UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Board of Education of the Highland Local School District,

Plaintiff,

v.

United States Department of Education; John B. King, Jr., in his official capacity as United States Secretary of Education; United States Department of Justice; Loretta E. Lynch, in her official capacity as United States Attorney General; and Vanita Gupta, in her official capacity as Principal Deputy Assistant Attorney General,

Defendants.

Jane Doe, a minor, by and through her legal guardians Joyce and John Doe,

Intervenor Third-Party Plaintiffs,

v.

Board of Education of the Highland Local School District; Highland Local School District; William Dodds, Superintendent of Highland Local School District; and Shawn Winkelfoos, Principal of Highland Elementary School,

Third-Party Defendants.

Case No. 2:16-cv-00524

Judge Algenon L. Marbley
Magistrate Judge Kimberley A. Jolson

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Sources

LIST OF EXHIBITS

Exhibit 1: United States Department of Education, Office for Civil Rights, Dear Colleague Letter on Harassment and Bullying (October 26, 2010) ("2010 DCL")

Exhibit 2: United States Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (April 29, 2014) ("April 2014 Guidance")

Exhibit 3: United States Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (Dec. 1, 2014) ("December 2014 Guidance")

Exhibit 4: United States Department of Education, Office for Civil Rights, Title IX Resource Guide (April 2015) ("April 2015 Guidance")

Exhibit 5: United States Department of Education, Office for Civil Rights, Dear Colleague Letter on Transgender Students (May 13, 2016) ("2016 DCL")

Exhibit 6: United States Department of Education, Office for Civil Rights, Letter of Findings re: OCR Docket #15-14-1076 (June 28, 2016)

Exhibit 7: United States Department of Education, Office for Civil Rights, Letter of Impending Enforcement Action re: OCR Docket #15-14-1076 (July 29, 2016)

INTRODUCTION

Plaintiff Board of Education of the Highland Local School District brings this action against the U.S. Departments of Education ("ED") and Justice ("DOJ"), as well as the Secretary of Education, the Attorney General, and the Principal Deputy Assistant Attorney General in their official capacities (collectively, the "Defendants"), seeking to enjoin Defendants from enforcing the antidiscrimination provisions of Title IX and its implementing regulations. *See* 20 U.S.C. § 1681 *et seq.*; 34 C.F.R. pt. 106. This lawsuit improperly seeks to circumvent the statutory process for enforcing Title IX, a process that guarantees judicial review at the end, not the beginning. Specifically, Plaintiff asks this Court to issue a broad injunction to preemptively shut down any enforcement action requiring schools to treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. But Plaintiff has entirely failed to establish any of the requirements for this extraordinary form of relief.

Plaintiff cannot show a likelihood of success on the merits for a number of reasons. At the outset, this Court lacks jurisdiction over Plaintiff's claims. Congress has established a specific enforcement scheme for Title IX. After investigating a complaint and attempting to achieve voluntary compliance, ED's Office for Civil Rights ("OCR") can either initiate administrative proceedings to withhold federal funds—with judicial review in the court of appeals—or it can refer the matter to DOJ for a civil action to enjoin compliance with Title IX. That scheme precludes duplicative challenges like the present one, which Plaintiff filed after OCR had completed its investigation, but before any enforcement action had been taken. Whichever enforcement option the federal government pursues, Plaintiff will have a full opportunity for judicial review. This Court, however, does not have jurisdiction over Plaintiff's parallel pre-enforcement challenges.

Even if the Court had jurisdiction, Plaintiff has no cause of action under the Administrative Procedure Act ("APA") for two reasons. First, Plaintiff has not challenged final agency action, because the guidance documents at issue impose no independent legal consequences—they simply express Defendants' interpretation of Title IX and its regulations. Second, Plaintiff has an adequate remedy in a court. If ED withholds funding at the end of an administrative enforcement proceeding, Plaintiff can seek full judicial review in the court of appeals; if DOJ seeks an injunction, Plaintiff can simply defend that lawsuit in the court where it is filed. In other words, there is no enforcement scenario in which Plaintiff does not get a full opportunity to ask a court for the same relief it seeks here.

Plaintiff is also unlikely to succeed on the merits of its APA claims. The challenged guidance documents are interpretive rules that need not be promulgated through notice-and-comment rulemaking. Plaintiff's substantive APA claims fare no better, as Defendants' interpretations are consistent with Title IX and its implementing regulations, as well as other statutory and constitutional commands. Indeed, the only court of appeals to have considered Defendants' interpretation found it to be reasonable. Finally, the challenged interpretation does not implicate the requirement of clear notice nor the prohibition on coercion, and so Plaintiff is unlikely to succeed in its Tenth Amendment claim.

Even if it could establish a likelihood of success on the merits, Plaintiff cannot establish that it faces irreparable harm absent a preliminary injunction. The Supreme Court has made clear that simply having to defend against an enforcement action does not constitute irreparable harm. And in the event ED decides to initiate administrative proceedings to withhold funding, the District will have a full opportunity for administrative review, followed by judicial review in the court of appeals. The remaining preliminary injunction factors also cut against Plaintiff. The

balance of equities and the public interest are best served by allowing Defendants to explain their understanding of Title IX to the public, and by allowing the congressionally-mandated enforcement process to play out. Accordingly, Plaintiff's motion for a preliminary injunction should be denied.

BACKGROUND

I. Statutory and Regulatory Background

Title IX prohibits discrimination on the basis of sex in education programs and activities by recipients of federal financial assistance. 20 U.S.C. § 1681 *et seq.* DOJ and ED share responsibility for enforcing Title IX and its implementing regulations. *See* 20 U.S.C. § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54. Under this authority, OCR investigates complaints and conducts compliance reviews, promulgates regulations, and issues guidance to clarify how it evaluates a school's compliance with its statutory and regulatory obligations.

ED's regulations implementing Title IX provide, in relevant part, that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any . . . education program or activity operated by a recipient which receives Federal financial assistance." 34 C.F.R. § 106.31(a). The regulations permit recipients to provide sex-segregated "toilet, locker room, and shower facilities," so long as "facilities provided for students of one sex [are] comparable to such facilities for students of the other sex." *Id.* § 106.33.

In a series of guidance documents, OCR has explained its interpretation of Title IX and its implementing regulations with respect to transgender students. For example, in 2010, ED's

OCR stated in a Dear Colleague Letter[1] that Title IX protects "all students, including . . . transgender . . . students, from sex discrimination." Ex. 1. In April 2014, in response to requests for clarification from various funding recipients, OCR issued guidance ("April 2014 Guidance") explaining that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." Ex. 2. In December 2014, OCR further explained that "[u]nder Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Ex. 3. In April 2015, OCR reiterated this interpretation, stating that recipients must ensure that "transgender students are treated consistent with their gender identity in the context of single-sex classes." Ex. 4. Finally, on May 13, 2016, ED and DOJ issued joint guidance in the form of a Dear Colleague Letter ("2016 DCL"), explaining that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." Compl., Ex. 3 at 3.

These guidance documents are the focal point of Plaintiff's claims. *See* PI Mem. 7. But the documents are not legally binding, and they expose Plaintiff to no new liability or legal requirements. ED has issued guidance documents for decades, across multiple administrations, in order to notify schools and other recipients of federal funds of how the agency interprets the law and how it views new and emerging issues. *See, e.g.*, U.S. Dep't of Educ., Office for Civil Rights, Sex Discrimination Policy Guidance (describing purpose of guidance documents and

[1] A Dear Colleague Letter is a guidance document issued by ED to explain its interpretation of Title IX. *See* Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

providing links to guidance documents back to 1975).[2] Guidance documents issued by ED "do not create or confer any rights for or on any person" and "do not impose any requirements beyond those required under applicable law and regulations." U.S. Dep't of Educ., Types of Guidance Documents.[3] The guidance documents at issue in this case are explicit about the fact that they do not have the force of law. *See, e.g.*, Ex. 5, 2016 DCL, at 1 ("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."); Ex. 2, April 2014 Guidance, at 1 n.1 (same).

II. Title IX's Enforcement Process

After receipt and investigation of an administrative complaint, if OCR determines that a funding recipient is not complying with its Title IX obligations, ED can effectuate compliance with the statute in one of two ways: It can initiate administrative proceedings to withhold further funds; or it can refer the matter to DOJ to file a civil action to enjoin further violations. *See* 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a).

The administrative process begins when a complaint is filed with ED's OCR. *See* 34 C.F.R. § 100.7(b).[4] After OCR investigates the complaint, if it determines that a funding recipient is indeed violating Title IX, it must first seek to achieve voluntary compliance. *See* 20 U.S.C. § 1682(2) (voluntary compliance); 34 C.F.R. § 100.7(c), (d) (investigation); *id.* § 100.8(d) (voluntary compliance). If voluntary compliance is not achieved, OCR can initiate the

[2] *Available at* http://www.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html (last visited July 26, 2016).

[3] *Available at* http://www.ed.gov/policy/gen/guid/types-of-guidance-documents.html (last visited July 26, 2016).

[4] ED's Title IX regulation incorporates ED's Title VI procedural regulations, *see* 34 C.F.R. § 106.71, which are therefore cited in the text.

administrative process for terminating some or all ED funding. This process requires a hearing before an administrative law judge, with a right to an administrative appeal, and discretionary review by the Secretary of Education. *See* 20 U.S.C. § 1682(1) ; 34 C.F.R. § 100.10(b), (e). If a funding recipient is found to be in violation of Title IX, it can restore its eligibility by complying with the terms of the final administrative decision. *Id.* § 100.10(g). After any adverse administrative decision, a recipient is entitled to judicial review in the court of appeals for the circuit in which the recipient is located. *See* 20 U.S.C. § 1683 (incorporating 20 U.S.C. § 1234g(b)). ED cannot terminate any funding until 30 days after reporting the termination to both houses of Congress. *See* 42 U.S.C. § 2000d-1(2); *see also N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 515 n.2 (1982) (summarizing this process).

The other enforcement procedure is judicial. When it determines that a funding recipient is violating Title IX, and that voluntary compliance cannot be secured, ED can refer the case to DOJ, which is empowered by statute to seek an injunction in federal district court to restrain the violations. *See* 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a)(1).

III. Factual and Procedural Background

Student A is an eleven-year-old transgender girl, who completed fourth grade during the 2015-2016 school year. Ex. 6, at 4.[5] Prior to the start of Student A's first grade year in 2012-2013, her parent met with administrators from the Highland Local School District (the "District") to notify the District of Student A's gender transition and gender identity, and to request that Student A be treated consistently with her gender identity for all educational purposes. *Id.* Among other things, Student A's parent requested that she be permitted to use school bathrooms consistent with her gender identity. *Id.* District administrators refused the request. In June

[5] Student A was assigned the sex of male at birth, but starting in kindergarten began asserting a female gender identity. *Id.* During the summer between kindergarten and first grade, Student A transitioned and began identifying as female, consistent with her gender identity. *Id.*

2013, they informed Student A's parent that she could not use the girls' restrooms consistent with her gender identity, unless her birth certificate identified her sex as female (an insurmountable hurdle for a person born in Ohio[6]), and stated that Student A would be required to utilize an individual-user restroom instead. *Id.* at 9. Throughout every subsequent school year thereafter—2013-2014, 2014-2015, and 2015-16—Student A's parent has continued to request that Student A be permitted to use restrooms consistent with her gender identity. The District has denied all such requests. *Id.*

On December 23, 2013, Student A's parent filed a complaint with OCR, alleging that the District had violated Title IX by denying her access to girls' restrooms. On March 29, 2016, after completing its investigation, OCR notified the District of its determination that the District failed to comply with Title IX's implementing regulation by, among other things, excluding Student A from girls' restrooms.[7] *Id.* at 12. The next day, on March 30, 2016, OCR followed up by providing the District with a summary of ED's clarifying guidance regarding Title IX and a Proposed Resolution Agreement for the District's review. *See* Compl., Ex. 5. By the proposed agreement, OCR offered resolution if the District would, among other things: (a) "provide the Student access to sex-specific facilities at the District consistent with the Student's gender identity"; (b) "provide the Student access to sex-specific facilities at all District-sponsored activities, including overnight events and extracurricular activities on and off campus, consistent

[6] Ohio law does not permit a person to change the sex assigned on a person's birth certificate. *See* Ohio Revised Code § 3705.22 (2006).

[7] On August 29, 2014, Student A amended her complaint to include allegations that District staff subjected her to harassment and that the District failed to respond when Student A and her parent reported harassment by other students, including bullying based on sex. Plaintiff's lawsuit challenges only Defendants' guidance regarding access to sex-specific facilities (including restrooms, locker rooms, and overnight accommodations), but not ED's findings of noncompliance with regard to Student A's allegations of harassment; Plaintiff continues to ignore this aspect of Student A's complaint here.

with the Student's gender identity"; and (c) "treat the Student consistent with the Student's gender identity and the same as other students of the same gender in all respects in the education programs and activities offered by the District." Compl., Ex. 4. OCR further advised the District that it would have up to 90 calendar days from the date of the Proposed Resolution Agreement (expiring on June 28, 2016), within which to reach a final agreement. *See* Compl., Ex. 5. OCR made several subsequent attempts to discuss a resolution agreement with the District. However, the District never responded to OCR's Proposed Resolution Agreement, nor did it provide any alternative proposals or language regarding the elements of OCR's initial Proposed Resolution Agreement. Ex. 7, at 14.

Instead, on June 10, 2016, the District filed this lawsuit. The Complaint states that the District will not accept OCR's proposed agreement, and challenges Defendants' interpretation of Title IX and its implementing regulations—specifically, the interpretation that transgender students must be allowed to access sex-segregated activities and facilities consistent with their gender identity. Plaintiff asserts violations of the APA (Count I), the Spending Clause (Count II), federalism guarantees (Count III), separation-of-powers guarantees (Count IV), and the Regulatory Flexibility Act (Count V).

Based on statements in Plaintiff's Complaint, OCR issued a letter on June 10, 2016, declaring an impasse in the parties' negotiations, followed by a Letter of Findings on June 28, 2016. Ex. 6 ("OCR finds, by a preponderance of the evidence, that the District treated the Student differently on the basis of sex in its educational programs and activities . . . ."). The Letter of Findings further explained that if OCR and the District were not able to negotiate an agreement that would bring the District into compliance with its obligations within 30 days, OCR would issue a Letter of Impending Enforcement Action. *Id.* at 12.

On July 15, 2016, Plaintiff moved for a preliminary injunction in this lawsuit. Plaintiff seeks to enjoin Defendants: "(1) from enforcing Title IX in a manner that would require Highland to allow students who profess a gender identity that conflicts with their sex to access overnight accommodations, locker rooms, and rest rooms designated for the opposite sex and (2) from taking any adverse action against Highland, including but not limited to steps to revoke Highland's federal funding." PI Motion, ECF No. 10, at 1-2.

To date, OCR has not received a response to its Letter of Findings or any further communications from the District. Accordingly, on July 29, 2016, OCR issued a Letter of Impending Enforcement Action, which states that OCR will either "initiate administrative proceedings" or "refer the case to the U.S. Department of Justice" for judicial enforcement, and OCR "can take this action after 15 calendar days." Ex. 7 at 14. The letter also reiterated that "OCR remains willing to resolve this matter" through a negotiation process at the administrative level. *Id.* at 14-15.

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Lafayette*, 305 F.3d 566, 573 (6th Cir. 2002). A party seeking a preliminary injunction must establish that (1) it will suffer irreparable harm without the injunction; (2) it is likely to succeed on the merits; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *See Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 408 (6th Cir. 2010).

ARGUMENT

I. Plaintiff Has Not Established a Likelihood of Success on the Merits

In order to establish a likelihood of success on the merits, "a plaintiff must show more than a mere possibility of success." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007). Its burden at this stage "is much more stringent than the proof required to survive a summary judgment motion." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). Plaintiff cannot meet that stringent standard here. As a threshold matter, the Court should not even reach the merits of Plaintiff's claims, because it lacks subject-matter jurisdiction over this lawsuit, and also because Plaintiff does not have a cause of action under the APA. Even if the Court did reach the merits, none of Plaintiff's claims is likely to succeed.

A. This Court Does Not Have Subject Matter Jurisdiction Over Plaintiff's Complaint

Before addressing the merits, a court must determine that it has subject-matter jurisdiction. *Steel Co. v. Citizens for a Better Envmt.*, 523 U.S. 83, 94-95 (1998). In this case, the Court lacks jurisdiction because Congress has established an enforcement process that does not allow the type of claims Plaintiff has brought. In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the Supreme Court held that such a specific enforcement scheme "precludes district court jurisdiction" over parallel pre-enforcement challenges. *Id.* at 207. In that case, a mine operator challenged an agency's interpretation of a statute, which was about to form the basis for an enforcement action against the operator. *See id.* at 216. Based on a review process remarkably similar to Title IX's, the Court held that Congress's intent to preclude district court review was "fairly discernible in the statutory scheme" under the Mine Act. *Id.* at 207 (quotes omitted); *see* 30 U.S.C. § 801 *et seq*.

First, the Mine Act "establishe[d] a detailed [administrative] structure for reviewing" citations issued by the agency. *Id.* at 207-08 (describing review before an ALJ followed by administrative appeal). The same is true for Title IX. *See* 20 U.S.C. § 1682 (requiring "an express finding on the record, after opportunity for hearing"); 34 C.F.R. § 100.10(b) (administrative appeal); *id.* § 100.10(e) (possibility of Secretarial review); *id.* § 100.10(g) (right to be "restored to full eligibility" if the recipient complies with an adverse final decision). Second, the Mine Act allowed regulated parties to "challenge adverse [agency] decisions in the appropriate court of appeals." *Thunder Basin*, 510 U.S. at 208. Here too. *See* 20 U.S.C. § 1683 (incorporating 20 U.S.C. § 1234g). Third, the Mine Act "expressly authorize[d] district court jurisdiction" in *other* circumstances, including suits by "the *Secretary* to enjoin habitual violations of the statute"; by contrast, regulated parties "enjoy[ed] no corresponding right." *Id.* at 209. Both are true of the statutory scheme for enforcing Title IX. *See* 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a)(1) (referral to DOJ for civil action).

Just as in *Thunder Basin*, then, this Court does not have jurisdiction to consider Plaintiff's anticipatory challenge. By providing for administrative review, followed by judicial review in the court of appeals, Congress did not intend to allow parallel challenges in federal district court. Plaintiff styles its complaint as only challenging the background statutory interpretation announced in Defendants' guidance documents, but the same was true in *Thunder Basin*. *See id.* at 205 (describing plaintiff's pre-enforcement "challenge [to] the [agency's] interpretation of" a statute). There is simply "[n]othing in the language and structure of the Act or its legislative history [to] suggest[] that Congress intended to allow [regulated parties] to evade the statutory-review process by enjoining the [agency] from commencing enforcement proceedings." *Id.* at 216. Courts have consistently refused to allow funding recipients to circumvent the civil rights

laws' administrative enforcement processes. *See, e.g.*, *Taylor v. Cohen*, 405 F.2d 277 (4th Cir. 1968) (en banc); *School Dist. of City of Saginaw v. Dep't of Health, Ed., & Welfare*, 431 F. Supp. 147 (E.D.Mich. 1977). This Court should too.[8]

B. Plaintiff Does Not Have a Cause of Action Under the APA

To have an APA cause of action, a plaintiff must challenge "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704; *see Jama v. DHS*, 760 F.3d 490, 494 n.4 (6th Cir. 2014). Plaintiff fails both requirements, because it has not challenged any "final agency action," and because it has another "adequate remedy in a court."[9]

1. The Guidance Documents Are Not Final Agency Action

To be final, an agency action must meet two requirements: (1) the decision must "mark the 'consummation' of the agency's decisionmaking process," and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Plaintiff's challenge to the guidance documents fails the second prong of this test. Any challenge to the agency's ongoing administrative process fails both prongs.

The challenged guidance merely lays out the United States' interpretation of Title IX. *See* 2016 DCL, at 2 ("The Departments interpret Title IX to require" certain treatment of

[8] A further reason for rejecting Plaintiff's anticipatory claims is that this lawsuit only raises a *subset* of the issues raised in the OCR complaint and Letter of Findings, which allege harassment claims that Plaintiff has not challenged here. *See supra* n.7; Ex. 6, 7.

[9] Plaintiff also argues that "Title IX expressly permits judicial review." PI Mem. 8 (citing 20 U.S.C. § 1683). But section 1683 permits judicial review of funding termination "as may otherwise be provided by law for similar action taken by such department or agency on other grounds." This reference to judicial review of "similar action" incorporates the more general provision for judicial review of funding termination in 20 U.S.C. § 1232g(b), which only provides for judicial review in "the United States Court of Appeals for the circuit in which that recipient is located" upon completion of the administrative enforcement process. *See Freeman v. Cavazos*, 923 F.2d 1434, 1440 (11th Cir. 1991). Section 1683's separate reference to judicial review under the APA, by contrast, only applies to funding terminations "not otherwise subject to judicial review"—a description that does not apply here.

transgender students.). The guidance documents are intended to help recipients, parents, and students understand how Title IX's prohibition on sex-based discrimination applies to transgender students. They have no independent legal effect. *See id.* at 1 ("This guidance does not add requirements to applicable law."). The only consequences come from violating Title IX itself and its implementing regulations, not the guidance letters. Indeed, in a proceeding to enforce the statute, the Department could assert the same interpretation with or without the guidance. *See Golden and Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432-33 (4th Cir. 2010).

The documents thus "created no legal obligations beyond those which the [statute] already imposed." *Rhea Lana, Inc. v. Dep't of Labor*, 2016 WL 3125035, at *3 (D.C. Cir. June 3, 2016). They simply inform the public what obligations the agency believes Title IX imposes directly, without purporting to alter those obligations at all. *See id.* at *4 ("Agencies routinely use such letters to warn regulated entities of potential violations before saddling them with expensive and demanding enforcement actions."). In other words, the guidance does not "creat[e] 'new law, rights or duties,'" but rather "goes 'to what the [agency] thinks [the statute] means.'" *Hadley-Memorial Hospital v. Kynard*, 981 F. Supp. 690, 693 (D.D.C. 1997) (quoting *General Motors Corp. v. Ruckelshause*, 742 F.2d 1561, 1565 (D.C. Cir. 1984)). "[L]egal consequences do not emanate from [the guidance] but from the [] Act and its implementing regulations." *Domenech*, 599 F.3d at 433. Plaintiff therefore lacks a cause of action to challenge the guidance documents.[10]

[10] As the D.C. Circuit has recently held, "interpretive rules or statements of policy generally do not qualify [as final agency action] because they are not finally determinative of the issues or rights to which they are addressed." *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013) (quotes and alteration omitted); *see id.* ("Like agency policy statements, 'interpretive rules' that do not establish a binding norm are not subject to judicial review under the APA.") (quotes omitted). To be sure, there are exceptions when an interpretive document imposes its *own* legal or practical consequences, such as

Of course, Plaintiff has not brought this challenge in the abstract. Instead, after OCR completed its investigation and attempted to enter a resolution agreement with the District, Plaintiff sued in an attempt to shut down any further enforcement proceedings. Its claims thus function as a collateral challenge to the determination ED has made that the District is in violation of Title IX and its regulations. *See* Ex. 6; Ex. 7. That determination is not final agency action for two reasons. First, as with the guidance documents, the letter does not itself impose any legal consequences. Those consequences can come only through either a final decision in an enforcement proceeding, or a successful request for injunctive relief in a lawsuit brought by DOJ. *See supra* Background, Part II. Second, the determination letters are not the "consummation" of the agency's decisionmaking process; indeed, the agency has not yet decided whether to seek an injunction or the termination of funds. Courts have repeatedly held that such "intermediate steps" in the enforcement process are "not the consummation of the agencies' decisionmaking." *Jama v. DHS*, 760 F.3d 490, 496 (6th Cir. 2014); *see Nat'l Wildlife Fed. v. Adamkus*, 936 F. Supp. 435, 443 (W.D. Mich. 1996) ("[O]nly final agency action, not procedural, preliminary, or intermediate action, is subject to judicial review under the APA.").

"double penalties in a future enforcement proceeding," *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012), or "cast[ing] a shadow over [a business's] customer relationships, . . . long-term planning, and . . . ability to fend off competitors," *CSI Aviation Serv., Inc. v. DOT*, 637 F.3d 408, 413 (D.C. Cir. 2011). All the final-agency-action cases cited by Highland fall into one of these exceptions. But that exception does not apply here. There are no penalties for violating the guidance documents, and the guidance documents do not impose practical consequences on a recipient in advance of a successful enforcement action brought directly under the statute. Instead, the only practical consequence faced by Plaintiff is "the burden of responding to the charges made against it in a formal hearing," which the D.C. Circuit and Supreme Court have held does not convert interpretive guidance into final agency action. *CSI*, 637 F.3d at 413 (quotes omitted). *Compare Rhea Lana*, 2016 WL 3125035, at *7 (guidance letter functioned as "a stand-alone trigger for willfulness penalties"); *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000) (cited PI Mem. 10) (imposing fines); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 437 (D.C. Cir. 1986) (cited PI Mem. 9) (imposing "civil and criminal penalties"). In addition, the D.C. Circuit later distinguished both *Ciba-Geigy* and *Barrick Goldstrike* as not speaking to "a situation in which, as here, the agency is required by statute to bring an enforcement proceeding before it may make any legally binding determination." *Reliable Auto. Sprinkler Co., Inc. v. Consumer Product Safety Comm'n*, 324 F.3d 726, 734 (D.C. Cir. 2003). The instant case also presents that situation. *See* 20 U.S.C. § 1682.

2. Plaintiff Has an Adequate Remedy in a Court

Even if the guidance documents somehow constituted final agency action, Plaintiff would have an "adequate remedy in a court." 5 U.S.C. § 704. As described above, there are two ways the federal government can enforce Title IX. Under either scenario, Plaintiff would have the opportunity to convince a court that its interpretation of Title IX, not Defendants', was correct.

If ED sought to withhold federal funds, it would first have to complete the administrative process Congress has set up to review those decisions, which includes judicial review in the court of appeals. The Sixth Circuit has held that this precise arrangement provides an "adequate remedy in a court," which forecloses district court review. *See Haines v. Federal Motor Carrier Safety Admin.*, 814 F.3d 417, 428 (6th Cir. 2016) (holding that 49 U.S.C. § 521(b)(9) provided an adequate remedy). As the court explained, there is no APA cause of action when "the statute provides for review by an appellate court following administrative review, [] because the APA's 'no other adequate remedy in court' requirement is intended to insure that the APA's general grant of jurisdiction to review agency decisions is not duplicative of more specific statutory procedures for judicial review." *Id.* (quotes and alteration omitted). *See also Bangura v. Hansen*, 434 F.3d 487, 500-01 (6th Cir. 2006) ("The essential inquiry is whether another statutory scheme of judicial review exists so as to preclude review under the more general provisions of the APA."). If, at the end of this process, Plaintiff convinced the court of appeals that its interpretation was correct, it would achieve the same relief it seeks in this case.

Similarly, if DOJ sued Plaintiff to enjoin its Title IX violations, it would "almost by definition [] have an adequate remedy in a court, that is, the remedy of opposing the Attorney General's motions in the court in which [s]he files h[er] papers." *NAACP v. Meese*, 615 F. Supp. 200, 203 (D.D.C. 1985). "Not only would the filing of such an opposition there be a judicial

remedy obviating the need for resort to the APA in this District, but it is a far more appropriate, far more logical remedy than a lawsuit here seeking injunctive relief." *Id.* And, again, if Plaintiff convinced the court that its interpretation was correct, it would achieve the same relief it seeks here.

C. Defendants' Actions Do Not Violate the APA

Plaintiff also is unlikely to succeed on the merits of its APA claims, specifically its claims that Defendants' actions: (1) are inconsistent with the language of Title IX and its implementing regulations; and (2) required notice-and-comment rulemaking.

As relevant here, the APA permits agency action to be set aside only if it is "in excess of statutory jurisdiction, authority or limitations, or short of statutory right," "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). Plaintiff cannot meet this heavy burden.

1. Defendants' Interpretation Is Consistent with Title IX and Its Implementing Regulations

a) Title IX and Its Implementing Regulations Do Not Define the Term "Sex"

ED and DOJ's regulations do not define the term "sex," nor do they address how to determine sex (*i.e.*, who is a male and who is a female) when providing sex-specific facilities. That absence of a definition in the regulatory scheme is central to the issues before the Court.

Plaintiff's entire argument is predicated on its view that the term "sex," as used in Title IX, "unambiguously" refers to sex "determined at birth." PI Mem. 12. But the Sixth Circuit has expressly rejected an analysis of sex discrimination that limits the term "sex" to genetic makeup or reproductive organs. In *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), the Sixth Circuit explained that "[t]he Supreme Court [has] made clear that in the context of Title VII,

discrimination because of 'sex' includes gender discrimination." *Id.* at 572. It therefore rejected the district court's conclusion "that transsexuals, as a class, are not entitled to Title VII protection because 'Congress had a narrow view of sex in mind' and never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.'" *Id.*; *see id.* (understanding "gender" to "designate the sexes as viewed as social rather than biological classes") (quotation marks omitted).[11] Other circuits have also concluded that "sex" in Title IX and analogous statutes includes gender identity. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 721-22 (4th Cir. 2016), *mandate recalled and stayed*, *Gloucester Cnty. Sch. Bd. v. G.G.*, No. 16A52 (Aug. 3, 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-15 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *see also Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008).

In any event, Plaintiff's position is premised on reasoning that is incorrect as a matter of fact and law. Contrary to Plaintiff's assertions, when Title IX was enacted, dictionaries did not refer only "to the biological distinctions between men and women." PI Mem. 11. Rather, they included psychological and behavioral differences within the definition of "sex." *See Gloucester*, 822 F.3d at 721-22 (describing dictionaries that defined "sex" as "the character of being male or female" or "the sum of the morphological, physiological, and behavioral

[11] In *Smith*, the Sixth Circuit held that a transgender plaintiff stated a claim for sex discrimination under Title VII, having pled adverse employment action resulting from failure to conform to sex stereotypes about how a man should look and behave. *See id.* at 572. Regardless of whether sex stereotyping is at issue here, the core principle of *Smith*—that "sex" discrimination covers more than just birth sex—forecloses Plaintiff's narrow reading of that term. *Id.* at 573 (agreeing that "'sex' under Title VII encompasses *both* the anatomical difference between men and women *and* gender"). *Contra, e.g.*, PI Mem. 12 (arguing that "gender identity is very different from sex" and so is not covered by Title IX).

peculiarities . . . that is typically manifested as maleness or femaleness").[12] In other words, Plaintiff's contention that the meaning of sex in Title IX is "a binary biological reality," PI Mem. 12, is belied by contemporaneous dictionary definitions, which demonstrate "that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive." *See Gloucester*, 822 F.3d at 721.[13] Accordingly, the plain language of Title IX and its implementing regulations "shed[] little light on how exactly to determine the 'character of being either male or female'" in situations where the morphological, physiological, and behavioral indicators of sex "diverge." *Id.*[14]

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[12] *See* Am. Heritage Dictionary 548, 1187 (1973) (defining "sex" as, *inter alia*, "the physiological, functional, and psychological differences that distinguish the male and the female" and defining "gender" as "sex"); Webster's Seventh New Collegiate Dictionary 347, 795 (1970) (defining "sex" to include "behavioral peculiarities" that "distinguish males and females" and defining "gender" as "sex"); 9 Oxford English Dictionary ("OED") 577-78 (1st ed. 1939) (defining "sex" as, *inter alia*, a "distinction between male and female in general").

[13] Plaintiff incorrectly states that "sex is binary," whereas "gender identity, in stark contrast, has many more than two variations." PI Mem. 12. As the Fourth Circuit noted, reducing "sex" solely to genitalia creates unresolvable ambiguities about how laws and regulations governing sex discrimination and the lawfulness of sex-segregated facilities would apply to "an intersex individual," and "an individual born with X-X-Y chromosomes," and "an individual who lost external genitalia in an accident." *Gloucester*, 822 F.3d at 720-21. The Court further explained that "[m]odern definitions of 'sex' also implicitly recognize the limitations of a nonmalleable, binary conception of sex. For example, Black's Law Dictionary defines 'sex' as '[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender.' The American Heritage Dictionary includes in the definition of 'sex' '[o]ne's identity as either female or male.'" *Id.* at 721 n.7 (quoting Black's Law Dictionary 1583 (10th ed. 2014) and American Heritage Dictionary 1605 (5th ed. 2011)).

[14] Even assuming *arguendo* that the Court were to accept Plaintiff's underlying premise that the term "sex" refers only to biological distinctions, it would not preclude a finding that sex encompasses gender identity. To the contrary, "numerous medical studies conducted in the past six years . . . 'point in the direction of hormonal and genetic causes for the in utero development'" of gender identity that is inconsistent with an individual's genitalia. Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973*, *in* GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE ch.16, at 16-72 to 16-74 & n.282 (Christine Michelle Duffy ed. Bloomberg BNA 2014))); *see also* Aruna Saraswat, MD, et al., *Evidence Supporting the Biologic Nature of Gender Identity*, 21 ENDOCRINE PRACTICE 199, 199-202 (2015) (providing a review of data in support of a "fixed, biologic basis for gender identity" and concluding that "current data suggest a biologic etiology for transgender identity"); E.S. Smith et al., *The Transexual Brain—A Review of Findings on the Neural Basis of Transsexualism*, 59 NEUROSCIENCE AND BIOBEHAVORIAL REVIEWS 251-266 (Dec. 2015) (citing numerous studies and concluding that "[t]he available data from structural

Plaintiff's arguments about "contemporaneous definitions" are really an attempt to channel Congress's mindset from 1972. *See* PI Mem. 11 ("Because Defendants' rule is not consistent with Title IX's objectives . . . that rule exceed[s] their express grant of statutory authority."). But the Supreme Court has refused to restrict the meaning of Title IX to what was in the minds of the legislators who drafted it over forty-five years ago. This is because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Servs., Inc.*, 523 U.S. 75, 79 (1998); *cf. Barr v. United States*, 324 U.S. 83, 90 (1945) ("[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators."). For example, under Title IX, sexual harassment is discrimination on the basis of sex, even though "[w]hen Title IX was enacted in 1972, the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts." *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting). Similarly, the Supreme Court has held that Title VII (like Title IX) protects against discrimination between members of the same sex even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Oncale*, 523 U.S. at 79.[15]

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and functional neuroimaging-studies promote the view of transsexualism as a condition that has biological underpinnings"). Thus, the current research increasingly indicates that gender identity has physiological or biological origins.

[15] Contrary to Plaintiff's assertions, other congressional action does not "clearly show[] that Congress understands gender identity to be distinct from sex." PI Mem. 13. There is no evidence that Congress intended the inclusion of "gender identity" in the Violence Against Women Act, 42 U.S.C. § 13925(b)(13)(A), to imply that discrimination based on gender identity falls outside the meaning of discrimination "based on . . . sex." Nor can any inference of intent be drawn from Congress' inaction on including the term "gender identity" in Title VII and Title IX. "Congress does not express its intent by a

Accordingly, the language of Title IX does not "unambiguously" dictate that "sex" refers only to specific anatomical distinctions between males and females, and so Defendants' guidance is not contrary to the statute's plain language.

b) Defendants' Interpretations of Title IX and Its Implementing Regulations Are Reasonable

DOJ and ED are the principal agencies tasked with implementing Title IX. *See* 20 U.S.C. § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54. Thus, in the absence of an express definition of the term "sex," Defendants' regulations and their interpretation of those regulations are owed substantial deference by this Court. *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Indeed, under *Auer*, agencies' interpretations of their own regulations are "controlling unless plainly erroneous or inconsistent with the regulation[s]." *Id.* Under this deferential standard of review, Plaintiff is unlikely to succeed on the merits.

Defendants' implementing regulations prohibit recipients from, *inter alia*, providing "different aid, benefits, or services," or "[o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of sex. 34 C.F.R. § 106.31; 28 C.F.R. § 54.400. The regulations also explain that schools may "provide separate toilet, locker

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failure to legislate." *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998) (citing *United States v. Estate of Romani*, 523 U.S. 517, 534 (1998) (Scalia, J., concurring)); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 187 (1994) ("[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'"). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). Indeed, an amendment can be rejected for the simple reason that Congress believes the proposed change is not needed because its substance is already included in the statute. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'"). In any event, those legislative efforts did not address the question raised here—namely, how to determine the sex of a transgender student for purposes of access to sex-segregated facilities under Title IX's regulations.

room, and shower facilities on the basis of sex," as well as "separate housing," without running afoul of Title IX, so long as the "facilities provided for students of the one sex" are "comparable to [the] facilities provided for the other sex." 34 C.F.R. §§ 106.32, 106.33; 28 C.F.R. § 54.410. But neither the regulations nor the statute define the term "sex," and certainly neither one *unambiguously* defines "sex" as being limited to the sex assigned to a person at birth. *See Gloucester*, 822 F.3d at 720-21 (holding that the regulation is "ambiguous as applied to transgender individuals"). This reading is consistent with the Sixth Circuit's view that Title VII's equivalent language encompasses sex "as viewed as social rather than biological classes." *Smith*, 378 F.3d at 572.

The Fourth Circuit is the only federal court of appeals to have considered Defendants' interpretation of Title IX's implementing regulations regarding single-sex facilities, and it found the interpretation to be reasonable.[16] It found that the regulation itself "sheds little light on how exactly to determine the 'character of being either male or female' where those indicators diverge," as they sometimes do. *Gloucester*, 822 F.3d at 722.[17] But in light of contemporaneous and modern evidence that sex includes "the sum of the morphological, psychological, and

[16] The Fourth Circuit's decision in *Gloucester* remains good law despite the Supreme Court's stay pending a decision on certiorari. Even a *grant* of certiorari does not negate the binding effect of a lower court opinion. *See, e.g.*, *Height v. United States*, 2016 WL 756504, at *4 & n.3 (W.D.N.C. Feb. 25, 2016) (relying on *Taylor v. United States*, 754 F.3d 217 (4th Cir. 2013), and explaining that "[i]t is of no moment that the Supreme Court has granted certiorari in the *Taylor* case because unless the Court rules otherwise, the Fourth Circuit precedent detailed above binds this Court on questions of law."); *see also Schwab v. Dep't of Correction*, 507 F.3d 1297 (11th Cir. 2007) ("[G]rants of certiorari do not themselves change the law," and so "they must not be used by courts of this circuit as a basis for granting a stay of execution that would otherwise be denied."); *Levesque v. Gov't Employees Ins. Co.*, 2015 WL 6155897, at *6 (S.D. Fla. 2015) ("Where controlling circuit precedent exists on an issue before a district court, a grant of certiorari on the same issue by the United States Supreme Court does not justify a stay because certiorari grants do not change the law.").

[17] The Maine Supreme Court reached a similar conclusion when evaluating a state law requiring restrooms in school buildings to be "[s]eparated according to sex." Me. Rev. Stat. Ann. Tit. 20-a, § 6501 (2013). In *Doe v. Regional School Unit 26*, that court determined that the statute "does not mandate, or even suggest, the manner in which transgender students should be permitted to use sex-segregated facilities." 86 A.3d 600, 605-06 (Me. 2014).

behavioral peculiarities . . . that is typically manifested as maleness and femaleness," which obviously include gender identity, the Fourth Circuit concluded that ED's interpretation offered a reasonable resolution of that ambiguity. *Id.* at 721-22. The Fourth Circuit's decision comports with foundational principles of administrative law, which instruct courts to give controlling weight to agencies' interpretations of their own regulations, unless those interpretations are plainly erroneous. *See Auer*, 519 U.S. at 461; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Gardebring v. Jenkins*, 485 U.S. 415, 429-30 (1988). Interpretative rules construing ambiguous statutes are likewise "entitled to respect." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The Sixth Circuit's broad view of the term "sex," coupled with the Fourth Circuit's decision in *Gloucester*, should weigh heavily in this Court's consideration of Plaintiff's likelihood of success on its Title IX claims.[18] *See Smith*, 378 F.3d at 572. Those Courts' clear rejection of Plaintiff's primary argument—that the word "sex" is unambiguous and must be based on one's genitalia at birth in all cases—is strong evidence that those claims will also fail here. *See, e.g.*, *Butts v. NCAA*, 600 F. Supp. 73, 74 (E.D. Pa. 1984) (where plaintiff's argument was "considered, and firmly rejected" by a court of appeals, likelihood of success was low); *Metro Found. Contractors, Inc. v. Arch Ins. Co.*, 2011 WL 2947003, at *1 (S.D.N.Y. July 18, 2011) (finding no likelihood of success on the merits of appeal where "other courts of appeals . . . have rejected" plaintiff's argument).[19]

[18] *See supra* note 16 (explaining that *Gloucester* is still good law despite the Supreme Court's stay pending a decision on certiorari).

[19] Plaintiff also argues that Defendants' guidance is arbitrary and capricious because: (1) "Defendants failed to consider the practical problems" associated with their interpretation, primarily the purported privacy interests of other students; and (2) the guidance constitutes a "change [of] the law." PI Mem. 19-20. As explained below, no such privacy rights are implicated here. *See infra* Part I.D.2. With respect to Plaintiff's argument that Defendants have "changed their position" on the meaning of "sex" in

2. The Guidance Documents Provide Interpretive Rules Exempt from the Notice-and-Comment Requirements of the APA

Plaintiff incorrectly contends that the challenged guidance documents should be set aside because they "have created a legislative rule without following notice-and-comment procedures." PI Mem. 18. That argument is not likely to succeed because the challenged guidance is an interpretive rule, for which notice-and-comment procedures are not required.

The APA does not require agencies to follow notice-and-comment procedures in all situations. Instead, the statute specifically exempts "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). The Supreme Court has explained that the "critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.* at 1204.

Interpretive rules encourage predictability in the administrative process because they "clarify or explain existing law or regulations and go to what the administrative officer thinks the statute or the regulation means." *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 679 (6th Cir. 2005) (quoting *First Nat'l Bank v. Sanders*, 946 F.2d 1185, 1188-89 (6th Cir. 1991)). An agency that enforces "less than crystalline" statutes and regulations must interpret them, "and it does the public a favor if it announces the interpretation in advance of enforcement,

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federal nondiscrimination law, Plaintiff points only to a motion to dismiss that DOJ filed in 2006, in *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008). *See* PI Mem. 20. But agencies "are not bound by their own prior construction of a statute," *Dismas Charities, Inc. v. U.S. Dept. of Justice*, 401 F.3d 666, 682 (6th Cir. 2005), much less their litigating position in an isolated case. This is particularly true where, as was the case in *Schroer*, the court *rejected* the agency's statutory construction argument. *See Schroer*, 577 F. Supp. 2d at 308 (holding that refusal to hire the plaintiff in response to her "decision to transition, legally, culturally and physically, from male to female . . . violated Title VII's prohibition on sex discrimination"). Moreover, even when they change a policy, agencies are not subject to any heightened standard of explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009); *see* Eric Holder, Att'y Gen., Memorandum to United States Attorneys, Dec. 15, 2014 (explaining DOJ's conclusion that Title VII protects transgender people).

whether the announcement takes the form of a rule or of a policy statement, which the [APA] assimilates to an interpretive rule." *Hoctor v. USDA*, 82 F.3d 165, 167 (7th Cir. 1996). Courts should not "discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities." *Id.* Here, by announcing their interpretations of Title IX and its regulations, Defendants have informed the public about their understanding of the law—and no more. The challenged guidance documents are non-binding, do not have the force of law, and do not change existing laws, but simply "advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). The guidance documents are therefore paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA. *Id.*

Plaintiff makes two arguments to the contrary. First, it argues that the challenged interpretations are subject to notice and comment because they affect rights and obligations, and are binding. PI Mem. 16-17.[20] But that is simply not so: unlike the statutes and regulations on which they are premised, the interpretations themselves do not carry the force of law. Rather, as explained above, they merely explain what Defendants think Title IX and its regulations *already*

[20] For this point, Plaintiff relies primarily upon *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015 (D.C. Cir. 2000). But the cited provisions of *Appalachian Power* relate to the question of whether the EPA's guidance was a "final agency action," not whether it required notice and comment. As that case's separate analyses show, the former does not necessarily imply the latter. *Id.* at 1020-23 (finality); *id.* at 1023-28 (notice and comment). *Appalachian Power's* notice-and-comment holding, moreover, has no application in the present case. There, the Court found that the EPA's guidance *contradicted* statements made in its response to comments and in the preamble to the applicable regulation. *Id.* at 1026 (explaining that EPA's subsequent guidance "is flatly against EPA's position" in the regulation). The *Appalachian Power* Court also found that "the EPA's guidance would change the entire method of measuring compliance" and could "affect the stringency of the limitation itself." *Id.* at 1027. Thus, the Court found that the EPA guidance substantively changed the scope of the regulation it purported to interpret (requiring notice and comment), instead of "serv[ing] only a gap-filling function" (which would not require notice and comment). *Id.* at 1025. By contrast, Defendants' interpretation here is entirely consistent with its regulations interpreting Title IX, and only serves to interpret those regulations by filling a gap left open by the undefined term "sex." *See Gloucester*, 822 F.3d at 722. And, unlike in *Appalachian Power*, the guidance here creates no new rights or obligations—much less an entirely new compliance monitoring scheme.

require.[21] Valid interpretations of binding authorities necessarily implicate rights and obligations, but the binding nature of the interpreted statute does not make the explications themselves legislative rules. If that were so, "every interpretive rule would become legislative." *Dismas*, 401 F.3d at 681.

Second, Plaintiff argues that the challenged interpretations are subject to notice and comment because they "add substantive content to the existing statutory and regulatory requirements" and thereby "effectively changed Title IX." Pl.' Mem. at 17-18. As detailed above, the Fourth Circuit recently—and correctly—concluded that ED's interpretation does not change Title IX, but rather is consistent with the statute's implementing regulations and "prior agency practice." *See Gloucester*, 822 F.3d at 720-22. The guidance merely interprets the undefined term "sex." As schools have confronted the reality that some students' gender identities do not align with their birth-assigned sex, schools have begun to look to ED for guidance on the question of how its regulations apply to transgender students—*i.e.*, how to construe the term "sex" when providing sex-segregated facilities in schools. *Id*. at 720. The guidance thus applies preexisting rules to new circumstances. Even if that represented a change, interpretive changes do not require notice and comment. *See Perez*, 135 S. Ct. at 1306.

In sum, although the guidance documents supply "crisper and more detailed lines" than the statutes and regulations they interpret, they do not alter the legal obligations of regulated entities. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Accordingly, they set forth an interpretive rule, which is not subject to the notice-and-comment requirements of the APA.

[21] The guidance itself makes clear that Defendants do not intend it to have the force of law. For example, the 2016 DCL prominently states that the document "does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluates whether covered entities are complying with their legal obligations." Ex. 5, at 1. Those obligations flow from Title IX and its implementing regulations, not the Guidance itself.

D. Defendants' Actions Do Not Violate Any Constitutional Rights

1. The Spending Clause Is Not Violated by Title IX, the Agencies' Implementing Regulations, or the Guidance Documents Interpreting Them

Plaintiff contends that the challenged interpretation of Title IX violates the Spending Clause, U.S. Const., art. I, § 8, cl. 1, (1) by failing to provide clear notice of the conditions on which federal funding was predicated, (2) by coercing states that receive Title IX funding, or (3) because it is unrelated to the purposes of the funding. None of these is likely to succeed.

First, the Constitution vests Congress with the power to "fix the terms under which it disburses federal money to the States." *Suter v. Artist*, 503 U.S. 347, 356 (1992). "The Supreme Court has explained that so long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004) (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999)). For example, in *Davis*, the Supreme Court held that Title IX's prohibition on sex discrimination in the school context provided adequate notice to federal funds recipients that severe student-on-student sexual harassment was actionable, even though "the level of actionable harassment . . . depends on a constellation of surrounding circumstances, expectations, and relationships." 526 U.S. at 651 (quotation marks omitted); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 1509 (2005) (noting that Title IX's conditions have been "broadly" interpreted "to encompass diverse forms of intentional sex discrimination"). Recipients of federal funds are clearly on notice that they must comply with Title IX's anti-discrimination provision, and "the possibility that application of [the condition] might be unclear in [some] contexts" does not render it unenforceable under the Spending Clause. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 665-66 (1985) (where statute makes clear that conditions apply to receipt of federal funds, Congress need not "specifically identif[y] and proscrib[e]" each action

that will violate its terms). In any event, even if an enforcement action were brought in the future, ED would not seek penalties or the return of federal funds already provided based on Plaintiff's prior conduct that was inconsistent with the agencies' interpretation. Instead, if ED sought to terminate funds at all, it would only seek to terminate future funding prospectively, and only until compliance. *See* 34 C.F.R. § 100.8(c).

Second, Plaintiff's coercion claim is not viable. The Supreme Court has explained "that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." *South Dakota v. Dole*, 483 U.S. 203, 211 (1987); *see also Nat'l Fed. of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2606 (2012). For example, coercion may occur when Congress leverages an old and large program to force states to participate in a new one. *See NFIB*, 132 S. Ct. at 2607 ("What Congress is not free to do is to penalize States that choose not to participate in [a] new program by taking away their existing . . . funding."). But there is no coercion where, as here, the only issue is the interpretation of a longstanding condition on federal funding. Title IX is not new, nor is it some separate program. To the contrary, Title IX is an integral part of federal education spending, which has always prohibited sex discrimination. *See id.* at 2603-04 (reaffirming Congress's authority to place "restrictions on the use of [federal] funds"). No court has ever suggested that coercion might occur when an existing statutory condition is interpreted in a new context—a routine task for courts and agencies applying cooperative spending statutes. This Court should not be the first. *See, e.g.*, *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 287 (5th Cir. 2005) (en banc) (rejecting coercion claim as to analogous statute prohibiting disability discrimination).

Finally, the Court should reject Plaintiff's contention that Title IX's antidiscrimination condition is not "reasonably related to the purpose of the expenditure at issue." PI Mem. 25. It

is well-settled that federal funding for schools may be conditioned on the absence of sex discrimination. *See Koslow v. Pennsylvania*, 302 F.3d 161, 176 (3d Cir. 2002) (explaining that "[b]oth Title VI and Title IX . . . have been upheld as valid Spending Clause legislation" and citing cases). The federal government has a clear interest in ensuring that the programs and activities it funds are free from unlawful discrimination. And the Spending Clause's germaneness requirement—which has never been used to strike down a statute—is extremely deferential. *See, e.g.*, *Dole*, 483 U.S. at 206 (minimum drinking age germane to highway construction funds); *Cutter v. Wilkinson*, 423 F.3d 579, 586-87 (6th Cir. 2005) (religious protection germane to prison funds). Plaintiff cites no authority to the contrary.

2. Defendants' Actions Do Not Violate Students' Fundamental Rights to Privacy

Plaintiff also argues that Defendants' actions violate "students' constitutional rights of bodily privacy." PI Mem. 22. Plaintiff lacks standing to assert the individual rights of students—none of whom are plaintiffs in this case—against the federal government. *See Mass. v. Mellon*, 262 U.S. 447, 485-86 (1923) ("It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof."); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011) ("[A] state possesses no legitimate interest in protecting its citizens from the government of the United States."). This claim must fail for that reason alone.

This claim also fails on the merits. "Courts generally recognize two types of substantive due process claims—those that deprive an individual of a fundamental right and deprivations that 'shock[] the conscience.'" *Carney v. Univ. of Akron*, No. 5:15-cv-2309, 2016 WL 4036726, at *11 (N.D. Ohio July 28, 2016).

Here, Plaintiff seems to allege a violation of students' fundamental constitutional rights,

rather than government action that shocks the conscience.[22] A fundamental constitutional right protected by the Due Process Clause is one that is "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Supreme Court has mandated extreme caution in elevating individual liberty interests to the status of fundamental constitutional rights, because recognizing such rights, "to a great extent, places the matter outside the arena of public debate and legislative action" and risks transforming the Due Process Clause "into the policy preferences of the Members of the Court." *Id.* In determining whether a claimed right is fundamental, courts first require "'a careful description of the asserted fundamental liberty interest.'" *Bell v. Ohio State Univ*, 351 F.3d 240, 250 (6th Cir. 2003) (quoting *Glucksberg*, 521 U.S. at 721). "[V]ague generalities . . . will not suffice." *Chavez v. Martinez*, 538 U.S. 760, 776 (2003).[23] "The list of fundamental rights is short." *Doe v. Ohio State Univ.*, 136 F. Supp. 3d 854, 868 (S.D. Oh. 2016) (listing fundamental rights); *see also Bell*, 351 F.3d at 250 & n.1 (same); *Seal v. Morgan*, 229 F.3d 567, 574-75 (6th Cir. 2000) (same).

[22] Nor would Plaintiff be able to satisfy the "shocks the conscience" standard, which "sets a high bar." *Range v. Douglas*, 763 F.3d 573, 589 (6th Cir. 2014). "Conduct shocks the conscience if it 'violates the decencies of civilized conduct,'" or is "'so brutal and offensive that [it does] not comport with traditional ideas of fair play and decency.'" *Id.* at 589-90 (quoting *Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998)).

[23] For example, in *Glucksberg*, a case challenging Washington's ban on assisted suicide, the Supreme Court refused to characterize the interest at stake as the "right to die" or "the right to choose a humane, dignified death"; instead, the Court narrowly phrased the question as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." 521 U.S. at 722-23. Similarly, in *Reno v. Flores*, a case involving juvenile aliens challenging regulations governing their detention on due process grounds, the Court rejected several asserted fundamental rights, such as the right of "freedom from physical restraint" and the "right of a child to be released from all other custody into the custody of its parents, legal guardian, or even close relatives." 507 U.S. 292, 302 (1993). Instead, the Court narrowly characterized the right as "the right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Id.*

The alleged right identified by Plaintiff is "bodily privacy." This description fails to narrowly and accurately define the interest that Plaintiff actually seeks to vindicate, which is an alleged right of some students to sex-specific facilities from which transgender students are excluded. There is, however, no such fundamental right, and Plaintiff cannot merely use the word "privacy" and then automatically invoke the protections of the Due Process Clause. *See, e.g.*, *Doe*, 136 F. Supp. 3d at 869 (explaining that the right to privacy only "take[s] on a constitutional dimension" in certain circumstances); *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (explaining that lower courts should not expand privacy rights that have not been clearly recognized by the Supreme Court). Neither the Supreme Court nor the Sixth Circuit has recognized the type of interest that Plaintiff asserts here as a fundamental constitutional right. To be sure, courts have recognized that individuals may have privacy interests in the exposure of their unclothed bodies, but the scope of this interest is neither limitless nor fundamental. Indeed, while Plaintiff relies on the Sixth Circuit's decision in *Brannum v. Overton County School Board*, 516 F.3d 489 (6th Cir. 2008), to show that such a fundamental right exists, that decision shows no such thing. To the extent the *Brannum* court recognized a constitutional "right to shield one's body from exposure to viewing by the opposite sex," it derived that right "from the Fourth Amendment, rather than the Due Process Clause." *Id.* at 494. In other words, the Sixth Circuit recognized a right to be free from *unreasonable searches and seizures of one's body*, which included the right not to be videotaped in a school locker room by the government. *See id.* at 494-96; *Everson v. Mich. Dep't of Corrections*, 391 F.3d 737, 757 n.26 (4th Cir. 2004) ("This court has found the 'privacy' right against the forced exposure of one's body to strangers of the opposite sex to be located in the Fourth Amendment."). But Plaintiff cannot plausibly allege that there is any government "search and seizure" here, let alone an unreasonable one.

Furthermore, even if Defendants' actions somehow implicated the fundamental privacy rights of students—which they do not—Plaintiff's substantive due process claim would fail because Defendants have not interfered "directly" and "substantially" with those rights. *See Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978). As the Seventh Circuit has explained, incidental effects on fundamental rights are not cognizable pursuant to the Due Process Clause. *See Christensen v. Cnty. of Boone*, 483 F.3d 454, 463 (7th Cir. 2007) ("The Constitution prevents fundamental rights from being aimed at; it does not, however, prevent side effects that may occur if the government is aiming at some other objective.") (citing *Califano v. Jobst*, 434 U.S. 47 (1977)). Plaintiff fails to establish how Defendants' interpretation of Title IX and its implementing regulations "directly and substantially" infringe students' rights to privacy. Indeed, Plaintiff frames its concern not as forced exposure to members of the opposite sex, but merely as a "risk [of] exposing [students'] partially or fully unclothed bodies to people of the opposite sex." PI Mem. 22. Such a risk does not amount to a constitutional violation, particularly where students who want additional privacy may be able to mitigate or eliminate that risk by using alternative restroom and changing facilities. *See* Compl. ¶ 3 (describing the availability of "alternate private facilities").[24]

[24] It is also relevant that this case arises in the context of schools. In *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), the Supreme Court upheld a school's policy of requiring students participating in interscholastic athletics to submit to random drug testing against a Fourth Amendment challenge. In upholding the policy, the Court emphasized the diminished privacy interests of students in public schools: "Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." 515 U.S. at 654. The Court noted that minors do not have the same rights as adults, explaining that they "lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will." *Id.*; *see also id.* at 657 ("Public school locker rooms . . . are not notable for the privacy they afford."); *Brannum*, 516 F.3d at 496 ("The Supreme Court has acknowledged that generally, students have a less robust expectation of privacy than is afforded the general population.").

Because Plaintiff has entirely failed to allege that any fundamental rights to privacy have been substantially impaired, the rational basis test governs this Court's review. *See Glucksberg*, 521 U.S. at 728. Under this test, the Court must simply ask if the government action bears "a reasonable relation to a legitimate state interest." *Id.* at 722. Defendants' actions easily meet this standard. But even if the Court were to evaluate Defendants' actions under the higher standard used to analyze substantial burdens on fundamental rights, Plaintiff's claim would fail. The federal government undoubtedly has a compelling interest in enforcing the antidiscrimination provisions of Title IX and its regulations, and in protecting the right of all students to receive an education in an environment free from discrimination. Accordingly, Plaintiff's substantive due process claim is unlikely to succeed.

II. Plaintiff Faces No Irreparable Harm Absent a Preliminary Injunction

Even if it could establish a likelihood of success on the merits, Plaintiff faces no irreparable harm. "[T]he moving party must show that irreparable harm is 'both certain and immediate, rather than speculative or theoretical.'" *Contech Casting, LLC v. ZF Steering Systems, LLC*, 931 F. Supp. 2d 809, 818 (E.D. Mich. 2013) (quoting *Mich. Coalition of Radioactive Mat. Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991)).

Plaintiff is not in "certain and immediate" danger of losing its funding, because any termination of funds would be subject to administrative and judicial review. There are only two ways for the federal government to enforce Title IX against the District: DOJ can sue in federal district court to enjoin violations of the statute, *see* 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a)(1), or ED can withhold funding after the requisite administrative process that culminates in judicial review in the court of appeals, *see* 20 U.S.C. § 1683 (incorporating 20 U.S.C. § 1234g(b)). In either case, Plaintiff is guaranteed an opportunity for judicial review. *See Contech*, 931 F. Supp.

2d at 818 ("[I]rreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary.") (quotes omitted). If it prevails in defending either kind of enforcement action, it will achieve the same relief it seeks in this lawsuit. At this point in the administrative process, neither enforcement action has even been commenced. And if and when one does commence, simply having to defend against a lawsuit or administrative action does not constitute irreparable harm. *See, e.g.*, *FTC v. Std. Oil Co.*, 449 U.S. 232, 244 (1980) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.") (quotes omitted); *Martin Marietta Energy Sys., Inc. v. Martin*, 909 F. Supp. 528, 533 (E.D. Tenn. 1993) ("[T]he expense of litigation in the administrative proceeding is not sufficient to show such irreparable harm.").

Plaintiff argues that it faces five types of irreparable harm. PI Mem. 26-29. All of them assume that the consequences of one or both enforcement avenues—an injunction or the loss of funds—is imminent. *See id.* at 26 ("violation of Highland's constitutional rights"); *id.* at 27 ("strip the school district of its authority"); *id.* at 27-28 ("forcing [it] to change its policies"); *id.* at 28-29 ("impending revocation of federal funding"); *id.* at 29 (being "compelled" to abide by the Department's interpretation of Title IX). These arguments ignore the administrative and judicial process to which Plaintiff will be entitled, if either enforcement avenue is pursued in the future. To satisfy this prong of the preliminary injunction standard, Plaintiff would have to show that, *before* this Court can reach the merits in this lawsuit, the school board is "likely" to lose funding or suffer some other irreparable harm. *See Winter*, 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.") (emphasis in original); *Griepentrog*, 945 F.2d at 154 (requiring that "the harm alleged must be both certain and immediate, rather than speculative

or theoretical"); *CLT Logistics v. River West Brands*, 777 F. Supp. 2d 1052, 1073 (E.D. Mich. 2011) (denying preliminary injunction where "irreparable harm remains speculative and does not appear imminent"). Plaintiff plainly cannot make that showing.

Plaintiff also argues that "Defendants' actions violate Highland's constitutional rights under the Spending Clause." PI Mem. 26. As an initial matter, for the reasons stated above, that merits claim is exceedingly unlikely to succeed, because no court has ever suggested that an agency's *interpretation* of a longstanding spending condition (here, compliance with Title IX) could somehow violate the Spending Clause. *See supra* Part I.D.1; *McNeilly v. Land*, 684 F.3d 611, 620-21 (6th Cir. 2012) (requiring that the plaintiff demonstrate a likelihood of success on the merits in order to claim irreparable injury based on the deprivation of a constitutional right). Regardless, ED cannot cut off Plaintiff's funding, based on its interpretation of Title IX, without full administrative review, after which Plaintiff can seek judicial review.[25] It can thus "pursue other reasonable alternatives to avoid the harm it claims is imminent," which "fundamentally undermines its contention of irreparable injury." *Contech*, 931 F. Supp. 2d at 821.

Because Highland will not experience irreparable harm stemming from the challenged guidance documents, that alone is enough for the Court to deny Plaintiff's motion for a preliminary injunction. *See Patio Enclosures, Inc. v. Herbst*, 39 Fed. App'x 964, 967 (6th Cir. 2002) ("[T]he demonstration of some irreparable injury is a *sine qua non* for issuance of an injunction."); *Gas Natural Inc. v. Osborne*, 624 Fed. App'x 944, 948 (6th Cir. 2015) ("[A] district court abuses its discretion when it grants a preliminary injunction without making

[25] While ED has statutory authority to *defer* funding while that process is ongoing, 20 U.S.C. § 1232i(b), it has not done so in decades. *See* Gov't Accountability Office, *Men's and Women's Participation in Higher Education*, at 23 n.24, GAO-01-128, Dec. 2000; *Freeman v. Cavazos*, 923 F.2d 1434, 1440 (11th Cir. 1991). To show irreparable harm, Highland must show that such harm is "likely," not just theoretically possible. *See Winter*, 555 U.S. at 22; *Apex Tool Group, LLC v. Wessels*, 119 F. Supp. 3d 599, 609 (E.D. Mich. 2015) ("Although irreparable harm may be possible at some point in time, plaintiff has not established that the injury is *likely*.") (quotes omitted).

specific findings of irreparable injury to the party seeking the injunction.") (quoting *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)).

III. Granting a Preliminary Injunction Would Harm Defendants, Third Parties, and the Public Interest

Because Plaintiff has not made the threshold showings of irreparable harm and a likelihood of success on the merits, there is no need for the Court to proceed to the balancing phase of the preliminary injunction analysis. *See Certified Restoration Dry Cleaning Network*, 511 F.3d at 542. However, even if the Court were to consider the balance of equities and public interest, it should still deny Plaintiff's motion because these factors tip sharply in favor of Defendants.

As explained above, Plaintiff faces no irreparable harm from simply having to defend itself in the congressionally-mandated enforcement process. Against this weighs the substantial public interest in achieving Title IX's goals of eliminating discrimination in educational settings. As a general matter, "there is inherent harm to an agency" in preventing it from enforcing statutes and regulations that "Congress found it in the public interest to direct that [it] develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998) ("[T]he granting of an injunction against the enforcement of a likely constitutional statute would harm the government."). That harm is all the greater here, where the agency action being challenged protects the rights of unrepresented minors. As Judge Davis stated in *Gloucester County*, "[e]nforcing [a transgender student's] right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest." 2016 WL 1567467, at *14 (Davis, J., concurring); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[Courts] should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

The preliminary injunction Plaintiff seeks would prevent Defendants from implementing the antidiscrimination provisions of Title IX, which ED and DOJ are charged with enforcing. *See* 20 U.S.C. § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54. It would short-circuit the administrative enforcement procedures Congress has mandated. And it would inflict a very real harm on the public and, in particular, a readily identifiable group of individuals. *See, e.g.*, Ex. 7 (detailing some of the harms suffered by Student A when she was excluded from the girls' locker room); Ex. 6 (same); *see also Nken v. Holder*, 556 U.S. 418, 420 (2009) (consideration of harm to the opposing party and the public interest "merge when the Government is the opposing party"). Accordingly, the requested preliminary injunction should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for a preliminary injunction.

Dated: August 16, 2016

Respectfully submitted,

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EXHIBIT 1

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

October 26, 2010

Dear Colleague:

In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education (Department) fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools' appreciation of their important responsibility to maintain a safe learning environment for all students. I am writing to remind you, however, that some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department's Office for Civil Rights (OCR). As discussed in more detail below, by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment.

The statutes that OCR enforces include Title VI of the Civil Rights Act of 1964[1] (Title VI), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972[2] (Title IX), which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973[3] (Section 504); and Title II of the Americans with Disabilities Act of 1990[4] (Title II). Section 504 and Title II prohibit discrimination on the basis of disability.[5] School districts may violate these civil rights statutes and the Department's implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.[6] School personnel who understand their legal obligations to address harassment under these laws are in the best position to prevent it from occurring and to respond appropriately when it does. Although this letter focuses on the elementary and secondary school context, the legal principles also apply to postsecondary institutions covered by the laws and regulations enforced by OCR.

Some school anti-bullying policies already may list classes or traits on which bases bullying or harassment is specifically prohibited. Indeed, many schools have adopted anti-bullying policies that go beyond prohibiting bullying on the basis of traits expressly protected by the federal civil

[1] 42 U.S.C. § 2000d *et seq.*
[2] 20 U.S.C. § 1681 *et seq.*
[3] 29 U.S.C. § 794.
[4] 42 U.S.C. § 12131 *et seq.*
[5] OCR also enforces the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, and the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905. This letter does not specifically address those statutes.
[6] The Department's regulations implementing these statutes are in 34 C.F.R. parts 100, 104, and 106. Under these federal civil rights laws and regulations, students are protected from harassment by school employees, other students, and third parties. This guidance focuses on peer harassment, and articulates the legal standards that apply in administrative enforcement and in court cases where plaintiffs are seeking injunctive relief.

rights laws enforced by OCR—race, color, national origin, sex, and disability—to include such bases as sexual orientation and religion. While this letter concerns your legal obligations under the laws enforced by OCR, other federal, state, and local laws impose additional obligations on schools.[7] And, of course, even when bullying or harassment is not a civil rights violation, schools should still seek to prevent it in order to protect students from the physical and emotional harms that it may cause.

Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.[8]

A school is responsible for addressing harassment incidents about which it knows or reasonably should have known.[9] In some situations, harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice. In other situations, the school may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment. In all cases, schools should have well-publicized policies prohibiting harassment and procedures for reporting and resolving complaints that will alert the school to incidents of harassment.[10]

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's 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. In all cases, however, the inquiry should be prompt, thorough, and impartial.

If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile

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[7] For instance, the U.S. Department of Justice (DOJ) has jurisdiction over Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c (Title IV), which prohibits discrimination on the basis of race, color, sex, religion, or national origin by public elementary and secondary schools and public institutions of higher learning. State laws also provide additional civil rights protections, so districts should review these statutes to determine what protections they afford (*e.g.*, some state laws specifically prohibit discrimination on the basis of sexual orientation).

[8] Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression. For more information on the First Amendment's application to harassment, see the discussions in OCR's Dear Colleague Letter: First Amendment (July 28, 2003), *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html, and OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001) (*Sexual Harassment Guidance*), *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.

[9] A school has notice of harassment if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment. For a discussion of what a "responsible employee" is, see OCR's *Sexual Harassment Guidance*.

[10] Districts must adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex and disability discrimination complaints, and must notify students, parents, employees, applicants, and other interested parties that the district does not discriminate on the basis of sex or disability. *See* 28 C.F.R. § 35.106; 28 C.F.R. § 35.107(b); 34 C.F.R. § 104.7(b); 34 C.F.R. § 104.8; 34 C.F.R. § 106.8(b); 34 C.F.R. § 106.9.

environment and its effects, and prevent the harassment from recurring. These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target's educational program (*e.g.*, not requiring the target to change his or her class schedule).

In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. A school also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district's Title IX and Section 504/Title II coordinators.[11]

Finally, a school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. At a minimum, the school's responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.

When responding to incidents of misconduct, schools should keep in mind the following:

- The label used to describe an incident (*e.g.*, bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.

- When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school's responsibility is to eliminate the

[11] Districts must designate persons responsible for coordinating compliance with Title IX, Section 504, and Title II, including the investigation of any complaints of sexual, gender-based, or disability harassment. *See* 28 C.F.R. § 35.107(a); 34 C.F.R. § 104.7(a); 34 C.F.R. § 106.8(a).

hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.

Below, I provide hypothetical examples of how a school's failure to recognize student misconduct as discriminatory harassment violates students' civil rights.[12] In each of the examples, the school was on notice of the harassment because either the school or a responsible employee knew or should have known of misconduct that constituted harassment. The examples describe how the school should have responded in each circumstance.

Title VI: Race, Color, or National Origin Harassment

- *Some students anonymously inserted offensive notes into African-American students' lockers and notebooks, used racial slurs, and threatened African-American students who tried to sit near them in the cafeteria. Some African-American students told school officials that they did not feel safe at school. The school investigated and responded to individual instances of misconduct by assigning detention to the few student perpetrators it could identify. However, racial tensions in the school continued to escalate to the point that several fights broke out between the school's racial groups.*

  In this example, school officials failed to acknowledge the pattern of harassment as indicative of a racially hostile environment in violation of Title VI. Misconduct need not be directed at a particular student to constitute discriminatory harassment and foster a racially hostile environment. Here, the harassing conduct included overtly racist behavior (*e.g.*, racial slurs) and also targeted students on the basis of their race (*e.g.*, notes directed at African-American students). The nature of the harassment, the number of incidents, and the students' safety concerns demonstrate that there was a racially hostile environment that interfered with the students' ability to participate in the school's education programs and activities.

  Had the school recognized that a racially hostile environment had been created, it would have realized that it needed to do more than just discipline the few individuals whom it could identify as having been involved. By failing to acknowledge the racially hostile environment, the school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate. A more effective response would have included, in addition to punishing the perpetrators, such steps as reaffirming the school's policy against discrimination (including racial harassment), publicizing the means to report allegations of racial harassment, training faculty on constructive responses to racial conflict, hosting class discussions about racial harassment and sensitivity to students of other races, and conducting outreach to involve parents and students in an effort to identify problems and improve the school climate. Finally, had school officials responded appropriately

[12] Each of these hypothetical examples contains elements taken from actual cases.

and aggressively to the racial harassment when they first became aware of it, the school might have prevented the escalation of violence that occurred.[13]

- *Over the course of a school year, school employees at a junior high school received reports of several incidents of anti-Semitic conduct at the school. Anti-Semitic graffiti, including swastikas, was scrawled on the stalls of the school bathroom. When custodians discovered the graffiti and reported it to school administrators, the administrators ordered the graffiti removed but took no further action. At the same school, a teacher caught two ninth-graders trying to force two seventh-graders to give them money. The ninth-graders told the seventh-graders, "You Jews have all of the money, give us some." When school administrators investigated the incident, they determined that the seventh-graders were not actually Jewish. The school suspended the perpetrators for a week because of the serious nature of their misconduct. After that incident, younger Jewish students started avoiding the school library and computer lab because they were located in the corridor housing the lockers of the ninth-graders. At the same school, a group of eighth-grade students repeatedly called a Jewish student "Drew the dirty Jew." The responsible eighth-graders were reprimanded for teasing the Jewish student.*

  The school administrators failed to recognize that anti-Semitic harassment can trigger responsibilities under Title VI. While Title VI does not cover discrimination based solely on religion,[14] groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (*e.g.*, Muslims or Sikhs). Thus, harassment against students who are members of any religious group triggers a school's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices. A school also has responsibilities under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.[15]

  In this example, school administrators should have recognized that the harassment was based on the students' actual or perceived shared ancestry or ethnic identity as Jews (rather than on the students' religious practices). The school was not relieved of its responsibilities under Title VI because the targets of one of the incidents were not actually Jewish. The harassment was still based on the perceived ancestry or ethnic characteristics of the targeted students. Furthermore, the harassment negatively affected the ability and willingness of Jewish students to participate fully in the school's

[13] More information about the applicable legal standards and OCR's approach to investigating allegations of harassment on the basis of race, color, or national origin is included in *Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance*, 59 Fed. Reg. 11,448 (Mar. 10, 1994), *available at* http://www.ed.gov/about/offices/list/ocr/docs/race394.html.
[14] As noted in footnote seven, DOJ has the authority to remedy discrimination based solely on religion under Title IV.
[15] More information about the applicable legal standards and OCR's approach to investigating complaints of discrimination against members of religious groups is included in OCR's Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), *available at* http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html.

education programs and activities (*e.g.*, by causing some Jewish students to avoid the library and computer lab). Therefore, although the discipline that the school imposed on the perpetrators was an important part of the school's response, discipline alone was likely insufficient to remedy a hostile environment. Similarly, removing the graffiti, while a necessary and important step, did not fully satisfy the school's responsibilities. As discussed above, misconduct that is not directed at a particular student, like the graffiti in the bathroom, can still constitute discriminatory harassment and foster a hostile environment. Finally, the fact that school officials considered one of the incidents "teasing" is irrelevant for determining whether it contributed to a hostile environment.

Because the school failed to recognize that the incidents created a hostile environment, it addressed each only in isolation, and therefore failed to take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence. In addition to disciplining the perpetrators, remedial steps could have included counseling the perpetrators about the hurtful effect of their conduct, publicly labeling the incidents as anti-Semitic, reaffirming the school's policy against discrimination, and publicizing the means by which students may report harassment. Providing teachers with training to recognize and address anti-Semitic incidents also would have increased the effectiveness of the school's response. The school could also have created an age-appropriate program to educate its students about the history and dangers of anti-Semitism, and could have conducted outreach to involve parents and community groups in preventing future anti-Semitic harassment.

Title IX: Sexual Harassment

- *Shortly after enrolling at a new high school, a female student had a brief romance with another student. After the couple broke up, other male and female students began routinely calling the new student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages and e-mails. One of the student's teachers and an athletic coach witnessed the name calling and heard the rumors, but identified it as "hazing" that new students often experience. They also noticed the new student's anxiety and declining class participation. The school attempted to resolve the situation by requiring the student to work the problem out directly with her harassers.*

  Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Thus, sexual harassment prohibited by Title IX can include conduct such as touching of a sexual nature; making sexual comments, jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Web sites of a sexual nature.

In this example, the school employees failed to recognize that the "hazing" constituted sexual harassment. The school did not comply with its Title IX obligations when it failed to investigate or remedy the sexual harassment. The conduct was clearly unwelcome, sexual (*e.g.*, sexual rumors and name calling), and sufficiently serious that it limited the student's ability to participate in and benefit from the school's education program (*e.g.*, anxiety and declining class participation).

The school should have trained its employees on the type of misconduct that constitutes sexual harassment. The school also should have made clear to its employees that they could not require the student to confront her harassers. Schools may use informal mechanisms for addressing harassment, but only if the parties agree to do so on a voluntary basis. Had the school addressed the harassment consistent with Title IX, the school would have, for example, conducted a thorough investigation and taken interim measures to separate the student from the accused harassers. An effective response also might have included training students and employees on the school's policies related to harassment, instituting new procedures by which employees should report allegations of harassment, and more widely distributing the contact information for the district's Title IX coordinator. The school also might have offered the targeted student tutoring, other academic assistance, or counseling as necessary to remedy the effects of the harassment.[16]

Title IX: Gender-Based Harassment

- *Over the course of a school year, a gay high school student was called names (including anti-gay slurs and sexual comments) both to his face and on social networking sites, physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear (e.g., effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices). As a result, the student dropped out of the drama club to avoid further harassment. Based on the student's self-identification as gay and the homophobic nature of some of the harassment, the school did not recognize that the misconduct included discrimination covered by Title IX. The school responded to complaints from the student by reprimanding the perpetrators consistent with its anti-bullying policy. The reprimands of the identified perpetrators stopped the harassment by those individuals. It did not, however, stop others from undertaking similar harassment of the student.*

As noted in the example, the school failed to recognize the pattern of misconduct as a form of sex discrimination under Title IX. Title IX prohibits harassment of both male and female students regardless of the sex of the harasser—*i.e.*, even if the harasser and target are members of the same sex. It also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their

[16] More information about the applicable legal standards and OCR's approach to investigating allegations of sexual harassment is included in OCR's *Sexual Harassment Guidance*, *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.

sex, or for failing to conform to stereotypical notions of masculinity and femininity. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.

Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also, as this example illustrates, be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment. In this example, the harassing conduct was based in part on the student's failure to act as some of his peers believed a boy should act. The harassment created a hostile environment that limited the student's ability to participate in the school's education program (*e.g.*, access to the drama club). Finally, even though the student did not identify the harassment as sex discrimination, the school should have recognized that the student had been subjected to gender-based harassment covered by Title IX.

In this example, the school had an obligation to take immediate and effective action to eliminate the hostile environment. By responding to individual incidents of misconduct on an *ad hoc* basis only, the school failed to confront and prevent a hostile environment from continuing. Had the school recognized the conduct as a form of sex discrimination, it could have employed the full range of sanctions (including progressive discipline) and remedies designed to eliminate the hostile environment. For example, this approach would have included a more comprehensive response to the situation that involved notice to the student's teachers so that they could ensure the student was not subjected to any further harassment, more aggressive monitoring by staff of the places where harassment occurred, increased training on the scope of the school's harassment and discrimination policies, notice to the target and harassers of available counseling services and resources, and educating the entire school community on civil rights and expectations of tolerance, specifically as they apply to gender stereotypes. The school also should have taken steps to clearly communicate the message that the school does not tolerate harassment and will be responsive to any information about such conduct.[17]

Section 504 and Title II: Disability Harassment

- *Several classmates repeatedly called a student with a learning disability "stupid," "idiot," and "retard" while in school and on the school bus. On one occasion, these students tackled him, hit him with a school binder, and threw his personal items into the garbage. The student complained to his teachers and guidance counselor that he was continually being taunted and teased. School officials offered him counseling services and a*

[17] Guidance on gender-based harassment is also included in OCR's *Sexual Harassment Guidance*, *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.

psychiatric evaluation, but did not discipline the offending students. As a result, the harassment continued. The student, who had been performing well academically, became angry, frustrated, and depressed, and often refused to go to school to avoid the harassment.

In this example, the school failed to recognize the misconduct as disability harassment under Section 504 and Title II. The harassing conduct included behavior based on the student's disability, and limited the student's ability to benefit fully from the school's education program (*e.g.*, absenteeism). In failing to investigate and remedy the misconduct, the school did not comply with its obligations under Section 504 and Title II.

Counseling may be a helpful component of a remedy for harassment. In this example, however, since the school failed to recognize the behavior as disability harassment, the school did not adopt a comprehensive approach to eliminating the hostile environment. Such steps should have at least included disciplinary action against the harassers, consultation with the district's Section 504/Title II coordinator to ensure a comprehensive and effective response, special training for staff on recognizing and effectively responding to harassment of students with disabilities, and monitoring to ensure that the harassment did not resume.[18]

I encourage you to reevaluate the policies and practices your school uses to address bullying[19] and harassment to ensure that they comply with the mandates of the federal civil rights laws. For your convenience, the following is a list of online resources that further discuss the obligations of districts to respond to harassment prohibited under the federal antidiscrimination laws enforced by OCR:

- *Sexual Harassment: It's Not Academic* (Revised 2008): http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html
- *Dear Colleague Letter: Sexual Harassment Issues* (2006): http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html
- *Dear Colleague Letter: Religious Discrimination* (2004): http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html
- *Dear Colleague Letter: First Amendment* (2003): http://www.ed.gov/about/offices/list/ocr/firstamend.html

[18] More information about the applicable legal standards and OCR's approach to investigating allegations of disability harassment is included in OCR's Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html.

[19] For resources on preventing and addressing bullying, please visit http://www.bullyinginfo.org, a Web site established by a federal Interagency Working Group on Youth Programs. For information on the Department's bullying prevention resources, please visit the Office of Safe and Drug-Free Schools' Web site at http://www.ed.gov/offices/OESE/SDFS. For information on regional Equity Assistance Centers that assist schools in developing and implementing policies and practices to address issues regarding race, sex, or national origin discrimination, please visit http://www.ed.gov/programs/equitycenters.

- *Sexual Harassment Guidance* (Revised 2001): http://www.ed.gov/about/offices/list/ocr/docs/shguide.html

- *Dear Colleague Letter: Prohibited Disability Harassment* (2000): http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html

- *Racial Incidents and Harassment Against Students* (1994): http://www.ed.gov/about/offices/list/ocr/docs/race394.html

Please also note that OCR has added new data items to be collected through its Civil Rights Data Collection (CRDC), which surveys school districts in a variety of areas related to civil rights in education. The CRDC now requires districts to collect and report information on allegations of harassment, policies regarding harassment, and discipline imposed for harassment. In 2009-10, the CRDC covered nearly 7,000 school districts, including all districts with more than 3,000 students. For more information about the CRDC data items, please visit http://www2.ed.gov/about/offices/list/ocr/whatsnew.html.

OCR is committed to working with schools, students, students' families, community and advocacy organizations, and other interested parties to ensure that students are not subjected to harassment. Please do not hesitate to contact OCR if we can provide assistance in your efforts to address harassment or if you have other civil rights concerns.

For the OCR regional office serving your state, please visit: http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm, or call OCR's Customer Service Team at 1-800-421-3481.

I look forward to continuing our work together to ensure equal access to education, and to promote safe and respectful school climates for America's students.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights

EXHIBIT 2

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Questions and Answers on Title IX and Sexual Violence[1]

Title IX of the Education Amendments of 1972 ("Title IX")[2] is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.[3]

On April 4, 2011, the Office for Civil Rights (OCR) in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence ("DCL").[4] The DCL explains a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX.[5] Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as a school's independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.

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[1] The Department has determined that this document 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* www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. The Office for Civil Rights (OCR) issues this and other policy guidance 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. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates 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, SW, Washington, D.C. 20202.

[2] 20 U.S.C. § 1681 *et seq*.

[3] Throughout this document the term "schools" refers to recipients of federal financial assistance that operate educational programs or activities. For Title IX purposes, at the elementary and secondary school level, the recipient generally is the school district; and at the postsecondary level, the recipient is the individual institution of higher education. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that the law's requirements conflict with the organization's religious tenets. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

[4] Available at http://www.ed.gov/ocr/letters/colleague-201104.html.

[5] Although this document and the DCL focus on sexual violence, the legal principles generally also apply to other forms of sexual harassment.

- Provides guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.

- Discusses proactive efforts schools can take to prevent sexual violence.

- Discusses the interplay between Title IX, the Family Educational Rights and Privacy Act ("FERPA"),[6] and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act ("Clery Act")[7] as it relates to a complainant's right to know the outcome of his or her complaint, including relevant sanctions imposed on the perpetrator.

- Provides examples of remedies and enforcement strategies that schools and OCR may use to respond to sexual violence.

The DCL supplements OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, issued in 2001 (*2001 Guidance*).[8] The *2001 Guidance* discusses in detail the Title IX requirements related to sexual harassment of students by school employees, other students, or third parties. The DCL and the *2001 Guidance* remain in full force and we recommend reading these Questions and Answers in conjunction with these documents.

In responding to requests for technical assistance, OCR has determined that elementary and secondary schools and postsecondary institutions would benefit from additional guidance concerning their obligations under Title IX to address sexual violence as a form of sexual harassment. The following questions and answers further clarify the legal requirements and guidance articulated in the DCL and the *2001 Guidance* and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects. In order to gain a complete understanding of these legal requirements and recommendations, this document should be read in full.

Authorized by

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights

April 29, 2014

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[6] 20 U.S.C. §1232g; 34 C.F.R. Part 99.
[7] 20 U.S.C. §1092(f).
[8] Available at http://www.ed.gov/ocr/docs/shguide.html.

Notice of Language Assistance
Questions and Answers on Title IX and Sexual Violence

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TABLE OF CONTENTS

A. A School's Obligation to Respond to Sexual Violence

A-1. What is sexual violence?

Answer: Sexual violence, as that term is used in this document and prior OCR guidance, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (*e.g.*, due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Sexual violence can be carried out by school employees, other students, or third parties. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.

A-2. How does Title IX apply to student-on-student sexual violence?

Answer: Under Title IX, federally funded schools must ensure that students of all ages are not denied or limited in their ability to participate in or benefit from the school's educational programs or activities on the basis of sex. A school violates a student's rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program, *i.e.* creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.[9]

A-3. How does OCR determine if a hostile environment has been created?

Answer: As discussed more fully in OCR's *2001 Guidance*, OCR considers a variety of related factors to determine if a hostile environment has been created; and also considers the conduct in question from both a subjective and an objective perspective. Specifically, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.

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[9] This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. *See 2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629, 643 (1999).

A-4. When does OCR consider a school to have notice of student-on-student sexual violence?

Answer: OCR deems a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence. See question D-2 regarding who is a responsible employee.

A school can receive notice of sexual violence in many different ways. Some examples of notice include: a student may have filed a grievance with or otherwise informed the school's Title IX coordinator; a student, parent, friend, or other individual may have reported an incident to a teacher, principal, campus law enforcement, staff in the office of student affairs, or other responsible employee; or a teacher or dean may have witnessed the sexual violence.

The school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media. In some situations, if the school knows of incidents of sexual violence, the exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents. For example, if school officials receive a credible report that a student has perpetrated several acts of sexual violence against different students, that pattern of conduct should trigger an inquiry as to whether other students have been subjected to sexual violence by that student. In other cases, the pervasiveness of the sexual violence may be widespread, openly practiced, or well-known among students or employees. In those cases, OCR may conclude that the school should have known of the hostile environment. In other words, if the school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry. A school's failure to take prompt and effective corrective action in such cases (as described in questions G-1 to G-3 and H-1 to H-3) would violate Title IX even if the student did not use the school's grievance procedures or otherwise inform the school of the sexual violence.

A-5. What are a school's basic responsibilities to address student-on-student sexual violence?

Answer: When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E). If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its

effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation.[10] The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary. The school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. For additional information on interim measures, see questions G-1 to G-3.

If a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately. For example, if a school's ignoring of a student's complaints of sexual assault by a fellow student results in the complaining student having to remain in classes with the other student for several weeks and the complaining student's grades suffer because he or she was unable to concentrate in these classes, the school may need to permit the complaining student to retake the classes without an academic or financial penalty (in addition to any other remedies) in order to address the effects of the sexual violence.

A-6. Does Title IX cover employee-on-student sexual violence, such as sexual abuse of children?

Answer: Yes. Although this document and the DCL focus on student-on-student sexual violence, Title IX also protects students from other forms of sexual harassment (including sexual violence and sexual abuse), such as sexual harassment carried out by school employees. Sexual harassment by school employees can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature, including but not limited to sexual activity. Title IX's prohibition against

[10] Throughout this document, unless otherwise noted, the term "complainant" refers to the student who allegedly experienced the sexual violence.

sexual harassment generally does not extend to legitimate nonsexual touching or other nonsexual conduct. But in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment. Early signs of inappropriate behavior with a child can be the key to identifying and preventing sexual abuse by school personnel.

A school's Title IX obligations regarding sexual harassment by employees can, in some instances, be greater than those described in this document and the DCL. Recipients should refer to OCR's *2001 Guidance* for further information about Title IX obligations regarding harassment of students by school employees. In addition, many state and local laws have mandatory reporting requirements for schools working with minors. Recipients should be careful to satisfy their state and local legal obligations in addition to their Title IX obligations, including training to ensure that school employees are aware of their obligations under such state and local laws and the consequences for failing to satisfy those obligations.

With respect to sexual activity in particular, OCR will always view as unwelcome and nonconsensual sexual activity between an adult school employee and an elementary school student or any student below the legal age of consent in his or her state. In cases involving a student who meets the legal age of consent in his or her state, there will still be a strong presumption that sexual activity between an adult school employee and a student is unwelcome and nonconsensual. When a school is on notice that a school employee has sexually harassed a student, it is responsible for taking prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects. Indeed, even if a school was not on notice, the school is nonetheless responsible for remedying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when the employee engaged in the sexual activity in the context of the employee's provision of aid, benefits, or services to students (*e.g.*, teaching, counseling, supervising, advising, or transporting students).

A school should take steps to protect its students from sexual abuse by its employees. It is therefore imperative for a school to develop policies prohibiting inappropriate conduct by school personnel and procedures for identifying and responding to such conduct. For example, this could include implementing codes of conduct, which might address what is commonly known as grooming – a desensitization strategy common in adult educator sexual misconduct. Such policies and procedures can ensure that students, parents, and

school personnel have clear guidelines on what are appropriate and inappropriate interactions between adults and students in a school setting or in school-sponsored activities. Additionally, a school should provide training for administrators, teachers, staff, parents, and age-appropriate classroom information for students to ensure that everyone understands what types of conduct are prohibited and knows how to respond when problems arise.[11]

B. Students Protected by Title IX

B-1. Does Title IX protect all students from sexual violence?

Answer: Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.

B-2. How should a school handle sexual violence complaints in which the complainant and the alleged perpetrator are members of the same sex?

Answer: A school's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved. Title IX protects all students from sexual violence, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. A school must investigate and resolve allegations of sexual violence involving parties of the same sex using the same procedures and standards that it uses in all complaints involving sexual violence.

Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it

[11] For additional informational on training please see the Department of Education's Resource and Emergency Management for Schools Technical Assistance Center – Adult Sexual Misconduct in Schools: Prevention and Management Training, available at http://rems.ed.gov/Docs/ASM_Marketing_Flyer.pdf.

uses in all complaints involving sexual violence. The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.

If a school's policies related to sexual violence include examples of particular types of conduct that violate the school's prohibition on sexual violence, the school should consider including examples of same-sex conduct. In addition, a school should ensure that staff are capable of providing culturally competent counseling to all complainants. Thus, a school should ensure that its counselors and other staff who are responsible for receiving and responding to complaints of sexual violence, including investigators and hearing board members, receive appropriate training about working with LGBT and gender-nonconforming students and same-sex sexual violence. See questions J-1 to J-4 for additional information regarding training.

Gay-straight alliances and similar student-initiated groups can also play an important role in creating safer school environments for LGBT students. On June 14, 2011, the Department issued guidance about the rights of student-initiated groups in public secondary schools under the Equal Access Act. That guidance is available at http://www2.ed.gov/policy/elsec/guid/secletter/110607.html.

B-3. What issues may arise with respect to students with disabilities who experience sexual violence?

Answer: When students with disabilities experience sexual violence, federal civil rights laws other than Title IX may also be relevant to a school's responsibility to investigate and address such incidents.[12] Certain students require additional assistance and support. For example, students with intellectual disabilities may need additional help in learning about sexual violence, including a school's sexual violence education and prevention programs, what constitutes sexual violence and how students can report incidents of sexual

[12] OCR enforces two civil rights laws that prohibit disability discrimination. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits disability discrimination by public or private entities that receive federal financial assistance, and Title II of the American with Disabilities Act of 1990 (Title II) prohibits disability discrimination by all state and local public entities, regardless of whether they receive federal funding. *See* 29 U.S.C. § 794 and 34 C.F.R. part 104; 42 U.S.C. § 12131 *et seq.* and 28 C.F.R. part 35. OCR and the U.S. Department of Justice (DOJ) share the responsibility of enforcing Title II in the educational context. The Department of Education's Office of Special Education Programs in the Office of Special Education and Rehabilitative Services administers Part B of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1400 *et seq*. and 34 C.F.R. part 300. IDEA provides financial assistance to states, and through them to local educational agencies, to assist in providing special education and related services to eligible children with disabilities ages three through twenty-one, inclusive.

violence. In addition, students with disabilities who experience sexual violence may require additional services and supports, including psychological services and counseling services. Postsecondary students who need these additional services and supports can seek assistance from the institution's disability resource office.

A student who has not been previously determined to have a disability may, as a result of experiencing sexual violence, develop a mental health-related disability that could cause the student to need special education and related services. At the elementary and secondary education level, this may trigger a school's child find obligations under IDEA and the evaluation and placement requirements under Section 504, which together require a school to evaluate a student suspected of having a disability to determine if he or she has a disability that requires special education or related aids and services.[13]

A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner that is accessible to students and employees with disabilities, for example, by providing electronically-accessible versions of paper forms to individuals with print disabilities, or by providing a sign language interpreter to a deaf individual attending a training. See question J-4 for more detailed information on student training.

B-4. What issues arise with respect to international students and undocumented students who experience sexual violence?

Answer: Title IX protects all students at recipient institutions in the United States regardless of national origin, immigration status, or citizenship status.[14] A school should ensure that all students regardless of their immigration status, including undocumented students and international students, are aware of their rights under Title IX. A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner accessible to students who are English language learners. OCR recommends that a school coordinate with its international office and its undocumented student program coordinator, if applicable, to help communicate information about Title IX in languages that are accessible to these groups of students. OCR also encourages schools to provide foreign national complainants with information about the U nonimmigrant status and the T nonimmigrant status. The U nonimmigrant status is set

[13] *See* 34 C.F.R. §§ 300.8; 300.111; 300.201; 300.300-300.311 (IDEA); 34 C.F.R. §§ 104.3(j) and 104.35 (Section 504). Schools must comply with applicable consent requirements with respect to evaluations. *See* 34 C.F.R. § 300.300.
[14] OCR enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal financial assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d.

aside for victims of certain crimes who have suffered substantial mental or physical abuse as a result of the crime and are helpful to law enforcement agency in the investigation or prosecution of the qualifying criminal activity.[15] The T nonimmigrant status is available for victims of severe forms of human trafficking who generally comply with a law enforcement agency in the investigation or prosecution of the human trafficking and who would suffer extreme hardship involving unusual and severe harm if they were removed from the United States.[16]

A school should be mindful that unique issues may arise when a foreign student on a student visa experiences sexual violence. For example, certain student visas require the student to maintain a full-time course load (generally at least 12 academic credit hours per term), but a student may need to take a reduced course load while recovering from the immediate effects of the sexual violence. OCR recommends that a school take steps to ensure that international students on student visas understand that they must typically seek prior approval of the designated school official (DSO) for student visas to drop below a full-time course load. A school may also want to encourage its employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence to approach the DSO on the student's behalf if the student wishes to drop below a full-time course load. OCR recommends that a school take steps to ensure that its employees who work with international students, including the school's DSO, are trained on the school's sexual violence policies and that employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence are aware of the special issues that international students may encounter. See questions J-1 to J-4 for additional information regarding training.

A school should also be aware that threatening students with deportation or invoking a student's immigration status in an attempt to intimidate or deter a student from filing a Title IX complaint would violate Title IX's protections against retaliation. For more information on retaliation see question K-1.

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[15] For more information on the U nonimmigrant status, see http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/questions-answers-victims-criminal-activity-u-nonimmigrant-status.

[16] For more information on the T nonimmigrant status, see http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status.

B-5. How should a school respond to sexual violence when the alleged perpetrator is not affiliated with the school?

Answer: The appropriate response will differ depending on the level of control the school has over the alleged perpetrator. For example, if an athlete or band member from a visiting school sexually assaults a student at the home school, the home school may not be able to discipline or take other direct action against the visiting athlete or band member. However (and subject to the confidentiality provisions discussed in Section E), it should conduct an inquiry into what occurred and should report the incident to the visiting school and encourage the visiting school to take appropriate action to prevent further sexual violence. The home school should also notify the student of any right to file a complaint with the alleged perpetrator's school or local law enforcement. The home school may also decide not to invite the visiting school back to its campus.

Even though a school's ability to take direct action against a particular perpetrator may be limited, the school must still take steps to provide appropriate remedies for the complainant and, where appropriate, the broader school population. This may include providing support services for the complainant, and issuing new policy statements making it clear that the school does not tolerate sexual violence and will respond to any reports about such incidents. For additional information on interim measures see questions G-1 to G-3.

C. Title IX Procedural Requirements

Overview

C-1. What procedures must a school have in place to prevent sexual violence and resolve complaints?

Answer: The Title IX regulations outline three key procedural requirements. Each school must:

(1) disseminate a notice of nondiscrimination (see question C-2);[17]

(2) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX (see questions C-3 to C-4);[18] and

[17] 34 C.F.R. § 106.9.
[18] *Id.* § 106.8(a).

(3) adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints (see questions C-5 to C-6).[19]

These requirements apply to all forms of sex discrimination and are particularly important for preventing and effectively responding to sexual violence.

Procedural requirements under other federal laws may also apply to complaints of sexual violence, including the requirements of the Clery Act.[20] For additional information about the procedural requirements in the Clery Act, please see http://www2.ed.gov/admins/lead/safety/campus.html.

Notice of Nondiscrimination

C-2. What information must be included in a school's notice of nondiscrimination?

Answer: The notice of nondiscrimination must state that the school does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. The notice must state that questions regarding Title IX may be referred to the school's Title IX coordinator or to OCR. The school must notify all of its students and employees of the name or title, office address, telephone number, and email address of the school's designated Title IX coordinator.[21]

Title IX Coordinator

C-3. What are a Title IX coordinator's responsibilities?

Answer: A Title IX coordinator's core responsibilities include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX coordinator must have knowledge of the requirements of Title IX, of the school's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. To accomplish this, subject to the exemption for school counseling employees discussed in question E-3, the Title IX coordinator must be informed of all

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[19] *Id.* § 106.8(b).
[20] All postsecondary institutions participating in the Higher Education Act's Title IV student financial assistance programs must comply with the Clery Act.
[21] For more information on notices of nondiscrimination, please see OCR's Notice of Nondiscrimination (August 2010), available at http://www.ed.gov/ocr/docs/nondisc.pdf.

reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office or if the investigation will be conducted by another individual or office. The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

Because the Title IX coordinator must have knowledge of all Title IX reports and complaints at the school, this individual (when properly trained) is generally in the best position to evaluate a student's request for confidentiality in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students. A school may determine, however, that another individual should perform this role. For additional information on confidentiality requests, see questions E-1 to E-4. If a school relies in part on its disciplinary procedures to meet its Title IX obligations, the Title IX coordinator should review the disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX as discussed in question C-5.

In addition to these core responsibilities, a school may decide to give its Title IX coordinator additional responsibilities, such as: providing training to students, faculty, and staff on Title IX issues; conducting Title IX investigations, including investigating facts relevant to a complaint, and determining appropriate sanctions against the perpetrator and remedies for the complainant; determining appropriate interim measures for a complainant upon learning of a report or complaint of sexual violence; and ensuring that appropriate policies and procedures are in place for working with local law enforcement and coordinating services with local victim advocacy organizations and service providers, including rape crisis centers. A school must ensure that its Title IX coordinator is appropriately trained in all areas over which he or she has responsibility. The Title IX coordinator or designee should also be available to meet with students as needed.

If a school designates more than one Title IX coordinator, the school's notice of nondiscrimination and Title IX grievance procedures should describe each coordinator's responsibilities, and one coordinator should be designated as having ultimate oversight responsibility.

C-4. Are there any employees who should not serve as the Title IX coordinator?

Answer: Title IX does not categorically preclude particular employees from serving as Title IX coordinators. However, Title IX coordinators should not have other job responsibilities that may create a conflict of interest. Because some complaints may raise issues as to whether or how well the school has met its Title IX obligations, designating

the same employee to serve both as the Title IX coordinator and the general counsel (which could include representing the school in legal claims alleging Title IX violations) poses a serious risk of a conflict of interest. Other employees whose job responsibilities may conflict with a Title IX coordinator's responsibilities include Directors of Athletics, Deans of Students, and any employee who serves on the judicial/hearing board or to whom an appeal might be made. Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest.

Grievance Procedures

C-5. Under Title IX, what elements should be included in a school's procedures for responding to complaints of sexual violence?

Answer: Title IX requires that a school adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination, including sexual violence. In evaluating whether a school's grievance procedures satisfy this requirement, OCR will review all aspects of a school's policies and practices, including the following elements that are critical to achieve compliance with Title IX:

(1) notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;

(2) application of the grievance procedures to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties;

(3) provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;

(4) designated and reasonably prompt time frames for the major stages of the complaint process (see question F-8);

(5) written notice to the complainant and alleged perpetrator of the outcome of the complaint (see question H-3); and

(6) assurance that the school will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.

To ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the school processes complaints, a school's Title IX grievance procedures should also explicitly include the following in writing, some of which themselves are mandatory obligations under Title IX:

(1) a statement of the school's jurisdiction over Title IX complaints;

(2) adequate definitions of sexual harassment (which includes sexual violence) and an explanation as to when such conduct creates a hostile environment;

(3) reporting policies and protocols, including provisions for confidential reporting;

(4) identification of the employee or employees responsible for evaluating requests for confidentiality;

(5) notice that Title IX prohibits retaliation;

(6) notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;

(7) notice of available interim measures that may be taken to protect the student in the educational setting;

(8) the evidentiary standard that must be used (preponderance of the evidence) (*i.e.*, more likely than not that sexual violence occurred) in resolving a complaint;

(9) notice of potential remedies for students;

(10) notice of potential sanctions against perpetrators; and

(11) sources of counseling, advocacy, and support.

For more information on interim measures, see questions G-1 to G-3.

The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights. Procedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions. Of course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.

A school's procedures and practices will vary in detail, specificity, and components, reflecting differences in the age of its students, school size and administrative structure, state or local legal requirements (*e.g.*, mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

C-6. Is a school required to use separate grievance procedures for sexual violence complaints?

Answer: No. Under Title IX, a school may use student disciplinary procedures, general Title IX grievance procedures, sexual harassment procedures, or separate procedures to resolve sexual violence complaints. However, any procedures used for sexual violence complaints, including disciplinary procedures, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution (as discussed in question C-5), including applying the preponderance of the evidence standard of review. As discussed in question C-3, the Title IX coordinator should review any process used to resolve complaints of sexual violence to ensure it complies with requirements for prompt and equitable resolution of these complaints. When using disciplinary procedures, which are often focused on the alleged perpetrator and can take considerable time, a school should be mindful of its obligation to provide interim measures to protect the complainant in the educational setting. For more information on timeframes and interim measures, see questions F-8 and G-1 to G-3.

D. Responsible Employees and Reporting[22]

D-1. Which school employees are obligated to report incidents of possible sexual violence to school officials?

Answer: Under Title IX, whether an individual is obligated to report incidents of alleged sexual violence generally depends on whether the individual is a responsible employee of the school. A responsible employee must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee, subject to the exemption for school counseling employees discussed in question E-3. This is because, as discussed in question A-4, a school is obligated to address sexual violence about which a responsible employee knew or should have known. As explained in question C-3, the Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or

[22] This document addresses only Title IX's reporting requirements. It does not address requirements under the Clery Act or other federal, state, or local laws, or an individual school's code of conduct.

complaint was initially filed with another individual or office, subject to the exemption for school counseling employees discussed in question E-3.

D-2. Who is a "responsible employee"?

Answer: According to OCR's *2001 Guidance*, a responsible employee includes any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.[23]

A school must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees. A school must also inform all employees of their own reporting responsibilities and the importance of informing complainants of: the reporting obligations of responsible employees; complainants' option to request confidentiality and available confidential advocacy, counseling, or other support services; and complainants' right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

Whether an employee is a responsible employee will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.

As noted in response to question A-4, when a responsible employee knows or reasonably should know of possible sexual violence, OCR deems a school to have notice of the sexual violence. The school must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E), and, if the school determines that sexual violence created a hostile environment, the school must then take appropriate steps to address the situation. The

[23] 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 v. Lago Vista Ind. Sch. Dist*., 524 U.S. 274, 290 (1998), and *Davis*, 524 U.S. at 642. The concept of a "responsible employee" under OCR's guidance for administrative enforcement of Title IX is broader.

school has this obligation regardless of whether the student, student's parent, or a third party files a formal complaint. For additional information on a school's responsibilities to address student-on-student sexual violence, see question A-5. For additional information on training for school employees, see questions J-1 to J-3.

D-3. What information is a responsible employee obligated to report about an incident of possible student-on-student sexual violence?

Answer: Subject to the exemption for school counseling employees discussed in question E-3, a responsible employee must report to the school's Title IX coordinator, or other appropriate school designee, all relevant details about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation. This includes the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location. A school must make clear to its responsible employees to whom they should report an incident of alleged sexual violence.

To ensure compliance with these reporting obligations, it is important for a school to train its responsible employees on Title IX and the school's sexual violence policies and procedures. For more information on appropriate training for school employees, see question J-1 to J-3.

D-4. What should a responsible employee tell a student who discloses an incident of sexual violence?

Answer: Before a student reveals information that he or she may wish to keep confidential, a responsible employee should make every effort to ensure that the student understands: (i) the employee's obligation to report the names of the alleged perpetrator and student involved in the alleged sexual violence, as well as relevant facts regarding the alleged incident (including the date, time, and location), to the Title IX coordinator or other appropriate school officials, (ii) the student's option to request that the school maintain his or her confidentiality, which the school (*e.g.*, Title IX coordinator) will consider, and (iii) the student's ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services (*e.g.*, sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers). As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request

and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

D-5. If a student informs a resident assistant/advisor (RA) that he or she was subjected to sexual violence by a fellow student, is the RA obligated under Title IX to report the incident to school officials?

Answer: As discussed in questions D-1 and D-2, for Title IX purposes, whether an individual is obligated under Title IX to report alleged sexual violence to the school's Title IX coordinator or other appropriate school designee generally depends on whether the individual is a responsible employee.

The duties and responsibilities of RAs vary among schools, and, therefore, a school should consider its own policies and procedures to determine whether its RAs are responsible employees who must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee.[24] When making this determination, a school should consider if its RAs have the general authority to take action to redress misconduct or the duty to report misconduct to appropriate school officials, as well as whether students could reasonably believe that RAs have this authority or duty. A school should also consider whether it has determined and clearly informed students that RAs are generally available for confidential discussions and do not have the authority or responsibility to take action to redress any misconduct or to report any misconduct to the Title IX coordinator or other appropriate school officials. A school should pay particular attention to its RAs' obligations to report other student violations of school policy (*e.g.*, drug and alcohol violations or physical assault). If an RA is required to report other misconduct that violates school policy, then the RA would be considered a responsible employee obligated to report incidents of sexual violence that violate school policy.

If an RA is a responsible employee, the RA should make every effort to ensure that *before* the student reveals information that he or she may wish to keep confidential, the student understands the RA's reporting obligation and the student's option to request that the school maintain confidentiality. It is therefore important that schools widely disseminate policies and provide regular training clearly identifying the places where students can seek confidential support services so that students are aware of this information. The RA

[24] Postsecondary institutions should be aware that, regardless of whether an RA is a responsible employee under Title IX, RAs are considered "campus security authorities" under the Clery Act. A school's responsibilities in regard to crimes reported to campus security authorities are discussed in the Department's regulations on the Clery Act at 34 C.F.R. § 668.46.

should also explain to the student (again, before the student reveals information that he or she may wish to keep confidential) that, although the RA must report the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location to the Title IX coordinator or other appropriate school designee, the school will protect the student's confidentiality to the greatest extent possible. Prior to providing information about the incident to the Title IX coordinator or other appropriate school designee, the RA should consult with the student about how to protect his or her safety and the details of what will be shared with the Title IX coordinator. The RA should explain to the student that reporting this information to the Title IX coordinator or other appropriate school designee does not necessarily mean that a formal complaint or investigation under the school's Title IX grievance procedure must be initiated if the student requests confidentiality. As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. If a student discloses sexual violence to an RA who is a responsible employee, the school will be deemed to have notice of the sexual violence even if the student does not file a Title IX complaint. Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.

E. Confidentiality and a School's Obligation to Respond to Sexual Violence

E-1. How should a school respond to a student's request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address the alleged sexual violence?

Answer: Students, or parents of minor students, reporting incidents of sexual violence sometimes ask that the students' names not be disclosed to the alleged perpetrators or that no investigation or disciplinary action be pursued to address the alleged sexual violence. OCR strongly supports a student's interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student's request

for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school's response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. In the case of minors, state mandatory reporting laws may require disclosure, but can generally be followed without disclosing information to school personnel who are not responsible for handling the school's response to incidents of sexual violence.[25]

Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school's response. To improve trust in the process for investigating sexual violence complaints, a school should notify students of the information that will be disclosed, to whom it will be disclosed, and why. Regardless of whether a student complainant requests confidentiality, a school must take steps to protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. For additional information on interim measures see questions G-1 to G-3.

For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator. The school should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate

[25] The school should be aware of the alleged student perpetrator's right under the Family Educational Rights and Privacy Act ("FERPA") torequest to inspect and review information about the allegations if the information directly relates to the alleged student perpetrator and the information is maintained by the school as an education record. In such a case, the school must either redact the complainant's name and all identifying information before allowing the alleged perpetrator to inspect and review the sections of the complaint that relate to him or her, or must inform the alleged perpetrator of the specific information in the complaint that are about the alleged perpetrator. *See* 34 C.F.R. § 99.12(a) The school should also make complainants aware of this right and explain how it might affect the school's ability to maintain complete confidentiality.

and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary. See question K-1 regarding retaliation.

If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. As discussed in question C-3, the Title IX coordinator is generally in the best position to evaluate confidentiality requests. Because schools vary widely in size and administrative structure, OCR recognizes that a school may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests. Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention, and a school should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them. For example, if a school has a sexual assault response coordinator, that person should be consulted in evaluating requests for confidentiality. The school should identify in its Title IX policies and procedures the employee or employees responsible for making such determinations.

If the school determines that it can respect the student's request not to disclose his or her identity to the alleged perpetrator, it should take all reasonable steps to respond to the complaint consistent with the request. Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence. There are steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school's policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests.

E-2. What factors should a school consider in weighing a student's request for confidentiality?

Answer: When weighing a student's request for confidentiality that could preclude a meaningful investigation or potential discipline of the alleged perpetrator, a school should consider a range of factors.

These factors include circumstances that suggest there is an increased risk of the alleged perpetrator committing additional acts of sexual violence or other violence (e.g., whether there have been other sexual violence complaints about the same alleged perpetrator, whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence, whether the alleged perpetrator threatened further sexual violence or other violence against the student or others, and whether the sexual violence was committed by multiple perpetrators). These factors also include circumstances that suggest there is an increased risk of future acts of sexual violence under similar circumstances (e.g., whether the student's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group). Other factors that should be considered in assessing a student's request for confidentiality include whether the sexual violence was perpetrated with a weapon; the age of the student subjected to the sexual violence; and whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).

A school should take requests for confidentiality seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. For example, if the school has credible information that the alleged perpetrator has committed one or more prior rapes, the balance of factors would compel the school to investigate the allegation of sexual violence, and if appropriate, pursue disciplinary action in a manner that may require disclosure of the student's identity to the alleged perpetrator. If the school determines that it must disclose a student's identity to an alleged perpetrator, it should inform the student prior to making this disclosure. In these cases, it is also especially important for schools to take whatever interim measures are necessary to protect the student and ensure the safety of other students. If a school has a sexual assault response coordinator, that person should be consulted in identifying safety risks and interim measures that are necessary to protect the student. In the event the student requests that the school inform the perpetrator that the student asked the school not to investigate or seek discipline, the school should honor this request and inform the alleged perpetrator that the school made the decision to go forward. For additional information on interim measures see questions G-1 to G-3. Any school officials responsible for

discussing safety and confidentiality with students should be trained on the effects of trauma and the appropriate methods to communicate with students subjected to sexual violence. See questions J-1 to J-3.

On the other hand, if, for example, the school has no credible information about prior sexual violence committed by the alleged perpetrator and the alleged sexual violence was not perpetrated with a weapon or accompanied by threats to repeat the sexual violence against the complainant or others or part of a larger pattern at a given location or by a particular group, the balance of factors would likely compel the school to respect the student's request for confidentiality. In this case the school should still take all reasonable steps to respond to the complaint consistent with the student's confidentiality request and determine whether interim measures are appropriate or necessary. Schools should be mindful that traumatic events such as sexual violence can result in delayed decisionmaking by a student who has experienced sexual violence. Hence, a student who initially requests confidentiality might later request that a full investigation be conducted.

E-3. What are the reporting responsibilities of school employees who provide or support the provision of counseling, advocacy, health, mental health, or sexual assault-related services to students who have experienced sexual violence?

Answer: OCR does not require campus mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person, to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student. Although these employees may have responsibilities that would otherwise make them responsible employees for Title IX purposes, OCR recognizes the importance of protecting the counselor-client relationship, which often requires confidentiality to ensure that students will seek the help they need.

Professional counselors and pastoral counselors whose official responsibilities include providing mental-health counseling to members of the school community are not required by Title IX to report *any* information regarding an incident of alleged sexual violence to the Title IX coordinator or other appropriate school designee.[26]

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[26] The exemption from reporting obligations for pastoral and professional counselors under Title IX is consistent with the Clery Act. For additional information on reporting obligations under the Clery Act, see Office of Postsecondary Education, *Handbook for Campus Safety and Security Reporting* (2011), available at http://www2.ed.gov/admins/lead/safety/handbook.pdf. Similar to the Clery Act, for Title IX purposes, a pastoral counselor is a person who is associated with a religious order or denomination, is recognized by that religious

OCR recognizes that some people who provide assistance to students who experience sexual violence are not professional or pastoral counselors. They include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers ("non-professional counselors or advocates"), including front desk staff and students. OCR wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student's consent.[27] These non-professional counselors or advocates are valuable sources of support for students, and OCR strongly encourages schools to designate these individuals as confidential sources.

Pastoral and professional counselors and non-professional counselors or advocates should be instructed to inform students of their right to file a Title IX complaint with the school and a separate complaint with campus or local law enforcement. In addition to informing students about campus resources for counseling, medical, and academic support, these persons should also indicate that they are available to assist students in filing such complaints. They should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary.

In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women's centers, or

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order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor. A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the school, but are under contract to provide counseling at the school. This includes individuals who are not yet licensed or certified as a counselor, but are acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the school.

[27] Postsecondary institutions should be aware that an individual who is counseling students, but who does not meet the Clery Act definition of a pastoral or professional counselor, is not exempt from being a campus security authority if he or she otherwise has significant responsibility for student and campus activities. See fn. 24.

health centers. Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.

E-4. Is a school required to investigate information regarding sexual violence incidents shared by survivors during public awareness events, such as "Take Back the Night"?

Answer: No. OCR wants students to feel free to participate in preventive education programs and access resources for survivors. Therefore, public awareness events such as "Take Back the Night" or other forums at which students disclose experiences with sexual violence are not considered notice to the school for the purpose of triggering an individual investigation unless the survivor initiates a complaint. The school should instead respond to these disclosures by reviewing sexual assault policies, creating campus-wide educational programs, and conducting climate surveys to learn more about the prevalence of sexual violence at the school. Although Title IX does not require the school to investigate particular incidents discussed at such events, the school should ensure that survivors are aware of any available resources, including counseling, health, and mental health services. To ensure that the entire school community understands their Title IX rights related to sexual violence, the school should also provide information at these events on Title IX and how to file a Title IX complaint with the school, as well as options for reporting an incident of sexual violence to campus or local law enforcement.

F. Investigations and Hearings

Overview

F-1. What elements should a school's Title IX investigation include?

Answer: The specific steps in a school's Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

For the purposes of this document the term "investigation" refers to the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions

the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.

In all cases, a school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence. The investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing.[28] Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation. It could be the Title IX coordinator, provided there are no conflicts of interest, but it does not have to be. All persons involved in conducting a school's Title IX investigations must have training or experience in handling complaints of sexual violence and in the school's grievance procedures. For additional information on training, see question J-3.

When investigating an incident of alleged sexual violence for Title IX purposes, to the extent possible, a school should coordinate with any other ongoing school or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator. A school should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event. If the investigation includes forensic evidence, it may be helpful for a school to consult with local or campus law enforcement or a forensic expert to ensure that the evidence is correctly interpreted by school officials. For additional information on working with campus or local law enforcement see question F-3.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence as required by Title IX. If a school typically processes complaints of sexual violence through its disciplinary process and that process, including any investigation and hearing, meets the Title IX requirements discussed above and enables the school to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, then the school may use that process to satisfy its Title IX obligations and does not need to conduct a separate Title IX investigation. As discussed in question C-3, the Title IX coordinator should review the disciplinary process

[28] This answer addresses only Title IX's requirements for investigations. It does not address legal rights or requirements under the U.S. Constitution, the Clery Act, or other federal, state, or local laws.

to ensure that it: (1) complies with the prompt and equitable requirements of Title IX; (2) allows for appropriate interim measures to be taken to protect the complainant during the process; and (3) provides for remedies to the complainant and school community where appropriate. For more information about interim measures, see questions G-1 to G-3, and about remedies, see questions H-1 and H-2.

The investigation may include, but is not limited to, conducting interviews of the complainant, the alleged perpetrator, and any witnesses; reviewing law enforcement investigation documents, if applicable; reviewing student and personnel files; and gathering and examining other relevant documents or evidence. While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator. A balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.[29] Specifically:

- Throughout the investigation, the parties must have an equal opportunity to present relevant witnesses and other evidence.
- The school must use a preponderance-of-the-evidence (*i.e.*, more likely than not) standard in any Title IX proceedings, including any fact-finding and hearings.
- If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.
- If the school permits one party to submit third-party expert testimony, it must do so equally for both parties.
- If the school provides for an appeal, it must do so equally for both parties.
- Both parties must be notified, in writing, of the outcome of both the complaint and any appeal (see question H-3).

[29] As explained in question C-5, the parties may have certain due process rights under the U.S. Constitution.

Intersection with Criminal Investigations

F-2. What are the key differences between a school's Title IX investigation into allegations of sexual violence and a criminal investigation?

Answer: A criminal investigation is intended to determine whether an individual violated criminal law; and, if at the conclusion of the investigation, the individual is tried and found guilty, the individual may be imprisoned or subject to criminal penalties. The U.S. Constitution affords criminal defendants who face the risk of incarceration numerous protections, including, but not limited to, the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation. In addition, government officials responsible for criminal investigations (including police and prosecutors) normally have discretion as to which complaints from the public they will investigate.

By contrast, a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required. Further, while a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence. Because the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.

Of course, criminal investigations conducted by local or campus law enforcement may be useful for fact gathering if the criminal investigation occurs within the recommended timeframe for Title IX investigations; but, even if a criminal investigation is ongoing, a school must still conduct its own Title IX investigation.

A school should notify complainants of the right to file a criminal complaint and should not dissuade a complainant from doing so either during or after the school's internal Title IX investigation. Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local, or other federal laws.

F-3. How should a school proceed when campus or local law enforcement agencies are conducting a criminal investigation while the school is conducting a parallel Title IX investigation?

Answer: A school should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, it is important for a school to understand that during this brief delay in the Title IX investigation, it must take interim measures to protect the complainant in the educational setting. The school should also continue to update the parties on the status of the investigation and inform the parties when the school resumes its Title IX investigation. For additional information on interim measures see questions G-1 to G-3.

If a school delays the fact-finding portion of a Title IX investigation, the school must promptly resume and complete its fact-finding for the Title IX investigation once it learns that the police department has completed its evidence gathering stage of the criminal investigation. The school should not delay its investigation until the ultimate outcome of the criminal investigation or the filing of any charges. OCR recommends that a school work with its campus police, local law enforcement, and local prosecutor's office to learn when the evidence gathering stage of the criminal investigation is complete. A school may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations. Any MOU or other agreement must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably, and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws.

The DCL states that in one instance a prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances. OCR understands that this example may not be representative and that the law enforcement agency's process often takes more than ten days. OCR recognizes that the length of time for evidence gathering by criminal investigators will vary depending on the specific circumstances of each case.

Off-Campus Conduct

F-4. Is a school required to process complaints of alleged sexual violence that occurred off campus?

Answer: Yes. Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.

A school must determine whether the alleged off-campus sexual violence occurred in the context of an education program or activity of the school; if so, the school must treat the complaint in the same manner that it treats complaints regarding on-campus conduct. In other words, if a school determines that the alleged misconduct took place in the context of an education program or activity of the school, the fact that the alleged misconduct took place off campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus.

Whether the alleged misconduct occurred in this context may not always be apparent from the complaint, so a school may need to gather additional information in order to make such a determination. Off-campus education programs and activities are clearly covered and include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (*e.g.*, a debate team trip to another school or to a weekend competition).

Even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity. The school cannot address the continuing effects of the off-campus sexual violence at school or in an off-campus education program or activity unless it processes the complaint and gathers appropriate additional information in accordance with its established procedures.

Once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct. The mere presence on campus or in an

off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment. A school should also take steps to protect a student who alleges off-campus sexual violence from further harassment by the alleged perpetrator or his or her friends, and a school may have to take steps to protect other students from possible assault by the alleged perpetrator. In other words, the school should protect the school community in the same way it would had the sexual violence occurred on campus. Even if there are no continuing effects of the off-campus sexual violence experienced by the student on campus or in an off-campus education program or activity, the school still should handle these incidents as it would handle other off-campus incidents of misconduct or violence and consistent with any other applicable laws. For example, if a school, under its code of conduct, exercises jurisdiction over physical altercations between students that occur off campus outside of an education program or activity, it should also exercise jurisdiction over incidents of student-on-student sexual violence that occur off campus outside of an education program or activity.

Hearings[30]

F-5. Must a school allow or require the parties to be present during an entire hearing?

Answer: If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety of a hearing, it must do so equally for both parties. At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means. Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school's Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

[30] As noted in question F-1, the investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing. Although Title IX does not dictate the membership of a hearing board, OCR discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence.

F-6. May every witness at the hearing, including the parties, be cross-examined?

Answer: OCR does not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.

OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment. A school may choose, instead, to allow the parties to submit questions to a trained third party (*e.g.*, the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.

F-7. May the complainant's sexual history be introduced at hearings?

Answer: Questioning about the complainant's sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence. The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant.

Timeframes

F-8. What stages of the investigation are included in the 60-day timeframe referenced in the DCL as the length for a typical investigation?

Answer: As noted in the DCL, the 60-calendar day timeframe for investigations is based on OCR's experience in typical cases. The 60-calendar day timeframe refers to the entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate. Although this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school's response was prompt and equitable as required by Title IX.

OCR does not require a school to complete investigations within 60 days; rather OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable. Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct. OCR recognizes that the investigation process may take longer if there is a parallel criminal investigation or if it occurs partially during school breaks. A school may need to stop an investigation during school breaks or between school years, although a school should make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.

Because timeframes for investigations vary and a school may need to depart from the timeframes designated in its grievance procedures, both parties should be given periodic status updates throughout the process.

G. Interim Measures

G-1. Is a school required to take any interim measures before the completion of its investigation?

Answer: Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow the complainant to change academic and extracurricular activities or his or her living, transportation, dining, and working situation as appropriate. The school should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. If a school does not offer these services on campus, it should enter into an MOU with a local victim services provider if possible.

Even when a school has determined that it can respect a complainant's request for confidentiality and therefore may not be able to respond fully to an allegation of sexual violence and initiate formal action against an alleged perpetrator, the school must take immediate action to protect the complainant while keeping the identity of the complainant confidential. These actions may include: providing support services to the

complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred.

G-2. How should a school determine what interim measures to take?

Answer: The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. A school should consider a number of factors in determining what interim measures to take, including, for example, the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (*e.g.*, civil protection orders).

In general, when taking interim measures, schools should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.

G-3. If a school provides all students with access to counseling on a fee basis, does that suffice for providing counseling as an interim measure?

Answer: No. Interim measures are determined by a school on a case-by-case basis. If a school determines that it needs to offer counseling to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.

H. Remedies and Notice of Outcome[31]

H-1. What remedies should a school consider in a case of student-on-student sexual violence?

Answer: Effective remedial action may include disciplinary action against the perpetrator, providing counseling for the perpetrator, remedies for the complainant and others, as well as changes to the school's overall services or policies. All services needed to remedy the hostile environment should be offered to the complainant. These remedies are separate from, and in addition to, any interim measure that may have been provided prior to the conclusion of the school's investigation. In any instance in which the complainant did not take advantage of a specific service (*e.g.*, counseling) when offered as an interim measure, the complainant should still be offered, and is still entitled to, appropriate final remedies that may include services the complainant declined as an interim measure. A refusal at the interim stage does not mean the refused service or set of services should not be offered as a remedy.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without more, likely will not be sufficient to satisfy its Title IX obligation to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. Additional remedies for the complainant and the school community may be necessary. If the school's student disciplinary procedure does not include a process for determining and implementing these remedies for the complainant and school community, the school will need to use another process for this purpose.

Depending on the specific nature of the problem, remedies for the complainant may include, but are not limited to:

- Providing an effective escort to ensure that the complainant can move safely between classes and activities;

[31] As explained in question A-5, if a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to be subjected to a hostile environment. In this case, in addition to the remedies discussed in this section, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately.

- Ensuring the complainant and perpetrator do not share classes or extracurricular activities;
- Moving the perpetrator or complainant (if the complainant requests to be moved) to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- Providing comprehensive, holistic victim services including medical, counseling and academic support services, such as tutoring;
- Arranging for the complainant to have extra time to complete or re-take a class or withdraw from a class without an academic or financial penalty; and
- Reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the sexual violence and the misconduct that may have resulted in the complainant being disciplined.[32]

Remedies for the broader student population may include, but are not limited to:

- Designating an individual from the school's counseling center who is specifically trained in providing trauma-informed comprehensive services to victims of sexual violence to be on call to assist students whenever needed;
- Training or retraining school employees on the school's responsibilities to address allegations of sexual violence and how to conduct Title IX investigations;
- Developing materials on sexual violence, which should be distributed to all students;
- Conducting bystander intervention and sexual violence prevention programs with students;
- Issuing policy statements or taking other steps that clearly communicate that the school does not tolerate sexual violence and will respond to any incidents and to any student who reports such incidents;

[32] For example, if the complainant was disciplined for skipping a class in which the perpetrator was enrolled, the school should review the incident to determine if the complainant skipped class to avoid contact with the perpetrator.

- Conducting, in conjunction with student leaders, a campus climate check to assess the effectiveness of efforts to ensure that the school is free from sexual violence, and using that information to inform future proactive steps that the school will take;

- Targeted training for a group of students if, for example, the sexual violence created a hostile environment in a residence hall, fraternity or sorority, or on an athletic team; and

- Developing a protocol for working with local law enforcement as discussed in question F-3.

When a school is unable to conduct a full investigation into a particular incident (*i.e.*, when it received a general report of sexual violence without any personally identifying information), it should consider remedies for the broader student population in response.

H-2. If, after an investigation, a school finds the alleged perpetrator responsible and determines that, as part of the remedies for the complainant, it must separate the complainant and perpetrator, how should the school accomplish this if both students share the same major and there are limited course options?

Answer: If there are limited sections of required courses offered at a school and both the complainant and perpetrator are required to take those classes, the school may need to make alternate arrangements in a manner that minimizes the burden on the complainant. For example, the school may allow the complainant to take the regular sections of the courses while arranging for the perpetrator to take the same courses online or through independent study.

H-3. What information must be provided to the complainant in the notice of the outcome?

Answer: Title IX requires both parties to be notified, in writing, about the outcome of both the complaint and any appeal. OCR recommends that a school provide written notice of the outcome to the complainant and the alleged perpetrator concurrently.

For Title IX purposes, a school must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence. The perpetrator should not be notified of the individual remedies offered or provided to the complainant.

Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school. Additional steps the school has taken to eliminate the hostile environment may include counseling and academic support services for the complainant and other affected students. Additional steps the school has taken to prevent recurrence may include sexual violence training for faculty and staff, revisions to the school's policies on sexual violence, and campus climate surveys. Further discussion of appropriate remedies is included in question H-1.

In addition to the Title IX requirements described above, the Clery Act requires, and FERPA permits, postsecondary institutions to inform the complainant of the institution's final determination and any disciplinary sanctions imposed on the perpetrator in sexual violence cases (as opposed to all harassment and misconduct covered by Title IX) not just those sanctions that directly relate to the complainant.[33]

I. Appeals

I-1. What are the requirements for an appeals process?

Answer: While Title IX does not require that a school provide an appeals process, OCR does recommend that the school do so where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings. If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties. The specific design of the appeals process is up to the school, as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process. Any individual or body handling appeals should be trained in the dynamics of and trauma associated with sexual violence.

If a school chooses to offer an appeals process it has flexibility to determine the type of review it will apply to appeals, but the type of review the school applies must be the same regardless of which party files the appeal.

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[33] 20 U.S.C. § 1092(f) and 20 U.S.C. § 1232g(b)(6)(A).

I-2. Must an appeal be available to a complainant who receives a favorable finding but does not believe a sanction that directly relates to him or her was sufficient?

Answer: The appeals process must be equal for both parties. For example, if a school allows a perpetrator to appeal a suspension on the grounds that it is too severe, the school must also allow a complainant to appeal a suspension on the grounds that it was not severe enough. See question H-3 for more information on what must be provided to the complainant in the notice of the outcome.

J. Title IX Training, Education and Prevention[34]

J-1. What type of training on Title IX and sexual violence should a school provide to its employees?

Answer: A school needs to ensure that responsible employees with the authority to address sexual violence know how to respond appropriately to reports of sexual violence, that other responsible employees know that they are obligated to report sexual violence to appropriate school officials, and that all other employees understand how to respond to reports of sexual violence. A school should ensure that professional counselors, pastoral counselors, and non-professional counselors or advocates also understand the extent to which they may keep a report confidential. A school should provide training to all employees likely to witness or receive reports of sexual violence, including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsels, athletic coaches, health personnel, and resident advisors. Training for employees should include practical information about how to prevent and identify sexual violence, including same-sex sexual violence; the behaviors that may lead to and result in sexual violence; the attitudes of bystanders that may allow conduct to continue; the potential for revictimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language; the impact of trauma on victims; and, as applicable, the person(s) to whom such misconduct must be reported. The training should also explain responsible employees' reporting obligation, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students' requests for confidentiality, as well as provide the contact

[34] As explained earlier, although this document focuses on sexual violence, the legal principles apply to other forms of sexual harassment. Schools should ensure that any training they provide on Title IX and sexual violence also covers other forms of sexual harassment. Postsecondary institutions should also be aware of training requirements imposed under the Clery Act.

information for the school's Title IX coordinator. A school also should train responsible employees to inform students of: the reporting obligations of responsible employees; students' option to request confidentiality and available confidential advocacy, counseling, or other support services; and their right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement. For additional information on the reporting obligations of responsible employees and others see questions D-1 to D-5.

There is no minimum number of hours required for Title IX and sexual violence training at every school, but this training should be provided on a regular basis. Each school should determine based on its particular circumstances how such training should be conducted, who has the relevant expertise required to conduct the training, and who should receive the training to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX. A school should also have methods for verifying that the training was effective.

J-2. How should a school train responsible employees to report incidents of possible sexual harassment or sexual violence?

Answer: Title IX requires a school to take prompt and effective steps reasonably calculated to end sexual harassment and sexual violence that creates a hostile environment (*i.e.*, conduct that is sufficiently serious as to limit or deny a student's ability to participate in or benefit from the school's educational program and activity). But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

OCR therefore recommends that a school train responsible employees to report to the Title IX coordinator or other appropriate school official any incidents of sexual harassment or sexual violence that may violate the school's code of conduct or may create or contribute to the creation of a hostile environment. The school can then take steps to investigate and prevent any harassment or violence from recurring or escalating, as appropriate. For example, the school may separate the complainant and alleged perpetrator or conduct sexual harassment and sexual violence training for the school's students and employees. Responsible employees should understand that they do not need to determine whether the alleged sexual harassment or sexual violence actually occurred or that a hostile environment has been created before reporting an incident to the school's Title IX coordinator. Because the Title IX coordinator should have in-depth knowledge of Title IX and Title IX complaints at the school, he or she is likely to be in a better position than are other employees to evaluate whether an incident of sexual

harassment or sexual violence creates a hostile environment and how the school should respond. There may also be situations in which individual incidents of sexual harassment do not, by themselves, create a hostile environment; however when considered together, those incidents may create a hostile environment.

J-3. What type of training should a school provide to employees who are involved in implementing the school's grievance procedures?

Answer: All persons involved in implementing a school's grievance procedures (*e.g.*, Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the school's grievance procedures. The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

In rare circumstances, employees involved in implementing a school's grievance procedures may be able to demonstrate that prior training and experience has provided them with competency in the areas covered in the school's training. For example, the combination of effective prior training and experience investigating complaints of sexual violence, together with training on the school's current grievance procedures may be sufficient preparation for an employee to resolve Title IX complaints consistent with the school's grievance procedures. In-depth knowledge regarding Title IX and sexual violence is particularly helpful. Because laws and school policies and procedures may change, the only way to ensure that all employees involved in implementing the school's grievance procedures have the requisite training or experience is for the school to provide regular training to all individuals involved in implementing the school's Title IX grievance procedures even if such individuals also have prior relevant experience.

J-4. What type of training on sexual violence should a school provide to its students?

Answer: To ensure that students understand their rights under Title IX, a school should provide age-appropriate training to its students regarding Title IX and sexual violence. At the elementary and secondary school level, schools should consider whether sexual violence training should also be offered to parents, particularly training on the school's process for handling complaints of sexual violence. Training may be provided separately or as part of the school's broader training on sex discrimination and sexual harassment. However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or training provided to students. The school may want to include this training in its orientation programs for new students; training for student athletes and members of student organizations; and back-to-school nights. A school should consider educational methods that are most likely to help students retain information when designing its training, including repeating the training at regular intervals. OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school's policies;
- the school's definition of consent applicable to sexual conduct, including examples;
- how the school analyzes whether conduct was unwelcome under Title IX;
- how the school analyzes whether unwelcome sexual conduct creates a hostile environment;
- reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting;
- the school's grievance procedures used to process sexual violence complaints;
- disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;
- effects of trauma, including neurobiological changes;
- the role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence;
- strategies and skills for bystanders to intervene to prevent possible sexual violence;
- how to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance; and
- Title IX's protections against retaliation.

The training should also encourage students to report incidents of sexual violence. The training should explain that students (and their parents or friends) do not need to determine whether incidents of sexual violence or other sexual harassment created a

hostile environment before reporting the incident. A school also should be aware that persons may be deterred from reporting incidents if, for example, violations of school or campus rules regarding alcohol or drugs were involved. As a result, a school should review its disciplinary policy to ensure it does not have a chilling effect on students' reporting of sexual violence offenses or participating as witnesses. OCR recommends that a school inform students that the school's primary concern is student safety, and that use of alcohol or drugs never makes the survivor at fault for sexual violence.

It is also important for a school to educate students about the persons on campus to whom they can confidentially report incidents of sexual violence. A school's sexual violence education and prevention program should clearly identify the offices or individuals with whom students can speak confidentially and the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. It should also identify the school's responsible employees and explain that if students report incidents to responsible employees (except as noted in question E-3) these employees are required to report the incident to the Title IX coordinator or other appropriate official. This reporting includes the names of the alleged perpetrator and student involved in the sexual violence, as well as relevant facts including the date, time, and location, although efforts should be made to comply with requests for confidentiality from the complainant. For more detailed information regarding reporting and responsible employees and confidentiality, see questions D-1 to D-5 and E-1 to E-4.

K. Retaliation

K-1. Does Title IX protect against retaliation?

Answer: Yes. The Federal civil rights laws, including Title IX, make it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by these laws. This means that if an individual brings concerns about possible civil rights problems to a school's attention, including publicly opposing sexual violence or filing a sexual violence complaint with the school or any State or Federal agency, it is unlawful for the school to retaliate against that individual for doing so. It is also unlawful to retaliate against an individual because he or she testified, or participated in any manner, in an OCR or school's investigation or proceeding. Therefore, if a student, parent, teacher, coach, or other individual complains formally or informally about sexual violence or participates in an OCR or school's investigation or proceedings related to sexual violence, the school is prohibited from retaliating (including intimidating, threatening, coercing, or in any way

discriminating against the individual) because of the individual's complaint or participation.

A school should take steps to prevent retaliation against a student who filed a complaint either on his or her own behalf or on behalf of another student, or against those who provided information as witnesses.

Schools should be aware that complaints of sexual violence may be followed by retaliation against the complainant or witnesses by the alleged perpetrator or his or her associates. When a school knows or reasonably should know of possible retaliation by other students or third parties, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and witnesses and ensure their safety as necessary. At a minimum, this includes making sure that the complainant and his or her parents, if the complainant is in elementary or secondary school, and witnesses know how to report retaliation by school officials, other students, or third parties by making follow-up inquiries to see if there have been any new incidents or acts of retaliation, and by responding promptly and appropriately to address continuing or new problems. A school should also tell complainants and witnesses that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation, but will also take strong responsive action if it occurs.

L. First Amendment

L-1. How should a school handle its obligation to respond to sexual harassment and sexual violence while still respecting free-speech rights guaranteed by the Constitution?

Answer: The DCL on sexual violence did not expressly address First Amendment issues because it focuses on unlawful physical sexual violence, which is not speech or expression protected by the First Amendment.

However, OCR's previous guidance on the First Amendment, including the 2001 Guidance, OCR's July 28, 2003, Dear Colleague Letter on the First Amendment,[35] and OCR's October 26, 2010, Dear Colleague Letter on harassment and bullying,[36] remain fully in effect. OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution. Therefore, when a school works to prevent

[35] Available at http://www.ed.gov/ocr/firstamend.html.
[36] Available at http://www.ed.gov/ocr/letters/colleague-201010.html.

and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.

Title IX protects students from sex discrimination; it does not 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 hostile environment under Title IX. Title IX also does not require, prohibit, or abridge the use of particular textbooks or curricular materials.[37]

M. The Clery Act and the Violence Against Women Reauthorization Act of 2013

M-1. How does the Clery Act affect the Title IX obligations of institutions of higher education that participate in the federal student financial aid programs?

Answer: Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX. The Clery Act requires institutions of higher education to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. The Clery Act requirements apply to many crimes other than those addressed by Title IX. For those areas in which the Clery Act and Title IX both apply, the institution must comply with both laws. For additional information about the Clery Act and its regulations, please see http://www2.ed.gov/admins/lead/safety/campus.html.

M-2. Were a school's obligations under Title IX and the DCL altered in any way by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, including Section 304 of that Act, which amends the Clery Act?

Answer: No. The Violence Against Women Reauthorization Act has no effect on a school's obligations under Title IX or the DCL. The Violence Against Women Reauthorization Act amended the Violence Against Women Act and the Clery Act, which are separate statutes. Nothing in Section 304 or any other part of the Violence Against Women Reauthorization Act relieves a school of its obligation to comply with the requirements of Title IX, including those set forth in these Questions and Answers, the 2011 DCL, and the *2001 Guidance*. For additional information about the Department's negotiated rulemaking related to the Violence Against Women Reauthorization Act please see http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html.

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[37] 34 C.F.R. § 106.42.

N. Further Federal Guidance

N-1. Whom should I contact if I have additional questions about the DCL or OCR's other Title IX guidance?

Answer: Anyone who has questions regarding this guidance, or Title IX should contact the OCR regional office that serves his or her state. Contact information for OCR regional offices can be found on OCR's webpage at https://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. If you wish to file a complaint of discrimination with OCR, you may use the online complaint form available at http://www.ed.gov/ocr/complaintintro.html or send a letter to the OCR enforcement office responsible for the state in which the school is located. You may also email general questions to OCR at ocr@ed.gov.

N-2. Are there other resources available to assist a school in complying with Title IX and preventing and responding to sexual violence?

Answer: Yes. OCR's policy guidance on Title IX is available on OCR's webpage at http://www.ed.gov/ocr/publications.html#TitleIX. In addition to the April 4, 2011, Dear Colleague Letter, OCR has issued the following resources that further discuss a school's obligation to respond to allegations of sexual harassment and sexual violence:

- Dear Colleague Letter: Harassment and Bullying (October 26, 2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf
- *Sexual Harassment: It's Not Academic* (Revised September 2008), http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf
- *Revised Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties* (January 19, 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf

In addition to guidance from OCR, a school may also find resources from the Departments of Education and Justice helpful in preventing and responding to sexual violence:

- Department of Education's Letter to Chief State School Officers on Teen Dating Violence Awareness and Prevention (February 28, 2013)
  https://www2.ed.gov/policy/gen/guid/secletter/130228.html

- Department of Education's National Center on Safe Supportive Learning Environments
  http://safesupportivelearning.ed.gov/

- Department of Justice, Office on Violence Against Women
  http://www.ovw.usdoj.gov/

EXHIBIT 3

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*

The Office for Civil Rights (OCR) of the U.S. Department of Education (Department) has received a number of questions about the legality, under the Department's regulations implementing Title IX of the Education Amendments of 1972 (Title IX), of single-sex elementary and secondary classes and extracurricular activities offered by recipients of funding from the Department.[1]

Although Title IX prohibits discrimination on the basis of sex in federally funded education programs and activities, regulations issued by the Department authorize schools to offer single-sex classes or extracurricular activities under certain circumstances.[2] In order to ensure that schools subject to Title IX comply with the Department's requirements if they choose to offer single-sex classes and extracurricular activities, OCR provides the following responses to questions that schools should consider when assessing their compliance with Title IX. Although this document focuses on single-sex classes, some of the legal principles will also apply to single-sex schools. In order to gain a complete understanding of these legal requirements and recommendations, this document should be read in full.

Authorized by

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights

December 1, 2014

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* The Department has determined that this document 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* www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. OCR issues this and other policy guidance 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 it enforces. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates 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, SW, Washington, D.C. 20202.

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TABLE OF CONTENTS

Overview of Title IX's Application to Single-Sex Classes and Extracurricular Activities*

1. **What types of schools are covered by the Department's Title IX regulations on single-sex classes?**

   Answer: Coeducational elementary and secondary schools and school districts that receive Federal financial assistance from the Department must comply with the Department's Title IX regulations in 34 C.F.R. § 106.34(b) on single-sex classes if they intend to offer such classes. (OCR often refers to these schools and school districts as "recipients.") In practice, the regulations regarding single-sex classes apply to every public school (including traditional, charter, and magnet schools) because every public school is part of a local education agency that receives financial assistance from the Department. The regulations also apply to the few private coeducational schools that receive Federal financial assistance from the Department[3] and wish to offer single-sex classes.[†]

2. **Are there other legal considerations beyond the Title IX regulations discussed in this guidance document that apply to single-sex classes?**

   Answer: Yes. While this document only addresses the requirements of the Department's Title IX regulations, public school districts and schools that are currently offering or are interested in offering single-sex classes must comply with the Constitution of the United States and other applicable Federal laws. The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination on the basis of sex by public schools.[4] In addition, Title IV of the Civil Rights Act of 1964 (Title IV) prohibits public school boards from denying students the equal protection of the laws based on sex,[5] and the Equal Educational Opportunities Act (EEOA) prohibits some forms of student assignment to schools if the assignment results in sex segregation.[6]

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[*] The Department's regulations clarified in this document apply to all single-sex classes and extracurricular activities covered by 34 C.F.R. § 106.34(b). For simplicity, OCR generally uses the term "classes" or "classes and activities" to refer to "classes and extracurricular activities."

[†] A private school that is controlled by a religious organization is exempt from Title IX even when it receives Federal financial assistance to the extent that the law's requirements conflict with the organization's religious tenets. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office. (See the response to Question 33 to determine which regional office serves your location.)

All of these legal requirements are enforced in different ways. OCR has authority to investigate a potential Title IX violation in response to a complaint or proactively through a compliance review and may refer a matter to the Department of Justice (DOJ) if voluntary compliance cannot be achieved.[7] DOJ also has independent authority to enforce the Equal Protection Clause, Title IV, and the EEOA. Additionally, an individual may bring a private lawsuit against a school district or school for alleged violations of Title IX, the Equal Protection Clause, or the EEOA, and DOJ may seek to intervene in such a suit.

Therefore, when public school districts and schools offer single-sex classes, they must ensure that they comply with the Constitution and all applicable Federal laws, not just Title IX. State and local rules cannot limit or override the requirements of Federal laws, including Title IX and its regulations, but States and localities may have constitutions, laws, or regulations that impose additional limitations regarding the offering of single-sex classes.[8]

OCR recommends that a school district or school consult with legal counsel prior to offering single-sex classes.

3. Does this document address single-sex schools?

Answer: This document focuses on the Department's Title IX regulations pertaining to single-sex classes in public elementary and secondary schools. There are separate Title IX regulations in 34 C.F.R. § 106.34(c) that govern public, nonvocational single-sex schools. Generally, a school district may offer a single-sex nonvocational elementary or secondary school under Title IX only if it offers a substantially equal single-sex or coeducational school to students of the excluded sex.[9] However, single-sex nonvocational private schools are not governed by the Department's Title IX regulation requiring a substantially equal single-sex or coeducational school. By contrast, vocational schools that receive Federal financial assistance may never be limited to one sex.[10] There are also Department Title IX regulations that apply to admissions to single-sex nonvocational public and private colleges and universities.[11]

As noted in the response to Question 2, public single-sex schools are subject to the Equal Protection Clause of the Fourteenth Amendment and other Federal statutes as well as Title IX. The Department requires grant applicants that seek funds or other forms of Federal financial assistance for the establishment or operation of a public single-sex school to demonstrate the school's compliance with Title IX, the Equal Protection Clause of the Fourteenth Amendment, and all other applicable laws and regulations. Failure to demonstrate compliance with these requirements may lead to a rejection of the grant application or disqualification from receipt of continuation funds or other financial assistance.

4. May schools offer single-sex classes and extracurricular activities under the Department's Title IX regulations?

Answer: Yes. The Department's Title IX regulations permit offering single-sex classes under certain circumstances. The general rule under Title IX is that a recipient may not exclude, separate, deny benefits to, or otherwise treat differently any person on the basis of sex in its education programs or activities—including classes and extracurricular activities—unless expressly authorized to do so under Title IX or the Department's implementing regulations.[12] The Department's Title IX regulations identify the following categories for which a recipient may intentionally separate students by sex: [13]

- Contact sports in physical education classes;[14]
- Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality;[15] and
- Nonvocational classes and extracurricular activities within a coeducational, nonvocational elementary or secondary school if certain criteria are met.[16]

5. What kinds of classes and activities does this document address?

Answer: This document focuses on the last exception noted in the response to Question 4—nonvocational classes and extracurricular activities in a coeducational, nonvocational elementary or secondary school receiving Federal financial assistance. These include any single-sex curricular activity (such as a class or a field trip) and any single-sex extracurricular activity (such as a before-school or after-school activity, lunch, or recess). The requirements regarding this exception apply to single-sex classes and activities whether they are provided directly by a school district or school or through another entity.[17]

Vocational classes are not discussed further in this document because they may never be offered on a single-sex basis.[18] For purposes of this document, vocational classes are those classes that have as their primary purpose the preparation of students to pursue a technical, skilled, or semi-skilled occupation or trade; or to pursue study in a technical field, consistent with the definition of "institution of vocational education" in 34 C.F.R. § 106.2(o).[19]

OCR does not address interscholastic, club, or intramural athletics in this document because extracurricular athletics are governed by separate Title IX regulations.[20]

6. Is a class that is open to all students but in which only members of one sex enroll covered by the Title IX regulations described in this document?

Answer: No. The regulations described in this document apply to a class that excludes students of one sex from enrolling or otherwise participating in that class.

By contrast, a class is not subject to the regulations described in this document if it is open to members of both sexes, even if students of only one sex, or a substantially disproportionate number of students of one sex, enroll. If such disproportion exists in a coeducational class, however, it may be an indication of inappropriate steering or other discrimination in counseling or guidance. Title IX requires that, if such disproportion exists, the school ensure that the disproportionate enrollment is not the result of discrimination on the basis of sex, including in counseling or guidance of students or applicants for admission.[21]

7. What criteria must be met to offer single-sex classes under the Department's Title IX regulations?

Answer: The Department's Title IX regulations permit a nonvocational elementary or secondary school to offer a nonvocational single-sex class if it has a two-part justification for doing so that demonstrates that:

- each single-sex class is based on the recipient's "important objective" either to
    - improve its students' educational achievement through its overall established policies to provide diverse educational opportunities (the diversity objective), or
    - to meet the particular, identified educational needs of its students (the needs objective); and
- the single-sex nature of the class is "substantially related" to achieving that important objective.[22]

In addition to establishing a justification for offering a single-sex class, in order to comply with the Department's Title IX regulations, the recipient must:

- implement its objective in an evenhanded manner;
- ensure that student enrollment in the single-sex class is completely voluntary;
- provide a substantially equal coeducational class in the same subject; and

- conduct periodic evaluations to determine whether the class complies with Title IX, and if not, modify or discontinue the class to ensure compliance with Title IX.

Each of these elements is discussed below.

Justification for Offering a Single-Sex Class

8. Does a recipient need a justification for each single-sex class or activity it offers?

Answer: Yes. A specific, individual justification (demonstrating the recipient's objective and the substantial relationship between the objective and the single-sex nature of the class or activity) is necessary for each single-sex class or activity. A recipient may not offer single-sex classes in multiple grades or subjects without separately justifying each class. At the elementary school level, where a class typically covers many subjects, the recipient must separately justify the use of single-sex classes for each subject. This requirement applies to each single-sex curricular activity and each single-sex extracurricular activity offered by the school.

9. When must a recipient establish its justification for a single-sex class?

Answer: A recipient must establish its justification prior to offering the single-sex class.[23]

Although OCR does not pre-approve class offerings or offer legal advisory opinions, OCR will request documentation of the justification during a complaint investigation or compliance review. OCR will review the justification to ensure that it was the actual reason that motivated the offering of that single-sex class, rather than an after-the-fact explanation prepared in response to the complaint or investigation.[24] A recipient is not required to prepare a written justification, but in the absence of a written justification, OCR will assume that the recipient did not establish its justification prior to offering the single-sex class and that any justification was established after the initiation of the complaint investigation or compliance review, unless the recipient can prove otherwise. Therefore, it is strongly recommended that the recipient articulate its justification in writing prior to offering the single-sex class and preserve that documentation for at least as long as the recipient offers the single-sex class in question and for a reasonable time after the class ends. This documentation may also assist the recipient as it periodically evaluates its single-sex offerings, as discussed in more detail in response to Questions 23 through 28.

10. In what ways can a school identify an important objective for offering a single-sex class?

Answer: To offer a single-sex class, a school district or school must first identify an important objective that the particular single-sex class is intended to address. The Title IX

regulations on single-sex classes describe the following two important objectives, one of which must be the basis for offering a single-sex class.

- Diversity Objective: "To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective."[25]

  To meet this objective, a recipient must first identify the educational achievement it seeks to improve through the diverse educational opportunities it offers and the proposed single-sex class.[26] Recipients may not rely on the diversity objective if the only type of nontraditional class offered is a single-sex class.[27] Rather, the recipient must offer a range of diverse educational opportunities beyond single-sex and coeducational classes. Diverse offerings in a school might include, for example, a variety of electives, a variety of curricula (such as a science, technology, engineering, math (STEM) focus or International Baccalaureate classes), co-op or internship opportunities, or the option to take classes at other schools.

  - *Example A*[*]: The students at Options High School earn high grades and above-average scores on State exams, but their enrollment in Advanced Placement (AP) classes is low. Options High School would like to increase enrollment in AP classes in an effort to improve its students' college preparedness. As part of its college-preparedness effort, Options High School offers diverse educational opportunities, including AP classes, a variety of electives, a STEM-focused curriculum option, and a visual and performing arts-focused curriculum option. Many students who are not enrolled in AP classes have expressed interest in taking AP classes in a single-sex setting. The high school would like to add single-sex AP classes to its class offerings in order to increase enrollment in AP classes and thus improve college preparedness. Under these circumstances, attempting to improve its students' college preparedness through single-sex AP classes is an appropriate use of the diversity objective.

[*] This document provides guidance on a number of Title IX requirements applicable to single-sex classes, including justification/important objective; substantial relationship; evenhandedness; voluntariness; a substantially equal coeducational class; and periodic evaluations. Each example in this document is intended to illustrate the principles discussed in the response in which the example appears. Each example also presumes compliance with all the Title IX requirements discussed elsewhere in the document and should be read with that understanding.

- Needs Objective: "To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective."[28]

  Unlike the diversity objective, to meet the needs objective, the recipient must identify a particular educational need in its student body, evidenced by limited or deficient educational achievement, which is not being met by coeducational classes.[29]

  - *Example B*: Underperforming Elementary School wants to address the fact that its male third-grade students routinely score "not proficient" on the State reading exam. Attempting to increase male students' performance to proficient on a State exam through the offering of a single-sex third-grade reading class is an appropriate use of the needs objective.

  The needs objective also encompasses certain social needs that students may have. The Department recognizes that a school's educational mission may extend beyond strictly academic objectives, and that classes and activities may provide social benefits that can have a positive effect on students' educational outcomes.[30]

  - *Example C*: A high school's Title IX coordinator has received a number of reports of dating violence among the school's students. All of the reports came from female complainants and were about male aggressors. Many of the female complainants have expressed a fear of interacting with male students. To address the issue, the school offers an after-school, extracurricular program to provide all students with information about dating violence, the cycle of abuse, anger management, and effective methods for ending a violent relationship. The school offers the program to students on a single-sex basis, with boys meeting on one night and girls meeting a different night, as well as a coeducational option.

    Given the circumstances at this school, attempting to decrease the prevalence of dating violence among students by offering a single-sex extracurricular activity is an appropriate use of the needs objective.

Regardless of which objective it chooses, the recipient must meet the other Title IX requirements discussed in this document, including showing that the single-sex nature of the class is substantially related (*see* the responses to Questions 11 and 12) to meeting the identified objective.

Administrative convenience will never justify the offering of single-sex classes.[31]

- *Example D*: Shortcut Elementary School's fourth-grade class is half female and half male. The fourth-grade students have lunch and recess from 10:30 a.m. to 11:30 a.m., with half an hour allotted for lunch and half an hour for recess. Half of the students have lunch first, followed by recess. The other half of the students go to recess first, followed by lunch. To make it easier for teachers to know whether students are attending their assigned lunch/recess block, Shortcut Elementary has divided the students by sex, with all fourth-grade girls in the first group and all fourth-grade boys in the second group. This is not an appropriate justification for operating single-sex lunch and recess.

11. What kind of evidence may a recipient use to show that the single-sex nature of a class is substantially related to achieving an important objective?

Answer: The substantial relationship between the single-sex nature of the class and the school's important objective must be directly supported by evidence (as described below) gathered and evaluated prior to offering the single-sex class. Below are examples of types of evidence that a recipient may use to demonstrate the required substantial relationship. A recipient may use more than one type of evidence to determine whether a substantial relationship exists. Regardless of the evidence used, the justification may "not rely on overbroad generalizations about the different talents, capacities, or preferences of" either sex, so, likewise, the evidence cited in the justification may not rely on these overly broad generalizations.[32]

Comparator schools: The recipient may obtain data demonstrating a substantial relationship through the use of comparator schools. To do this, the recipient must: (1) identify comparator schools with a student population and school and class setting (*e.g.*, grades served, curricular offerings, geographic location, admissions requirements, educational benefits, etc.) that are similar to the population and setting of the recipient's school; and (2) obtain data showing that the comparator schools achieved the recipient's important objective in the relevant subject or with respect to the relevant educational or social need through the use of single-sex classes. When identifying comparator schools, the recipient should consider factors that may distinguish two schools, such as socioeconomic differences among the student population, differences in admissions policies and criteria, or resources available through private funding.

If the recipient can identify appropriate comparator schools that have offered single-sex classes in the same subjects and grades, the recipient should ensure that the comparator school's success in each class is substantially related to the single-sex nature of the class rather than other simultaneously used strategies (*e.g.*, tutoring, extended class sessions, weekend academic programming, etc.). If the comparator school used other strategies in

its single-sex class, the recipient will need to take further steps in order to show a substantial relationship between its important objective and the single-sex nature of the class because it would be very difficult to determine whether any success in the comparator school was due to the single-sex nature of the class or the other strategies that were used. One way for the recipient school to demonstrate that the single-sex nature of the class contributed to the students' success is to try the other strategies used by the comparator school in a coeducational setting at the recipient's school prior to offering a single-sex class and to compare the results relative to the important objective that the recipient seeks to achieve.

- *Example E*: A majority of seventh-grade boys at Evidentiary Middle School have scored "not proficient" on the State science exam for the past three years. The school has identified a public school in a neighboring district, Comparator Middle School, which has dramatically increased its seventh-grade boys' scores on the State science exam over the past five years. Comparator Middle School is roughly the same size as Evidentiary Middle School, and both schools serve students at the same grade level and of similar socioeconomic status. Evidentiary Middle School would like to implement Comparator Middle School's science program in hopes that Evidentiary's seventh-grade boys will achieve similar success.

  In achieving its gains, Comparator Middle School offered a single-sex science class for seventh-grade boys. The State science exam scores of male students in that class increased significantly. The all-boys science class used a newly developed curriculum and textbook, implemented a double-period science class, offered after-school tutoring to all students in the class, and implemented a mandatory robotics-themed Saturday school for the seventh-grade students in those classes.

  Evidentiary Middle School implemented these same sex-neutral strategies in its coeducational seventh-grade science classes: it adopted the curriculum and textbook used by Comparator, increased class time to make science a double-period class, offered after-school tutoring, and implemented the same mandatory robotics-themed Saturday school. It offered these classes on a coeducational basis for three years, but the science scores of its seventh-grade boys remained stagnant. At that point, consistent with the needs objective, Evidentiary decided to offer an all-boys seventh-grade science class in conjunction with the sex-neutral strategies listed above.

Given these facts, OCR would find that Evidentiary Middle School had shown a substantial relationship between its objective of increasing its seventh-grade male students' proficiency on the State science exam and the single-sex nature of the boys science class it decided to offer.

- *Example F*: Most girls at Scientific High School do not enroll in AP Chemistry, though their grades and scores on State science exams suggest that they would be good candidates for the class. Boys at Scientific High School do enroll in AP Chemistry and all students otherwise take advantage of the school's widely diverse class offerings. Consistent with the diversity objective, Scientific High School would like to improve the educational achievement of its students by increasing female enrollment in AP Chemistry by further expanding its class offerings to include an all-girls AP Chemistry class.

  Scientific High School has identified two schools in nearby districts that have implemented an all-girls AP Chemistry class. These schools are approximately the same size as Scientific High School, and all three schools serve students at the same grade level and of similar socioeconomic status. All three are neighborhood schools with no specific admissions requirements, and all students receive transportation to and from school through the applicable district.

  Over the last three years, since the implementation of those classes, the enrollment rate of female students in AP Chemistry has steadily increased at both of the two comparator schools. Female enrollment in those schools' coeducational AP Chemistry classes has stayed roughly the same. The schools did not change any other aspect of their AP Chemistry programs; the single-sex classes are identical to their coeducational counterparts.

  Given these facts, OCR would find that, through its overall policy to provide diverse educational opportunities, Scientific High School had shown a substantial relationship between the single-sex nature of the girls science class and its important objective of improving the educational achievement of its students by increasing female enrollment in AP Chemistry.

Research Evidence: Research evidence demonstrating the effectiveness of single-sex classes in circumstances sufficiently similar to the school's circumstances may also satisfy the substantial relationship requirement. A 2005 Department-commissioned survey found the results of available research on the general use of single-sex education were equivocal.[33] Nonetheless, to satisfy the substantial relationship requirement, OCR will accept a research study that: 1) employs a rigorous research design for causal inference; 2) demonstrates the

effectiveness of the single-sex nature of the class with respect to the specific important objective at issue (*e.g.*, improving achievement in Algebra or reducing infractions requiring discipline); and 3) includes a sample that overlaps with the proposed populations or settings (*e.g.*, ninth-grade girls in low-income communities) that the recipient is targeting. The standards set forth in the Department's *What Works Clearinghouse Procedures and Standards Handbook*[34] provide an appropriate guide for assessing the strength of a study of the effectiveness of the intervention (*e.g.*, limiting a class to a single sex) in addressing the school's important objective.

- *Example G:* Town Elementary School would like to offer an all-boys fourth-grade class to reduce the discipline problems of the boys in that grade. Before it offers this class, Town Elementary School finds a research study that meets the What Works Clearinghouse Procedures and Standards and concludes that boys ages five through ten in all-boys classrooms committed fewer infractions leading to discipline than boys in coeducational "control" classes with identical rules and procedures for discipline, curricula, educational strategies, teacher-student ratio, and student population (e.g., eligibility for free and reduced-price lunch).[35] The population and settings of the single-sex and coeducational classes examined in the study are almost identical to those of Town Elementary School's fourth-grade classes. Absent facts distinguishing the research classes from Town Elementary School's classes, OCR would find this study is sufficient to show a substantial relationship between the school's objective of reducing discipline and the single-sex nature of the class.

12. May a recipient demonstrate a substantial relationship using a claim that a certain strategy, other than single-sex, is more effective for most members of one sex?

Answer: Claims that a certain strategy (such as a teaching method or a specific learning environment) is more effective for most members of one sex will not be sufficient, standing alone, to show a substantial relationship between the single-sex nature of a class and the important objective. This is because such a strategy may be equally effective regardless of whether it is implemented in a single-sex or a coeducational setting. If the recipient wants to use that strategy in a single-sex setting, the recipient still needs to show that students will benefit from the fact that the class is single-sex. Therefore, even assuming a recipient had evidence showing that a certain strategy was particularly effective for one sex, the recipient would need further evidence showing that the exclusion of the other sex was necessary to make the strategy effective or, at the least, substantially more effective. (This showing could be made through the use of comparator schools or research evidence, described in the response to Question 11.)

- *Example H:* A majority of third-grade girls at Cold Elementary School are underperforming on State science tests. Cold Elementary School would like to implement an all-girls third-grade class that keeps the classroom temperature ten degrees higher than the school's other classrooms, because the school's principal has read an article suggesting that girls learn better in warmer temperatures and boys learn better in colder temperatures. The article did not cite to any studies comparing students in coeducational warm or cold classes with students in single-sex warm or cold classes, but rather simply concluded that all girls will learn better in a warm environment and that all boys will learn better in a cold environment. Even if this research were reliable, it would not prove that boys would learn better in a cold environment with no girls, or that girls would learn better in a warm environment with no boys.

  Thus, the school cannot show a substantial relationship between the single-sex nature of the class and the anticipated increase in girls' State science test scores. If the school believes temperature affects educational outcomes, it can offer a coeducational "warm" and a coeducational "cool" classroom and use criteria, other than the student's sex, to decide which students would attend each of those coeducational classrooms, such as allowing students and parents to choose the learning environment they believe best suits each student.

Evenhanded Offerings

13. What is the evenhandedness requirement?

Answer: A recipient must treat male and female students evenhandedly in implementing its important objective.[36] The evenhandedness requirement means that a recipient offering single-sex classes must provide equal educational opportunities to students regardless of their sex, with the end result that both sexes receive substantially equal classes.[37]

14. How does the evenhandedness analysis apply if a recipient is asserting the diversity objective?

Answer: If the recipient asserts the diversity objective, and it has identified single-sex classes for which it can demonstrate a substantial relationship to its important objective, it must still ensure that the choice of diverse educational opportunities, including single-sex or coeducational classes, is offered evenhandedly to male and female students. To do this, it must conduct a thorough and impartial assessment of what single-sex classes to offer to each sex, and then offer those classes evenhandedly to its students.[38] Thus, under the diversity objective, if a recipient is able to justify single-sex classes for both sexes, offering single-sex classes for only one sex will likely violate the evenhandedness requirement,

unless the recipient can show that it evenhandedly gauged the interest of both sexes and the excluded sex was not interested in having the option to enroll in single-sex classes. Likewise, if one sex is offered single-sex classes in the school's core subjects, while the other sex is only offered single-sex classes in the school's non-core subjects, OCR would not find that the recipient is offering classes in an evenhanded manner.

- *Example I*: Advanced High School would like to use single-sex classes to increase enrollment of both male and female students in its AP Physics, English, or American History classes. Advanced High School has already determined that it can meet the requisite regulatory requirements of the Department's Title IX regulations for all of these classes, but because of staffing concerns, the school can only offer single-sex classes in one subject. Advanced High School conducted a survey to determine which subject male students would prefer; the male students chose AP Physics. Because it could only devote one teacher to single-sex classes, Advanced High School did not survey its female students, but decided instead to offer the female students a single-sex AP Physics class, as well.

  This would violate the evenhandedness requirement. Even though all students are being offered identical single-sex classes, taught by the same teacher, the assessment of which class to offer favored the male students.

This does not mean, however, that male and female students must always be offered single-sex classes in the same subjects. To ensure evenhandedness, once it has completed its justification for each single-sex class, a recipient may wish to collect pre-enrollment information from parents[*] and students or survey parents and students about interest in enrolling in single-sex classes in each subject. If students of one sex lack interest in a single-sex class in a certain subject, the recipient would not be required to provide them a single-sex class in that subject.

- *Example J:* Nearby Middle School is considering adding single-sex classes to the diverse array of other classes it offers. Having documented its justification for the addition of single-sex classes in Pre-Algebra, American History, English, and Geometry, the school surveys all parents and students to determine whether students would be interested in taking any of these classes on a single-sex basis. Forty eighth-grade boys express interest in all-male Pre-Algebra and American

[*] When this document refers to "parents," the term encompasses both parents and legal guardians.

History classes, while only two girls request these classes on a single-sex basis. Thirty-five eighth-grade girls request all-female English and Geometry classes, while no boys request these classes on a single-sex basis. In this scenario, Nearby Middle School may offer the all-male Pre-Algebra and American History classes and all-female English and Geometry classes to its eighth-grade students without violating the evenhandedness requirement.

15. How does the evenhandedness analysis apply if a recipient is asserting the needs objective?

Answer: If the recipient asserts the needs objective, the evenhandedness analysis is different from the analysis used under the diversity objective. Under the needs objective, the recipient must first conduct an assessment to identify the educational needs of its students, and then determine how to meet those needs on an evenhanded basis.[39] If a recipient has evidence demonstrating that a single-sex class in a particular subject would meet the particular, identified educational needs of students of both sexes and that the single-sex nature of the classes is substantially related to meeting the needs for both sexes, then if the recipient offers a single-sex class in that subject, it must do so for both sexes. On the other hand, if the evidence shows that the single-sex class in that subject would meet the particular, identified needs of only one sex or that the single-sex nature of the class would be substantially related to meeting the needs of only one sex, a recipient may not offer the single-sex class to students of the other sex. That recipient would instead have to determine, based on its assessment of the educational needs of both sexes, whether a single-sex class in another subject should be offered to the excluded sex, in order to meet the evenhandedness requirement.[40]

- *Example K:* Faraway High School intends to offer an all-boys AP English class because the percentage of its male students passing the AP English exam is far below the district average. The school's female students pass the AP English exam at a rate higher than the district average. The reverse is true with respect to AP Physics: the percentage of girls passing the AP Physics exam is far below the district average, while the boys' scores suggest no deficiency.

  Under these circumstances, Faraway High School may provide an all-boys AP English class without offering an all-girls AP English class because there is no particular identified need for such an all-girls class. To meet the evenhandedness requirement, however, in light of data showing its female students' deficiency on the AP Physics exam, the school must first research whether an all-girls AP Physics class would be substantially related to increasing

female students' proficiency on that exam. If so, then the school must offer the female-only AP Physics class as well.

Voluntariness

16. Who decides whether a student enrolls in a single-sex class?

Answer: The Department's Title IX regulations require that student "enrollment in a single-sex class or extracurricular activity" be "completely voluntary."[41] To meet this requirement, OCR strongly encourages recipients to obtain the affirmative consent from the parents to enroll a student in a single-sex class.[42] Nevertheless, OCR will defer to State law to determine whether a student or the student's parents will have ultimate decision-making authority regarding whether a student will be enrolled in a single-sex class. If State law is silent, a recipient may use its educational judgment, based on the age and circumstances of its students and its normal class assignment procedures. The affirmative consent of the designated decision-maker, whether the parent or the student, must be received before assigning a student to a single-sex class.

17. May a recipient assign students to a single-sex class as long as it permits students to opt out of the class?

Answer: No. Regardless of whether the authority rests with the student or the parent, the decision-maker must affirmatively opt into a single-sex class; the student may not simply be assigned to a single-sex class by the school and then be permitted to opt out.[43] If no affirmative consent is received, the student must be enrolled in a coeducational class.[44] OCR recommends that such affirmative consent come in the form of a written, signed document.[45]

18. May a recipient make it easier to enroll in a single-sex class than it is to enroll in a coeducational class?

Answer: No. A school cannot use a less stringent class enrollment procedure for its single-sex classes than it does for its coeducational classes. In order for the choice to be completely voluntary, a school may not influence the choice to enroll in one class over the other. In assessing whether a decision to enroll in a single-sex class was voluntary, OCR will consider, among other things, whether the choice was influenced by extraneous factors. For example, any authorization (*e.g.*, a permission slip) or procedure (*e.g.*, a pre-enrollment meeting with a guidance counselor) that is required for enrolling in a coeducational class, but not for enrolling in the single-sex counterpart would render involuntary the choice to enroll in the single-sex class.

19. How does the breadth of class offerings affect voluntariness?

Answer: For the single-sex class to be voluntary, a recipient must offer a substantially equal coeducational class in the same subject.[46] (Factors for determining substantial equality are discussed in the response to Question 22.) If a student is forced to choose between taking a single-sex class in a particular subject and not taking a class in that subject, the choice to take the single-sex class is not voluntary. Likewise, if the only honors class in a given subject is a single-sex class, a student's selection of that single-sex class will not be considered voluntary. And if a student must take a single-sex class in order to avoid a coeducational option that is set at a remedial level, the single-sex class will also not be considered voluntary. (Classes with such differences may also violate the requirement of offering a substantially equal coeducational class, discussed in the responses to Questions 21 and 22.)

20. What additional steps should a recipient take to ensure that participation in a single-sex class is completely voluntary?

Answer: Because an uninformed decision may, in many circumstances, not be completely voluntary, OCR recommends that recipients provide pre-enrollment information about each class to students and parents in sufficient time and in a manner that is accessible to those with disabilities and with limited English proficiency so that the decision-maker can make an informed choice.[47]

This pre-enrollment information should explain that the decision-maker has the option of choosing between the coeducational and single-sex class;[48] describe the similarities and differences between the coeducational and single-sex classes; and provide a summary of the recipient's justification for offering the single-sex option. OCR recommends that pre-enrollment disclosures specify that parents and students have the option of reviewing the recipient's full justification (and any periodic evaluations, described in the responses to Questions 23 through 28) upon request. In providing this pre-enrollment information, recipients must ensure that the information is conveyed in a way that does not pressure parents to enroll students in a single-sex class.

- *Example L*: Steering Elementary School is planning to implement single-sex fifth-grade reading and math classes for both boys and girls. To comply with the Title IX regulatory requirements for establishing new single-sex classes, over the summer, the school sends an information packet to every parent of an incoming fifth-grade student that includes: the school's justification for its single-sex classes; the data upon which the school relied in developing its justification; a statement that substantially equal coeducational reading and math classes are available; and a description of the differences between the single-sex and

coeducational classes. In each packet are two consent forms—one for the reading class and one for the math class—allowing parents to opt in to each single-sex class. The form states that if a parent does not return the form for a given class, his or her child will be placed in a substantially equal coeducational class.

A week before school starts, the principal of Steering Elementary School calls all of the parents who have not returned the consent forms to remind them of the option to enroll their children in single-sex classes. He encourages them to take advantage of the single-sex classes, and explains that if there is not enough interest to sustain them, the school will not be able to provide the classes to anyone. He explains that many people are interested in the single-sex classes, and warns parents against being the individuals who "hold up" implementation of the "unique and beneficial opportunity."

Although the elementary school's practice of sending an impartial information packet home to parents, along with an appropriate opt-in form, is a good one, OCR would consider the principal's later behavior to be inappropriate pressure to enroll in a single-sex class. His warning inappropriately suggested that a parent should consider factors outside of his or her child's educational well-being (including ensuring that other students have access to single-sex classes). Any consent forms received after the principal's phone calls would not be valid.

Substantially Equal Coeducational Option

21. Must a recipient offer a substantially equal coeducational option for every single-sex class offered?

Answer: Yes. A recipient that offers a single-sex class must provide all other students, including students of the excluded sex, with a substantially equal coeducational class in the same subject.[49] At least one substantially equal coeducational section must be offered in each subject for which there is a single-sex class, and more than one section may be needed because every student who requests a coeducational option must be enrolled in one. Once the preferences of students seeking a coeducational class are met, a school may offer more than one single-sex section in a given subject if enrollment in that subject warrants it.

- *Example M*: If a school offers each of its 50 eighth-grade boys the choice between single-sex or coeducational Algebra classes, and 40 choose a single-sex class and 10 choose a coeducational class, the school may offer two single-sex sections and only one coeducational section of Algebra. This is permissible, so long as every student who sought the coeducational option was enrolled in a

substantially equal coeducational class. (Additionally, the school may also be required to provide a substantially equal single-sex class for its eighth-grade girls, consistent with the evenhandedness requirement discussed in the responses to Questions 13 through 15.)[50]

A school is not obligated to provide a single-sex class to any individual student, even if that student opted into the single-sex class. The school must consider the number of students interested in the option and the school's need to provide a substantially equal coeducational class for all other students, including students of the excluded sex. Thus, in the example above, if all of the eighth-grade boys opted into the single-sex Algebra class, resulting in the substantially equal coeducational class enrolling only girls, the school could not honor all of the requests for the single-sex boys class, because doing so would deny the girls a substantially equal coeducational class.

22. What factors will OCR consider in determining whether a coeducational class is substantially equal to the single-sex class?

Answer: OCR will consider all relevant factors, both individually and in the aggregate, in determining whether a coeducational class is substantially equal to the single-sex class.[51] Although the single-sex and coeducational classes do not need to be identical with respect to each factor, they need to be substantially equal. This means that if one class is significantly superior with respect to one factor, or slightly superior with respect to many factors, the classes are likely not substantially equal.[52] The Department's Title IX regulations include a non-exhaustive list of factors, each of which is addressed individually below, that OCR will consider while conducting a complaint investigation or compliance review. OCR will consider all relevant factors in determining whether a coeducational class and a single-sex class are substantially equal.[53] Whether information is relevant will depend on the specific facts and circumstances of each case, because each single-sex class seeks to achieve a different objective and may be offered in a different way.

- The admissions criteria and policies;
    - *Example N*: College-Bound High School offers single-sex and coeducational classes in AP Spanish. Both the coeducational and single-sex AP Spanish classes were open only to students with a grade point average of 3.5 or higher and who participate in a summer language program. On these facts, OCR would consider the admissions criteria and policies to be substantially equal.

- The educational benefits provided, including the quality, range, and content of curriculum and other services, and the quality and availability of books, instructional materials, and technology;

    - *Example O:* Tech-Savvy Middle School offers single-sex and coeducational biology classes. The coeducational classes follow a curriculum that uses textbooks with corresponding videos, which the students watch on a DVD player in the classroom, to teach lessons. The single-sex classes incorporate individually issued laptops, which allow for interactive, technology-based lessons, into the curriculum. On these facts, OCR would not consider the educational benefits provided to be substantially equal.

- The qualifications of faculty and staff;

    - *Example P:* Tenured Middle School ensures that an equal proportion of first- and second-year teachers as compared to more experienced teachers are assigned to its single-sex and coeducational Pre-Algebra classes. All of the Pre-Algebra teachers have a background in mathematics and receive training on teaching the school's Pre-Algebra curriculum. Prior to teaching the class, each teacher must demonstrate content knowledge and competencies in the relevant teaching methods. On these facts, OCR would consider the qualifications of the faculty of the classes to be substantially equal.

- Geographic accessibility;[54]

    - *Example Q:* Centrally Located High School offers one all-male and one all-female chemistry class onsite. For students wishing to take this class on a coeducational basis, Centrally Located High School has entered into an agreement with Distant High School, 15 miles away, which will accept Centrally Located High School's students. Because of traffic in the district, it would take students approximately 30 minutes each way to travel to the class at Distant High School, resulting in an hour of lost instruction time. On these facts, OCR would not consider the geographic accessibility of the classes to be substantially equal.

- The quality, accessibility, and availability of facilities and resources provided to the class;

    - *Example R:* Updated High School offers both coeducational and single-sex Chemistry classes. The coeducational Chemistry class is held in a chemistry lab that was original to the building, constructed in 1970. Updated High School added a new wing in 2010, which includes a new chemistry lab that offers state-of-the-art equipment and incorporates interactive technology. The single-sex

Chemistry classes are held in the new lab. On these facts, OCR would not consider the facilities and resources of the classes to be substantially equal.

- Intangible features, such as the reputation of faculty.
    - *Example S:* Connected High School offers two single-sex journalism classes: one for boys and one for girls. A journalist for a local newspaper teaches both of these classes. The journalist is well connected in the local media community, and in the past, she has assisted students with obtaining internships at local media outlets. The school also offers a coeducational journalism class that is taught by an individual with a degree in English, but who has never worked in the field or been involved in a school journalism program. On these facts, OCR would not consider the reputation of the faculty (an intangible feature) of the two classes to be substantially equal.

Periodic Evaluations

23. How often must a recipient conduct an evaluation of its single-sex programs?

Answer: The recipient must evaluate each of its single-sex classes, and the original justification behind each single-sex class, at least every two years.[55] A recipient may decide to conduct evaluations more frequently (because its own findings have identified concerns or for other reasons). If OCR investigates a recipient and identifies compliance problems, OCR may require the recipient to conduct more frequent evaluations.[56]

24. What is the purpose of these evaluations?

Answer: The recipient must use these periodic evaluations to ensure that each single-sex class it offers is based upon genuine justifications, does not rely on overly broad generalizations about either sex, and continues to be substantially related to the achievement of the important objective (*see* the responses to Questions 7 through 12).[57] The periodic evaluations should also confirm that substantially equal single-sex classes are offered if necessary to comply with the evenhandedness requirement (*see* the responses to Questions 13 through 15), and that a substantially equal coeducational alternative to each single-sex class is available (*see* the responses to Questions 21 and 22). The periodic evaluations must assess evidence and data related to the recipient's single-sex classes, rather than relying on the comparator school or research evidence used at the justification stage (*see* the response to Question 27).

25. Must the periodic evaluation address the way a single-sex class is taught?

Answer: Yes. Because of the risk that single-sex classes may lead to the adoption of classroom methods or strategies that revert to sex stereotypes, the Department's Title IX regulations require that the recipient ensure that each single-sex class is operated in a manner that does not "rely on overly broad generalizations about the different talents, capacities, or preferences of either sex."[58] Thus, classroom methods or strategies should be chosen on the basis of their effectiveness in teaching the individual students in the class, without regard to the sex of those students. Of course, it may be difficult to ascertain why certain methods or strategies were chosen, so the following information is intended to help schools understand how OCR will conduct its analysis during a complaint investigation or compliance review.

If identical classroom methods and strategies—including choices about classroom activities and environment—are used in single-sex classes for boys and in single-sex classes for girls (or in a single-sex class and a coeducational class), the evaluation of the way the classes are taught is complete. This is because the use of the same methods and strategies for classes for boys and classes for girls offers no reason to believe the decision to use those methods and strategies was based on overly broad generalizations about either sex.

But if different classroom methods or strategies are used in single-sex classes for boys than are used in single-sex classes for girls (or in a single-sex class in comparison with its coeducational counterpart), then the recipient must evaluate whether the decision to adopt these different methods or strategies was made in reliance on overly broad generalizations. In some cases, the different methods or strategies used in single-sex classes may simply be the result of the professional choices of an individual teacher without regard to the sex of his or her students. If the recipient can show that the teacher would have selected identical methods and strategies even if he or she were teaching a single-sex class of the opposite sex or a coeducational class, OCR will likely conclude that the school did not use overly broad generalizations about either sex. In determining whether the recipient has made this showing, OCR will consider such factors as the methods and strategies historically used by the teacher, and the timing of any changes in the teacher's methods and strategies.

If, however, the methods or strategies were selected because of the sex of the students in the class, the risk of sex stereotypes is at its greatest because methods and strategies that are based on sex ignore the differences among students of the same sex. When a teaching method or strategy is, in fact, selected on the basis of the sex of the students, its use must be directly supported by evidence demonstrating that the particular method or strategy is more effective for one sex than the other or is more effective when used in a single-sex setting. (The response to Question 12 addresses the appropriate way to assess whether

strategies that are purported to be more effective for one sex may be used in a single-sex setting.) It would not be enough to show that there is evidence about differences between boys and girls that does not directly involve that particular teaching method or strategy. For example, while there is, of course, evidence that biological differences between males and females exist,[59] evidence of general biological differences is not sufficient to allow teachers to select different teaching methods or strategies for boys and girls.[60]

- *Example T:* Quiet Elementary School created single-sex fourth-grade classes for both boys and girls. During the school year, the teachers of the single-sex classes became aware of studies that show that girls are born with a significantly more sensitive sense of hearing than boys, and that the differences grow larger as the children grow older. Relying on those studies, the school decided that the boys class would incorporate speaking in a loud tone, while the girls class would not.

  A periodic evaluation of the boys class would indicate reliance on overly broad generalizations about the sexes with respect to teaching methods. Use of the specific teaching method (loud talking) would not comply with Title IX because the teachers did not rely on evidence that directly linked that particular teaching method or strategy to improved educational achievement for boys. Instead, they relied on a purported biological difference (that there are, on average, biological differences in the hearing sensitivity of the sexes) to conclude that the particular teaching method or strategy was appropriate. This general difference between the sexes, even if true, does not by itself provide evidence that loud talking will be more effective in teaching for one sex than the other or more effective in a single-sex setting. The leap from the biological differences to the use of a particular teaching method or strategy for students of one sex, without the support of evidence regarding the educational effectiveness of the method or strategy for one sex over the other, resulted in an overly broad generalization (that loud talking would improve boys' ability to learn). Because of the overly broad generalization, the school would have to discontinue its use of this teaching method for the all-boys class.

  The teaching method itself is permissible. A recipient is still free to incorporate loud talking in a coeducational class or in single-sex classes for both boys and girls. But a recipient may not limit that method of instruction only to the single-sex class for boys on the basis of the overly broad generalization described above.

26. How should the evaluations be made available to the public?

Answer: OCR recommends wide distribution of the evaluations, through the recipient's website and otherwise. Like the initial justification, these evaluations could be useful to parents who are deciding whether to enroll their children in single-sex classes and would help ensure the choice is completely voluntary.

27. How will OCR determine whether a periodic evaluation demonstrates that a single-sex class is still substantially related to the recipient's important objective?

Answer: OCR will consider all relevant sources of evidence in determining whether the single-sex nature of the class remains substantially related to the recipient's important objective. Whether evidence is relevant will depend on the specific facts and circumstances of each case, because each single-sex class seeks to achieve a different objective and may be offered in a different way. The evidence presented in a recipient's periodic evaluation must be related to the recipient's single-sex classes, rather than the evidence relied upon in the justification stage. Possible sources of evidence include, but are not limited to: students' grades; students' scores on standardized statewide or districtwide exams; discipline rates; attendance data; enrollment data; and educators' observation and evaluation of the effectiveness of each class.

Because the biennial evaluations must show that the single-sex nature of the class results in achievement of, or progress toward, the recipient's important objective, a comparison between the students in the single-sex class and the substantially equal coeducational class is appropriate.[61] To best assess the effectiveness of each class, OCR recommends that schools monitor the progress of the individual students in each class from year to year. This will help ensure that any comparison between a single-sex class and a substantially equal coeducational class controls for variations among students. Positive or negative changes related to the recipient's objective for all students in the single-sex class should be averaged together; the same should be done for students in the coeducational class. The school can then compare these averages to see how students in the single-sex class fared in comparison to their peers in the substantially equal coeducational class. The same procedure should be used to assess the single-sex class the following year. If, based on these averages, a coeducational class outperforms a substantially equal single-sex class, it is likely that OCR would find that the single-sex class is not substantially related to the recipient's objective. Of course, the evidence will vary based on the school's objective. For example, if the school implemented a single-sex class in an attempt to lower discipline rates, discipline statistics should be analyzed.

- *Example U*: A middle school offers three substantially equal sections of tenth-grade American Literature: an all-girls class, an all-boys class, and a coeducational class. The school's objective is to increase proficiency on the State English exam. At the end of the first school year, to gather information for the periodic evaluation required at the end of the second school year, each student's score on the state English exam is compared to his or her score on the previous year's exam. The school averages the change in scores of students in the all-girls class, the all-boys class, and the coeducational class, respectively. The proficiency rate of students in the coeducational class increased slightly. By contrast, the proficiency rates of the students in the all-boys and all-girls classes both increased significantly. The difference in average increases between the single-sex classes and the coeducational class is statistically significant. The averages are similar the following year. Under these circumstances, the evidence in this periodic evaluation would suffice to show a continuing substantial relationship between the single-sex nature of the classes and the objective to increase student's proficiency on the State English exam. Note, however, that the school must continue to conduct biennial evaluations to show that a substantial relationship between the single-sex nature of the classes and the school's objective persists.

Every recipient's ability to continue each single-sex class will depend on the recipient's circumstances, the particular objective articulated in the recipient's justification, and whether the comparative class data over time demonstrate a substantial relationship between that objective and the single-sex nature of the class. A recipient's evaluation should analyze and explain all factors that influenced the achievement of, or failure to achieve, the recipient's objective.

28. What is the role of the recipient's Title IX coordinator in conducting these evaluations?

Answer: Every recipient must designate an employee to coordinate its efforts to comply with Title IX.[62] The Title IX coordinator is responsible for overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX coordinator must have knowledge of the requirements of Title IX, of the school's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. The Title IX coordinator must also track and review complaints to identify and correct any systemic compliance issues. This would include any complaints that single-sex classes are being offered in violation of Title IX. Because of these responsibilities, OCR recommends that the Title IX coordinator be involved in assessing the compliance of the

recipient's single-sex classes, both when determining whether and how single-sex classes can be offered and during the recipient's periodic review of single-sex offerings.

Employment

29. May a recipient assign teachers to single-sex classes based on the sex of the teacher?

Answer: No. A recipient must not assign teachers to single-sex classes on the basis that boys should be taught by men and girls should be taught by women or vice versa.[63] Title IX prohibits recipients from discriminating on the basis of sex in: employment; recruitment; compensation and benefits; job assignment, classification, and structure; and consideration and selection of individuals for jobs in any education program or activity operated by a recipient.[64] Although Title IX allows employment decisions based on sex "provided it is shown that sex is a bona-fide occupational qualification for that action,"[65] a school may not, for example, assign a male teacher, on the basis of his sex, to teach an all-boys class because the school thinks male students will prefer, respond better to, or learn more effectively from, a man.[66]

Other Federal Protections for Students in Single-Sex Classes

30. May a recipient exclude students with disabilities or English language learners from a single-sex class so long as it permits them to participate in the substantially equal coeducational class?

Answer: No. Students with disabilities or English language learners may not be excluded from single-sex classes because of their need for special education or related aids and services or English language services.[67] Schools must ensure that students with disabilities participating in single-sex classes receive needed special education and related services in accordance with their individualized education programs, developed under Part B of the Individuals with Disabilities Education Act[68] (including, if applicable, the Part B educational placement provisions), or their plans developed under Section 504 of the Rehabilitation Act of 1973. Likewise, the school must provide the same English language services in single-sex classes as in coeducational classes.

31. How do the Title IX requirements on single-sex classes apply to transgender students?

Answer: All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.

Additional Topics

32. Which set of regulations governs a school within a school—the regulations governing single-sex schools or the regulations governing single-sex classes?

Answer: If a recipient operates a single-sex school within another school or two single-sex academies, OCR will consider these to be single-sex classes within a coeducational school unless the two entities are administratively separate from each other.[69] This is a fact-specific inquiry and will depend on the specific organization of the school within a school.

- *Example V:* A district operates dual single-sex academies that are housed in the same facility and share the same principal and certain support staff. The district claims that it need not comply with the Department's Title IX regulations on single-sex classes because each academy is a single-sex school. Because the two academies are not administratively separate, OCR would instead view the academies as one coeducational school offering single-sex classes in every subject.

33. How can I contact OCR to get additional information or to file a complaint?

Answer: A recipient, parent, student, or other member of the public who has a question or concern about a particular single-sex offering may contact the appropriate OCR regional enforcement office. To determine which OCR regional enforcement office handles inquiries and complaints in your State, please call 1-800-421-3481 or 1-800-877-8339 (TDD) or check OCR's website at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm.

OTHER FEDERAL LEGAL RESOURCES RELATED TO SINGLE-SEX EDUCATION:

Department of Education Title IX regulations: 34 C.F.R. part 106, available at http://www2.ed.gov/policy/rights/reg/ocr/34cfr106.pdf

OCR Dear Colleague Letter on Single-Sex Title IX Regulations, dated January 31, 2007, available at http://www.ed.gov/ocr/letters/single-sex-20070131.pdf

Final Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530 (October 25, 2006), available at http://www2.ed.gov/legislation/FedRegister/finrule/2006-4/102506a.pdf

Brief for the United States as *Amicus Curiae*, *Doe v. Vermilion Parish Sch. Bd.*, No. 10-30378 (5th Cir.) (filed June 4, 2010), available at http://www.justice.gov/crt/about/app/briefs/vermillion_brief.pdf

[1] 20 U.S.C. §§ 1681-1688.

[2] *Id.*; *see also* 34 C.F.R. § 106.34.

[3] Private elementary and secondary schools are subject to the Department's regulatory requirements for single-sex classes if they receive Federal financial assistance directly from the Department or indirectly through an intermediary. Private elementary and secondary schools are not considered recipients of Federal financial assistance if the only form of assistance that they receive is through their students' participation in programs conducted by public school districts that are funded under Federal programs such as Title I of the Elementary and Secondary Education Act of 1965 or the Individuals with Disabilities Education Act. These private schools are not subject to these regulations, but public school districts must ensure that their programs, including services to private school students, are consistent with Title IX. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Final Regulations, 71 Fed. Reg. 62,530, 62,530 n.7 (Oct. 25, 2006).

[4] U.S. CONST. amend. XIV, § 1; *see also United States v. Virginia*, 518 U.S. 515, 531, 533 (1996) (holding, in a challenge to an all-male public postsecondary institution, that a party "seek[ing] to defend gender-based government action" under the Equal Protection Clause "must demonstrate an exceedingly persuasive justification for that action," which means the government "must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives" (citations, brackets, and internal quotation marks omitted)).

[5] 42 U.S.C. §§ 2000c to c-9.

[6] 20 U.S.C. §§ 1703(c), 1705, 1720(c); *see also* 71 Fed. Reg. at 62,533 n.18 (referencing same).

[7] 34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. §§ 100.6-100.11 and 34 C.F.R. part 101).

[8] 34 C.F.R. § 106.6(b); *see also* 71 Fed. Reg. at 62,533 n.18 ("Public school and private school recipients also may be subject to State or local laws prohibiting single-sex classes or schools.").

[9] 34 C.F.R. § 106.34(c).

[10] 34 C.F.R. § 106.35; 34 C.F.R. § 106.2(o) (defining "institution of vocational education").

[11] 34 C.F.R. § 106.15(c)–(e).

[12] 20 U.S.C. §§ 1681-1688; 34 C.F.R. § 106.34(a).

[13] In addition to these exceptions, the Department's Title IX regulations do not prohibit schools from employing the following facially neutral tests or criteria even if they have a disproportionate effect on persons on the basis of sex: the grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex; and the use of requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex. 34 C.F.R. § 106.34(a)(2) and (4).

[14] 34 C.F.R. § 106.34(a)(1).

[15] 34 C.F.R. § 106.34(a)(3).

[16] 34 C.F.R. § 106.34(b).

[17] 34 C.F.R. § 106.34(b)(5).

[18] 34 C.F.R. § 106.35; 34 C.F.R. Appendix A to Part 106; *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Notice of Proposed Rulemaking, 69 Fed. Reg. 11,276, 11,278 (Mar. 9, 2004) ("Even in these elementary and secondary schools that are not vocational schools, the proposed amendments do not change the applicability of the current general regulatory prohibition against single-sex vocational education classes.").

[19] This document refers to vocational classes because the Department's Title IX regulations refer to "nonvocational" classes. The Department currently prefers the term "career and technical" courses.

[20] The Department's Title IX regulations governing athletics appear at 34 C.F.R. §§ 106.41 and 106.37(c).

[21] 34 C.F.R. § 106.36(c).

[22] 34 C.F.R. § 106.34(b)(1)(i).

[23] 71 Fed. Reg. at 62,533 (citing *Virginia*, 518 U.S. at 533) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.").

[24] *Id.*

[25] 34. C.F.R. § 106.34(b)(1)(i)(A).

[26] "For example, a recipient may seek to achieve an educational benefit for its students such as improvement in class work." 71 Fed. Reg. at 62,534 n.26.

[27] 71 Fed. Reg. at 62,535.

[28] 34 C.F.R. § 106.34(b)(1)(i)(B).

[29] 71 Fed. Reg. at 62,535 & n.30.

[30] 71 Fed. Reg. at 62,536.

[31] 71 Fed. Reg. at 62,535 (citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151-52 (1980) and *Frontiero v. Richardson*, 411 U.S. 677, 689-90 (1973)).

[32] 71 Fed. Reg. at 62,533 (citing *Virginia*, 518 U.S. at 533).

[33] The 2005 Department-commissioned survey of research on single-sex schooling found that for "many outcomes, there is no evidence of either benefit or harm." OFFICE OF PLANNING, EVALUATION AND POLICY DEVELOPMENT, U.S. DEPARTMENT OF EDUCATION, SINGLE-SEX VERSUS COEDUCATIONAL SCHOOLING: A SYSTEMATIC REVIEW x (2005), *available at* http://www2.ed.gov/rschstat/eval/other/single-sex/single-sex.pdf.

[34] The WWC Procedures and Standards Handbook is available at http://ies.ed.gov/ncee/wwc/pdf/reference_resources/wwc_procedures_v3_0_standards_handbook.pdf.

[35] This example, like all the examples provided in this document, is based on hypothetical facts to help readers understand how OCR would evaluate a recipient's single-sex class for compliance with the Department's Title IX regulations. A recipient cannot rely on the hypothetical research described in this example to show a substantial relationship between its important objective and the single-sex nature of the class.

[36] 34 C.F.R. § 106.34(b)(1)(ii).

[37] 71 Fed. Reg. at 62,536 (citing *Virginia*, 518 U.S. at 554).

[38] 71 Fed. Reg. at 62,536.

[39] *Id*.

[40] *Id.* at 62,536-37 ("[A]lthough a single-sex class would not be required in that subject, evenhanded implementation of the recipient's objective does require the recipient to determine, based on its assessment of educational needs of students, whether a class in another subject should be offered on a single-sex basis to meet the particular, identified needs of the students of the excluded sex.").

[41] 34 C.F.R. § 106.34(b)(1)(iii).

[42] 71 Fed. Reg. at 62,537.

[43] *Id.*; *Doe v. Wood Cnty. Bd. of Educ*., 888 F. Supp. 2d 771, 776 (S.D. W. Va. 2012) ("An opt-out provision is insufficient to meet the requirement that single-sex classes be 'completely voluntary.'").

[44] 71 Fed. Reg. at 62,537; *Doe*, 888 F. Supp. 2d at 776 ("[T]he Department of Education regulations require an affirmative assent by parents or guardians before placing children in single-sex classrooms.").

[45] 71 Fed. Reg. at 62,537; *Doe*, 888 F. Supp. 2d at 776 ("Such affirmative assent would preferably come in the form of a written, signed agreement by the parent explicitly opting *into* a single-sex program.").

[46] 71 Fed. Reg. at 62,537.

[47] *Doe*, 888 F. Supp. 2d at 777 ("The close proximity of the notices to the beginning of the school year, after students have already enrolled, suggest[s] that their choice was not fully voluntary.").

[48] 71 Fed. Reg. at 62,537.

[49] 34 C.F.R. § 106.34(b)(1)(iv).

[50] 34 C.F.R. § 106.34(b)(2).

[51] 34 C.F.R. § 106.34(b)(3); 71 Fed. Reg. at 62,538.

[52] 71 Fed. Reg. at 62,538.

[53] 34 C.F.R. § 106.34(b)(3); *see also* 71 Fed. Reg. at 62,538.

[54] 71 Fed. Reg. at 62,538 ("[There are] situations in which geographic accessibility will be relevant for classes. For example, if a recipient operates a consortium of schools whereby students at three neighboring high schools [take classes at all three schools, the] location, *i.e.*, geographic accessibility, of the classes in the same subject, would be relevant to the issue of substantial equality.").

[55] 34 C.F.R. § 106.34(b)(4).

[56] 71 Fed. Reg. at 62,539.

[57] 34 C.F.R. § 106.34(b)(4)(i).

[58] *Id.*

[59] *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("Physical differences between men and women, however, are enduring . . . .").

[60] *See J.E. B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994) ("We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.").

[61] 71 Fed. Reg. at 62,539 ("Part of the periodic evaluation requirement involves an assessment of the degree to which the recipient's important objective has been achieved and an assessment of whether the single-sex nature of the class is substantially related to achievement of the recipient's objective.").

[62] 34 C.F.R. § 106.8(a).

[63] 71 Fed. Reg. at 62,534 ("Among other things, the Title IX regulations prohibit recipients from making job assignments on the basis of sex, § 106.51(b)(4), and from classifying jobs as being for males or females, § 106.55(a). Both of these provisions would prohibit schools from assigning teachers to single-sex classes based on their sex.").

[64] 34 C.F.R. part 106, subpart E.

[65] 34 C.F.R. § 106.61.

[66] *Id.* ("A recipient shall not take action pursuant to this section [regarding bona-fide occupational qualifications] which is based upon . . . preference based on sex of the recipient, employees, students, or other persons.").

[67] 29 U.S.C. § 794 (Section 504 of the Rehabilitation Act of 1973) and 34 C.F.R. part 104; 42 U.S.C. §§ 12131-12165 (Title II of the Americans with Disabilities Act of 1990) and 28 C.F.R. part 35; 42 U.S.C. §§ 2000d to d-7 (Title VI of the Civil Rights Act of 1964) and 34 C.F.R. part 100. OCR enforces Section 504 as it applies to recipients of Federal financial assistance from the Department and shares enforcement responsibility with the U.S. Department of Justice for Title II in the education context. Title II prohibits discrimination on the basis of disability by public entities, including public school districts, in their services, programs, and activities, regardless of receipt of Federal funds.

[68] 20 U.S.C. §§ 1411-1414; 34 C.F.R. part 300.

[69] 34 C.F.R. § 106.34(c)(4).

EXHIBIT 4

TITLE IX RESOURCE GUIDE

U.S. Department of Education

Office for Civil Rights

April 2015

U.S. Department of Education
Office for Civil Rights

Catherine E. Lhamon
Assistant Secretary

April 2015

This guide is also available on the Office for Civil Rights' website at http://www.ed.gov/ocr. Any updates to this guide will be available at this website.

If you need technical assistance, please contact the OCR regional office serving your State or territory by:

- visiting http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm, or
- calling OCR's Customer Service Team at 1 800-421-3481; TDD 1-800-877-8339; or
- emailing OCR at ocr@ed.gov.

Notice of Language Assistance
Title IX Resource Guide

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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。

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TABLE OF CONTENTS

A. Scope of Title IX

Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination based on sex in education programs and activities in federally funded schools at all levels.[1] If any part of a school district or college receives any Federal funds for any purpose, all of the operations of the district or college are covered by Title IX.[2]

Title IX protects students, employees, applicants for admission and employment, and other persons from all forms of sex discrimination, including discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity. All students (as well as other persons) at recipient institutions are protected by Title IX—regardless of their sex, sexual orientation, gender identity, part- or full-time status, disability, race, or national origin—in all aspects of a recipient's educational programs and activities.

As part of their obligations under Title IX, all recipients of Federal financial assistance must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX and must notify all students and employees of that employee's contact information.[3] This employee is generally referred to as the Title IX coordinator.

The essence of Title IX is that an institution may not exclude, separate, deny benefits to, or otherwise treat differently any person on the basis of sex unless expressly authorized to do so under Title IX or the Department's implementing regulations.[4] When a recipient is considering relying on one of the exceptions to this general rule (several of which are discussed below), Title IX coordinators should be involved at every stage and work with school officials and legal counsel to help determine whether the exception is applicable and, if so, properly executed.

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[1] 20 U.S.C. §§ 1681–1688. The Department of Justice shares enforcement authority over Title IX with OCR. The Department of Education's Title IX regulations, 34 C.F.R. Part 106, are available at http://www.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html. Although Title IX and the Department's implementing regulations apply to any recipient institution that offers education programs or activities, this resource guide focuses on Title IX coordinators designated by local educational agencies, schools, colleges, and universities.

[2] An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

[3] 34 C.F.R. § 106.8(a).

[4] 20 U.S.C. § 1681(a); 34 C.F.R. § 106.31.

B. Responsibilities and Authority of a Title IX Coordinator

Although the recipient is ultimately responsible for ensuring that it complies with Title IX and other laws, the Title IX coordinator is an integral part of a recipient's systematic approach to ensuring nondiscrimination, including a nondiscriminatory environment. Title IX coordinators can be effective agents for ensuring gender equity within their institutions only when they are provided with the appropriate authority and support necessary to coordinate their institution's Title IX compliance, including access to all of their institution's relevant information and resources.

One of the most important facets of the Title IX coordinator's responsibility is helping to ensure the recipient's compliance with Title IX's administrative requirements. The Title IX coordinator must have knowledge of the recipient's policies and procedures on sex discrimination and should be involved in the drafting and revision of such policies and procedures to help to ensure that they comply with the requirements of Title IX.

The coordinator may help the recipient by coordinating the implementation and administration of the recipient's procedures for resolving Title IX complaints, including educating the school community on how to file a complaint alleging a violation of Title IX, investigating complaints, working with law enforcement when necessary, and ensuring that complaints are resolved promptly and appropriately. The coordinator should also coordinate the recipient's response to all complaints involving possible sex discrimination to monitor outcomes, identify patterns, and assess effects on the campus climate. Such coordination can help an institution avoid Title IX violations, particularly violations involving sexual harassment and violence, by preventing incidents from recurring or becoming systemic problems. Title IX does not specify who should determine the outcome of Title IX complaints or the actions the school will take in response to such complaints. The Title IX coordinator could play this role, provided there are no conflicts of interest, but does not have to.

The Title IX coordinator should also assist the institution in developing a method to survey the school climate and coordinate the collection and analysis of information from that survey. Further, the coordinator should monitor students' participation in athletics and across academic fields to identify programs with disproportionate enrollment based on sex and ensure that sex discrimination is not causing any disproportionality or otherwise negatively affecting a student's access to equal educational opportunities.

The Title IX coordinator should provide training and technical assistance on school policies related to sex discrimination and develop programs, such as assemblies or college trainings, on issues related to Title IX to assist the recipient in making sure that all members of the school community, including students and staff, are aware of their rights and obligations under Title IX. To perform

this responsibility effectively, the coordinator should regularly assess the adequacy of current training opportunities and programs and propose improvements as appropriate.

A recipient can designate more than one Title IX coordinator, which may be particularly helpful in larger school districts, colleges, and universities. It may also be helpful to designate specific employees to coordinate certain Title IX compliance issues (*e.g.*, gender equity in academic programs or athletics, harassment, or complaints from employees). If a recipient has multiple Title IX coordinators, then it should designate one lead Title IX coordinator who has ultimate oversight responsibility.

Because Title IX prohibits discrimination in all aspects of a recipient's education programs and activities, the Title IX coordinator should work closely with many different members of the school community, such as administrators, counselors, athletic directors, non-professional counselors or advocates, and legal counsel. Although these employees may not be formally designated as Title IX coordinators, the Title IX coordinator may need to work with them because their job responsibilities relate to the recipient's obligations under Title IX. The recipient should ensure that all employees whose work relates to Title IX communicate with one another and that these employees have the support they need to ensure consistent practices and enforcement of the recipient's policies and compliance with Title IX. The coordinator should also be available to meet with the school community, including other employees, students, and parents or guardians, as needed to discuss any issues related to Title IX.

For more information about the role of the Title IX coordinator, please review:

- 34 C.F.R. § 106.8(a);
- Dear Colleague Letter: Title IX Coordinators (April 24, 2015), *available at* http://www.ed.gov/ocr/letters/colleague-201504-title-ix-coordinators.pdf; and
- Letter to Title IX Coordinators (April 24, 2015), *available at* http://www.ed.gov/ocr/docs/dcl-title-ix-coordinators-letter-201504.pdf.

C. Title IX's Administrative Requirements

The administrative requirements in the Department's Title IX regulations are the underpinning of both the Title IX coordinator's job and a recipient's compliance with Title IX; their purpose is to ensure that a recipient maintains an environment for students and employees that is free from unlawful sex discrimination in all aspects of the educational experience, including academics, extracurricular activities, and athletics. These requirements provide that a recipient must establish a system for the prompt and equitable resolution of complaints. This allows an institution to resolve complaints of discrimination without the need for involvement by outside entities, such as the Federal government. They also provide that a recipient must ensure that members of the school community are aware of their rights under Title IX, have the contact information for the Title IX coordinator, and know how to file a complaint alleging a violation of Title IX.

1. Grievance Procedures

The Department's Title IX regulations require a recipient to adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints under Title IX. These procedures provide an institution with a mechanism for discovering incidents of discrimination or harassment as early as possible and for effectively correcting individual and systemic problems. The procedures that each school uses to resolve Title IX complaints may vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements, and what it has learned from past experiences.

There are several ways in which a Title IX coordinator can coordinate the recipient's compliance with the Title IX regulatory requirement regarding grievance procedures.

- First, the Title IX coordinator should work with the recipient to help make sure that the grievance procedures are written in language appropriate for the age of the audience (such as elementary, middle school, high school, or postsecondary students), and that they are easily understood and widely disseminated.

- Second, the Title IX coordinator should review the grievance procedures to help determine whether they incorporate all of the elements required for the prompt and equitable resolution of student and employee complaints under Title IX, consistent with the Title IX regulatory requirement and OCR guidance.

- Third, the Title IX coordinator should communicate with students, parents or guardians, and school employees to help them understand the recipient's grievance procedures; train employees and students about how Title IX protects against sex discrimination; and provide consultation and information regarding Title IX requirements to potential complainants.

- Fourth, the Title IX coordinator is responsible for coordinating the grievance process and making certain that individual complaints are handled properly. This coordination responsibility may include informing all parties regarding the process, notifying all parties regarding grievance decisions and of the right to and procedures for appeal, if any; monitoring compliance with all of the requirements and timelines specified in the grievance procedures; and maintaining grievance and compliance records and files.

- Finally, the Title IX coordinator should work with the recipient to help ensure that its grievance procedures are accessible to English language learners[5] and students with disabilities.[6]

For more information about grievance procedures, please review:

- 34 C.F.R. § 106.8(b);

- Questions and Answers on Title IX and Sexual Violence (April 29, 2014), *available at* http://www.ed.gov/ocr/docs/qa-201404-title-ix.pdf;

- Dear Colleague Letter: Sexual Violence (April 4, 2011), *available at* http://www.ed.gov/ocr/letters/colleague-201104.pdf;

- Dear Colleague Letter: Title IX Grievance Procedures, Postsecondary Education (August 4, 2004), *available at* http://www.ed.gov/ocr/responsibilities_ix_ps.html;

- Dear Colleague Letter: Title IX Grievance Procedures, Elementary and Secondary Education (April 26, 2004), *available at* http://www.ed.gov/ocr/responsibilities_ix.html; and

- Revised Sexual Harassment Guidance (January 19, 2001), *available at* http://www.ed.gov/ocr/docs/shguide.pdf.

[5] Public schools and State educational agencies must take affirmative steps to ensure that students with limited English proficiency can meaningfully participate in their educational programs and services under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to d-7, and the Equal Educational Opportunities Act, 20 U.S.C. § 1703(f) (1974).

[6] *See* 28 C.F.R. § 35.130(a) and (b); 34 C.F.R. § 104.4.

2. Notice of Nondiscrimination and Contact Information for the Title IX Coordinator

The Department's Title IX regulations require a recipient to publish a statement that it does not discriminate on the basis of sex in the education programs or activities it operates and that it is required by Title IX not to discriminate in such a manner. The notice must also state that questions regarding Title IX may be referred to the recipient's Title IX coordinator or to OCR.

The notice must be widely distributed to all applicants for admission and employment, students and parents or guardians of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient. The notice should be prominently posted on the recipient's website, at various locations on campus, and in electronic and printed publications for general distribution. In addition, the notice must be included in any bulletins, announcements, publications, catalogs, application forms, or recruitment materials.

A recipient must notify all students and employees of the name or title, office address, telephone number, and email address of the Title IX coordinator, including in its notice of nondiscrimination. The notice should also state any other job title that the Title IX coordinator might have. Recipients must notify students and employees of the Title IX coordinator's contact information in its notice of nondiscrimination. Recipients with more than one Title IX coordinator must notify the school community of the lead Title IX coordinator's contact information in its notice of nondiscrimination, and should also make available the contact information for its other Title IX coordinators as well to ensure consistent practices and standards in handling complaints. In doing so, recipients should include any additional information that would help students and employees identify which Title IX coordinator to contact, such as each Title IX coordinator's specific geographic region (*e.g.*, a particular elementary school or part of a college campus) or area of specialization within Title IX (*e.g.*, gender equity in academic programs or athletics, harassment, or complaints from employees). Because social media are now widespread means for students and other members of the school community to communicate, a recipient should also make the Title IX coordinator's contact information available on social media to the extent that they are supported or used by the recipient.

The content of the notice must be complete and include current information. The Title IX coordinator should work with the recipient to make sure the text of the notice complies with all applicable requirements, that the notice is published and properly displayed, and the content of the notice remains accurate. One potentially low-cost way to help ensure that a recipient's notice is properly disseminated and current on the recipient's website is to create a page on the website that includes the name and contact information of the recipient's Title IX coordinator(s), relevant Title IX policies and grievance procedures, and other resources related to Title IX compliance and gender equity. A link to this page should be prominently displayed on the recipient's homepage.

For more information on notices of nondiscrimination, please review:

- 34 C.F.R. §§ 106.8(a), 106.9;
- Notice of Nondiscrimination (August 2010), *available at* http://www.ed.gov/ocr/docs/nondisc.pdf;
- Dear Colleague Letter: Title IX Grievance Procedures, Postsecondary Education (August 4, 2004), *available at* http://www.ed.gov/ocr/responsibilities_ix_ps.html; and
- Dear Colleague Letter: Title IX Grievance Procedures, Elementary and Secondary Education (April 26, 2004), *available at* http://www.ed.gov/ocr/responsibilities_ix.html.

D. Application of Title IX to Various Issues

Below is a summary of some of the key issues covered by Title IX, as well as some general information on the legal requirements applicable to each issue area, including citations to the relevant Departmental regulatory provisions and references to OCR's guidance that address the issue. The discussion of each Title IX issue includes recommended best practices to help a recipient meet its obligations under Title IX.

1. Recruitment, Admissions, and Counseling

Title IX prohibits recipient institutions of vocational education, professional education, graduate higher education, and public colleges and universities from discriminating on the basis of sex in the recruitment or admission of students.[7] The Title IX coordinator at these recipient institutions should help the recipient to ensure that it does not discriminate on the basis of sex in recruitment and admissions by reviewing the recipient's recruitment materials, admission forms, and policies and practices in these areas.

The Department's Title IX regulations also prohibit all recipients from discriminating on the basis of sex in counseling or guiding students or applicants for admission. The Title IX coordinator should review any materials used for counseling students in terms of class or career selection, or for counseling applicants for admission, to ensure that the recipient does not use different materials for students based on sex or use materials that permit or require different treatment of students based on sex.

At all types of recipient institutions covered by Title IX, the Title IX coordinator should also work with school officials to help remind the school community that all students must have equal access to all programs. Many fields of study continue to be affected by sex-based disparities in enrollment; these are typically called nontraditional fields. For example, some fields of study in science, technology, engineering, and mathematics or career and technical education are often affected by disproportionate enrollment of students based on sex, which triggers a duty of inquiry on the part of the recipient. Title IX coordinators can help ensure that such disparities are not the result of discrimination on the basis of sex by reviewing enrollment data and working with other employees of the recipient to review counseling practices and counseling or appraisal materials. Under certain circumstances, recipients might encourage students to explore nontraditional fields to address underrepresentation of students of that sex in those fields.

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[7] 20 U.S.C. §1681(a)(1). The Department's Title IX regulations regarding admissions do not apply to private institutions of undergraduate higher education or to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex. 34 C.F.R. § 106.15.

For more information about sex discrimination in recruiting, admissions, and counseling, please review:

- 34 C.F.R. §§ 106.3(b), 106.15, 106.36, and 34 C.F.R. Part 106, Subpart C; and
- Title IX and Access to Courses and Programs in Science, Technology, Engineering and Math (October 2012), *available at* http://www.ed.gov/ocr/presentations/stem-t9-powerpoint.pdf.

2. Financial Assistance

Generally, a recipient may not: (a) provide different amounts or types of financial assistance, limit eligibility for such assistance, apply different criteria or otherwise discriminate on the basis of sex in administering such assistance; or (b) assist any agency, organization, or person which offers sex-restricted student aid.

The Department's Title IX regulations provide three exceptions to these general prohibitions. Recipients are permitted to administer or assist in the administration of scholarships, fellowships, or other awards that are restricted to members of one sex if the award is: (a) created by certain legal instruments, including wills or trusts, or by acts of a foreign government, provided the overall effect is nondiscriminatory; (b) for study at foreign institutions if the recipient provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex; or (c) athletic financial assistance. The Department's Title IX regulatory requirements regarding athletic financial assistance are discussed in the Athletics section, below.

To help the recipient ensure its compliance with these requirements, the Title IX coordinator should help the recipient develop, and subsequently monitor, the procedures and practices for awarding financial assistance and for administering or aiding any foundation, trust, agency, organization, person, or foreign government in awarding financial assistance to its students.

For more information about sex discrimination in financial assistance, please review:

- 34 C.F.R. §§ 106.31(c) and 106.37.

3. Athletics

The Department's Title IX regulations prohibit sex discrimination in interscholastic, intercollegiate, club, or intramural athletics offered by a recipient institution, including with respect to (a) student interests and abilities; (b) athletic benefits and opportunities; and (c) athletic financial assistance.

(a) Student Interests and Abilities

Under the Department's Title IX regulations, an institution must provide equal athletic opportunities for members of both sexes and effectively accommodate students' athletic interests and abilities. OCR uses a three-part test to determine whether an institution is providing nondiscriminatory athletic participation opportunities in compliance with the Title IX regulation. The test provides the following three compliance options:

1. Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

2. Where the members of one sex have been and are underrepresented among athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

3. Where the members of one sex are underrepresented among athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

The three-part test is intended to allow institutions to maintain flexibility and control over their athletic programs consistent with Title IX's nondiscrimination requirements. The three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

To coordinate the institution's compliance with this requirement, the Title IX coordinator should compare its enrollment data to the number of athletic participation opportunities it offers; review the institution's history of expanding participation opportunities for students of the underrepresented sex; and evaluate whether there is unmet interest in a particular sport, whether there is sufficient ability to sustain a team in the sport, and whether there is a reasonable expectation of competition for the team.

For more information about the obligation to provide equal athletic opportunities and to effectively accommodate students' athletic interests and abilities, please review:

- 34 C.F.R. § 106.41(c)(1);
- Dear Colleague Letter: Part Three of the Three-Part Test (April 20, 2010), *available at* http://www.ed.gov/ocr/letters/colleague-20100420.html;
- Dear Colleague Letter: Athletic Activities Counted for Title IX Purposes (September 17, 2008), *available at* http://www.ed.gov/ocr/letters/colleague-20080917.pdf;
- Dear Colleague Letter: Title IX Athletics Three-Part Test (March 27, 2008), *available at* http://www.ed.gov/ocr/letters/title-ix-2008-0327.pdf;
- Dear Colleague Letter: Further Clarification of Intercollegiate Athletics Policy Guidance (July 11, 2003), *available at* http://www.ed.gov/ocr/title9guidanceFinal.html;
- Dear Colleague Letter: Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (January 16, 1996), *available at* http://www.ed.gov/ocr/docs/clarific.html; and
- Title IX Policy Interpretation: Intercollegiate Athletics (December 11, 1979), *available at* http://www.ed.gov/ocr/docs/t9interp.html.

(b) Athletic Benefits and Opportunities

The Department's Title IX regulations and OCR guidance require that recipients that operate or sponsor interscholastic, intercollegiate, club or intramural athletics provide equal athletic opportunities for members of both sexes. In determining whether an institution is providing equal opportunity in athletics, the regulations require the Department to consider, among others, the following factors: (1) the provision of equipment and supplies; (2) scheduling of games and practice time; (3) travel and per diem allowances; (4) opportunity for coaching and academic tutoring; (5) assignment and compensation of coaches and tutors; (6) provision of locker rooms, and practice and competitive facilities; (7) provision of medical and training facilities and services; (8) housing and dining services; (9) publicity; (10) recruitment; and (11) support services. These factors are sometimes referred to as the laundry list.

As part of the recipient's obligation to provide equal athletic opportunity to its students, OCR encourages Title IX coordinators to work with the recipient to periodically review and compare the distribution of athletic benefits and opportunities by sex in each of these areas, including financial expenditures on male and female athletic teams.

For more information about each of these areas, please review:

- 34 C.F.R. § 106.41(c)(2)–(10); and
- Title IX Policy Interpretation: Intercollegiate Athletics (December 11, 1979), *available at* http://www.ed.gov/ocr/docs/t9interp.html.

(c) Athletic Financial Assistance

The Department's Title IX regulations specify that if a recipient awards athletic financial assistance, including athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in substantial proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics. Separate athletic financial assistance for members of each sex may be provided as part of separate athletic teams for members of each sex.

The Title IX coordinator should help coordinate the recipient's efforts to ensure that the athletic financial assistance awarded by the recipient complies with these provisions by working with the institution and its athletics department.

For more information about a recipient's obligations regarding awards of athletic financial assistance, please review:

- 34 C.F.R. § 106.37(c);
- Title IX Policy Interpretation: Intercollegiate Athletics (December 11, 1979), *available at* http://www.ed.gov/ocr/docs/t9interp.html; and
- Dear Colleague Letter: Bowling Green State University (July 23, 1998), *available at* http://www.ed.gov/ocr/docs/bowlgrn.html.

4. Sex-Based Harassment

In order to best perform academically and to have equal access to all aspects of a recipient's educational programs and activities, students must not be subjected to unlawful harassment, either in the classroom or while participating in other education programs or activities.[8]

Title IX prohibits sex-based harassment by peers, employees, or third parties that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the recipient's education programs and activities (*i.e.*, creates a hostile environment). When a recipient knows or reasonably should know of possible sex-based harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. If an investigation reveals that the harassment created a hostile environment, the recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent the harassment from recurring, and, as appropriate, remedy its effects.

Title IX prohibits several types of sex-based harassment. Sexual harassment is unwelcome conduct of a sexual nature, such as unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment and refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (*e.g.*, due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Gender-based harassment is another form of sex-based harassment and refers to unwelcome conduct based on an individual's actual or perceived sex, including harassment based on gender identity or nonconformity with sex stereotypes, and not necessarily involving conduct of a sexual nature. All of these types of sex-based harassment are forms of sex discrimination prohibited by Title IX.

Harassing conduct may take many forms, including verbal acts and name-calling, as well as non-verbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.

Title IX protects all students from sex-based harassment, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to

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[8] A Title IX coordinator may receive reports of sex-based harassment of any member of the school community. It is the Title IX coordinator's responsibility to help make sure that such complaints are processed appropriately.

conform to stereotypical notions of masculinity or femininity, and a recipient must accept and appropriately respond to all complaints of sex discrimination. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a recipient's obligations. A recipient should investigate and resolve allegations of sexual or gender-based harassment of lesbian, gay, bisexual, and transgender students using the same procedures and standards that it uses in all complaints involving sex-based harassment. The fact that an incident of sex-based harassment may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a recipient of its obligation under Title IX to investigate and remedy such an incident.

The Title IX coordinator must coordinate the recipient's efforts to accept and appropriately respond to all complaints of sex discrimination and should work with the recipient to prevent sexual and gender-based harassment.

- First, the Title IX coordinator should assist in any training the recipient provides to the school community, including all employees, as to what conduct constitutes sexual and gender-based harassment and how to respond appropriately when it occurs.

- Second, the Title IX coordinator should help the recipient develop a method appropriate to their institution to survey the campus climate, evaluate whether any discriminatory attitudes pervade the school culture, and determine whether any harassment or other problematic behaviors are occurring, where they happen, which students are responsible, which students are targeted, and how those conditions may be best remedied.

- Third, because the Title IX coordinator must have knowledge of all Title IX reports and complaints at the recipient institution, the Title IX coordinator is generally in the best position to evaluate confidentiality requests from complainants in the context of providing a safe, nondiscriminatory environment for all students.

- Fourth, the Title IX coordinator should coordinate recordkeeping (for instance, in a confidential log maintained by the Title IX coordinator), monitor incidents to help identify students or employees who have multiple complaints filed against them or who have been repeated targets, and address any patterns or systemic problems that arise, including making school officials aware of these patterns or systemic problems as appropriate.

- Fifth, the Title IX coordinator should recommend, as necessary, that the recipient increase safety measures, such as monitoring, supervision, or security at locations or activities where harassment has occurred.

- Finally, the Title IX coordinator should regularly review the effectiveness of the recipient's efforts to ensure that the recipient institution is free from sexual and gender-based harassment, and use that information to recommend future proactive steps that the recipient can take to comply with Title IX and protect the school community.

For more information about a recipient's obligation to address sexual and gender-based harassment, please review:

- Questions and Answers on Title IX and Sexual Violence (April 29, 2014), *available at* http://www.ed.gov/ocr/docs/qa-201404-title-ix.pdf;
- Dear Colleague Letter: Sexual Violence (April 4, 2011), *available at* http://www.ed.gov/ocr/letters/colleague-201104.pdf;
- Dear Colleague Letter: Harassment and Bullying (October 26, 2010), *available at* http://www.ed.gov/ocr/letters/colleague-201010.pdf;
- Sexual Harassment: It's Not Academic (September 2008), *available at* http://www.ed.gov/ocr/docs/ocrshpam.pdf;
- Dear Colleague Letter: Sexual Harassment Issues (January 25, 2006), *available at* http://www.ed.gov/ocr/letters/sexhar-2006.pdf;
- Dear Colleague Letter: First Amendment (July 28, 2003), *available at* http://www.ed.gov/ocr/firstamend.html;
- Revised Sexual Harassment Guidance (January 19, 2001), *available at* http://www.ed.gov/ocr/docs/shguide.pdf; and
- Not Alone: Together Against Sexual Assault, *available at* http://www.notalone.gov.

5. Pregnant and Parenting Students

Under the Department's Title IX regulations, recipients are prohibited from: (a) applying any rule concerning parental, family, or marital status that treats persons differently on the basis of sex; or (b) discriminating against or excluding any student from its education program or activity, including any class or extracurricular activity on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. Institutions of vocational education, professional education, graduate higher education, and public colleges and universities are prohibited from making pre-admission inquiries as to the marital status of an applicant for admission.

The Title IX coordinator should work with the recipient on its obligation not to discriminate against students based on their parental, family, or marital status, or exclude pregnant or parenting students from participating in any educational program, including extracurricular activities. The Title IX coordinator is responsible for coordinating the recipient's response to complaints of discrimination against pregnant and parenting students. In addition, the Title IX coordinator should provide training to students so they know that Title IX prohibits discrimination against pregnant and parenting students, provide workshops to administrators, teachers, and other staff on the Department's Title IX regulations and OCR guidance related to pregnant and parenting students, and assist the recipient in helping to meet the unique educational, child care, and health care needs of pregnant and parenting students.

For more information about a recipient's obligations regarding pregnant and parenting students, please review:

- 34 C.F.R. §§ 106.21(c), 106.31, 106.40;
- Supporting the Academic Success of Pregnant and Parenting Students (June 2013), *available at* http://www.ed.gov/ocr/docs/pregnancy.pdf;
- Dear Colleague Letter: Pregnant and Parenting Students (June 25, 2013), *available at* http://www2.ed.gov/ocr/letters/colleague-201306-title-ix.pdf; and
- Dear Colleague Letter: Nondiscriminatory Treatment of Pregnant Student Athletes (June 25, 2007), *available at* http://www.ed.gov/ocr/letters/colleague-20070625.pdf.

6. Discipline

The Department's Title IX regulations prohibit a recipient from subjecting any person to separate or different rules of behavior, sanctions, or other treatment, such as discriminatory discipline, based on sex.

The Title IX coordinator should review the recipient's discipline policies to help make sure they are not discriminatory. In addition, the Title IX coordinator should work with other coordinators or school employees to help the recipient keep and maintain accurate and complete records regarding its disciplinary incidents and monitor the recipient's administration of its discipline policies to ensure that they are not administered in a discriminatory manner. For example, the Title IX coordinator should review the recipient's disciplinary records and data to ensure that similarly situated students are not being disciplined differently based on sex for the same offense and that the recipient's discipline policies do not have an unlawful disparate impact on students based on sex. The Title IX coordinator should also help the recipient to ensure that students are not disciplined based on their gender identity or for failing to conform to stereotypical notions of masculinity or femininity in their behavior or appearance.

For more information about a recipient's obligations regarding nondiscriminatory administration of discipline, please review:

- 34 C.F.R. § 106.31(b)(4); and
- Dear Colleague Letter: Nondiscriminatory Administration of Discipline (January 8, 2014), *available at* http://www.ed.gov/ocr/letters/colleague-201401-title-vi.pdf.

7. Single-Sex Education

A recipient is generally prohibited from providing any of its education programs or activities separately on the basis of sex, or requiring or refusing participation by students on the basis of sex unless expressly authorized to do so under Title IX or the Department's implementing regulations. There are some limited exceptions, the most significant of which are outlined below.

(a) Schools

A recipient generally may offer a single-sex nonvocational elementary or secondary school under Title IX only if it offers a substantially equal school to students of the other sex.[9] The substantially equal school may be either single-sex or coeducational. The Department's Title IX regulations include a non-exhaustive list of factors that are relevant to determining whether a school is substantially equal to a single-sex school. The factors include the admission criteria and policies; the educational benefits provided, including the quality, range, and content of curriculum and other services, and the quality and availability of books, instructional materials, and technology; the qualifications of faculty and staff; geographic accessibility; the quality and range of extracurricular offerings; the quality, accessibility, and availability of facilities and resources provided; and intangible features, such as reputation of faculty. Although the schools do not need to be identical with respect to each factor, they need to be substantially equal. This means that if one school is significantly superior with respect to one factor, or slightly superior with respect to many factors, the schools are likely not substantially equal.

If the recipient offers a single-sex school, then the district's Title IX coordinator should be involved in assessing the recipient's compliance with Title IX by helping to ensure that the recipient offers a substantially equal single-sex school or coeducational school.

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[9] Title IX does not prohibit the operation of a single-sex nonvocational private elementary or secondary school or a single-sex nonvocational private institution of undergraduate higher education. 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d). Title IX permits the operation of a nonvocational public charter school that is a single-school local educational agency under State law without requiring the operation of a substantially equal school for the excluded sex.

(b) Classes and Extracurricular Activities

The Department's Title IX regulations do not prohibit recipients from grouping students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex or using requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

The Department's Title IX regulations identify the following categories for which a recipient may intentionally separate students by sex: (a) contact sports in physical education classes; (b) classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality; and (c) nonvocational classes and extracurricular activities within a coeducational, nonvocational elementary or secondary school if certain criteria are met.

With respect to the third category, a recipient may offer a single-sex nonvocational class or extracurricular activity in a coeducational, nonvocational elementary or secondary school if the class is based on one of two important objectives: to improve its students' educational achievement through its overall established policy to provide diverse educational opportunities or to meet the particular, identified educational needs of its students. The single-sex nature of each class must be substantially related to achievement of the important objective and the recipient must implement its important objective in an evenhanded manner. In addition, enrollment in a single-sex class must be completely voluntary and the recipient must provide a substantially equal coeducational class in the same subject to all students, and may be required to provide a substantially equal single-sex class for students of the excluded sex. The factors that are relevant to determining whether a single-sex class and a coeducational class are substantially equal are similar to those used to determine whether schools are substantially equal. If a recipient provides a single-sex class under this regulatory exception, it is also required to conduct a periodic evaluation of the class and the original justification behind the class at least every two years. The periodic evaluation must ensure that each single-sex class is based upon a genuine justification and does not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex, and that each single-sex class or extracurricular activity is substantially related to the achievement of the important objective for the class.

If the recipient offers a single-sex class, then the Title IX coordinator should be involved in assessing the recipient's compliance with Title IX, both when determining whether and how single-sex classes can be offered and during the recipient's periodic review of single-sex offerings. The Title IX coordinator's role may include assisting with the preparation and review of the required periodic evaluations, tracking and reviewing complaints involving single-sex classes, confirming that student enrollment in any single-sex class is completely voluntary, and helping to ensure that the recipient offers a substantially equal coeducational class and, as appropriate, substantially equal single-sex class, for each single-sex class offered. The Title IX coordinator should also help ensure that

transgender students are treated consistent with their gender identity in the context of single-sex classes.

For more information about single-sex schools, classes, and extracurricular activities, please review:

- 34 C.F.R. § 106.34;
- Questions and Answers Regarding Single-Sex Elementary and Secondary Classes and Extracurricular Activities (December, 2014), *available at* http://www.ed.gov/ocr/docs/faqs-title-ix-single-sex-201412.pdf;
- Dear Colleague Letter: Single-Sex Education (January 31, 2007), *available at* http://www.ed.gov/ocr/letters/single-sex-20070131.html; and
- Final Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530 (October 25, 2006), *available at* http://www2.ed.gov/legislation/FedRegister/finrule/2006-4/102506a.pdf.

8. Employment

Under the Department's Title IX regulations, a recipient is generally prohibited from discriminating on the basis of sex in any employment or recruitment, consideration or selection for employment, whether full-time or part-time.[10] This includes employment actions such as recruitment, hiring, promotion, compensation, grants of leave, and benefits. A recipient must make employment decisions in a nondiscriminatory manner, and may not enter into contracts, including those with employment agencies or unions, that have the direct or indirect effect of subjecting employees or students to discrimination based on sex. Additionally, Title IX's employment provisions protect against discrimination based on an applicant's or employee's pregnancy or marital or parental status. Finally, a recipient may not employ students in a way that discriminates against one sex, or provide services to any other organization that does so.

The Title IX coordinator should help the recipient in making sure school employees are aware that the Title IX coordinator is available to help employees as well as students. The Title IX coordinator should be familiar with the recipient's employment policies and procedures, and train the appropriate human resource employees regarding the recipient's obligations under Title IX.

For more information about employment discrimination, please review:

- 34 C.F.R. Part 106, Subpart E; 34 C.F.R. § 106.38.

[10] Employees are also protected from discrimination on the basis of sex, including sexual harassment, by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. OCR does not enforce Title VII. For information about Title VII, see the Equal Employment Opportunity Commission's website at http://www.eeoc.gov.

9. Retaliation

A recipient cannot retaliate against an individual, including a Title IX coordinator, for the purpose of interfering with any right or privilege secured by Title IX. Retaliation against an individual because the individual filed a complaint alleging a violation of Title IX; participated in a Title IX investigation, hearing, or proceeding; or advocated for others' Title IX rights is also prohibited. The recipient should ensure that individuals are not intimidated, threatened, coerced, or discriminated against for engaging in such activity.

For more information about the prohibition against retaliation, please review:

- 34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e)); and
- Dear Colleague Letter: Retaliation (April 2013), *available at* http://www.ed.gov/ocr/letters/colleague-201304.pdf.

E. Information Collection and Reporting

The Department requires recipients to report information about Title IX and other civil rights issues that may be useful to the work of Title IX coordinators. In addition, Title IX coordinators can play a helpful role in helping to ensure that their institutions' information is accurate, comprehensive, and effectively used to cure civil rights violations or prevent them from occurring.

OCR administers the Civil Rights Data Collection (CRDC), which collects information on key education and civil rights issues from public local educational agencies (LEAs) and schools, including juvenile justice facilities, charter schools, alternative schools, and schools serving students with disabilities. The information is used by OCR in its enforcement efforts, by other Department offices and Federal agencies, and by the public, including policymakers and researchers.

The CRDC collects information on several key issue areas under Title IX that might help inform the Title IX coordinator's work, including harassment or bullying,[11] discipline, and participation in various academic classes and programs, single-sex classes and activities, and interscholastic athletics. In addition, the CRDC asks LEAs to report whether they have civil rights coordinators, including Title IX coordinators and to provide each coordinator's contact information. For Title IX coordinators at elementary and secondary schools, the CRDC may be a useful tool to monitor trends within their districts and schools to determine whether there are patterns or systemic problems under Title IX. Additionally, the CRDC and other information collections at the State and local levels can help recipients and their Title IX coordinators identify patterns of disproportionality that may be rooted in sex discrimination. For example, the CRDC's information about student enrollment in particular courses of study (*e.g.*, science, technology, engineering, and mathematics courses) may help a Title IX coordinator determine whether a particular sex is underrepresented in such courses. If so, the coordinator should investigate the possible causes of the disproportionality and then recommend measures for reaching greater proportionality, as appropriate.

[11] The CRDC collects information on allegations of harassment or bullying, students reported as harassed or bullied, and students disciplined for harassment or bullying, based on sex, race/color/national origin, and disability. For allegations of harassment or bullying, data are also collected based on religion and sexual orientation. As a best practice, OCR recommends that Title IX coordinators assist the recipient in training relevant staff about how information on sex-based harassment should be reported under the CRDC. For example, relevant staff should be knowledgeable about the ways in which harassment based on sex and sexual orientation overlap, and informed that if an incident has multiple bases (*e.g.*, an incident in which a student was harassed both based on gender nonconformity (sex) and sexual orientation), the LEA should report all relevant bases under the CRDC. In addition, the recipient should remind staff who collect, maintain, and report information to the Department of these requirements and of the district's obligations, including keeping personally identifiable information private.

The Department's Office of Postsecondary Education also collects information about Title IX coordinators from postsecondary institutions in reports required under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act and the Higher Education Opportunity Act.[12] Title IX coordinators in postsecondary settings should assist the institution's officials in accurately reporting the required information.

For more information about data collection and reporting, please review:

- CRDC webpage, *available at* http://www.ed.gov/ocr/data.html; and
- Campus Security webpage (for postsecondary institutions), *available at* http://www.ed.gov/admins/lead/safety/campus.html.

[12] 20 U.S.C. § 1092(f). The Department will begin collecting this information in 2015.

EXHIBIT 5

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Dear Colleague Letter on Transgender Students
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

May 13, 2016

Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance.[1] This prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status. This letter summarizes a school's Title IX obligations regarding transgender students and explains how the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) evaluate a school's compliance with these obligations.

ED and DOJ (the Departments) have determined that this letter is *significant guidance*.[2] 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 have questions or are interested in commenting on this guidance, please contact ED at ocr@ed.gov or 800-421-3481 (TDD 800-877-8339); or DOJ at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Accompanying this letter is a separate document from ED's Office of Elementary and Secondary Education, *Examples of Policies and Emerging Practices for Supporting Transgender Students*. The examples in that document are taken from policies that school districts, state education agencies, and high school athletics associations around the country have adopted to help ensure that transgender students enjoy a supportive and nondiscriminatory school environment. Schools are encouraged to consult that document for practical ways to meet Title IX's requirements.[3]

Terminology

- *Gender identity* refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth.

- *Sex assigned at birth* refers to the sex designation recorded on an infant's birth certificate should such a record be provided at birth.

- *Transgender* describes those individuals whose gender identity is different from the sex they were assigned at birth. A *transgender male* is someone who identifies as male but was assigned the sex of female at birth; a *transgender female* is someone who identifies as female but was assigned the sex of male at birth.

- *Gender transition* refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Compliance with Title IX

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.[4] The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments' interpretation is consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination.[5]

The Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.[6] Because transgender students often are unable to obtain identification documents that reflect their gender identity (*e.g.*, due to restrictions imposed by state or local law in their place of birth or residence),[7] requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.[8]

1. Safe and Nondiscriminatory Environment

Schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly.[9] If sex-based harassment creates a hostile environment, the school must take prompt and effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. A school's failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX. For a more detailed discussion of Title IX

requirements related to sex-based harassment, see guidance documents from ED's Office for Civil Rights (OCR) that are specific to this topic.[10]

2. Identification Documents, Names, and Pronouns

Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex. The Departments have resolved Title IX investigations with agreements committing that school staff and contractors will use pronouns and names consistent with a transgender student's gender identity.[11]

3. Sex-Segregated Activities and Facilities

Title IX's implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.[12] When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.[13]

- **Restrooms and Locker Rooms**. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.[14] A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.[15]

- **Athletics.** Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.[16] A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or others' discomfort with transgender students.[17] Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport.[18]

- **Single-Sex Classes**. Although separating students by sex in classes and activities is generally prohibited, nonvocational elementary and secondary schools may offer nonvocational single-sex classes and extracurricular activities under certain circumstances.[19] When offering such classes and activities, a school must allow transgender students to participate consistent with their gender identity.

- **Single-Sex Schools**. Title IX does not apply to the admissions policies of certain educational institutions, including nonvocational elementary and secondary schools, and private undergraduate colleges.[20] Those schools are therefore permitted under Title IX to set their own

sex-based admissions policies. Nothing in Title IX prohibits a private undergraduate women's college from admitting transgender women if it so chooses.

- **Social Fraternities and Sororities**. Title IX does not apply to the membership practices of social fraternities and sororities.[21] Those organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses.

- **Housing and Overnight Accommodations**. Title IX allows a school to provide separate housing on the basis of sex.[22] But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students. Nothing in Title IX prohibits a school from honoring a student's voluntary request for single-occupancy accommodations if it so chooses.[23]

- **Other Sex-Specific Activities and Rules**. Unless expressly authorized by Title IX or its implementing regulations, a school may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule. Likewise, a school may not discipline students or exclude them from participating in activities for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity (*e.g.*, in yearbook photographs, at school dances, or at graduation ceremonies).[24]

4. Privacy and Education Records

Protecting transgender students' privacy is critical to ensuring they are treated consistent with their gender identity. The Departments may find a Title IX violation when a school limits students' educational rights or opportunities by failing to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth.[25] Nonconsensual disclosure of personally identifiable information (PII), such as a student's birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender students and may also violate the Family Educational Rights and Privacy Act (FERPA).[26] A school may maintain records with this information, but such records should be kept confidential.

- **Disclosure of Personally Identifiable Information from Education Records**. FERPA generally prevents the nonconsensual disclosure of PII from a student's education records; one exception is that records may be disclosed to individual school personnel who have been determined to have a legitimate educational interest in the information.[27] Even when a student has disclosed the student's transgender status to some members of the school community, schools may not rely on this FERPA exception to disclose PII from education records to other school personnel who do not have a legitimate educational interest in the information. Inappropriately disclosing (or requiring students or their parents to disclose) PII from education records to the school community may

violate FERPA and interfere with transgender students' right under Title IX to be treated consistent with their gender identity.

- **Disclosure of Directory Information**. Under FERPA's implementing regulations, a school may disclose appropriately designated directory information from a student's education record if disclosure would not generally be considered harmful or an invasion of privacy.[28] Directory information may include a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance.[29] School officials may not designate students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy.[30] A school also must allow eligible students (*i.e.*, students who have reached 18 years of age or are attending a postsecondary institution) or parents, as appropriate, a reasonable amount of time to request that the school not disclose a student's directory information.[31]

- **Amendment or Correction of Education Records**. A school may receive requests to correct a student's education records to make them consistent with the student's gender identity. Updating a transgender student's education records to reflect the student's gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.

  - Under FERPA, a school must consider the request of an eligible student or parent to amend information in the student's education records that is inaccurate, misleading, or in violation of the student's privacy rights.[32] If the school does not amend the record, it must inform the requestor of its decision and of the right to a hearing. If, after the hearing, the school does not amend the record, it must inform the requestor of the right to insert a statement in the record with the requestor's comments on the contested information, a statement that the requestor disagrees with the hearing decision, or both. That statement must be disclosed whenever the record to which the statement relates is disclosed.[33]
  - Under Title IX, a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records.[34] If a student or parent complains about the school's handling of such a request, the school must promptly and equitably resolve the complaint under the school's Title IX grievance procedures.[35]

* * *

We appreciate the work that many schools, state agencies, and other organizations have undertaken to make educational programs and activities welcoming, safe, and inclusive for all students.

Sincerely,

/s/

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

/s/

Vanita Gupta
Principal Deputy Assistant Attorney General for Civil Rights
U.S. Department of Justice

[1] 20 U.S.C. §§ 1681–1688; 34 C.F.R. Pt. 106; 28 C.F.R. Pt. 54. In this letter, the term *schools* refers to recipients of Federal financial assistance at all educational levels, including school districts, colleges, and universities. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a).

[2] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf.

[3] ED, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 13, 2016), www.ed.gov/oese/oshs/emergingpractices.pdf. OCR also posts many of its resolution agreements in cases involving transgender students online at www.ed.gov/ocr/lgbt.html. While these agreements address fact-specific cases, and therefore do not state general policy, they identify examples of ways OCR and recipients have resolved some issues addressed in this guidance.

[4] 34 C.F.R. §§ 106.4, 106.31(a). For simplicity, this letter cites only to ED's Title IX regulations. DOJ has also promulgated Title IX regulations. *See* 28 C.F.R. Pt. 54. For purposes of how the Title IX regulations at issue in this guidance apply to transgender individuals, DOJ interprets its regulations similarly to ED. State and local rules cannot limit or override the requirements of Federal laws. *See* 34 C.F.R. § 106.6(b).

[5] *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998); *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *8 (4th Cir. Apr. 19, 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008); *Macy v. Dep't of Justice*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012). *See also* U.S. Dep't of Labor (USDOL), Training and Employment Guidance Letter No. 37-14, *Update on Complying with Nondiscrimination Requirements: Discrimination Based on Gender Identity, Gender Expression and Sex Stereotyping are Prohibited Forms of Sex Discrimination in the Workforce Development System* (2015), wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14.pdf; USDOL, Job Corps, Directive: Job Corps Program Instruction Notice No. 14-31, *Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program* (May 1, 2015), https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf; DOJ, Memorandum from the Attorney General, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (2014), www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; USDOL, Office of Federal Contract Compliance Programs, Directive 2014-02, *Gender Identity and Sex Discrimination* (2014), www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[6] *See Lusardi v. Dep't of the Army*, Appeal No. 0120133395 at 9 (U.S. Equal Emp't Opportunity Comm'n Apr. 1, 2015) ("An agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity.").

[7] *See G.G.*, 2016 WL 1567467, at *1 n.1 (noting that medical authorities "do not permit sex reassignment surgery for persons who are under the legal age of majority").

[8] 34 C.F.R. § 106.31(b)(4); *see G.G.*, 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment); *Glenn*, 663 F.3d at 1321 (defendant's proffered justification that "other women might object to [the plaintiff]'s restroom use" was "wholly irrelevant"). *See also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (recognizing that "mere negative attitudes, or fear . . . are not permissible bases for" government action).

[9] *See, e.g.,* Resolution Agreement, *In re Downey Unified Sch. Dist., CA*, OCR Case No. 09-12-1095, (Oct. 8, 2014), www.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (agreement to address harassment of transgender student, including allegations that peers continued to call her by her former name, shared pictures of her prior to her transition, and frequently asked questions about her anatomy and sexuality); Consent Decree, *Doe v. Anoka-Hennepin Sch. Dist. No. 11, MN* (D. Minn. Mar. 1, 2012), www.ed.gov/ocr/docs/investigations/05115901-d.pdf (consent decree to address sex-based harassment, including based on nonconformity with gender stereotypes); Resolution Agreement, *In re Tehachapi Unified Sch. Dist*., *CA*, OCR Case No. 09-11-1031 (June 30, 2011), www.ed.gov/ocr/docs/investigations/09111031-b.pdf (agreement to address sexual and gender-based harassment, including harassment based on nonconformity with gender stereotypes). *See also Lusardi,* Appeal No. 0120133395, at *15 ("Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment").

[10] *See, e.g.*, OCR, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), www.ed.gov/ocr/docs/shguide.pdf; OCR, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), www.ed.gov/ocr/letters/colleague-201010.pdf; OCR, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), www.ed.gov/ocr/letters/colleague-201104.pdf; OCR, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf.

[11] *See, e.g.*, Resolution Agreement, *In re Cent. Piedmont Cmty. Coll., NC*, OCR Case No. 11-14-2265 (Aug. 13, 2015), www.ed.gov/ocr/docs/investigations/more/11142265-b.pdf (agreement to use a transgender student's preferred name and gender and change the student's official record to reflect a name change).

[12] 34 C.F.R. §§ 106.32, 106.33, 106.34, 106.41(b).

[13] *See* 34 C.F.R. § 106.31.

[14] 34 C.F.R. § 106.33.

[15] *See, e.g.*, Resolution Agreement, *In re Township High Sch. Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 2, 2015), www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (agreement to provide any student who requests additional privacy "access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.").

[16] 34 C.F.R. § 106.41(b). Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.

[17] 34 C.F.R. § 106.6(b), (c). An interscholastic athletic association is subject to Title IX if (1) the association receives Federal financial assistance or (2) its members are recipients of Federal financial assistance and have ceded controlling authority over portions of their athletic program to the association. Where an athletic association is covered by Title IX, a school's obligations regarding transgender athletes apply with equal force to the association.

[18] The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled *On the Team: Equal Opportunity for Transgender Student Athletes* (2010) by Dr. Pat Griffin & Helen J. Carroll (*On the Team*), https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf. *See* NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* 2, 30-31 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (citing *On the Team*). The *On the Team* report noted that policies that may be appropriate at the college level may "be unfair and too complicated for [the high school] level of competition." *On the Team* at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.

[19] 34 C.F.R. § 106.34(a), (b). Schools may also separate students by sex in physical education classes during participation in contact sports. *Id*. § 106.34(a)(1).

[20] 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d); 34 C.F.R. § 106.34(c) (a recipient may offer a single-sex public nonvocational elementary and secondary school so long as it provides students of the excluded sex a "substantially

equal single-sex school or coeducational school").

[21] 20 U.S.C. § 1681(a)(6)(A); 34 C.F.R. § 106.14(a).

[22] 20 U.S.C. § 1686; 34 C.F.R. § 106.32.

[23] *See, e.g.,* Resolution Agreement, *In re Arcadia Unified. Sch. Dist., CA*, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013), www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf (agreement to provide access to single-sex overnight events consistent with students' gender identity, but allowing students to request access to private facilities).

[24] *See* 34 C.F.R. §§ 106.31(a), 106.31(b)(4). *See also*, *In re Downey Unified Sch. Dist., CA*, *supra* n. 9; *In re Cent. Piedmont Cmty. Coll., NC, supra* n. 11.

[25] 34 C.F.R. § 106.31(b)(7).

[26] 20 U.S.C. § 1232g; 34 C.F.R. Part 99. FERPA is administered by ED's Family Policy Compliance Office (FPCO). Additional information about FERPA and FPCO is available at www.ed.gov/fpco.

[27] 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1).

[28] 34 C.F.R. §§ 99.3, 99.31(a)(11), 99.37.

[29] 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.

[30] Letter from FPCO to Institutions of Postsecondary Education 3 (Sept. 2009), www.ed.gov/policy/gen/guid/fpco/doc/censuslettertohighered091609.pdf.

[31] 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. §§ 99.3. 99.37(a)(3).

[32] 34 C.F.R. § 99.20.

[33] 34 C.F.R. §§ 99.20-99.22.

[34] *See* 34 C.F.R. § 106.31(b)(4).

[35] 34 C.F.R. § 106.8(b).

EXHIBIT 6

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

June 28, 2016

Via Regular U.S. Mail and E-Mail to Andrew@rwblawoffice.com

Andrew J. Burton, Esq.
Renwick, Welsh & Burton, LLC
9 N. Mulberry Street
Mansfield, Ohio 44902

Re: OCR Docket #15-14-1076

Dear Mr. Burton:

The U.S. Department of Education's Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint filed on December 23, 2013, against the Highland Local Schools (the District). The complaint alleged that the District discriminated against a transgender student (the Student) based on sex. Specifically, the complaint alleged that the District discriminated against the Student, on the basis of sex, by requiring the Student to use a gender-neutral restroom and denying the Student access to restrooms consistent with the Student's gender identity. On August 29, 2014, OCR notified the District that the complaint was amended to include allegations that: District staff subjected the Student to harassment and the District failed to respond appropriately when the Student and Student's parent reported to the District that the Student was being subjected to frequent and repetitive harassment by other students.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681–1688, and its implementing regulation at 34 C.F.R. Part 106. Title IX prohibits discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. As a recipient of Federal financial assistance from the U.S. Department of Education (the Department), the District is subject to Title IX. Therefore, OCR has jurisdiction over this complaint.

Based on the complaint allegations, OCR investigated the following issues:

1. Whether the District, on the basis of sex, excluded a student from participation in, denied a student the benefits of, or otherwise subjected a student to discrimination in any education program or activity in violation of the Title IX implementing regulation at 34 C.F.R. § 106.31.

2. Whether the District interfered with or limited the ability of a student to participate in or benefit from the services, activities, or privileges provided, or otherwise limited any person in the enjoyment of any right, privilege, advantage, or opportunity based on sex of which it had notice in violation of the Title IX implementing regulation at 34 C.F.R. § 106.31.

3. Whether the District has adopted grievance procedures provide for the prompt and equitable resolution of student complaints under Title IX in accordance with the Title IX implementing regulation at 34 C.F.R. § 106.8(b).

To reach its determinations, OCR interviewed the Student's parent (the parent) and District administrators and staff members, reviewed documents provided by the parent and the District, conducted an on-site in March 2015, and reviewed information publicly available on the District's website, including the District's nondiscrimination policies and Title IX grievance procedure. This letter summarizes OCR's investigation and analysis. For the reasons set out below, OCR finds by a preponderance of the evidence that the District is in violation of Title IX because it 1) has failed to assess whether a hostile environment existed for the Student; and 2) denied the Student access to restrooms consistent with the Student's gender identity.

Applicable Legal Standards

Title IX Procedural Requirements

The Title IX regulation, at 34 C.F.R. § 106.8(a), requires a District to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX and its implementing regulation, including the investigation of any complaint communicated to such District alleging its noncompliance with Title IX or alleging any actions which would be prohibited by Title IX. The District must notify all of its students and employees of the name, office address, telephone number, and e-mail address of the employee or employees appointed. School districts must ensure that their Title IX coordinators are appropriately trained and possess comprehensive knowledge in all areas over which they have responsibility in order to effectively carry out their responsibilities, including the district's policies and procedures on sex discrimination and all complaints raising Title IX issues throughout the district.

In addition, the regulation implementing Title IX, at 34 C.F.R. § 106.9(a), requires each District to implement specific and continuing steps to notify indiviudals, including students and employees, that it does not discriminate on the basis of sex in the educational program or activity which it operates and that it is required by Title IX not to discriminate in such a manner.

Further, the Title IX regulation, at 34 C.F.R. § 106.8(b), requires a District to adopt and publish procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any actions prohibited by Title IX and its implementing regulation.

Sex-Based Harassment

Sex-based harassment is a form of sex discrimination prohibited by Title IX. Harassment of a student on the basis of sex can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex. Districts have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. A school's failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX.

A school may violate Title IX and the Title IX implementing regulation if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the school knew or reasonably should have known about the harassment; and (3) the school fails to take appropriate responsive action reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. 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.

Schools also provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in sex-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the school is responsible for the discriminatory conduct whether or not it has notice.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon circumstances. However, in all cases the response must be tailored to stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The school must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate, or providing more systemic remedies to prevent its reoccurrence. Any steps to address harassment should be designed to minimize the burden on the harassed student.

Bathroom Use

Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), provides, in relevant part, that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, or other education program or activity operated by a recipient which receives Federal financial assistance. The regulation implementing Title IX, at 34 C.F.R. § 106.31(b), further provides that a recipient may not, on the basis of sex, deny any person such aid, benefit or services; treat an individual differently from another in determining whether the individual satisfies any requirement or condition for the provision of such aid, benefit, or service; provide different aid, benefits, or services or provide

aid, benefits, or services in a different manner; subject any person to separate or different rules of behavior; or otherwise limit any person in the enjoyment of any right, privilege or opportunity.

All students, including transgender students, are protected from sex-based discrimination under Title IX. OCR treats a student's gender identity as the student's sex for purposes of Title IX and its implementing regulation. A school may receive requests to correct a student's education records to make them consistent with the student's gender identity. Under Title IX, a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records. 34 C.F.R. § 106.31(b)(4). If a student or parent complains about the school's handling of such a request, the school must promptly and equitably resolve the complaint under the school's Title IX grievance procedures. 34 C.F.R. § 106.8(b).

A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities. The regulation implementing Title IX, at 34 C.F.R. § 106.33, provides that a recipient may provide separate toilet facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.[1] Consistent with Title IX, a school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.

Background Facts

Currently 11 years old, the Student attends elementary school in the District and is in fourth grade. During kindergarten, the Student began exhibiting behavior indicating gender identification different from sex assigned at birth. During the summer between kindergarten and first grade, the Student transitioned and consistently began identifying with the Student's gender identity. Prior to the start of the Student's first grade year in 2012-2013, the Student's parent met with District administrators to notify the District of the Student's gender transition and gender identity and requested that the Student be treated consistently with the Student's gender identity for all educational purposes. Specifically, the parent requested that the Student be referred to by the Student's preferred name and pronouns in school, school documents, and records; and be permitted to use school bathrooms consistent with the Student's gender identity. The Student's preferred name was legally changed in November 2013 and the parent presented the District with a judgment entry from the court granting the name change.

The District operates one elementary school (K-5), one middle school (graded 6-8), and one high school (grades 9-12), with a total student population of approximately 1750 students. Approximately 850 students attend the elementary school which is located in a one-level building.

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[1] This complaint focuses on access to bathrooms and allegations of sex-based harassment.

The District's Title IX Policies and Procedures

The District maintains bylaws and policies (AG 2260) which include its notice of nondiscrimination that prohibits discrimination, including discrimination on the basis of "[s]ex, including sexual orientation and transgender identity", and posts its policy and administrative guideline (AG) prohibiting such discrimination on its website.[2] AG 2260 also states that OCR considers gender-based harassment to be a form of sex discrimination. AG 2260 designates the superintendent as the person to handle inquiries regarding the non-discrimination policies of the District or to address any complaint of discrimination, and it provides a contact address and telephone number for the superintendent.

The District's Title IX grievance procedure applying to students is explained in Bylaw and Policy 5517, entitled "Anti-Harassment" and its corresponding Administrative Guideline.[3] The grievance procedure, which applies to complaints alleging harassment carried out by employees, other students, or third parties, provides for the adequate, reliable, and impartial investigation of complaints, and gives both parties the right to produce witnesses and other evidence.

Alleged Sex-Based Harassment

Student Incidents

The parent told OCR that the District failed to respond appropriately when District staff were made aware that during the 2012-2013 and 2013-2014 school years the Student was being subjected to frequent and repetitive harassment by other students on the bus, at recess, and at lunch for failure to conform to gender stereotypes, including taunting, name-calling, questions about the Student's anatomy, intentional use of the Student's old name, and referring to the Student's sex assigned at birth. The parent said that, when harassment occurred by other students, she and/or the Student would notify the principal and/or superintendent of the harassment.

The documentation established that in 2014 the parent complained of the above-described harassment to District staff at least five times. One incident from February 2014, involved a student in the lunchroom yelling, "You ARE a [the Student's birth sex]!" to the Student, loud enough for other students to hear it. The student also went around the lunchroom telling everyone of the Student's sex identified at birth. The incident was reported to an administrator and the Student reported that the administrator told the Student to be strong and ignore the comments. The administrator did not deny or admit making the statement, but told OCR that he took additional steps to address the incident. However, the District provided no documentation to establish whether and how the incident was investigated or addressed.

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[2] Note the District did not provide OCR copies of Bylaw and Policy 2260 (Policy 2260) and Administrative Guideline 2260 (AG 2260), both entitled "Nondiscrimination and Access to Equal Educational Opportunity," *available at* http://www.neola.com/highlandlcl-oh/. OCR located them on the District's website.

[3] Bylaw and Policy 5517, entitled Anti-Harassment", *available at* http://www.neola.com/highlandlcl-oh/. OCR found that the District also maintains Bylaw and Policy and Administrative Guideline 3362 and 4362, which are applicable to professional staff (i.e., teachers) and classified employees (i.e., custodians), respectively. These documents are nearly identical to 5517; thus, the same concerns OCR identified with respect to 5517 apply equally to 3362 and 4362.

In May 2014, the parent notified an administrator that several students at school continued to make comments to the Student referencing the Student's sex identified at birth. In early August 2014, the parent notified the same administrator that other schoolchildren who ride the school bus with the Student were calling the Student a faggot and harassing the Student, and she was concerned that the Student would be harassed on the bus once school started. A week later the parent notified the administrator that as she had expected would happen, these schoolchildren at the bus stop were harassing the Student and the Student's sibling, calling the Student "gay". The administrator initially responded that if the behavior occurs on the bus or at school the school would address it.

The parent informed the school administrator that she was not satisfied with this response as the students were waiting for the school bus. The next day the parent notified the administrator that the other students were using the Student's old name in a harassing manner. In early September 2014, the parent notified the administrator that one of the same students was again harassing the Student on the bus. The administrator informed the parent that he would speak with the student about the behavior and confirmed to the parent that he had addressed the conduct with the student; however, the parent reported to the administrator that harassing conduct continued even after the administrator spoke with the student. In January 2015, the parent notified the administrator again that another student on the bus was harassing the Student by calling the Student by the Student's old name, referring to the Student's sex identified at birth, and making comments about the Student's genitalia. The bus driver confirmed to OCR that she heard this comment and reported it to District administrators.

District staff told OCR that they addressed each incident as it happened; however, there was insufficient documentation for OCR to corroborate the District's efforts. In most of the incidents, District administrators reported that they told the students to stop the harassment and sometimes moved seats on the bus. When investigating the bus incidents, administrators said they did not speak with the bus driver to find out whether she was aware of any of the harassment. In one instance, the District informed OCR that discipline was levied against the harassing student.

The Student's parent stated that the harassment by other students has impacted the Student. According to the parent, there have been days when the Student does not want to go to school or ride the bus because of the way other students acted towards the Student, especially during the 2014-2015 school year. The Student's parent reports that the Student has missed some days of school because the Student felt humiliated and embarrassed by the behavior of some students. Irrespective of the harassment experienced by the Student and the Student's feelings of being ostracized, the Student's parent continued to insist that the Student go to school.

Name and Pronoun Use

Since notifying the District of the Student's gender identity prior to the start of the Student's first grade year in 2012-2013, the parent has requested that all of the Student's records correctly identify the Student's preferred name and gender identity. District administrators reported to OCR that some District staff have mistakenly used Student's old name and the wrong pronouns.

An administrator told OCR that when the Student started kindergarten, the Student identified with the Student's birth sex and name, and the Student's new legal name is a shorter version of the Student's old name. Therefore, the administrator stated there have been some mistakes in using the Student's old name and wrong pronouns by those who knew the Student in kindergarten. Administrators said that, each time the parent brought to their attention that District staff were using the wrong name or pronouns with the Student, the administrators would speak with the staff person about it.

When OCR spoke to District staff, certain teachers and staff stated that they had on occasion mistakenly used the wrong pronouns and name with the Student or when referring to the Student. One staff member reported only referring to the Student as "the Student" or by the Student's name, and informed the principal she would not use pronouns consistent with the Student's gender identity when referring to or speaking with the Student because she disagrees with such a practice. Another District staff member told OCR that she did not use pronouns consistent with the Student's gender identity as she had difficulty recognizing the Student in this way.

The parent told OCR that the use of the Student's old name and incorrect pronouns has impacted the Student, as there have been days when the Student has not wanted to go to school or has tried to avoid going to certain classes because of this practice.

First Grade (2012-2013)

The principal informed OCR that he communicated the Student's name change by email and during staff meetings; however, the District did not provide OCR a copy of the email.

In March 2013, the District initially agreed with the parent to use the Student's gender identity on the Student's IEP (Individualized Education Plan) and revised the document. However, in June 2013, a District administrator informed the parent that the District must use the Student's sex identified at birth in the Education Management Information System (EMIS)[4] reporting system, and that the Student's gender would be changed back to the Student's sex identified at birth in the District's document. OCR reviewed the District March 2013 IEP, which used the Student's preferred and legal name in the student information section but the Student's birth name was used throughout the rest of the document. The 2013 IEP lists the Student's sex identified at birth, not the Student's gender identity.

In April and again in June 2013, the parent requested that the District not use the Student's gender identity on teacher's class lists, and that they not use the Student's birth middle name, which was gender specific and identified the Student's birth sex.

Second Grade (2013-2014)

The District administrator told OCR that during the 2013-2014 school year the Student's name change was clearly communicated to staff via e-mail and in staff meetings, and reminders were provided in several staff meetings that pronouns consistent with the Student's gender identity are

[4] The EMIS guidelines, available at http://education.ohio.gov/Topics/Data/EMIS/EMIS-Documentation/Current-EMIS-Manual, do not state that districts must report the sex assigned on a student's birth certificate.

to be used with the Student. The District has not provided any copies of such e-mails in any of its data responses to or communications with OCR. The District provided OCR an undated typed written note, which stated "During the 2013-2014 school year, any staff member that had [Student] in class was informed of [the Student's] transgender status per parent/guardian request. The staff members involved were told that [Student] is a transgender student and will be identifying as a [gender identity]." The typed note provided the name and title of a District administrator. The District did not indicate how this undated note was used or distributed.

In November 2013, three special education related District documents, generated after the parent notified the District of the Student's legal name change, all used the Student's birth name (a notice, parental consent form, and an evaluation report). As previously noted, the parent provided the District with documentation of the Student's legal name change in November 2013. Subsequently in February 2014, three special education related assessments included the Student's new legal name with no use of pronouns. The Student's 2014 IEP listed the Student's legally changed name but contained pronouns consistent with the Student's birth sex. According to the parent, during the spring 2014 annual IEP meeting, school staff continued to use the Student's birth name.

Third Grade (2014-2015)

The parent complained to the superintendent in August 2014 that at least four District staff continued to use the wrong pronouns and refer to the Student's sex identified at birth. In September 2014, the parent reported to administrators that two additional District staff continued to use the Student's old name with the Student.

In January 2015 the parent reported that another District staff person continued to use the Student's old name with the Student. In March 2015, administrators told OCR they felt that District staff were using the correct name and pronouns with the Student.

In April 2015, the parent reported to the District and OCR that the school's email system continued to use the Student's previous name and provided a screen shot demonstrating the use of the Student's previous name. The superintendent responded to the parent on the same day that she made the request and informed the parent that the District would make the correction immediately. The parent confirmed to OCR that the Student's name was corrected on the Student's email account.

Fourth Grade (2015-2016)

In September 2015, the parent reported to OCR that the Student's previous name was used on the "scoreboard" link for the typing club, which allowed the Student's entire class to see typing scores of their classmates and the Student's previous name. The parent reported this and that the teacher had used the wrong name and pronouns to the District administrator, who assured the parent that the name would be fixed and that action would be taken concerning the teacher. A District administrator confirmed to OCR that the name was changed and that no students viewed the previous name in the system. In addition, the Student was moved to a different computer lab class.

PowerSchool Generated Student Records

The District uses PowerSchool, a database system used to maintain student information such as students' names, parent information, demographics, attendance records, student schedules, and student grades. According to District administrators, District teachers, administrators, and secretaries all have access to PowerSchool. As of March 2015, District administrators provided documentation that the Student's current legal name was correctly listed in PowerSchool. The Student's gender was listed as the sex identified at birth, not the Student's gender identity.

Bathroom Use

Prior to the Student's first grade year (2012-2013), the parent requested that the Student be permitted to use the bathrooms consistent with the Student's gender identity. District administrators refused the request and, instead, required the Student to use the individual-user restroom in the Student's first grade classroom, which was also available and used by the student's classmates, and an individual-user restroom in the office area of the Student's school. Specifically, a District administrator informed the parent in June 2013 that the Student could use the restrooms consistent with the Student's gender identity only if the Student's birth certificate identified the Student's gender identity.[5]

Every subsequent school year thereafter—2013-2014, 2014-2015, and 2015-16—the parent has requested that the Student be permitted to use restrooms consistent with the Student's gender identity, and the District has denied the request. During the Student's second grade year (2013-2014), the Student was required to use an individual-user restroom in the office area of the Student's school. The parent told OCR that each time the Student's classmates lined up for a restroom break, they would see that the Student did not use the restrooms with them. The parent reported that the Student said that many times classmates asked the Student why the Student does not use the restroom with them, and the Student complained about feeling separated from peers, alone, and left out. Meeting notes provided by the District indicate that in 2014 the parent raised concerns about the distance the student traveled from the class to the office when the Student used the restroom.

During the Student's third grade year (2014-2015), the Student was required to use an individual-user restroom in the office area or a teachers' lounge restroom, which was closer to the Student's homeroom and the gymnasium. The parent stated that the teachers' lounge and office restrooms made available to the Student were farther from the Student's classrooms than the restrooms classmates used. In addition, the parent said that the Student expressed feeling uncomfortable entering the teachers' lounge.

The parent notified the school and OCR that at the start of the Student's fourth grade year (2015-2016), for a short period of time that the Student refused to use the bathroom while at school. The parent conveyed that the Student did not want to draw attention from other students as being different and not being permitted to use the restrooms consistent with the Student's gender

[5] Ohio law does not permit a person to change the sex assigned on the person's birth certificate. See Ohio Revised Code § 2705.15 (2006)

identity. During the 2015-2016 school, the District added another teacher restroom that the Student can use that is closer to the Student's classroom. However, this restroom is locked. Therefore, when the Student had to use the restroom, the Student had to either go to the office or faculty bathrooms farther away or notify one of the teachers or staff, who escorted the Student to a faulty restroom closer to the Student's classroom, entered the keypad bathroom code to unlock the door, waited for the Student, and then escorted the Student back to the classroom.

The District acknowledged to OCR that it prohibits the Student from using District restrooms consistent with the Student's gender identity. The School administrator confirmed having told the parent that if the Student's birth certificate identified the Student's gender identity, the Student could use the restrooms consistent with the Student's gender identity. The School administrator also stated that the District's basis for this decision is that it assigns sex-segregated facilities, like restrooms and locker rooms, based on the sex identified on a student's birth certificate. However, the District cited to no written policy outlining this policy or practice. In response to OCR's inquiries, the School administrator also stated he was unaware that Ohio law does not permit a person to change the sex on the person's birth certificate. In addition, District administrators told OCR that the District is concerned that, if it allowed the Student to use restrooms consistent with the Student's gender identity, when the Student's birth certificate identifies the opposite sex, then other students may say they want to go to a different restroom than what is identified on their birth certificate.

Support Services

The parent reports that the District never offered the Student professional school support services to address any discriminatory effects experienced by the Student. There also is no documentation of support services being offered to the Student in the materials produced to OCR by the District.

Analysis and Conclusions

Policies and Procedures

OCR has determined that the District's notice of non-discrimination is in compliance with Title IX. OCR also concludes that the grievance procedures, taken together with the notice of non-discrimination, are also in compliance with Title IX. OCR, however, notes that the Superintendent was not familiar with the District's specific policy language referencing transgender students.

Gender-Based Harassment

Based on the preponderance of evidence standard, OCR has determined that the District failed to assess whether a hostile environment existed for the Student in violation of the Title IX, at 34 C.F.R. § 106.31.

The evidence shows District staff used the Student's previous name and pronouns inconsistent with the Student's gender identity after the District was notified of the Student's transgender

status in the early part of the 2012-2013 school year through the 2015-16 school years. While the District stated that it informed the appropriate staff during the 2013-2014 school year to use the Student's preferred and then legally changed name, along with the correct gender identity pronouns, a few staff acknowledged calling the Student by the former birth name and using pronouns inconsistent with the Student's gender identity.

While the District took some steps to respond to the harassment by staff and students towards the Student, it failed to adequately investigate the complaints lodged by the parent. For instance, according to the bus driver, the District did not interview the driver regarding the alleged incidents of harassment on the bus in 2014. Moreover, the District merely offered to change the student's seat on the bus and did not provide any other alternatives to the Student. Although administrators stated that the District investigated each incident reported by the parent and the Student, the materials produced to OCR by the District are sparse and do not provide documentation recording the District's efforts to investigate and respond to the harassment. The District did not dispute that the Student was harassed by other Students.

With regard to the use of pronouns inconsistent with the Student's gender identity and use of the Student's preferred and legally changed name, the District failed to provide OCR materials adequately substantiating the District's efforts to inform and to instruct staff to use the Student's preferred and then legally changed name and to use pronouns consistent with the Student's gender identity. Although the frequency of using the incorrect name or pronouns with respect to the Student declined from 2012-2013 to 2015-2016, the continued use of the Student's name may have contributed to a hostile environment for the Student.

Without an adequate investigations of the reported incidents of alleged harassment and consideration of the totality of the impact of the alleged incidents, of both the student incidents and staff's failure to use the Student's preferred and legal name and pronouns consistent with the Student's gender identity, the District failed to assess whether the reported harassing conduct created a hostile environment for the Student. Specifically, in violation of Title IX, OCR concludes that the District failed to assess whether the reported incidents were sufficiently serious to deny or limit the Student's ability to participate in or benefit from the educational program and, therefore, could not determine if responsive actions were reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

Bathroom Use

Once the parent notified the school that the Student is transgender, the school was obligated to begin permitting the student access to sex-segregated facilities in a manner consistent with the Student's gender identity. During the 2013-2014, 2014-2015, 2015-2016 school years the District denied the Student access to student restrooms consistent with the Student's gender identity. Denying access to the bathroom consistent with the Student's gender identity, required the Student to make choices about privacy, particularly whether and how to respond to other students questions about why the Student used different bathrooms. The Student reported that having to deal with these questions, along with having to use adult office staff and faculty bathrooms, made the Student feel ostracized and generally was difficult for the Student.

Accordingly, OCR finds, by a preponderance of the evidence, that the District treated the Student differently on the basis of sex in its educational programs and activities, in determining whether the Student satisfies any requirement or condition for the provision of benefits or services; by providing her different benefits or benefits in a different manner; and by subjecting the Student to separate or different rules of behavior, or otherwise limiting the Student in the enjoyment of rights, privileges or opportunities in violation of Title IX, at 34 C.F.R. § 106.31.

Procedural Posture

OCR attempted on multiple occasions to engage in negotiations with the District to resolve the Title IX violations in this case. Specifically, on March 29, 2016, OCR notified the District of its determinations that the District failed to comply with the Title IX regulations. On March 30, 2016, OCR provided the District with a proposed resolution agreement designed to resolve the District's non-compliance. Since March 30, 2016, OCR has attempted to negotiate a resolution agreement by communicating with the District, through you, on April 8, May 6, May 12, May 13, May 31, and June 3, 2016, to discuss potential agreement to resolve this case with the District.

On June 10, 2016, the District filed a lawsuit in U.S. District Court, Southern District of Ohio, Eastern Division, Case No. 16-524. Verified by the Superintendent, the authorized representative of the Board of the Education, the District represented in the complaint that it would not accept OCR's proposed Resolution Agreement. In fact, the District never responded to OCR's proposed Resolution Agreement or provided any alternative proposals or language regarding the elements of OCR's initial proposed Resolution Agreement. In light of the District's verified representation that it would not voluntarily resolve this investigation and its lack of response to OCR's negotiation attempts, on June 10, 2016, pursuant to OCR's *Case Processing Manual*, at §303 (b)(2)(i), OCR informed the District in writing that it had determined that negotiations had reached an impasse. This letter further informed the District that unless a resolution agreement is reached, OCR will issue a letter finding the District in violation of Title IX. As of the date of this letter, the District has not entered into a voluntary resolution agreement to resolve the Title IX violations.

Consistent with the statute and regulation, OCR continues to be willing to negotiate compliance. If an agreement is not reached within 30 calendar days of the date of this Letter of Findings OCR will issue a Letter of Impending Enforcement Action pursuant to the *Case Processing Manual*, at § 305.

If OCR determines that the matter cannot be resolved voluntarily by informal means OCR then must either initiate proceedings to effectuate the suspension or termination of or refusal to grant or to continue Federal financial assistance or seek compliance through any means otherwise authorized by law. Such other means may include, but are not limited to, referring the matter to the Department of Justice to initiate a lawsuit. 34 C.F.R § 106.71 (incorporating, among other provisions, 34 C.F.R. §§ 100.7 (c)-(d)); 100.8; 100.9 (a)).

This concludes OCR's investigation of the complaint. These findings should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues

other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she had filed a complaint or participated in the complaint resolution process. If this happens another complaint may be file alleging such treatment. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you or the District has any questions about this matter, please do not hesitate to contact Lisa M. Lane, Supervisory Attorney/Team Leader, at (216) 522-2678.

Sincerely,

Meena Morey Chandra
Regional Director

EXHIBIT 7

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

July 29, 2016

Via Regular U.S. Mail and E-Mail to Andrew@rwblawoffice.com

Andrew J. Burton, Esq.
Renwick, Welsh & Burton LLC
9 N. Mulberry Street
Mansfield, Ohio 44902

Re: OCR Docket #15-14-1076

Dear Mr. Burton:

Pursuant to Article III, Section 305 of its *Case Processing Manual*, the U.S. Department of Education Office for Civil Rights issues this Letter of Impending Enforcement Action in Complaint 15-14-1076. The complaint, filed on December 23, 2013, against Highland Local Schools (District), alleged that the District discriminated against a student (the Student) based on sex. Specifically, the complaint alleged that the District discriminated against the Student, on the basis of sex, by denying the Student access to restrooms consistent with the Student's gender identity. On August 29, 2014, the Complainant amended the complaint to include allegations that District staff subjected the Student to harassment and the District failed to respond appropriately when the Student and Student's parent reported to the District that the Student was being subjected to harassment, including bullying based on sex, by other students.

After opening the Complaint for investigation, OCR issued data requests to the District and reviewed its responses. OCR conducted interviews and an on-site visit, and reviewed other relevant information regarding the case. At the conclusion of the investigation, OCR informed the District of its determination that the District is in violation of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. § 106.31. Specifically, OCR determined that the District 1) failed to assess whether a hostile environment based on sex existed when students made derogatory comments about the Student and staff continued to refer to the Student by the wrong name or pronouns; and 2) denied the Student access to restrooms consistent with the Student's gender identity.

On March 29, 2016, OCR conducted a telephone conference with the District's counsel[1] and provided a summary of OCR's violation determinations. On March 30, 2016, OCR provided the District with a proposed Resolution Agreement (Agreement) with terms designed to resolve the District's non-compliance. OCR advised the District that under the *Case Processing Manual*, OCR and the recipient have a period of up to 90 calendar days, from the date that proposed terms of the resolution agreement are shared with the recipient, within which to reach final agreement, provided the *Case Processing Manual* for reference, and advised that the 90 days would expire on June 28, 2016.

During the negotiation period, OCR made attempts to discuss its Title IX violation determinations and possible resolution terms with the District to address sex-based harassment issues involving the Student and students and staff and access to restrooms consistent with the Student's gender identity:

- On April 7, 2016, OCR attempted to reach the District via telephone. On April 8, 2016, the District returned OCR's call explaining that the proposed Agreement was clear and that the Superintendent planned to advise the District's Board of Education (Board) of the proposed Agreement, at the April 20, 2016, Board meeting.
- On April 26, 2016, OCR attempted to reach the District by telephone and left the District a voicemail message.
- On May 3, 2016, the District left OCR a voicemail message stating that the Board met on April 20, 2016, and decided it needed to review the proposed Agreement further and the next Board meeting was May 18, 2016.
- On May 6, 2016, OCR reached the District and was informed that some Board members at the April 20, 2016, Board meeting wanted more time to discuss the entire proposed Agreement. At that time, OCR reiterated the 90-day time period for negotiations and offered to meet with the Board to explain, discuss, and answer any questions regarding OCR's investigation determinations and proposed resolution terms. The District indicated OCR's offer to meet would be shared with Board members and the District would follow up with OCR not later than May 11 or 12, 2016, prior to the May 18 Board meeting.
- On May 11 and 12, 2016, OCR left voicemails for the District following up on the previous May 6 call. On May 12, 2016, the District left a voicemail message for OCR stating that the Board met on May 11 and the next Board meeting would be June 8, 2016.
- On May 13, 2016, OCR e-mailed the District noting the 90-day negotiation period would expire on June 28, 2016, and that OCR may end the negotiations period at any time prior to the expiration of the 90-calendar-day period when it is clear that agreement will not be reached (e.g., the recipient has refused to discuss any resolution). On the same day, May 13, 2016, the District e-mailed thanking OCR for the information.
- On May 31, 2016, OCR e-mailed the District to follow up on OCR's offer to meet with the Board before the 90 days to negotiate expired. On June 3, 2016, the District replied that the Board did not need to meet with OCR and that it would be making decisions

[1] On January 23, 2014, the law firm of Renwick, Welsh & Burton LLC notified OCR that it represented the District, its officials, and its employees in this matter.

regarding the proposed resolution agreement at the next regular Board meeting on June 9, 2016. OCR responded the same day acknowledging the District's e-mail response.

On June 10, 2016, the District filed a lawsuit in the U.S. District Court, Southern District of Ohio, Eastern Division, Case No. 16-524. This complaint, verified and signed by Superintendent William Dodds, states that the District decided that it will not accept OCR's proposed Agreement. Based on this information, OCR issued a letter on June 10, 2016, declaring an impasse in the negotiations, pursuant to OCR's *Case Processing Manual*, at Section 303(b)(2)(i).

The District did not respond to OCR's June 10 letter. Because a resolution agreement was not reached during the 10-day impasse period, OCR issued its Letter of Findings to the District on June 28, 2016, pursuant to OCR's *Case Processing Manual*, at Section 303(b)(3).

As of the date of this letter, OCR has not received any further communications from the District regarding the Title IX violation determinations or possible terms to resolve the District's violation of civil rights laws. As a result, OCR issues this Letter of Impending Enforcement Action pursuant to Section 305 of its *Case Processing Manual*.

Jurisdiction

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, and Title IX's implementing regulation at 34 C.F.R. Part 106. Title IX prohibits discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. 34 C.F.R. § 106.1. As a recipient of Federal financial assistance from the Department, the District is subject to Title IX.

Legal Standards

Sex-Based Harassment

Sex-based harassment is a form of sex discrimination prohibited by the Title IX regulation at 34 C.F.R. § 106.31. Harassment of a student on the basis of sex can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. Districts have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. A school's failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX.

A school may violate Title IX and the Title IX implementing regulation if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the school knew or reasonably should have known about the harassment; and (3) the school fails to take appropriate responsive action reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. 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.

Schools also provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in sex-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the school is responsible for the discriminatory conduct whether or not it has notice. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and impartial. What constitutes a reasonable response to harassment will differ depending upon circumstances. However, the response must be tailored to stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The school must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate, or providing more systemic remedies to prevent its reoccurrence. Steps to address harassment should be designed to minimize the burden on the harassed student.

A school may receive requests to correct a student's education records to make them consistent with the student's gender identity. Under Title IX, a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records. 34 C.F.R. § 106.31(b)(4). If a student or parent complains about the school's handling of such a request, the school must promptly and equitably resolve the complaint under the school's Title IX grievance procedures. 34 C.F.R. § 106.8(b).

Restroom Use

Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), provides, in relevant part, that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, or other education program or activity operated by a recipient which receives Federal financial assistance. The regulation implementing Title IX, at 34 C.F.R. § 106.31(b), further provides that a recipient may not, on the basis of sex, deny any person such aid, benefit or services; treat an individual differently from another in determining whether the individual satisfies any requirement or condition for the provision of such aid, benefit, or service; provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; subject any person to separate or different rules of behavior; or otherwise limit any person in the enjoyment of any right, privilege or opportunity.

All students, including transgender students, are protected from sex-based discrimination under Title IX. OCR treats a student's gender identity as the student's sex for purposes of Title IX and its implementing regulation.

A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities. The regulation implementing Title IX, at 34 C.F.R. § 106.33, provides that a recipient may provide separate toilet facilities on the basis of sex, but such facilities provided for students of one sex shall be

comparable to such facilities provided for students of the other sex.[2] Consistent with Title IX, a school may not require transgender students to use such facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.

Findings of Fact

Background

Currently 11 years old, the Student is enrolled in the District's elementary school and completed fourth grade during the 2015-2016 school year. During kindergarten, the Student began exhibiting behavior indicating gender identification different from the Student's sex assigned at birth. During the summer between kindergarten and first grade, the Student transitioned and consistently began identifying with the Student's gender identity. Prior to the Student entering first grade in the 2012-2013 school year, the Student's parent met with the elementary school Principal (Principal) to notify the District of the Student's gender transition and gender identity and requested that the Student be treated consistently with the Student's gender identity for all educational purposes. The Student's parent provided the District with a note from a physician explaining that the Student was transgender. Specifically, the parent requested that the Student be referred to by the Student's preferred name and pronouns in school, school documents, and records; and be permitted to use school restrooms consistent with the Student's gender identity. The Student's preferred name was legally changed in November 2013 and the parent presented the District with a judgment entry from the court granting the name change.

The District operates one elementary school (grades K-5), one middle school (grades 6-8), and one high school (grades 9-12). The District reported to OCR for its 2013-2014 Civil Rights Data Collection (CRDC) a total student population of 1,750 and that 827 students attend the elementary school. The District reported to the Ohio Department of Education (ODE) in the fall enrollment headcount from October 2015 a total student population of 1,855 students and that 865 students attend the elementary school. The District's elementary school is a one-level building.

District Policies

During the investigation, OCR obtained the District's publicly available policies concerning Title IX prior to its March 18, 2015 onsite. The District maintained bylaws and policies which include its notice of nondiscrimination (AG 2260) that prohibits discrimination, including discrimination on the basis of "[s]ex, including sexual orientation and transgender identity", and posts its policy and administrative guideline (AG) prohibiting such discrimination on its website. AG 2260 also states that OCR considers gender-based harassment to be a form of sex discrimination. AG 2260 designates the Superintendent as the person to handle inquiries regarding the nondiscrimination policies of the District or to address any complaint of discrimination, and it provides a contact address and telephone number for the Superintendent.

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[2] This Complaint focuses on access to restrooms and allegations of sex-based harassment.

In an interview with OCR on March 18, 2015, the Superintendent stated that the District's grievance procedures did not cover discrimination based on transgender status; however, later in the interview, the Superintendent acknowledged the District's grievance procedures, available at http://www.neola.com/highlandlcl-oh/, included policy documents that referenced discrimination based on transgender identity. OCR confirmed the publicly available policies referenced discrimination based on transgender identity on the date OCR issued its Letter of Finding, June 28, 2016.

On June 30, 2015, OCR representatives again confirmed with the Superintendent the District's Title IX policies. The District's Title IX grievance procedure applying to students is explained in Bylaw and Policy 5517, entitled "Anti-Harassment," and its corresponding Administrative Guideline. The grievance procedure, which applies to complaints alleging harassment carried out by employees, other students, or third parties, provides for the adequate, reliable, and impartial investigation of complaints, and gives both parties the right to produce witnesses and other evidence. The procedures provide for written notice of the outcome of the investigation to both parties and an assurance that the school will take steps to end harassment and "rectify the problems" and later states that the District will take action to prevent the harassment from reoccuring.

Sex-Based Harassment

Student Incidents

The Student's parent reported to OCR that the District failed to respond appropriately when District staff were made aware that during the 2012-2013, 2013-2014, and 2014-2015 school years the Student was being subjected to frequent and repetitive harassment by other students on the bus, at recess, and at lunch for failure to conform to gender stereotypes, including taunting, name-calling, questions about the Student's anatomy, intentional use of the Student's old name, and references to the Student's sex assigned at birth. The parent stated that, when harassment occurred by other students, the parent and/or the Student would notify the Principal and/or Superintendent of the harassment.

The documentation established that in 2014 the parent complained of the above-described harassment to District staff at least five times. One incident from February 2014, involved a student in the lunchroom yelling, "You ARE a [the Student's birth sex]!" to the Student, loud enough for other students to hear it. The student also went around the lunchroom telling everyone of the Student's sex assigned at birth. The incident was reported to the Principal and the Superintendent and the Student reported that the elementary school Assistant Principal (Assistant Principal) told the Student to be strong and ignore the comments. When interviewed by OCR on March 18, 2015, the Assistant Principal did not deny or admit making the statement, but told OCR that he took additional steps to address the incident. The Assistant Principal informed OCR that he recalled telling the Student to stay away from those types of students and stated that he believed he would have sought out the student involved and spoken with the student, but the Assistant Principal could not recall who the student was or provide specific details about his response during his interview with OCR. In its responses to OCR's January 17, 2014, August 29, 2014, and March 19, 2015, data requests on January 31, 2014, September 19,

2014, and April 2, 2015, the District provided no documentation to establish whether and how the incident was investigated or addressed. After OCR's inquiries during the Assistant Principal interview on March 18, 2015, the District did not provide any additional information that it investigated or addressed the lunchroom incident.

On August 7, 2014, prior to the start of the school year, the parent notified the Principal and Superintendent that neighborhood schoolchildren who typically rode the school bus with the Student during the school year were harassing the Student by calling the Student a "faggot," and she was concerned that the Student would be harassed on the bus once school started. The following day the Principal assured the parent via e-mail that the District would respond immediately and enforce the elementary school student handbook if this occurred, stating, "We will zero tolerance for any such behavior and enforce our discipline procedures as appropriate." On the second day of school, August 15, 2014, the parent notified the Principal, Superintendent, and Assistant Principal that the same schoolchildren at the bus stop were harassing the Student and the Student's sibling and calling the Student "gay" while the students waited for the bus. The Student's parent provided the administrators with the first names and bus routes for three of the students involved. On August 15, 2014, the Principal initially responded that if the behavior occurs on the bus or at school the school would address it.

That same day the parent informed the Principal, Superintendent, and Assistant Principal that she was not satisfied with this response as the behavior occurred while students were waiting for the school bus at their designated bus stop. The Principal replied that "[t]he matter will be addressed with the students once we identify them and never said we wouldn't speak with them." The next day, August 16, 2014, the parent notified the Principal, Superintendent, and Assistant Principal via e-mail that the other students were using the Student's old name in a harassing manner. The parent provided the bus number and first name of one student and identified one student witness. On August 18, 2014, the Principal e-mailed the parent and stated that he and the Assistant Principal "took care of the situation this morning;" however, the only documentation the District provided to OCR concerning its response was a student discipline log with an August 18, 2014, entry, on which the District had redacted student identifying information. The entry stated, "Talked to about [Student]; reminded to BE NICE to students on bus."

On September 2, 2014, the parent notified the Assistant Principal that one of the same students was again harassing the Student on the bus by "making vulgar faces at [the Student] and sticking out and wiggling her tongue constantly, making sure to get [the Student's] attention." The Assistant Principal informed the parent that he would speak with the student about the behavior and confirmed to the parent that he had addressed the conduct with the student; however, the parent reported to the Assistant Principal that harassing conduct continued even after the administrator spoke with the student. The District provided OCR with a student discipline log which included an entry dated September 4, 2014, that stated, "Discussed sticking tongue out at [the Student] on bus; instructed to not say anything or do anything to any students if it isn't nice" but the identifying information of the student involved was redacted. The bus driver confirmed to OCR that the Assistant Principal moved the involved student's seat on the bus.

In January 2015, the parent notified the Assistant Principal again that another student on the bus was harassing the Student by calling the Student by the Student's old name, referring to the

Student's sex assigned at birth, and making comments about the Student's genitalia. During an interview with OCR on April 29, 2015, the bus driver confirmed that she heard this comment and reported it to District administrators. The Assistant Principal e-mailed the parent and informed the parent that he had spoken with the student involved, who admitted to making these comments earlier in the year but denied making the comments in January 2015, and notified the transportation director to move the student's seat away from the Student.

District staff told OCR that they addressed each incident as it happened; however, there was insufficient documentation for OCR to corroborate the District's efforts. In most of the incidents, District administrators reported that they told the students to stop the harassment and sometimes moved seats on the bus. The only documentation the District provided to OCR concerning its investigation or response was a set of e-mails to the parent and a discipline log which had names redacted and for the most part failed to indicate any steps that were taken. When investigating the bus incidents, administrators said they did not speak with the bus driver to find out whether she was aware of any of the harassment. In one instance, the District informed OCR that discipline was levied against the harassing student.

The Student's parent stated that the harassment by other students impacted the Student. According to the parent, there have been days when the Student does not want to go to school or ride the bus because of the way other students acted towards the Student, especially during the 2014-2015 school year. In May 2014, the Student's parent reported to the District that the Student had been hospitalized for self-harm and asked the Principal and the Student's teachers to look out for any concerning depressive behavior. The Student's parent reported that the Student missed some days of school because the Student felt humiliated and embarrassed by the behavior of some students. The parent reported to OCR that when the Student is being harassed, the Student tends to become defiant and act out, which leads to the Student being disciplined. Irrespective of the harassment the parent believed the Student experienced and the Student's feelings of being ostracized, the Student's parent continued to insist that the Student continue to go to school.

Name and Pronoun Use

Since notifying the District of the Student's gender identity prior to the start of the Student's first-grade year in 2012-2013, the parent requested that all of the Student's records correctly identify the Student's preferred name and gender identity. The Superintendent and Principal reported to OCR that some District staff have mistakenly used the Student's old name and the wrong pronouns. The Principal told OCR that when the Student started kindergarten, the Student identified with the Student's birth sex and name, and the Student's new legal name is a shorter version of the Student's old name. Therefore, the Principal stated there have been some mistakes in using the Student's old name and wrong pronouns by those who knew the Student in kindergarten. The Superintendent and Principal said that, each time the parent brought to their attention that District staff were using the wrong name or pronouns with the Student, the administrators would speak with the staff person about it.

When OCR spoke to District staff, certain teachers and staff stated that they had on occasion mistakenly used the wrong pronouns and name with the Student or when referring to the Student.

One staff member reported only referring to the Student as "the Student" or by the Student's name, and informed the principal she would not use pronouns consistent with the Student's gender identity when referring to or speaking with the Student because she disagrees with such a practice. Another District staff member told OCR that she did not use pronouns consistent with the Student's gender identity as she had difficulty recognizing the Student in this way.

The parent told OCR that the use of the Student's old name and incorrect pronouns has impacted the Student, as there have been days when the Student has not wanted to go to school or has tried to avoid going to certain classes because of this practice.

First Grade (2012-2013)

The Principal informed OCR that he communicated the Student's name change by e-mail and during staff meetings; however, the District did not provide OCR a copy of the e-mail.

In March 2013, the District initially agreed with the parent to use the Student's gender identity on the Student's Individualized Education Program (IEP) during an IEP team meeting. However, in June 2013, the Principal informed the parent that the District must use the Student's sex assigned at birth in the Education Management Information System (EMIS)[3] reporting system, and that the Student's gender would be changed back to the Student's sex assigned at birth in the IEP. OCR reviewed the Student's March 2013 IEP, prepared by the District, which used the Student's preferred and legal name in the student information section but used the Student's birth name throughout the rest of the document. The 2013 IEP lists the Student's sex assigned at birth, not the Student's gender identity.

On April 19, 2013, and again on June 5, 2013, the parent requested that the District use the Student's gender identity on teachers' class lists, and that they not use the Student's birth middle name, which was gender-specific and identified the Student's birth sex.

Second Grade (2013-2014)

The Principal told OCR that during the 2013-2014 school year the Student's name change was clearly communicated to staff via e-mail and in staff meetings, and reminders were provided in several staff meetings that pronouns consistent with the Student's gender identity are to be used with the Student. The District has not provided any copies of such e-mails in any of its data responses to or communications with OCR. The District provided OCR an undated typewritten note, which stated, "During the 2013-2014 school year, any staff member that had [the Student] in class was informed of [the Student's] transgender status per parent/guardian request. The staff members involved were told that [the Student] is a transgender student and will be identifying as a [gender identity]." The typed note provided the name and title of the Principal. The District did not indicate how this undated note was used or distributed.

In November 2013, three special education-related District documents, generated after the parent notified the District of the Student's legal name change, all used the Student's birth name (a

[3] The EMIS guidelines, available at http://education.ohio.gov/Topics/Data/EMIS/EMIS-Documentation/Current-EMIS-Manual, do not state that districts must report the sex assigned on a student's birth certificate.

notice, parental consent form, and an evaluation report). As previously noted, the parent provided the District with documentation of the Student's legal name change in November 2013. Subsequently in February 2014, three special education-related assessments included the Student's new legal name with no use of pronouns. The Student's 2014 IEP listed the Student's legally changed name and used pronouns consistent with the Student's gender identity; however, the document listed the Student's birth sex. According to the parent, during the spring 2014 annual IEP meeting, school staff continued to use the Student's birth name.

Third Grade (2014-2015)

The parent complained to the Superintendent and Principal on August 27, 2014, that at least four District staff continued to use the wrong pronouns and refer to the Student's sex assigned at birth. In September 2014, the parent reported to the Principal that two additional District teachers continued to use the Student's old name with the Student.

In January 2015 the parent reported that another District staff person continued to use the Student's old name with the Student. During interviews with OCR in March 2015, the Principal, Superintendent, and Assistant Principal told OCR they felt that District staff were using the correct name and pronouns with the Student.

On April 16, 2015, the parent reported to the Superintendent and OCR that the school's e-mail system continued to use the Student's previous name and provided a screen shot demonstrating the use of the Student's previous name. The Superintendent responded to the parent on the same day and informed the parent that the District would make the correction immediately. The parent confirmed to OCR that the Student's name was corrected on the Student's e-mail account.

Fourth Grade (2015-2016)

In September 2015, the parent reported to OCR that the Student's previous name was used on the "scoreboard" link for the school's typing club, which allowed the Student's entire class to see typing scores of their classmates and the Student's previous name. The parent reported this and that the teacher had used the wrong name and pronouns to the Principal, who assured the parent that the name would be fixed and that action would be taken concerning the teacher. In an interview with OCR on September 18, 2015, the Principal confirmed to OCR that the name was changed and that no students viewed the previous name in the system. In addition, the Student was moved to a different computer lab class.

PowerSchool-Generated Student Records

The District uses PowerSchool, a database system used to maintain student information such as students' names, parent information, demographics, attendance records, student schedules, and student grades. According to District administrators, District teachers, administrators, and secretaries all have access to PowerSchool. During OCR's on-site visit at the District on March 18, 2015, the Principal showed an OCR staff member that the Student's current legal name was correctly listed in PowerSchool. However, the Student's gender was listed as the sex assigned at birth, not the Student's gender identity.

Restroom Use

Prior to the Student's first-grade year (2012-2013), the parent requested that the Student be permitted to use the restrooms at school consistent with the Student's gender identity. District administrators refused the request and, instead, required the Student to use the individual-user restroom in the Student's first-grade classroom, which was also available and used by the Student's classmates, and an individual-user restroom in the office area of the Student's school. Specifically, the Superintendent informed OCR that the Student could use the restrooms consistent with the Student's gender identity only if the Student's birth certificate identified the Student's gender identity. [4]

Every subsequent school year thereafter—2013-2014, 2014-2015, and 2015-2016—the parent has requested that the Student be permitted to use restrooms consistent with the Student's gender identity, and the District has denied the request. Prior to the start of the 2013-2014 school year, the Superintendent informed the parent that the Student could use the restrooms consistent with the Student's gender identity only if the Student's birth certificate identified the Student's gender identity. In the District's January 31, 2014, data request response, the District provided OCR with typewritten notes labeled "Phone conversations between [Superintendent] and [parent] referencing RR use." An August 13, 2013, entry on the typewritten notes confirmed that the parent again requested the Student be provided access to restrooms consistent with the Student's gender identity and the Superintendent wrote, "I told her that would not be changing." An entry dated "December 19th or 20th 2013" stated, "Spoke to her in response to her request that [the Student] be allowed to use the [gender identity] restroom. I shared with her that we would not be making that change at this time. She was concerned with the distance from class to office for restroom and I offered an alternative (no closure)." The typewritten notes further confirm that the Superintendent and Principal discussed the matter.

During the Student's second-grade year (2013-2014), the Student was required to use an individual-user restroom in the office area of the Student's school. The parent told OCR that each time the Student's classmates lined up for a restroom break, they would see that the Student did not use the restrooms with them. The parent reported that the Student said that many times classmates asked the Student why the Student did not use the restroom with them, and the Student complained about feeling separated from peers, alone, and left out.

During the Student's third-grade year (2014-2015), the Student was required to use an individual-user restroom in the office area or a teachers' lounge restroom, which was closer to the Student's homeroom and the gymnasium. Meeting notes dated September 10, 2014, and provided by the District to OCR on September 19, 2014, indicate that in 2014 the parent raised concerns about the distance the Student traveled from the class to the office when the Student used the restroom. The parent reported to OCR in a June 22, 2016, interview that the teachers' lounge and office restrooms made available to the Student were farther from the Student's classrooms than the restrooms classmates used. In addition, the parent said that the Student expressed feeling uncomfortable entering the teachers' lounge.

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[4] The Student has a State of Ohio birth certificate. Ohio law does not permit a person to change the sex assigned on the person's birth certificate. See Ohio Revised Code § 2705.15 (2006)

The parent notified the school and OCR that at the start of the Student's fourth-grade year (2015-2016), for a short period of time the Student refused to use the restroom while at school. The parent conveyed that the Student did not want to draw attention from other students as being different and not being permitted to use the restrooms consistent with the Student's gender identity. During the 2015-2016 school year, the District added another teacher restroom that the Student could use that was closer to the Student's classroom. However, this restroom remained locked. Therefore, when the Student had to use the restroom, the Student had to either go to the office or faculty restrooms farther away or notify one of the teachers or staff, who escorted the Student to a faculty restroom closer to the Student's classroom, entered the keypad restroom code to unlock the door, waited for the Student, and then escorted the Student back to the classroom.

The District acknowledged to OCR that it prohibits the Student from using District restrooms consistent with the Student's gender identity. On March 18, 2015, the Superintendent confirmed having told the parent that if the Student's birth certificate identified the Student's gender identity, the Student could use the restrooms consistent with the Student's gender identity. The Superintendent also stated that the District's basis for this decision is that it assigns sex-segregated facilities, like restrooms and locker rooms, based on the sex identified on a student's birth certificate. However, the District cited to no written policy outlining this policy or practice. In response to OCR's inquiries on March 18, 2015, the Superintendent also stated he was unaware that Ohio law does not permit a person to change the sex on the person's birth certificate. In addition, the District's counsel told OCR that the District is concerned that, if it allowed the Student to use restrooms consistent with the Student's gender identity, when the Student's birth certificate identifies the opposite sex, then other students may say they want to go to a different restroom than what is identified on their birth certificate.

Analysis and Conclusions

Sex-Based Harassment

Based on the preponderance of evidence standard, OCR has determined that the District failed to assess whether a hostile environment based on sex existed for the Student in violation of the Title IX regulation, at 34 C.F.R. §§ 106.8(b) and 106.31. The evidence shows District staff used the Student's previous name and pronouns inconsistent with the Student's gender identity after the District was notified of the Student's transgender status in the early part of the 2012-2013 school year through the 2015-2016 school year. While the District stated that it informed the appropriate staff during the 2013-2014 school year to use the Student's preferred and then legally changed name, along with the correct gender identity pronouns, a few staff acknowledged calling the Student by the former birth name and using pronouns inconsistent with the Student's gender identity.

Staff and students using the wrong names and pronouns could constitute harassment. The District's Title IX grievance procedure provides for a formal complaint procedure, which states that an investigation will include interviews with the complainant, respondent, and witnesses and consideration of any documentation or information reasonably believed to be relevant to the

allegations. While the District took some steps to respond to the incidents involving staff and students toward the Student, it failed to adequately investigate the complaints lodged by the parent. Dealing with incidents individually may be insufficient to assess whether a hostile environment exists. When behavior implicates civil rights laws, school administrators should look beyond simply disciplining the perpetrators. A school's responsibility is to eliminate the hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. For instance, according to the bus driver, the District did not interview the driver regarding the alleged incidents of harassment on the bus in 2014. Moreover, the District merely moved students' seats on the bus and did not provide any other alternatives to the Student. There also is no record of support services, such as a bus monitor, counseling, or other appropriate measures, being offered to the Student in the materials produced to OCR by the District. Although administrators stated that the District investigated each incident reported by the parent and the Student, the materials produced to OCR by the District are sparse and do not provide documentation recording the District's efforts to investigate and respond to the harassment. The District did not dispute that the Student was harassed by other students at any time during OCR's investigation.

With regard to the use of pronouns inconsistent with the Student's gender identity and use of the Student's preferred and legally changed name, the District failed to provide OCR materials adequately substantiating the District's efforts to inform and to instruct staff to use the Student's preferred and then legally changed name and to use pronouns consistent with the Student's gender identity. Although the frequency of using the incorrect name or pronouns with respect to the Student declined from 2012-2013 to 2015-2016, the continued use of the Student's name may have contributed to a hostile environment based on sex for the Student.

Without an adequate investigation of the reported incidents of alleged harassment and consideration of the totality of the impact of the alleged incidents, the District failed to assess whether the reported harassing conduct created a hostile environment for the Student. Specifically, OCR concludes that the District, in violation of the Title IX regulation at 34 C.F.R. §§ 106.8(b) and 106.31, failed to promptly and equitably respond to the complaints of sex-based discrimination made on behalf of the Student and failed to assess whether the reported incidents were sufficiently serious to deny or limit the Student's ability to participate in or benefit from the educational program and, therefore, could not determine if responsive actions were reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

Restroom Use

Based on the facts in this investigation, once the parent notified the school of the Student's gender identity, the school was required to begin permitting the Student access to sex-segregated restroom facilities in a manner consistent with the Student's gender identity. During the 2013-2014, 2014-2015, and 2015-2016 school years, the District denied the Student access to student restrooms consistent with the Student's gender identity. Denying access to the restroom consistent with the Student's gender identity required the Student to make choices about privacy, particularly whether and how to respond to other students' questions about why the Student used different restrooms. The Student reported that having to deal with these questions, along with

having to use adult office staff and faculty restrooms, made the Student feel ostracized and generally was difficult for the Student, adversely impacting the Student's ability to participate in the school's program. Accordingly, OCR finds, by a preponderance of the evidence, that the District treated the Student differently on the basis of sex in its educational programs and activities without legitimate reason: in determining whether the Student satisfies any requirement or condition for the provision of benefits or services; by providing the Student different benefits or benefits in a different manner; and by subjecting the Student to separate or different rules of behavior, or otherwise limiting the Student in the enjoyment of rights, privileges or opportunities, in violation of the Title IX regulation, at 34 C.F.R. § 106.31.

Attempts to Resolve the Complaint

OCR's *Case Processing Manual* provides specific timeframes for negotiations. From the date that the proposed terms of the resolution agreement are shared with a recipient, OCR and the recipient have a period of up to 90 calendar days within which to reach final agreement. OCR may end the negotiations period when it is clear that agreement will not be reached (e.g., the recipient has refused to discuss any resolution). At such time, OCR shall issue an impasse letter that informs the recipient that OCR will issue a letter of finding(s) if a resolution agreement is not reached within 10 calendar days. If the recipient does not enter into a resolution agreement within 30 calendar days of the date of the letter of findings(s), OCR will follow the *Case Processing Manual* procedures for issuance of a Letter of Impending Enforcement Action. In this case OCR initiated a 90-day negotiation period on March 29, 2016, and issued an Impasse Letter on June 10, 2016, and a Letter of Findings on June 28, 2016.

OCR has unsuccessfully attempted to engage in negotiations with the District. Specifically, on March 29, 2016, OCR notified the District of its determination that the District failed to comply with the Title IX regulations. On March 30, 2016, OCR provided the District with a proposed resolution agreement designed to resolve the District's non-compliance. At that time, OCR advised the District that under the *Case Processing Manual* OCR and the recipient have a period of up to 90 calendar days, from the date that the proposed terms of the resolution agreement are shared with the recipient, within which to reach final agreement, and provided District with a link to the *Case Processing Manual* for reference, and advised that the 90 days would expire on June 28, 2016.

As detailed above at p. 2, OCR attempted work with the District to resolve this matter by communicating with the District on April 8, May 6, May 12, May 13, May 31, and June 3, 2016. OCR issued an Impasse Letter on June 10, 2016, and a Letter of Findings on June 28, 2016.

In accordance with the *Case Processing Manual*, OCR is issuing this Letter of Impending Enforcement Action as a result of the District's failure to enter into a resolution agreement within 30 days of receiving OCR's Letter of Findings.

Based on the District's failure to resolve the identified areas of noncompliance, OCR will either initiate administrative proceedings to suspend, terminate, or refuse to grant or continue financial assistance to the District or refer the case to the U.S. Department of Justice for judicial proceedings to enforce any rights of the United States under its laws. OCR can take this action

after 15 calendar days of the date of this letter if a resolution of this matter is not reached. OCR remains willing to resolve this matter. If you wish to do so, please contact me.

This Letter of Impending Enforcement Action is not intended and should not be construed to cover any other issue regarding the District's compliance with any other regulatory provision not addressed in this letter. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, OCR will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

Please be advised that the District may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies, or participates in an OCR proceeding. If this occurs, the individual may file a retaliation complaint with OCR.

If you have any questions about this matter, please do not hesitate to contact me at 216-522-2677.

Sincerely,

Meena Morey Chandra
Regional Director for the Office for Civil Rights