Cir. 2000) (citing Waltman); 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); holding that a company's quick decision to remove the harasser from the victim was adequate remedial action).

[90] See Intlekofer v. Turnage, 973 F.2d 773, 779-780 (9th Cir. 1992)(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).

[91] 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).

[92] See section on "Harassment by Other Students or Third Parties."

[93] 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).

[94] 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. Wills v. Brown University, 184 F.3d 20, 28 (1st Cir. 1999) (difficult problems are posed in balancing a student's request for anonymity or limited disclosure against the need to prevent future harassment); Fuller v. City of Oakland, 47 F.3d 1522, 1528-29 (9th Cir. 1995) (Title VII case).

[95] 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.

[96] 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).

[97] 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.

[98] 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.

[99] Fenton Community High School Dist. #100, OCR Case 05-92-1104.

[100] 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.

[101] 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).

[102] 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 97. 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.

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

[104] 34 CFR 106.8(a).

[105] Id.

[106] See Meritor, 477 U.S. at 72-73.

[107] 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.

[108] 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.

[109] 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.

[110] 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).

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

[112] 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.

[113] 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).

[114] 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).

[115] 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.)

[116] 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.)

[117] 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.)

[118] 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 sufficient 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); Monteiro, 158 F.3d at 1032-34 (9th Cir. 1998) (citing with approval OCR's racial harassment investigative guidance).

[119] 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).

ATTACHMENT B

CJC'S MISCONDUCT KNOWN TO SPARKMAN ADMINISTRATORS PRIOR TO RAPE

2008-2009 - 7th Grade -Ardmore High School		
DATE	**INCIDENT**	**PUNISHMENT**
9/24/08*	"Touching girls in inappropriate places" and writing "inappropriate note[s]" "asking them to have sex with him"	In-school suspension for 5 days
10/22/08**	Hitting another student	In-school suspension for 3 days
Sparkman Middle School		
12/17/08**	"Hit another student several times" on the school bus	Suspended from school
2/04/09*	"Sexual [h]arassment" by "[m]aking [i]nappropriate comments to a young lady"	Suspended from school
4/10/09	"[D]isrespect[ful] to [a] teacher" and refused to "follow instructions during tornado warning"	In-school suspension for 3 days
2009-2010 - 8th Grade - Sparkman Middle School		
9/23/09**	Offered to pay a student to beat up a girl and stated that "he would like to kill her"	Suspended from school for 3 days
9/29/09	Misbehaved and failed to follow directions while in in-school suspension	Additional day of in-school suspension
10/16/09	Verbal altercation with student while in in-school suspension	Additional day of in-school suspension
10/23/09	Said "[f] * * * [y]ou" to bus driver	Banned from riding school bus for 10 days
10/28/09*	"Inappropriate touching"	In-school suspension for 3 days
10/30/09	Disrespectful and disrupted class	Suspended from school
11/18/09*	"[R]efus[ed]" to "keep [his] hands off a female student" and obey bus driver	Banned from riding school bus for 24 days
11/25/09*	Kissing	In-school suspension for 2 days
12/15/09	Verbal altercation with student	In-school suspension for 1 day
12/18/09**	Threatened student	Suspended from school for 2 days
1/13/2010*	Allegedly touched a female student	In-school suspension for 20 days
A couple* of days later	Allegedly had sex with female student in boys' bathroom	No additional punishment

* Sexual misconduct
** Violent or threatening misconduct

ATTACHMENT C

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Notice of Language Assistance
Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: 如果您不懂英語， 或者使用英语有困难，您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339),或電郵: Ed.Language.Assistance@ed.gov.

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức của Bộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보 센터에 일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로 제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800-USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov 으로 연락하시기 바랍니다.

Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkol sa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

January 8, 2014

Dear Colleague:

The U.S. Department of Education and the U.S. Department of Justice (Departments) are issuing this guidance to assist public elementary and secondary schools in meeting their obligations under Federal law to administer student discipline without discriminating on the basis of race, color, or national origin. The Departments recognize the commitment and effort of educators across the United States to provide their students with an excellent education. The Departments believe that guidance on how to identify, avoid, and remedy discriminatory discipline will assist schools in providing all students with equal educational opportunities.[1]

The Departments strongly support schools in their efforts to create and maintain safe and orderly educational environments that allow our nation's students to learn and thrive. Many schools have adopted comprehensive, appropriate, and effective programs demonstrated to: (1) reduce disruption and misconduct; (2) support and reinforce positive behavior and character development; and (3) help students succeed. Successful programs may incorporate a wide range of strategies to reduce misbehavior and maintain a safe learning environment, including conflict resolution, restorative practices, counseling, and structured systems of positive interventions. The Departments recognize that schools may use disciplinary measures as part of a program to promote safe and orderly educational environments.

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[1] The Departments have determined that this Dear Colleague Letter is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at* http://www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. This and other policy guidance is issued to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. The Departments' legal authority is based on those laws. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202.

Regardless of the program adopted, Federal law prohibits public school districts from discriminating in the administration of student discipline based on certain personal characteristics. The Department of Justice's Civil Rights Division (DOJ) is responsible for enforcing Title IV of the Civil Rights Act of 1964 (Title IV), 42 U.S.C. §§ 2000c *et seq.*, which prohibits discrimination in public elementary and secondary schools based on race, color, or national origin, among other bases. The Department of Education's Office for Civil Rights (OCR) and the DOJ have responsibility for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d *et seq.*, and its implementing regulations, 34 C.F.R. Part 100, which prohibits discrimination based on race, color, or national origin by recipients of Federal financial assistance. Specifically, OCR enforces Title VI with respect to schools and other recipients of Federal financial assistance from the Department of Education.[2]

The Departments initiate investigations of student discipline policies and practices at particular schools based on complaints the Departments receive from students, parents, community members, and others about possible racial discrimination in student discipline.[3] The Departments also may initiate investigations based on public reports of racial disparities in student discipline combined with other information, or as part of their regular compliance monitoring activities.

This guidance will help public elementary and secondary schools administer student discipline in a manner that does not discriminate on the basis of race. Federal law also prohibits discriminatory discipline based on other factors, including disability, religion, and sex.[4] Those

[2] The Department of Justice enforces Title VI with respect to schools, law enforcement agencies, and other recipients of Federal financial assistance from DOJ; DOJ's Office for Civil Rights at the Office of Justice Programs (OJP OCR) is the principal DOJ office that enforces Title VI though its administrative process. *See* http://www.ojp.usdoj.gov/about/ocr/pdfs/OCR_TitleVI.pdf. DOJ also enforces Title VI upon referral from another Federal funding agency, or through intervention in an existing lawsuit. DOJ also coordinates the enforcement of Title VI government-wide.

[3] Throughout this guidance, "race" or "racial" includes race, color, or national origin; "policy" or "policies" includes policies and procedures; "school" or "schools" includes an elementary or secondary school, a school district, or a local educational agency (LEA) that is a recipient of Federal financial assistance, including a charter or "alternative" school that is a recipient of Federal financial assistance. The terms "program" and "programs" and "programs or activities" and "programs and activities" are used in a colloquial sense and are not meant to invoke the meaning of the terms "program" or "program or activity" as defined by the Civil Rights Restoration Act of 1987 (CRRA). Under the CRRA, which amended Title VI, Title IX of the Education Amendments of 1972 (Title IX), and Section 504 of the Rehabilitation Act of 1973 (Section 504), the term "program or activity" and the term "program," in the context of a school district, mean all of the operations of a school district. 42 U.S.C. § 2000d - 4a(2)(B); 20 U.S.C. § 1687(2)(B); 29 U.S.C. § 794(b)(2)(B).

[4] While this guidance explicitly addresses only race discrimination, much of the analytical framework laid out in this document also applies to discrimination on other prohibited grounds. Title IV also prohibits discrimination on the basis of sex and religion by public elementary and secondary schools. Title IX prohibits discrimination on the basis of sex by recipients of Federal financial assistance in their education programs or activities. 20 U.S.C. §§ 1681 *et seq.* Section 504 prohibits disability discrimination by recipients of Federal financial assistance, and Title II of the

prohibitions are not specifically addressed in this guidance because they implicate separate statutes and sometimes different legal analyses (although this guidance applies to race discrimination against all students, including students of both sexes and students with disabilities). Schools are reminded, however, that they must ensure that their discipline policies and practices comply with all applicable constitutional requirements and Federal laws, including civil rights statutes and regulations.

OVERVIEW OF RACIAL DISPARITIES IN THE ADMINISTRATION OF SCHOOL DISCIPLINE

The Civil Rights Data Collection (CRDC),[5] conducted by OCR, has demonstrated that students of certain racial or ethnic groups[6] tend to be disciplined more than their peers. For example, African-American students without disabilities are more than three times as likely as their white peers without disabilities to be expelled or suspended. Although African-American students represent 15% of students in the CRDC, they make up 35% of students suspended once, 44% of those suspended more than once, and 36% of students expelled. Further, over 50% of students

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Americans with Disabilities Act of 1990 (Title II) prohibits disability discrimination by public entities, including public school districts, in their services, programs, and activities. 29 U.S.C. § 794; 42 U.S.C. §§ 12131 *et seq.* Section 504 and Title II and their implementing regulations provide certain protections when students with disabilities are disciplined. Part B of the Individuals with Disabilities Education Act (IDEA) provides Federal funds to State educational agencies and through them to local educational agencies to assist in the provision of special education and related services to eligible children with disabilities. The IDEA contains specific provisions regarding the discipline of students with disabilities who are or may be IDEA-eligible and requires an analysis of discipline data disaggregated by race and ethnicity as well as possible review and revision of policies, practices, and procedures. *See, e.g.*, 20 U.S.C. §§ 1412(a)(22), 1415(k), 1418(d); 34 C.F.R. § 300.530(e)-(g). Additional information about Part B of the IDEA is available at http://idea.ed.gov.

[5] The CRDC is a mandatory data collection authorized under Title VI, Title IX, and Section 504, the regulations implementing those statutes, and the Department of Education Organization Act, 20 U.S.C. § 3413. Since 1968, the CRDC (formerly the Elementary and Secondary School Survey) has collected data on key education and civil rights issues in our nation's public schools. Unless otherwise noted, statistics referenced in this letter are drawn from unpublished (as of January 8, 2014) data collected by the CRDC for the 2011-12 school year. Additional information and publicly available data from the CRDC can be found at http://ocrdata.ed.gov.

[6] While this document addresses race discrimination against all students, including students with disabilities, evidence of significant disparities in the use of discipline and aversive techniques for students with disabilities raises particular concern for the Departments. For example, although students served by IDEA represent 12% of students in the country, they make up 19% of students suspended in school, 20% of students receiving out-of-school suspension once, 25% of students receiving multiple out-of-school suspensions, 19% of students expelled, 23% of students referred to law enforcement, and 23% of students receiving a school-related arrest. Additionally, students with disabilities (under the IDEA and Section 504 statutes) represent 14% of students, but nearly 76% of the students who are physically restrained by adults in their schools.

The Departments are developing resources to assist schools and support teachers in using appropriate discipline practices for students with disabilities.

who were involved in school-related arrests or referred to law enforcement are Hispanic or African-American.

The Departments recognize that disparities in student discipline rates in a school or district may be caused by a range of factors. However, research suggests that the substantial racial disparities of the kind reflected in the CRDC data are not explained by more frequent or more serious misbehavior by students of color.[7] Although statistical and quantitative data would not end an inquiry under Title IV or Title VI, significant and unexplained racial disparities in student discipline give rise to concerns that schools may be engaging in racial discrimination that violates the Federal civil rights laws. For instance, statistical evidence may indicate that groups of students have been subjected to different treatment or that a school policy or practice may have an adverse discriminatory impact. Indeed, the Departments' investigations, which consider quantitative data as part of a wide array of evidence, have revealed racial discrimination in the administration of student discipline. For example, in our investigations we have found cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students. In short, racial discrimination in school discipline is a real problem.

The CRDC data also show that an increasing number of students are losing important instructional time due to exclusionary discipline.[8] The increasing use of disciplinary sanctions such as in-school and out-of-school suspensions, expulsions, or referrals to law enforcement authorities creates the potential for significant, negative educational and long-term outcomes, and can contribute to what has been termed the "school to prison pipeline." Studies have suggested a correlation between exclusionary discipline policies and practices and an array of serious educational, economic, and social problems, including school avoidance and diminished educational engagement;[9] decreased academic achievement;[10] increased behavior problems;[11]

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[7] *See generally* Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline,* 101 J. CRIM. L. & CRIMINOLOGY 633 (2011); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline,* 40 SCH. PSYCHOL. REV 85 (2011); T. Fabelo, M.D. Thompson, M. Plotkin, D. Carmichael, M.P. Marchbanks & E.A. Booth, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (Council of State Governments Justice Center, 2011); A. Gregory & A.R. Thompson, *African American High School Students and Variability in Behavior Across Classrooms*, 38 J. COMMUNITY PSYCHOL. 386 (2010); R.J. Skiba, R.S. Michael, A.C. Nardo & R.L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment,* 34 URBAN REV. 317 (2002); Michael Rocque, *Office Discipline and Student Behavior: Does Race Matter?* 116 AM. J. EDUC. 557 (2010).

[8] Compare the 1984 CRDC National Estimations to the 2009 CRDC National Estimations for the category of suspension-out of school.

[9] Emily Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large, Multicultural School District*. 38 EDUC. & URB. SOC'Y 359 (2006).

[10] *Id.*

increased likelihood of dropping out;[12] substance abuse;[13] and involvement with juvenile justice systems.[14]

As a result, this guidance is critically needed to ensure that all students have an equal opportunity to learn and grow in school. Additionally, fair and equitable discipline policies are an important component of creating an environment where all students feel safe and welcome. Schools are safer when all students feel comfortable and are engaged in the school community, and when teachers and administrators have the tools and training to prevent and address conflicts and challenges as they arise. Equipping school officials with an array of tools to support positive student behavior – thereby providing a range of options to prevent and address misconduct – will both promote safety and avoid the use of discipline policies that are discriminatory or inappropriate. The goals of equity and school safety are thus complementary, and together help ensure a safe school free of discrimination.

This guidance summarizes schools' obligations to avoid and redress racial discrimination in the administration of student discipline. It provides a detailed explanation of the Departments' investigative process under Title IV and Title VI, including the legal framework within which the Departments consider allegations of racially discriminatory student discipline practices, and examples of school disciplinary policies and practices that may violate civil rights laws. In the Appendix to this guidance, the Departments have provided a set of recommendations to assist schools in developing and implementing student discipline policies and practices equitably and in a manner consistent with their Federal civil rights obligations. These recommendations are intended to be illustrative, not exhaustive. The Departments are available to provide technical assistance to support school efforts to cultivate an environment in which all students are safe and have equal educational opportunities.[15]

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[11] S.A. Hemphill, J.W. Toumbourou, T.I. Herrenkohl, B.J. McMorris & R.F. Catalano, *The Effect of School Suspensions and Arrests on Subsequent Adolescent Antisocial Behavior in Australia and the United States*. 39 J. ADOLESCENT HEALTH 736 (2006); S.A. Hemphill, T.I. Herrenkohl, S.M. Plenty, J.W. Toumbourou, R.F. Catalano & B.J. McMorris, *Pathways from School Suspension to Adolescent Nonviolent Antisocial Behavior in Students in Victoria, Australia and Washington State, United States*, 40 J. COMMUNITY PSYCHOL. 301 (2012).

[12] Arcia, *supra*; Fabelo et al, *supra*; Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, 99 NEW DIRECTIONS FOR YOUTH DEV. 17 (2003).

[13] S.A. Hemphill, J. A. Heerde, T.I. Herrenkohl, J.W. Toumbourou & R.F. Catalano, *The Impact of School Suspension on Student Tobacco Use: A Longitudinal Study in Victoria, Australia, and Washington State, United States.* 39 HEALTH EDUC. & BEHAV. 45 (2012).

[14] V. Costenbader & S. Markson, *School Suspension: A Study with Secondary School Students*. 36 J. SCH. PSYCHOL. 59 (1998); Fabelo et al, *supra*.

[15] Nothing in this guidance alters a school's obligation to respond to student misconduct that constitutes discriminatory harassment. More information about the applicable legal standards is included in OCR's Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010), *available at* http://www.ed.gov/ocr/letters/colleague-201010.pdf. *See also* OCR's Dear Colleague Letter: Sexual Harassment and Sexual Violence (Apr. 4, 2011),

THE DEPARTMENTS' INVESTIGATIONS AND ENFORCEMENT ACTIONS UNDER TITLE IV AND TITLE VI

A. Legal Framework

Titles IV and VI protect students from discrimination based on race in connection with all academic, educational, extracurricular, athletic, and other programs and activities of a school, including programs and activities a school administers to ensure and maintain school safety and student discipline. When schools respond to student misconduct, Titles IV and VI require that the school's response be undertaken in a racially nondiscriminatory manner.

These statutes cover school officials and everyone school officials exercise some control over, whether through contract or other arrangement, including school resource officers. Schools cannot divest themselves of responsibility for the nondiscriminatory administration of school safety measures and student discipline by relying on school resource officers, school district police officers, contract or private security companies, security guards or other contractors, or law enforcement personnel. To the contrary, the Departments may hold schools accountable for discriminatory actions taken by such parties.[16]

Titles IV and VI protect students over the entire course of the disciplinary process, from behavior management in the classroom, to referral to an authority outside the classroom because of misconduct – a crucial step in the student discipline process – to resolution of the discipline incident. In their investigations of school discipline, the Departments have noted that the initial referral of a student to the principal's office for misconduct is a decision point that can raise concerns, to the extent that it entails the subjective exercise of unguided discretion in which racial biases or stereotypes may be manifested. If a school refers students for discipline because of their race, the school has engaged in discriminatory conduct regardless of whether the student referred has engaged in misbehavior. And even if the referrals do not ultimately lead to the imposition of disciplinary sanctions, the referrals alone result in reduced classroom time and academic instruction for the referred student. Furthermore, if a sanction from a discriminatory referral becomes part of the student's school record, it could potentially enhance the penalty for subsequent misconduct and follow the student throughout the student's academic career. Therefore, it is incumbent upon a school to take effective steps to eliminate all racial discrimination in initial discipline referrals.

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available at http://www.ed.gov/ocr/letters/colleague-201104.pdf. When addressing such harassment, a school should consider incorporating wide-ranging strategies beyond exclusionary discipline, including, for example, conflict resolution, restorative practices, and counseling, to help meet its obligations under Federal civil rights laws.

[16] The nondiscrimination requirements of Titles IV and VI extend to conduct undertaken by entities that carry out some or all of the schools' functions through "contractual or other arrangements." *See, e.g.*, 34 C.F.R. § 100.3(b)(1), (2).

The administration of student discipline can result in unlawful discrimination based on race in two ways: first, if a student is subjected to *different treatment* based on the student's race, and second, if a policy is neutral on its face – meaning that the policy itself does not mention race – and is administered in an evenhanded manner but has a *disparate impact, i.e.*, a disproportionate and unjustified *effect* on students of a particular race. Under both inquiries, statistical analysis regarding the impact of discipline policies and practices on particular groups of students is an important indicator of potential violations. In all cases, however, the Departments will investigate all relevant circumstances, such as the facts surrounding a student's actions and the discipline imposed.

1. Different Treatment

Both Title IV and Title VI prohibit schools from intentionally disciplining students differently based on race.[17] The clearest case of intentional discrimination would be a policy that was discriminatory on its face: one that included explicit language requiring that students of one race be disciplined differently from students of another race, or that only students of a particular race be subject to disciplinary action.

More commonly, however, intentional discrimination occurs when a school has a discipline policy that is neutral on its face (meaning the language of the policy does not explicitly differentiate between students based on their race), but the school administers the policy in a discriminatory manner or when a school permits the *ad hoc* and discriminatory discipline of students in areas that its policy does not fully address.

Such intentional discrimination in the administration of student discipline can take many forms. The typical example is when similarly situated students of different races are disciplined differently for the same offense. Students are similarly situated when they are comparable, even if not identical, in relevant respects. For example, assume a group of Asian-American and Native-American students, none of whom had ever engaged in or previously been disciplined for misconduct, got into a fight, and the school conducted an investigation. If the school could not determine how the fight began and had no information demonstrating that students behaved differently during the fight, *e.g.*, one group used weapons, then the school's decision to discipline the Asian-American students more harshly than the Native-American students would raise an inference of intentional discrimination.

Selective enforcement of a facially neutral policy against students of one race is also prohibited intentional discrimination. This can occur, for example, when a school official elects to overlook a violation of a policy committed by a student who is a member of one racial group, while strictly enforcing the policy against a student who is a member of another racial group. It can occur at the classroom level as well. The Departments often receive complaints from parents

[17] 42 U.S.C. §§ 2000c *et seq*.; 42 U.S.C. § 2000d; 34 C.F.R. § 100.3(a), (b)(1).

that a teacher only refers students of a particular race outside of the classroom for discipline, even though students of other races in that classroom commit the same infractions. Where this is true, there has been selective enforcement, even if an administrator issues the same consequence for all students referred for discipline.

Intentional discrimination also occurs when a school adopts a facially neutral policy with the intent to target students of a particular race for invidious reasons. This is so even if the school punishes students of other races under the policy.[18] For example, if school officials believed that students of a particular race were likely to wear a particular style of clothing, and then, as a means of penalizing students of that race (as opposed to as a means of advancing a legitimate school objective), adopted a policy that made wearing that style of clothing a violation of the dress code, the policy would constitute unlawful intentional discrimination.

Lastly, intentional discrimination could be proven even without the existence of a similarly situated student if the Departments found that teachers or administrators were acting based on racially discriminatory motives. For example, if a school official uttered a racial slur when disciplining a student, this could suggest racial animus, supporting a finding that the official intended to discriminate based on a particular student's race.

Whether the Departments find that a school has engaged in intentional discrimination will be based on the facts and circumstances surrounding the particular discipline incident. Evidence of racially discriminatory intent can be either direct or circumstantial. Direct evidence might include remarks, testimony, or admissions by school officials revealing racially discriminatory motives. Circumstantial evidence is evidence that allows the Departments to infer discriminatory intent from the facts of the investigation as a whole, or from the totality of the circumstances.

Absent direct evidence of intentional discrimination based on race, the Departments examine the circumstantial evidence to evaluate whether discrimination has occurred. The Departments typically ask the following questions to determine whether a school intentionally discriminated in the administration of student discipline (see also Illustration 1, page 10):

(1) Did the school limit or deny educational services, benefits, or opportunities to a student or group of students of a particular race by treating them differently from a similarly situated student or group of students of another race in the disciplinary process? (As noted above, students are similarly situated when they are comparable (even if not identical) in relevant respects, for example, with regard to the seriousness of the infraction committed and their respective disciplinary histories.) If no, then the Departments would not find sufficient evidence to determine that the school has

[18] *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 227, 231-32 (1985).

engaged in intentional discrimination. If the students *are* similarly situated and the school has treated them differently, then:

(2) Can the school articulate a legitimate, nondiscriminatory reason for the different treatment? If not, the Departments could find that the school has intentionally discriminated on the basis of race. If yes, then:

(3) Is the reason articulated a pretext for discrimination?[19] Some of the circumstances where the Departments may find that the school's stated reason is a pretext – in other words, not the true reason for the school's action – are: the asserted reason does not explain the school's actions; witnesses contradict the school's stated reason for the disparity, exposing such reason as false; students of other races have received different sanctions for similar instances of misbehavior; or the sanctions imposed do not conform to the school's permitted discipline sanctions in its written discipline policy. If the nondiscriminatory reason offered by the school is found to be pretextual, the Departments would find that the school had engaged in intentional discrimination.

In evaluating claims under this analysis, the Departments may also consider other circumstantial evidence to determine whether there was discriminatory intent underlying a school's administration of discipline. Such circumstantial evidence may include, but is not limited to, whether the impact of a disciplinary policy or practice weighs more heavily on students of a particular race; whether there is a history of discriminatory conduct toward members of a student's race; the administrative history behind a disciplinary policy or decision; and whether there had been inconsistent application of disciplinary policies and practices to students of different racial backgrounds.[20]

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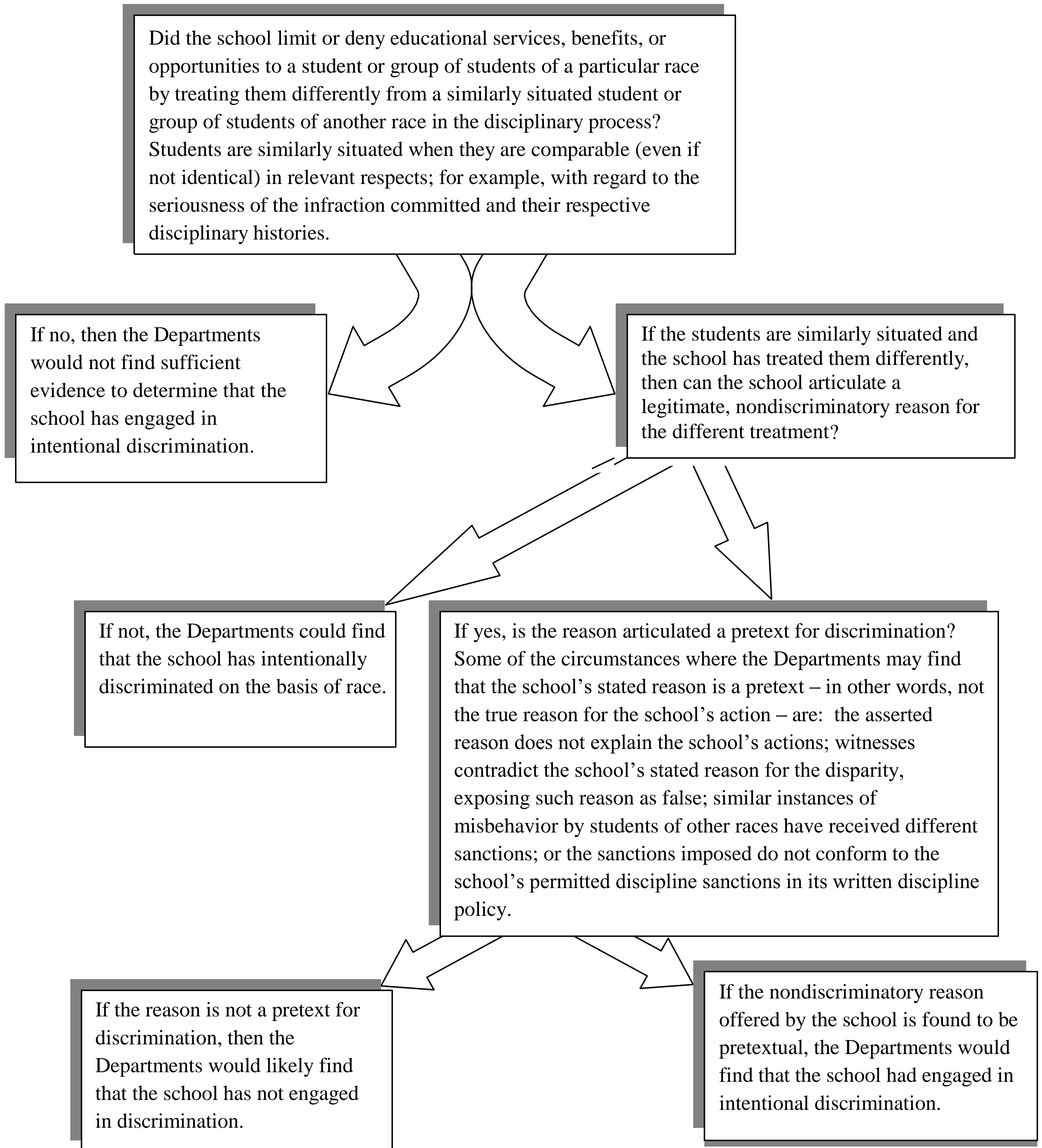
[19] *See generally Elston v. Talladega County Bd. of Educ*., 997 F.2d 1394 (11th Cir. 1993); U.S. Department of Justice, *Title VI Legal Manual* 44-46 (Jan. 11, 2001) ("Title VI Manual"); U.S. Department of Education, Racial Incidents and Harassment against Students at Educational Institutions, 59 Fed. Reg. 11,448 (Mar. 10, 1994). *See also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a Title VII case that sets forth a three-part test that also applies in the Title VI and Title IV contexts. The *McDonnell Douglas* test applies in court and administrative litigation to determine whether an institution has engaged in prohibited discrimination.

[20] *See, e.g.*, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977) (identifying a non-exhaustive list of factors that may serve as indicia of discriminatory intent).

Illustration 1: Different Treatment Flowchart



2. Disparate Impact

Schools also violate Federal law when they evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race. The resulting discriminatory effect is commonly referred to as "disparate impact."[21]

In determining whether a facially neutral policy has an unlawful disparate impact on the basis of race, the Departments will engage in the following three-part inquiry (see also Illustration 2, page 13).

(1) Has the discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races? For example, depending on the facts of a particular case, an adverse impact may include, but is not limited to, instances where students of a particular race, as compared to students of other races, are disproportionately: sanctioned at higher rates; disciplined for specific offenses; subjected to longer sanctions or more severe penalties; removed from the regular school setting to an alternative school setting; or excluded from one or more educational programs or activities. If there were no adverse impact, then, under this inquiry, the Departments would not find sufficient evidence to determine that the school had engaged in discrimination. If there were an adverse impact, then:

(2) Is the discipline policy necessary to meet an important educational goal?[22] In conducting the second step of this inquiry, the Departments will consider both the importance of the goal that the school articulates and the tightness of the fit between the stated goal and the means employed to achieve it. If the policy is not necessary to meet an important educational goal, then the Departments would find that the school had engaged in discrimination. If the policy is necessary to meet an important educational goal, then the Departments would ask:

(3) Are there comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact on the disproportionately affected racial group, or is the school's proffered justification a pretext for discrimination?[23] If the answer is yes to either question, then the

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[21] Recipients of Federal financial assistance are prohibited from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2); *see also* 28 C.F.R. § 42.104(b)(2).

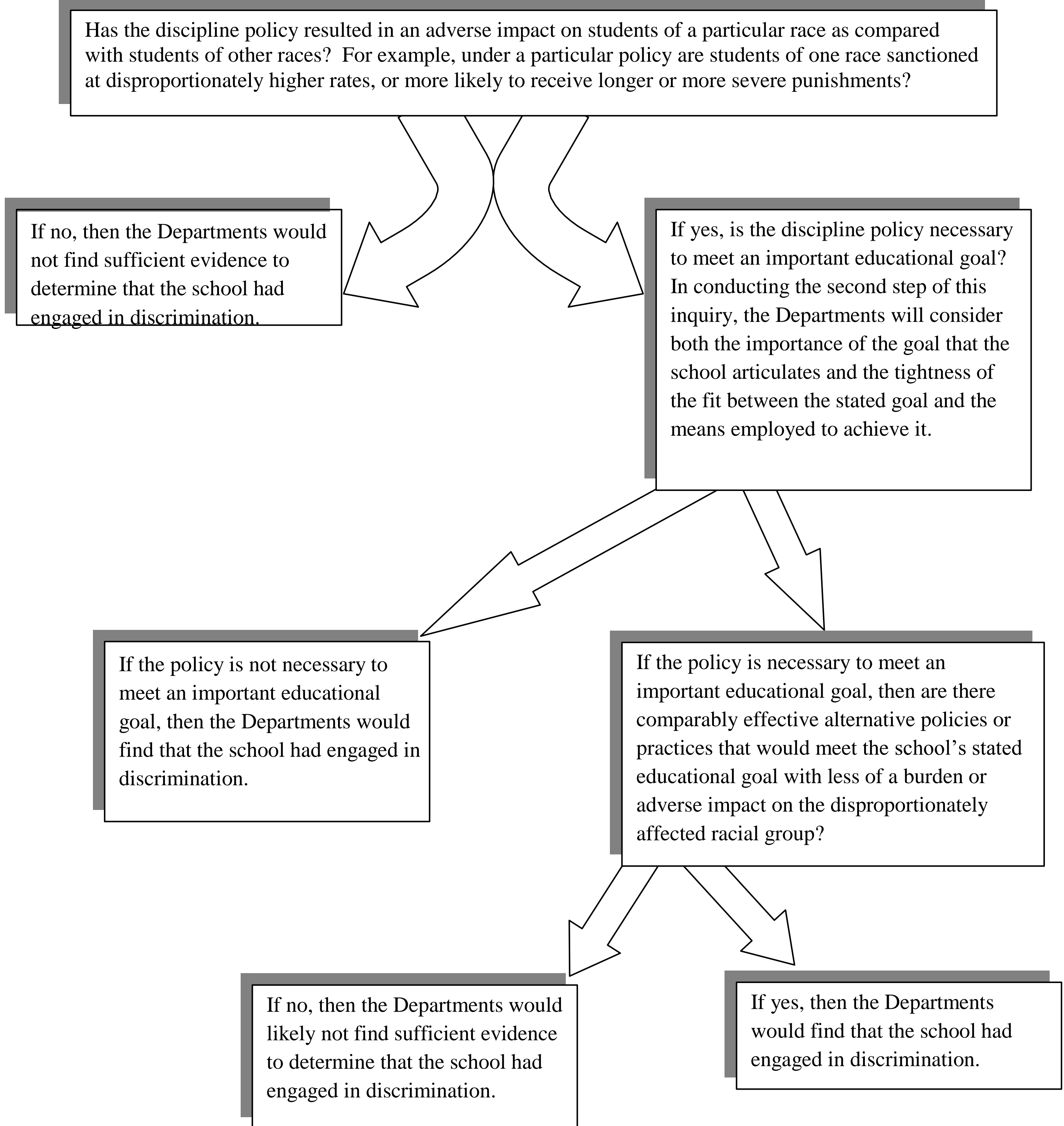
[22] *See Elston*, 997 F.2d at 1411-12 (explaining that courts have required schools to demonstrate an "educational necessity" for the challenged program, practice, or procedure); Title VI Manual at 51.

[23] *See Elston*, 997 F.2d at 1413.

Departments would find that the school had engaged in discrimination. If no, then the Departments would likely not find sufficient evidence to determine that the school had engaged in discrimination.

Examples of policies that can raise disparate impact concerns include policies that impose mandatory suspension, expulsion, or citation (*e.g.*, ticketing or other fines or summonses) upon any student who commits a specified offense – such as being tardy to class, being in possession of a cellular phone, being found insubordinate, acting out, or not wearing the proper school uniform; corporal punishment policies that allow schools to paddle, spank, or otherwise physically punish students; and discipline policies that prevent youth returning from involvement in the justice system from reenrolling in school. Additionally, policies that impose out-of-school suspensions or expulsions for truancy also raise concerns because a school would likely have difficulty demonstrating that excluding a student from attending school in response to the student's efforts to avoid school was necessary to meet an important educational goal.

Illustration 2: Disparate Impact Flowchart



3. Examples

This Section provides practical examples of situations in which the Departments might find, consistent with the principles set forth in the previous Sections, that violations of Title IV or Title VI have been established. These examples are intended to be illustrative, not exhaustive. We encourage school districts to contact us for technical assistance in applying this guidance to their particular situations.

Example 1

A complaint was filed alleging discrimination after a school imposed different disciplinary sanctions on two students in the sixth grade – a non-Hispanic student and a Hispanic student – who engaged in a fight. Both students had similar disciplinary histories, having each previously received after-school detention for minor infractions. The Hispanic student received a three-day out-of-school suspension for the student's involvement in the fight, while the non-Hispanic student received a two-day out-of-school suspension for the same misconduct, raising a concern that the students were treated differently on the basis of race.

Based on these facts and circumstances, the Departments would make an initial determination that the students were similarly situated, as they were involved in the same incident and have similar discipline records. If the school provided evidence of facts and circumstances surrounding the incident that would constitute a legitimate, nondiscriminatory reason for the different treatment, such as evidence that it disciplined the Hispanic student more severely because the student instigated the fight and directly threatened school officials who tried to break up the fight, then these facts and circumstances might constitute a nondiscriminatory reason for the different treatment.[24] If a nondiscriminatory reason for imposing a different sanction on either student were not identified, the Departments could find that the school had violated Titles IV and VI.

If a legitimate, nondiscriminatory reason for the different sanction were identified, the Departments would probe further to determine whether the reason given for the enhanced sanction was a pretext for racial discrimination. In making this determination, the Departments would request and consider information such as witness statements, codes of conduct, and student disciplinary records. The Departments would then evaluate, among other things, whether the school conformed to its written policies; whether the Hispanic student did, in fact, instigate the fight; and whether the school had previously imposed a higher sanction on non-Hispanic students who had instigated fights.

If the Departments found a violation, among the individual remedies that might be required would be the revision of the Hispanic student's school records to delete the record of additional

[24] For more information regarding evidence the Departments consider when conducting an investigation, please consult Section B.

punishment and the provision of compensatory educational services to remedy missed class time.[25] The Departments could also require systemic relief, such as training of decision makers and changing disciplinary procedures to prevent different treatment in the future.

Example 2

A district's code of conduct specifies three different categories of offenses, ranging from Level 1, or minor behavior offenses, to Level 3, which covers the most serious conduct.[26] The code of conduct gives school officials the discretion to select among a range of penalties identified for each category of offense. A complainant alleges that her eighth-grade son, who is African-American, was referred to the office at his school and received a one-day in-school suspension for "use of profane or vulgar language" – a Level 1 offense – during a class period. The disciplinary sanction imposed was within the permissible range for Level 1 offenses. The student has had no previous discipline incidents. A white student at the same school and with a similar disciplinary history also committed a Level 1 offense: "inappropriate display of affection" while on the school bus. While the parent of the white student was called, the student received no additional disciplinary sanction.

The fact that the school characterized both types of misconduct as Level 1 offenses indicates that the school itself believes that the misconduct warrants similar disciplinary responses. Based on these facts and circumstances, the Departments would make an initial determination that these students were similarly situated because they engaged in comparable conduct as defined by the school – misconduct classified as a Level 1 offense – and had similar disciplinary records.

The school would be asked whether it had a reason (such as the context or circumstances for these incidents) that would justify treating the students differently for Level 1 offenses. In this case, the school gave teachers and administrators a list of factors to consider when deciding whether to enhance or reduce disciplinary sanctions. Some of the factors relevant to Level 1 offenses were: whether the student's misconduct interrupted the learning process; whether the student had been previously disciplined for the same offense; whether the student accepted responsibility for the misconduct; and whether the student could demonstrate that he or she tried to avoid the situation that resulted in the misconduct. The school provided evidence that the parent of the African-American student previously received a telephone call about her son's prior use of profane or vulgar language in the classroom. The school also determined that the different

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[25] For more information on remedies for violations of Titles IV or VI, please consult Section D.

[26] A district can create categories of offenses and penalties as part of its discipline policy or student code of conduct, as long as the categories themselves do not reflect racial biases or stereotypes and/or are not based on race. Misconduct that is categorized in a manner that does not align with the severity of the offense (*e.g.*, school-based arrest for a school uniform violation) may raise an inference of racial discrimination if students of a particular race are disproportionately disciplined for that offense.

locations of the offenses, *e.g*., on the bus as compared to in the classroom, resulted in different levels of disruption to learning.

The school's reasons for treating the students differently would be sufficient under these facts and circumstances, unless the Departments found that the proffered reasons were a pretext for discrimination. In this instance, if school officials gave conflicting accounts of why the African-American student received a higher sanction, or if the school's records showed that it rarely distinguished misbehavior on the bus from misbehavior in the classroom in determining sanctions, the Departments could determine that the alleged nondiscriminatory explanation was pretextual.

If the school had not provided a nondiscriminatory reason for imposing a different sanction on the African-American student, or if the purported nondiscriminatory reason were found to be pretextual, the Departments would find that the school had violated Titles IV and VI. In that case, the Departments would seek individual and/or systemic relief.

Example 3

A complainant alleges that Native-American students are treated differently from their non-Native-American peers at a school that contracts with a school safety officer to secure the entrances and exits of the school building, patrol the halls, and maintain safety on the school grounds. The investigation reveals that the school safety officer, when he was posted for security at the main entrance, treated Native-American students differently from other students. The school's rules require that when a student arrives at the entrance less than five minutes late, the student should be allowed to go directly to class, whereas when a student arrives more than five minutes late, the student should be sent to the office before going to class. The school safety officer, however, had a practice of detaining for several minutes some Native-American students (but not any other students) who arrived less than five minutes late, and then sending them to the office. The school safety officer, who was not an employee of the school, offered no justification for the differential treatment and declined to speak with investigators or explain himself to the school.

Because a school is responsible for discrimination by parties with whom it contracts or to whom it otherwise delegates responsibility for aspects of the school's programs or functions, the conduct of the school safety officer would raise an inference of racial discrimination by the school. If the school could not provide a nondiscriminatory reason for the different treatment of Native American students by the school safety officer, or if the reason were found to be pretextual, the Departments would find that the school had violated Titles IV and VI.

Example 4

A school district established a district-wide alternative high school to which it assigns students with extensive disciplinary records. Although only 12 percent of the district's students are African-American, 90 percent of students assigned involuntarily to the alternative high school are African-American. The evidence shows that when white and African-American students commit similar offenses in their regular high schools, the offenses committed by the white students have not been reflected as often in school records. The evidence also shows that some white students are not assigned to the alternative high school, despite having disciplinary records as extensive (in terms of number of and severity of offenses) as some of the African-American students who have been involuntarily assigned there. Based on these facts and circumstances, if the school district could not provide a legitimate, nondiscriminatory reason for the different treatment or the reason provided were pretextual, the Departments would find that the school district had violated Titles IV and VI.

Example 5

A school district's discipline code allows for a one-day suspension of all students who commit the offense of "acting in a threatening manner." Statistical data demonstrate that under this provision of the code, a school in the district suspends African-American students disproportionately relative to their enrollment at the school. During the investigation, the Departments find that the discipline code provision lacks a clear definition of the prohibited conduct, and that the school has suspended African-American students under the provision for a broad range of actions, including congregating in groups in the hallways, talking too loudly, or talking back when admonished by the teacher. Further, the evidence indicates that white students engaging in comparable conduct are more likely to be charged with lower-level violations of the discipline code, such as "no hall pass" and "classroom disruption." These offenses do not lead to suspension and are more likely to result in after-school detention.

Based on this evidence, the Departments would probe further and ask the school whether it had a nondiscriminatory reason for the pattern of different treatment, such as additional circumstances or specific, objective factors that led decision makers to consider certain instances of misbehavior more threatening than other instances of similar misbehavior. If a nondiscriminatory reason were not identified (for instance, if the school provided only a statement from a teacher that the teacher felt more threatened by the conduct of the African-American students, without providing a reasonable basis to conclude that the behavior at issue actually was more threatening), or if the purported nondiscriminatory reason were found to be pretextual, the Departments would find the school in violation of Titles IV and VI, and seek individual and/or systemic relief.

Such remedies could consist of one or more of the following: (1) providing clear definitions and examples of threatening actions for which students may be suspended (including specifying the conduct that does not warrant a suspension); (2) requiring the administrator(s) to make specific

findings prior to imposing the sanction of suspension, *e.g.,* determining that the behavior in question falls within the scope of the prohibited conduct, and/or determining that other means of addressing student behavior are not feasible or repeatedly failed to bring about appropriate conduct; (3) providing teachers and administrators with training on how to administer the policy fairly and equitably; and/or (4) providing teachers with training in classroom management techniques and effective behavioral interventions that give them appropriate and culturally responsive tools to interpret and address the underlying behaviors.

Example 6

A school district adopted an elaborate set of rules governing the sanctions for various disciplinary offenses. For one particular offense, labeled “use of electronic devices,” the maximum sanction is a one-day in-school suspension where the student is separated from his regular classroom but still is provided some educational services. The investigation reveals that school officials, however, regularly impose a greater, unauthorized punishment – out-of-school suspension – for use of electronic devices. The investigation also shows that African-American students are engaging in the use of electronic devices at a higher rate than students of other races. Coupled with the school’s regular imposition of greater, unauthorized punishment for using electronic devices, therefore, African-American students are receiving excessive punishments more frequently than students of other races. In other words, African-American students are substantially more likely than students of other races to receive a punishment in excess of that authorized under the school’s own rules.

There is no evidence that the disproportionate discipline results from racial bias or reflects racial stereotypes. Rather, further investigation shows that this excessive punishment is the result of poor training of school officials on the school rules that apply to use of electronic devices.

Under these circumstances, the Departments could find a violation of Title VI. Although there is no finding of intentional discrimination, the misapplication of the discipline rules by school officials results in an adverse impact (disproportionate exclusion from education services) on African-American students as compared with other students. Because this practice has an adverse racial impact, the school must demonstrate that the practice is necessary to meet an important educational goal. The school cannot do so, however, because there is no justification for school officials to disregard their own rules and impose a punishment not authorized by those rules.

Additional training for school officials, clarification of the rules, and the immediate collection and review of incident data to prevent unauthorized punishments might be required to eliminate the disparate impact going forward. Among the individual remedies that might be required are revision of students’ school records and compensatory educational services to remedy missed class time.

Example 7

A middle school has a "zero tolerance" tardiness policy. Students who are more than five minutes tardy to class are always referred to the principal's office at a particular school, where they are required to remain for the rest of the class period regardless of their reason for being tardy. The school also imposes an automatic one-day suspension when a student is recorded as being tardy five times in the same semester. Additional tardiness results in longer suspensions and a meeting with a truancy officer.

The evidence shows Asian-American students are disproportionately losing instruction time under the school's "zero tolerance" tardiness policy, as a result of both office referrals and suspensions for repeated tardiness.

An investigation further reveals that white and Hispanic students are more likely to live within walking distance of the school, while Asian-American students are more likely to live farther away and in an area cut off by an interstate highway that prevents them from walking to school. The majority of Asian-American students are thus required to take public transportation. These students take the first public bus traveling in the direction of their school every morning. Even though they arrive at the bus stop in time to take the first bus available in the morning, they often are not dropped off at school until after school has begun.

As justification for the "zero tolerance" tardiness policy, the school articulates the goals of reducing disruption caused by tardiness, encouraging good attendance, and promoting a climate where school rules are respected, all of which the Departments accept as important educational goals. The Departments would then assess the fit between the stated goals and the means employed by the school – including whether the policy is reasonably likely to reduce tardiness for these students under these circumstances. Assuming there was such a fit, the Departments would then probe further to determine the availability of alternatives that would also achieve the important educational goals while reducing the adverse effect on Asian-American students (*e.g.*, aligning class schedules and bus schedules, or excusing students whose tardiness is the result of bus delays). If the Departments determine that a school's articulated goal can be met through alternative policies that eliminate or have less of an adverse racial impact, the Departments would find the school in violation of Title VI and require that the school implement those alternatives.

B. Information the Departments Consider

During an investigation, the Departments will examine facts and information related to a school's discipline approach. The following is a non-exhaustive list of the types of information the Departments have examined when investigating the possibility of discriminatory discipline: written policies (such as student codes of conduct, parent handbooks, and teacher manuals) and unwritten disciplinary practices (such as exercises of discretion by teachers and school administrators); data indicating the number of referrals to administrators charged with

implementing student discipline and/or to law enforcement authorities; discipline incident reports; copies of student discipline records and discipline referral forms; school discipline data disaggregated by subgroup, offense, other relevant factors (such as the time of incident, place of incident, whether more than one student was involved in an incident, the students' prior disciplinary infractions, the person(s) who referred a student for discipline); and interviews with students, parents, administrators, teachers, counselors, school resource officers and other law enforcement officers, relevant contractors, and support staff. The Departments also will review and analyze information provided by schools through the CRDC, if applicable, and other relevant data.

The Departments will look carefully at, among other things, a school's definitions of misconduct to ensure they are clear and nondiscriminatory, the extent to which disciplinary criteria and referrals are made for offenses that are subjectively defined (*e.g.*, disrespect or insubordination), and whether there are safeguards to ensure that discretion is exercised in a nondiscriminatory manner. In addition to establishing a system for monitoring all disciplinary referrals, the school should have a system in place to ensure that staff who have the authority to refer students for discipline are properly trained to administer student discipline in a nondiscriminatory manner. Schools should thus take steps to monitor and evaluate the impact of disciplinary practices to detect patterns that bear further investigation.

C. Importance of Appropriate Record Keeping

The Departments expect schools to cooperate with investigations and, upon request, to provide records that will enable the Departments to ascertain whether the administration of student discipline policies and practices complies with the requirements of Titles IV and VI. If the Departments determine that a school does not collect accurate and complete data to resolve an investigation, and/or the Departments are unable to obtain the necessary information through interviews or other means, the Departments may conclude that the school's record-keeping process presents concerns.

To address these concerns, the Departments may require, for example, that the school begin keeping the necessary information to determine if the school is meeting its Title VI obligations and not discriminating against students in the administration of its discipline policies.[27] A non-

[27] *See* 34 C.F.R. § 100.6(b), applying to the Department of Education ("Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying" with the Title VI regulations.); *id*. § 100.6(c) ("Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance" with the Title VI regulations). *See also* 28 C.F.R. § 42.106(b), applying to DOJ ("Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete, and accurate compliance reports at such times, and in such

exhaustive list of data-related remedies required of schools found to be in noncompliance with Title VI includes the following: developing and implementing uniform standards for the content of discipline files; developing and training all staff on uniform standards for entry, maintenance, updating and retrieval of data accurately documenting the school's discipline process and its implementation, including its racial impact; and keeping data on teacher referrals and discipline, to assess whether particular teachers may be referring large numbers of students by race for discipline (and following up with these teachers, as appropriate, to determine the underlying causes).

D. Remedies

If the Departments conclude that a school is in violation of Title IV or Title VI in the administration of student discipline, the Departments will attempt to secure the school's voluntary agreement to take specific steps to remedy the identified violation before seeking redress in court or through an administrative hearing. If appropriate under the circumstances, the Departments will involve the entire district, and not just an individual school, in the agreement. The remedy sought would be aligned with the Departments' findings and could include individual relief to students who were subjected to racial discrimination, and also prospective remedies that are necessary to ensure the school's (and district's) future adherence to the requirements of Titles IV and VI. Such remedies may include the following:

- correcting the records of students who were treated differently regarding the infraction and sanction imposed;
- providing compensatory, comparable academic services to students receiving in-school or out-of-school suspensions, expelled, placed in an alternative school, or otherwise removed from academic instruction;
- revising discipline policies to provide clear definitions of infractions to ensure that consequences are fair and consistent;
- developing and implementing strategies for teaching, including the use of appropriate supports and interventions, which encourage and reinforce positive student behaviors and utilize exclusionary discipline as a last resort;

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form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying" with the Title VI regulations); *id.* § 106(c) ("each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities, as may be pertinent to ascertain compliance" with the Title VI regulations); *id.* § 106(d). If a school has been previously instructed by the Departments to collect and maintain particular data, the failure to provide such data would be regarded as a violation of these provisions and would cause the Departments to presume the missing data would have supported a finding of a substantive violation.

- providing training for school personnel on revised discipline policies and classroom management techniques;
- providing school-based supports for struggling students whose behavior repeatedly disrupts their education and/or the education of other students;[28]
- designating a school official as a discipline supervisor to ensure that the school implements its discipline policies fairly and equitably;
- conducting and/or reviewing comprehensive needs assessments to ensure they are effective in measuring the perceptions of students and other members of the community in connection with the administration of school discipline, and using the results of these assessments to make responsive changes to policies and practices;
- at least annually, conducting a forum during the school day that provides students, teachers and administrators the opportunity to discuss matters relating to discipline and provide input on the school's discipline policies;
- developing a training and information program for students and community members that explains the school's discipline policies and what is expected of students in an age-appropriate, easily understood manner;
- creating a plan for improving teacher-student relationships and on-site mentoring programs; and
- conducting an annual comprehensive review of school resource officer interventions and practices to assess their effectiveness in helping the school meet its goals and objectives for student safety and discipline.

Remedies will necessarily vary with the facts of each case; in all instances, however, the remedies must fully and effectively address the school's discriminatory actions and ensure future compliance with Titles IV and VI.[29] If the Departments enter into a resolution agreement with a school, they will monitor the school's compliance with the agreement to ensure the school is meeting the requirements of Titles IV and VI when administering student discipline.

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[28] As previously noted, for students with disabilities, other Federal requirements may apply.

[29] The Departments have entered into settlement agreements and consent decrees to address and prevent racial discrimination in student discipline. These documents provide additional examples of the kinds of remedies that the Departments seek to ensure compliance with Titles IV and VI, and may be found at http://www.justice.gov/crt/about/edu/documents/classlist.php and http://www.ed.gov/ocr/docs/investigations/index.html.

CONCLUSION

The Departments are committed to promoting effective and appropriate school discipline policies and practices that create a safe and inclusive environment where all students can learn and succeed. As part of this commitment, we will enforce Federal laws to eliminate unlawful racial discrimination in school discipline. In addition to investigating complaints that have been filed, both Departments are collaboratively and proactively initiating compliance reviews nationwide focused on student discipline. Finally, the Departments will continue to provide technical assistance to schools on the adoption and administration of discipline policies consistent with their obligations under Federal civil rights laws.

Thank you for your efforts to ensure that the nation's students are provided with equal educational opportunities. If you need technical assistance, please contact the OCR regional office serving your State or territory by visiting http://www.ed.gov/about/offices/list/ocr/index.html or call OCR's Customer Service Team at 1-800-421-3481. You may contact DOJ's Civil Rights Division, Educational Opportunities Section, at education@usdoj.gov, or 1-877-292-3804.

We look forward to continuing our work together to ensure equal access to education and to promote safe school environments for all of America's students.

Sincerely,

/S/
Catherine E. Lhamon
Assistant Secretary
Office for Civil Rights
U.S. Department of Education

/S/
Jocelyn Samuels
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice

APPENDIX

Recommendations for School Districts, Administrators, Teachers, and Staff

The U.S. Department of Education and the U.S. Department of Justice (Departments) are committed to working with schools, parents, students, stakeholder organizations, and other interested parties to ensure that students are not subjected to racially discriminatory discipline policies and practices. This appendix supplements the Dear Colleague Letter concerning discrimination on the basis of race, color, or national origin in school discipline issued by the Departments on January 8, 2014. We hope the following list of recommendations, which are based on a review of a broad spectrum of our cases, will assist schools to identify, avoid, and remedy discriminatory discipline based on race, color, or national origin.

These recommendations are intended to be illustrative. They are not intended to be exhaustive or exclusive; do not address recommendations specifically targeted at preventing discriminatory discipline that is based on prohibited grounds other than race, color, or national origin; and may not be applicable to every specific factual setting in a particular school.[1] Additionally, these recommendations do not constitute legal advice, and schools that choose to implement one or more of these recommendations might still be found to be in violation of Federal law(s). For additional information, research, and resources in these three areas relating more generally to improving school climate and discipline policies and practices, see the Guiding Principles Resource Guide released by the U.S. Department of Education on January 8, 2014.

[1] For specific resources designed to assist schools in developing and implementing effective prevention and intervention strategies that promote positive student behavior and in planning and executing dropout prevention strategies, readers may wish to consult the following practice guides published by the Department of Education: Epstein, M., Atkins, M., Cullinan, D., Kutash, K., and Weaver, R. (2008). *Reducing Behavior Problems in the Elementary School Classroom: A Practice Guide* (NCEE #2008-012). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, *available at* http://ies.ed.gov/ncee/wwc/publications/practiceguides; and Dynarski, M., Clarke, L., Cobb, B., Finn J., Rumberger, R., and Smink, J. (2008). *Dropout Prevention: A Practice Guide* (NCEE 2008-4025). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, *available at* http://ies.ed.gov/ncee/wwc/publications/practiceguides. You may also wish to consult with regional Equity Assistance Centers that can assist schools in developing and implementing policies and practices to promote equitable educational opportunity on the basis of race, color, national origin, or sex. Please visit http://www.ed.gov/programs/equitycenters for more information.

I. Climate and Prevention

(A) Safe, inclusive, and positive school climates that provide students with supports such as evidence-based tiered supports and social and emotional learning.

- ✓ Develop and implement a comprehensive, school- and/or district-wide approach to classroom management and student behavior grounded in evidence-based educational practices that seeks to create a safe, inclusive, and positive educational environment.

- ✓ Ensure that appropriate student behavior is positively reinforced. Such reinforcement could include school-wide tiered supports, including universal, targeted, and intensive supports, to align behavioral interventions to students' behavioral needs.

- ✓ Encourage students to accept responsibility for any misbehavior and acknowledge their responsibility to follow school rules.

- ✓ Assist students in developing social and emotional competencies (*e.g.*, self-management, resilience, self-awareness, responsible decision-making) that help them redirect their energy, avoid conflict, and refocus on learning.

- ✓ Refer students with complex social, emotional, or behavioral needs for psychological testing and services, health services, or other educational services, where needed.

- ✓ Ensure that there are sufficient school-based counselors, social workers, nurses, psychologists, and other mental health and supportive service providers to work with students and implement tiered supports. Involve these providers in addressing disciplinary incidents; preventing future disciplinary concerns; reintegrating students who are returning from suspensions, alternative disciplinary schools, or incarceration; and maintaining a safe, inclusive, and positive educational environment.

- ✓ Involve students and student advocates in maintaining a safe, inclusive, and positive educational environment through programs such as peer mediation and restorative justice, as appropriate.

(B) Training and professional development for all school personnel

- ✓ Provide all school personnel, including teachers, administrators, support personnel, and school resource officers, with ongoing, job-embedded professional development and training in evidence-based techniques on classroom management, conflict resolution, and de-escalation approaches that decrease classroom disruptions and utilize exclusionary disciplinary sanctions as a last resort.

- ✓ Train all school personnel on the school's written discipline policy and how to administer discipline fairly and equitably. Facilitate discussion for all school personnel of the school's discipline policies and the faculty's crucial role in creating a safe, inclusive, and positive educational environment.
- ✓ Provide training to all school personnel on how to apply subjective criteria in making disciplinary decisions.
- ✓ Provide cultural awareness training to all school personnel, including training on working with a racially and ethnically diverse student population and on the harms of employing or failing to counter racial and ethnic stereotypes.
- ✓ Establish procedures to assess the effectiveness of professional development approaches in improving school discipline practice and staff knowledge and skills.
- ✓ Establish procedures for school administrators to identify teachers who may be having difficulty managing classrooms effectively, preventing discipline problems from occurring, or making appropriate disciplinary referrals, and to provide those teachers with assistance and training.
- ✓ Ensure that appropriate instruction is provided to any volunteer on a school's campus regarding the school's approach to classroom management and student behavior.

(C) Appropriate use of law enforcement

- ✓ Clearly define and formalize roles and areas of responsibility to govern student and school interaction with school resource officers and other security or law enforcement personnel.
- ✓ Document the roles and responsibilities of school resource officers and security or law enforcement personnel in a written agreement or memorandum of understanding between the school and appropriate law enforcement and/or related agencies.
- ✓ Ensure that school resource officers and other security or law enforcement personnel effectively support school climate and discipline goals by promoting a safe, inclusive, and positive learning environment, and mentoring and otherwise supporting the education of students.
- ✓ Provide opportunities and approaches for school resource officers and other security or law enforcement personnel, school personnel, students, and parents to develop a trusting and positive relationship with one another.
- ✓ Ensure that school personnel understand that they, rather than school resource officers and other security or law enforcement personnel, are responsible for administering routine student discipline.

- ✓ Establish procedures and train school personnel and school volunteers on how to distinguish between disciplinary infractions appropriately handled by school officials versus major threats to school safety or serious school-based criminal conduct that cannot be safely and appropriately handled by the school's internal disciplinary procedures, and how to contact law enforcement when warranted.

- ✓ Regularly meet with school resource officers and other security or law enforcement personnel who work in the school to ensure that they receive training to work effectively and appropriately with elementary and secondary students. Such training may include instruction in bias-free policing, including instruction on implicit bias and cultural competence; child and adolescent development and age appropriate responses; practices demonstrated to improve school climate; restorative justice techniques; mentoring; classroom presentation skills; conflict resolution; privacy issues; and working collaboratively with school administrators.

- ✓ Ensure compliance with the Family Educational Rights and Privacy Act (FERPA) if school resource officers or other security or law enforcement personnel are permitted access to personally identifiable information from students' education records, such as disciplinary records.[2]

- ✓ Collect data and monitor the actions that school resource officers and other security or law enforcement personnel take against students to ensure nondiscrimination.

II. Clear, Appropriate, and Consistent Expectations and Consequences

(A) Nondiscriminatory, fair, and age-appropriate discipline policies

- ✓ Ensure that school discipline policies specifically and positively state high expectations for student behavior, promote respect for others, and make clear that engaging in harassment and violence, among other problem behaviors, is unacceptable.

- ✓ Ensure that discipline policies include a range of measures that students may take to improve their behavior prior to disciplinary action.

- ✓ Develop or revise written discipline policies to clearly define offense categories and base disciplinary penalties on specific and objective criteria whenever possible. If certain offense categories have progressive sanctions, clearly set forth the range of sanctions for each infraction.

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[2] These requirements are contained in 34 C.F.R. § 99.31(a)(1) and the criteria set forth in the school's annual notification of FERPA rights for how to identify school officials who have legitimate educational interests in accessing such records.

- ✓ Ensure that the sanctions outlined by the school's discipline policies are proportionate to the misconduct.

- ✓ Review standards for disciplinary referrals and revise policies to include clear definitions of offenses and procedures for all school personnel to follow when making referrals.

- ✓ Clearly designate who has the authority to identify discipline violations and/or assign penalties for misconduct.

- ✓ Ensure that the school's written discipline policy regarding referrals to disciplinary authorities or the imposition of sanctions distinguishes between those students who have violated the school's discipline policy for the first time and those students who repeatedly commit a particular violation of the discipline policy.

- ✓ Ensure that appropriate due process procedures are in place and applied equally to all students and include a clearly explained opportunity for the student to appeal the school's disciplinary action.

(B) Communicating with and engaging school communities

- ✓ Involve families, students, and school personnel in the development and implementation of discipline policies or codes of conduct and communicate those policies regularly and clearly.

- ✓ Provide the discipline policies and student code of conduct to students in an easily understandable, age-appropriate format that makes clear the sanctions imposed for specific offenses, and periodically advise students of what conduct is expected of them.

- ✓ Put protocols in place for when parents and guardians should be notified of incidents meriting disciplinary sanctions to ensure that they are appropriately informed.[3]

- ✓ Post all discipline-related materials on district and school websites.

- ✓ Provide parents and guardians with copies of all discipline policies, including the discipline code, student code of conduct, appeals process, process for re-enrollment, where appropriate, and other related notices; and ensure that these written materials accurately reflect the key

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[3] To the extent that information about these incidents is included in education records, parents have the right under FERPA and Individuals with Disabilities Education Act (IDEA) to inspect and review them. 20 U.S.C. § 1232g(1)(A); 34 C.F.R. § 99.10; 34 C.F.R. § 300.229; 34 C.F.R. § 300.613. If a student is 18 or over, or in the case of an IDEA-eligible student, if a student has reached the age of majority as determined by State law, then the rights accorded to parents under FERPA and the IDEA will transfer to the student. For students who hold their own educational rights, consideration should be given to whether it is appropriate to notify the parents or the student, or both, of the offense. *See generally* 20 U.S.C. § 1232g (d); 34 C.F.R. §§ 99.3, 99.5(a), 99.31; 20 U.S.C. § 1415(m); 34 C.F.R. § 300.520.

elements of the disciplinary approach, including appeals, alternative dispositions, time lines, and provisions for informal hearings.

- ✓ Translate all discipline policies, including the discipline code and all important documents related to individual disciplinary actions, to ensure effective communication with students, parents, and guardians who are limited English proficient. Provide interpreters or other language assistance as needed by students and parents for all discipline-related meetings, particularly for expulsion hearings.[4]

- ✓ Establish a method for soliciting student, family, and community input regarding the school's disciplinary approach and process, which may include establishing a committee(s) on general discipline policies made up of diverse participants, including, but not limited to students, administrators, teachers, parents, and guardians; and seek input from parents, guardians, and community leaders on discipline issues, including the written discipline policy and process.

(C) Emphasizing positive interventions over student removal

- ✓ Ensure that the school's written discipline policy emphasizes constructive interventions over tactics or disciplinary sanctions that remove students from regular academic instruction (e.g., office referral, suspension, expulsion, alternative placement, seclusion).

- ✓ Ensure that the school's written discipline policy explicitly limits the use of out-of-school suspensions, expulsions, and alternative placements to the most severe disciplinary infractions that threaten school safety or to those circumstances where mandated by Federal or State law.

- ✓ Ensure that the school's written discipline policy provides for individual tailored intensive services and supports for students reentering the classroom following a disciplinary sanction.

- ✓ Ensure that the school's written discipline policies provide for alternatives to in-school and out-of-school suspensions and other exclusionary practices (*i.e.,* expulsions).

[4] Such language assistance may be required by Title VI; schools have the responsibility to provide national origin-minority parents who have limited proficiency in English with meaningful access to information provided to other parents in a language they understand.

III. Equity and Continuous Improvement

(A) Monitoring and self-evaluation

- ✓ Develop a policy requiring the regular evaluation of each school's discipline policies and practices and other school-wide behavior management approaches to determine if they are affecting students of different racial and ethnic groups equally. Such a policy could include requiring the regular review of discipline reports containing information necessary to assess whether students with different personal characteristics (*e.g.,* race, sex, disability, and English learner status) are disproportionately disciplined, whether certain types of disciplinary offenses are more commonly referred for disciplinary sanctions(s), whether specific teachers or administrators are more likely to refer specific groups of students for disciplinary sanctions, and any other indicators that may reveal disproportionate disciplinary practices.
- ✓ Establish a means for monitoring that penalties imposed are consistent with those specified in the school's discipline code.
- ✓ Conduct a periodic review of a sample of discipline referrals and outcomes to ensure consistency in assignments.

(B) Data collection and responsive action

- ✓ Collect and use multiple forms of data, including school climate surveys, incident data, and other measures as needed, to track progress in creating and maintaining a safe, inclusive and positive educational environment.[5]
- ✓ Collect complete information surrounding all discipline incidents, including office referrals and discipline incidents that do not result in sanctions. Relevant data elements include information related to the date, time, and location of the discipline incident; the offense type; whether an incident was reported to law enforcement; demographic and other information related to the perpetrator, victim, witness, referrer, and disciplinarian; and the penalty

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[5] In administering a comprehensive needs assessment, school districts must comply with the Protection of Pupil Rights Amendment (PPRA), which requires, among other things, that in the event that a survey administered or distributed to students will contain questions about one or more of eight specified items, such as the student's mental or psychological problems, the school district must: (1) develop and adopt policies to protect student privacy with regard to the survey; (2) notify the parents, at least annually at the beginning of the school year, of the specific or approximate dates that the survey will be scheduled; and, (3) offer an opportunity for parents to opt students out of participation in the survey. *See* 20 U.S.C. § 1232h(c). The rights provided to parents under the PPRA transfer to the student when the student turns 18 years old, or is an emancipated minor (under an applicable State law) at any age. 20 U.S.C. § 1232h(c)(5)(B).

imposed. Ensure that there are administrative staff who understand how to analyze and interpret each school's discipline data to confirm that data are accurately collected, reported, and used.[6]

- ✓ Create and review discipline reports to detect patterns that bear further investigation, assist in prioritizing resources, and evaluate whether a school's discipline and behavior management goals are being reached.
- ✓ If disparities in the administration of student discipline are identified, commit the school to a plan of action to determine what modifications to the school's discipline approach would help it ameliorate the root cause(s) of these disparities.
- ✓ Develop a discipline incident database that provides useful, valid, reliable, and timely discipline incident data.[7]
- ✓ Provide the school board and community stakeholders, consistent with applicable privacy laws and after removing students' identifiable information, with disaggregated discipline information to ensure transparency and facilitate community discussion.
- ✓ Make statistics publicly available on the main discipline indices disaggregated by school and race.
- ✓ Maintain data for a sufficient period of time to yield timely, accurate, and complete statistical calculations.
- ✓ In addition to the Federal civil rights laws, ensure that the school's discipline policies and practices comply with applicable Federal, State, and local laws, such as IDEA and FERPA.

[6] Any use and disclosure of personally identifiable information on students from school discipline data must be consistent with FERPA.

[7] Assistance in developing such a database is available from the National Forum on Education Statistics' report entitled, "Forum Guide to Crime, Violence, and Discipline Incident Data" (Forum Guide) (May 2011), *available at* http://nces.ed.gov/forum/pub_2011806.asp.