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U.S. COMMISSION ON CIVIL RIGHTS

FREE TO LEARN

SPEECH AND SEXUAL HARASSMENT ON CAMPUS

BRIEFING
REPORT

FEBRUARY 2020

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.[1]

[1] 42 U.S.C. §1975a.

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** Term ended 11/29/2019.

Free to Learn: Speech and Sexual Harassment on Campus

Briefing before
The United States Commission on Civil Rights
Held in Washington, DC

Briefing Report

February 2020

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UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 Pennsylvania Ave., NW • Suite 1150 • Washington, DC 20425 www.usccr.gov

Letter of Transmittal

February 12, 2020

President Donald J. Trump
Vice President Mike Pence
Speaker of the House Nancy Pelosi

On behalf of the United States Commission on Civil Rights ("the Commission"), I am pleased to transmit our briefing report, *Free to Learn: Speech and Sexual Harassment on Campus*. The report is also available in full on the Commission's website at www.usccr.gov.

This report addresses the potential tension between free speech and impermissible sexual harassment in higher education. Federal antidiscrimination law protects individuals from sexual harassment that interferes with education. The First Amendment protects speech – which may be offensive – in public schools, among other places, and regulating the content of speech can lead to the suppression of ideas and chill academic discourse. This report also evaluates guidance to higher education institutions from the United States Department of Education as to the line between protected speech and impermissible sexual harassment in education, as well as two instances of the Department's Title IX enforcement regarding sexual harassment.

The Commission majority approved key findings including the following: Education institutions that receive federal funds must maintain campuses free from sex-based discrimination, including sexual harassment. Sexual harassment occurs with frequency in higher education institutions and can have life-changing impacts including a significant negative effect on the academic experiences, health, and well-being of those being harassed. It has been shown to relate to disengagement, poor grades, symptoms of depression and anxiety, and to raise concerns about campus safety. When perpetrated by faculty or staff, it can lead to feelings of institutional betrayal. Consistent with maintaining the right to free speech, courts have held that schools may act to discipline students who harass or threaten other students. Investigative reporting has shown that lax enforcement from the Department of Education's Office for Civil Rights can result in schools not taking claims of sexual harassment seriously.

The Commission majority voted for key recommendations, including the following: The United States Department of Education's Office for Civil Rights should vigorously enforce Title IX, consistent with the recognition that failure to enforce nondiscrimination principles may have

deleterious effects on students, such as disengagement and psychological distress, and on campus communities more broadly. The Office for Civil Rights should continue to make clear to the regulated community that its enforcement standards comport with and continue to adhere to First Amendment principles.

The Commission also recommends that the Office for Civil Rights collect data from colleges and universities on the number of sexual harassment complaints filed with or incidents reported to the college or university, and how the college university investigated and resolved each complaint or report. The data should include whether the complaint or report resulted in a misconduct finding and whether the subject of the complaint or report was disciplined and how.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,

Catherine E. Lhamon
Chair

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EXECUTIVE SUMMARY

Federal antidiscrimination law (Title IX) protects individuals from sexual harassment that interferes with education. At the same time, offensive speech may be protected under the First Amendment on public education campuses. These ideals of equality in education, diversity of opinion, and freedom of expression can coexist. Yet, some have used speech to degrade, marginalize, threaten, and harass individuals on campus based on sex. Such speech tells the harassed individual that their academic contributions are not welcome. On the other side, regulating the content of speech can lead to the suppression of ideas and chill academic discourse. This report addresses this potential tension between free speech and impermissible sexual harassment in higher education.[1] This report also evaluates guidance to higher education institutions by the Department of Education as to the line between protected speech and impermissible sexual harassment in education, as well as two instances of the Department's Title IX enforcement regarding sexual harassment.

Title IX prohibits sexual harassment at educational institutions by stating:

> No 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.[2]

Title IX applies to all schools (public and private institutions) that receive federal funds. The Department of Education is the primary regulator of Title IX. The balance among free expression, speech, and Title IX can arise under multiple fact patterns including a professor speaking or writing inside or outside the classroom, students speaking inside or outside the classroom, and presentations by speakers on campus.

The First Amendment to the U.S. Constitution contains a right of free expression and speech, which applies to public higher education institutions.[3] The Supreme Court has long viewed higher institutes of learning as the "marketplace of ideas" and has protected uncommon and unpopular

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[1] The U.S. Commission on Civil Rights held a public briefing focusing on sexual harassment, federal enforcement of Title IX and freedom of speech on July 25, 2014. "*Enforcement of Sexual Harassment Policy at Educational Institutions by the U.S. Department of Education's Office for Civil Rights and the Civil Rights Division of the Department of Justice*," Briefing before the U.S. Commission on Civil Rights (July 25, 2014) (hereinafter "Briefing Transcript"), https://www.usccr.gov/calendar/trnscrpt/CommissionBriefingTranscript_July-25-2014_%20final.pdf. The briefing included information about these issues on K-12 campuses, which is not discussed herein. To review that portion of the briefing, please review the transcript. Ibid.

[2] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; *see Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

[3] U.S. CONST. amend. I.; *see e.g., Healy v. James*, 408 U.S. 169 (1972); *Papish v. Bd of Curators*, 410 U.S. 667 (1973).

speech.[4] Approximately 24 million people work or study on higher education campuses in the United States. Since the passage of Title IX forty-seven years ago, the number of women on college campuses has increased.[5] Yet, during the same period, campus surveys have fairly consistently reported that more than half of all students experience sexual harassment while studying.[6] The reported numbers for graduate students in certain fields, like the sciences, are higher.[7]

There are two basic types of sexual harassment: *quid pro quo* (Latin for "this for that") harassment, for example, when a teacher says "sleep with me or you get a bad grade," and a hostile environment.[8] Defining what constitutes a hostile environment comprises both subjective and objective elements, meaning the speech or conduct is unwelcome from the perspective of the person being harassed, and that a reasonable person would find the speech or conduct objectionable.[9] Higher education institutions that receive federal funds must take steps to address hostile environments and sex-based discrimination.[10]

Preventing a hostile environment, in public universities, may overlap with an individual's right of free speech or expression. The most common type of sexual harassment is often termed gender harassment.[11] Gender harassment includes verbal and nonverbal behaviors that convey insulting and degrading attitudes about members of one gender. Examples may include lewd jokes, disrespectful comments about body parts, and inappropriate gestures. Speech that offends another

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[4] *Healy v. James*, 408 U.S. 169, 181 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas' . . .") (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967); *Sweezy v. New Hampshire by Wyman*, 354 U.S. 234, 249-250 (1957) (plurality opinion of Mr. Chief Justice Warren), 262 (Frankfurter, J., concurring in result).

[5] *See infra*, text and notes 36-42 (discussing the changing demographics on college campuses over the past thirty years).

[6] *See infra*, text and notes 43-55 (discussing studies of the prevalence of sexual harassment on college campuses over the past thirty years).

[7] Ibid.

[8] *See infra*, text and notes 166-175 (listing the case law generally defining sexual harassment).

[9] *See infra*, text and notes 171-175 (discussing the history and current case law for what constitutes a hostile environment under Title IX).

[10] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; *see also* Department of Education, Office for Civil Rights, Frequently Asked Questions About Sex-Discrimination Harassment, What are the Responsibilities of school districts, colleges, and universities under Title IX to address sex-based harassment? ("If an investigation reveals that the harassment created a hostile environment, the educational institution must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects."), https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html#sexhar1; *see also infra*, text and notes 138-140 (discussing the Supreme Court's decisions regarding the liability of schools for money damages to students under Title IX).

[11] *See infra*, text and notes 61-65 (discussing what is gender harassment and prevalence studies of this type of harassment).

student is not necessarily harassment and may be protected under the First Amendment.[12] Some have argued that students are using Title IX as a shield from offensive speech.[13] At the same time, students have been praised for wanting more inclusive learning environments as opposed to marginalizing or denigrating certain student voices.[14]

Title IX's implementing regulations require that schools have "prompt and equitable" grievance procedures to address sexual harassment complaints, that schools designate at least one employee to carry out responsibilities under Title IX (commonly referred to as a "Title IX coordinator"), and that schools provide notice that they do not discriminate on the basis of sex in their educational programs or activities.[15] Since the enactment of Title IX, the Department of Education has issued guidance documents, which provide higher education institutions and students with information about what the federal government believes Title IX requires on campuses.[16] These guidance documents – sometimes in the form of a "Dear Colleague" letter -- have provided definitions of sexual harassment including what comprises a hostile environment and what is required for grievance procedures to be "prompt and equitable."[17]

The Department of Education's Office for Civil Rights may also investigate whether a school is complying with Title IX via a complaint investigation or a compliance review, which may result in a resolution agreement with one or more higher education institutions.[18] Resolution agreements only bind the parties to that agreement and do not constitute guidance for all higher education institutions. Resolution agreements routinely call for updated grievance procedures, updated Title IX coordinator information, and trainings for employees, staff and students, as warranted by the particular facts of the investigation.[19]

The Department of Education's enforcement and guidance about Title IX have been criticized for going too far and for not going far enough to remedy sexual harassment on campus. The

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[12] *See, e.g., Saxe v. State College Area School Dist.*, 240 F.3d 200 (3rd Cir. 2001) (no categorical rule divests harassing speech as defined by federal antidiscrimination statutes of First Amendment protection).

[13] *See infra*, text and note 313.

[14] *See infra*, text and notes 316-317 (discussing the expectations of students and classroom/on campus discourse); *see also infra*, text and note 318 (discussing optimizing learning in higher education classrooms).

[15] 34 C.F.R. § 106.8 (designation of responsible employee and adoption of grievance procedures); 34 C.F.R. § 106.9 (dissemination of policy).

[16] *See infra*, text and notes 176-243 (discussing regulations and guidance on implementation of Title IX issued by the Department of Education from 1975 to 2018).

[17] Ibid.

[18] *See* U.S. Dep't of Education, Office for Civil Rights, Case Processing Manual (Nov. 18, 2018) at 15, 19, https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf.

[19] *See infra*, text and notes 264-265 (discussing the types of remedies required in the 40 resolution agreements by the Department of Education from 2011-2016).

Department of Education has been criticized for issuing guidance that is unclear as to what constitutes sexual harassment and a hostile environment, and for not anticipating the impact of the guidance on schools (especially as to how schools would implement the grievance procedures in light of the potential for the loss of federal funding).[20] Others, however, have applauded these efforts and concluded for example that the Department's enforcement and guidance have "provided much needed clarification of what Title IX requires schools to do to prevent and address sex discrimination in educational programs."[21] The Department of Education has also been criticized for restricting speech on campuses in certain resolution agreements; the main criticism being that the agreements read out the objective requirement of the sexual harassment definition and allow for conduct or speech that is offensive to an individual to violate Title IX.[22]

The Department of Education has responded that its resolution agreements incorporating the long-standing definition of sexual harassment as unwelcome conduct comport with the Supreme Court's definition of sexual harassment and contains both the subjective and objective standards.[23] Additionally, the Department officials in the Obama Administrative defended ED OCR guidance as clear in providing notice to higher education institutions of what is equitable under Title IX.[24] In 2017, Department officials in the Trump Administration rescinded the Obama era guidance. Recently in 2018, the Department of Education published a notice of proposed rulemaking in the Federal Register.[25] In the notice, the Department previewed amending its regulations to include a revised definition of actionable sexual harassment under Title IX and also revisions to the grievance procedures requirements.[26]

The Department of Education has also been criticized for not enforcing Title IX more vigorously given the extent of sexual harassment on campuses. Some student advocates have argued that the burden of enforcement has been placed on students to bring claims forward under school grievance procedures – claims that the Department of Education should have been investigating – and that

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[20] *See infra*, text and notes 306-378 (discussing implementation of grievance procedures by higher education institutions).

[21] Letter to Secretary John B, King, Jr., from the National Women's Law Center and 85 other organizations (July 13, 2016), https://nwlc.org/resources/sign-on-letter-supporting-title-ix-guidance-enforcement/.

[22] *See infra*, text and notes 291-300 (discussing the criticism of the resolution agreement with the University of Montana and the Department of Education's response).

[23] Ibid.

[24] Ibid.

[25] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (Nov. 29, 2018) (notice of proposed rulemaking to amend the Department of Education's Title IX regulations).

[26] *Id.*

the Department of Education has not used its authority under Title IX to terminate federal funds.[27] Others argue that Title IX's enforcement policies result in institutions doing the bare minimum to comply with the law as opposed to reducing sexual harassment.[28]

The Department of Education has responded that it meaningfully uses applicable procedures to terminate federal funds, which can assist in reaching resolution with recalcitrant schools.[29] At the same time, the statute (Title IX) and implementing regulations require multiple steps, including notification to Congress, before federal funds can be terminated or suspended.[30] The Department of Education has also not just focused on enforcement to encourage the writing of policy documents but has also offered technical assistance on prevention and reduction of sexual harassment on higher education campuses.[31]

This report discusses the Constitution's free speech guarantees, and the rights of students and faculty under Title IX to study and work free from sexual harassment. The report analyzes the rights of faculty and academic freedoms associated with teaching. The report also examines the role of the Department of Education in providing guidance for schools and considers how higher education institutions have implemented this guidance in their Title IX grievance processes.[32] The scope of this report is limited to free expression, speech, and Title IX as applied to institutions of higher education. [33] This report includes findings and recommendations, a portion of which are summarized below:

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[27] *See infra*, text and notes 319-331 (discussing the criticism that enforcement by the Departments of Education and Justice has not been robust enough).

[28] National Academies of Sciences, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Science, Engineering, and Medicine* (2018) at 2, https://www.linguisticsociety.org/sites/default/files/24994.pdf. ("Too often, judicial interpretation of Title IX . . . has incentivized institutions to create policies and training on sexual harassment that focus on symbolic compliance with current law and avoiding liability, and not on preventing sexual harassment.").

[29] *See infra*, text and notes 379-389 (discussing the termination of federal funds).

[30] Ibid.

[31] *See infra*, text and notes 393-394 (discussing technical assistance provided by the Department of Education).

[32] Though not the focus of this report, the Department of Justice also has a role in enforcing Title IX, including regarding sexual harassment in schools. See, e.g., Settlement Agreement between the U.S. Department of Justice and the Board of Regents of the University of New Mexico, Oct. 17, 2016, https://www.justice.gov/crt/casedocument/university-new-mexico-settlement-agreement, discussed further at note 262.

[33] While sexual violence is a subset of Title IX's prohibition against sexual harassment, there is no First Amendment right for this conduct. Thus, a discussion of sexual violence is not included within this report (except for where a guidance document concerns both speech and sexual violence).

Findings

- Education institutions that receive federal funds must maintain campuses free from sex-based discrimination. Federal courts and the federal government have recognized sexual harassment as one form of sex-based discrimination for decades.

- Unwanted sexual harassment occurs with frequency in higher education institutions and can have life-changing impacts. Sexual harassment can have a significant negative affect on the academic experiences, health, and well-being of those being harassed. It has been shown to relate to disengagement, poor grades, symptoms of depression and anxiety, and raise concerns about campus safety. When perpetrated by faculty or staff, it can lead to feelings of institutional betrayal.

- The Department of Education enforces Title IX and its regulations through administrative investigation of complaints, compliance reviews, directed investigations, and monitoring of resolution agreements. The Department of Education also issues policy guidance, and provides technical assistance to educational institutions.

- ED OCR continues to publicly address the question of how Title IX enforcement comports with the First Amendment. Across Republican and Democratic presidential administrations ED OCR has explained: "OCR has consistently reaffirmed that the Federal civil rights laws it enforces protect students from prohibited discrimination, and are not intended to restrict expressive activities or speech protected under the U.S. Constitution's First Amendment." It continues to note that "Schools can also encourage students on all sides of an issue to express disagreement over ideas or beliefs in a respectful manner. Schools should be alert to take more targeted responsive action when speech crosses over into direct threats or actionable speech or conduct."

- Consistent with maintaining the right to free speech, courts have held that schools may still act to discipline students who harass or threaten other students.

- Investigative reporting has shown that lax enforcement from ED OCR can result in schools not taking claims of sexual harassment seriously.

Recommendations

- ED OCR should vigorously enforce Title IX, consistent with the recognition that failure to enforce nondiscrimination principles may have deleterious effects on students, such as disengagement and psychological distress, and on campus communities more broadly.

- Given the significant level of concern expressed to this Commission on these topics, ED OCR should continue to make clear to the regulated community that ED OCR's enforcement standards comport with and continue to adhere to First Amendment principles.

- ED OCR should collect data from colleges and universities on the number of sexual harassment complaints filed with or incidents reported to the college or university, and how the college university investigated and resolved each complaint or report. The data should include whether the complaint or report resulted in a misconduct finding and whether the subject of the complaint or report was disciplined and how.

SEXUAL HARASSMENT IN HIGHER EDUCATION

In the United States, approximately 7,200 postsecondary educational institutions are governed by Title IX.[34] Around 24 million people (19.6 million undergraduate students, 3 million post-baccalaureate students, and 1.5 million faculty) work and study at these higher educational institutions.[35] This section looks at the past forty-seven years (since the passage of Title IX) and discusses comparisons by gender of students enrolling in college, graduating with bachelor's degrees, and reporting of sexual harassment at higher educational institutions. As discussed herein, while women now enroll in colleges and attain degrees in higher numbers than men -- sexual harassment continues to occur consistently and frequently and disproportionately to women -- and more than half of women report being sexually harassed while studying on undergraduate college campuses.

Changes in Enrollment and Attainment of Bachelor's Degrees (1972 to 2017)

When Congress enacted Title IX in 1972, 57% of students enrolled in college were male and 43% were women.[36] By the fall of 2018, these percentages had switched; now, 57% of students enrolled are women and 43% are men.[37] In terms of attaining a bachelor's degree, in 1980, 17% of men and 13.6% of women had attained a bachelor's degree by age 29 (figure 1.1).[38] By 2017, these percentages had increased to 33.7% for men and 34.6% for women, meaning that women now attain slightly more bachelor's degrees than men (figure 1.2).[39] Women now also earn more

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[34] Department of Education, Office for Civil Rights, *Securing Equal Educational Opportunity: Report to the President and Secretary of Education,* p. 6 (2016), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf.

[35] National Center for Education Statistics, The Condition of Education, Characteristics of Degree-Granting Postsecondary Institutions, https://nces.ed.gov/programs/coe/indicator_csa.asp, (last updated May 2018), Undergraduate Enrollment, Postbaccalaureate Enrollment, and Characteristics of Postsecondary Faculty.

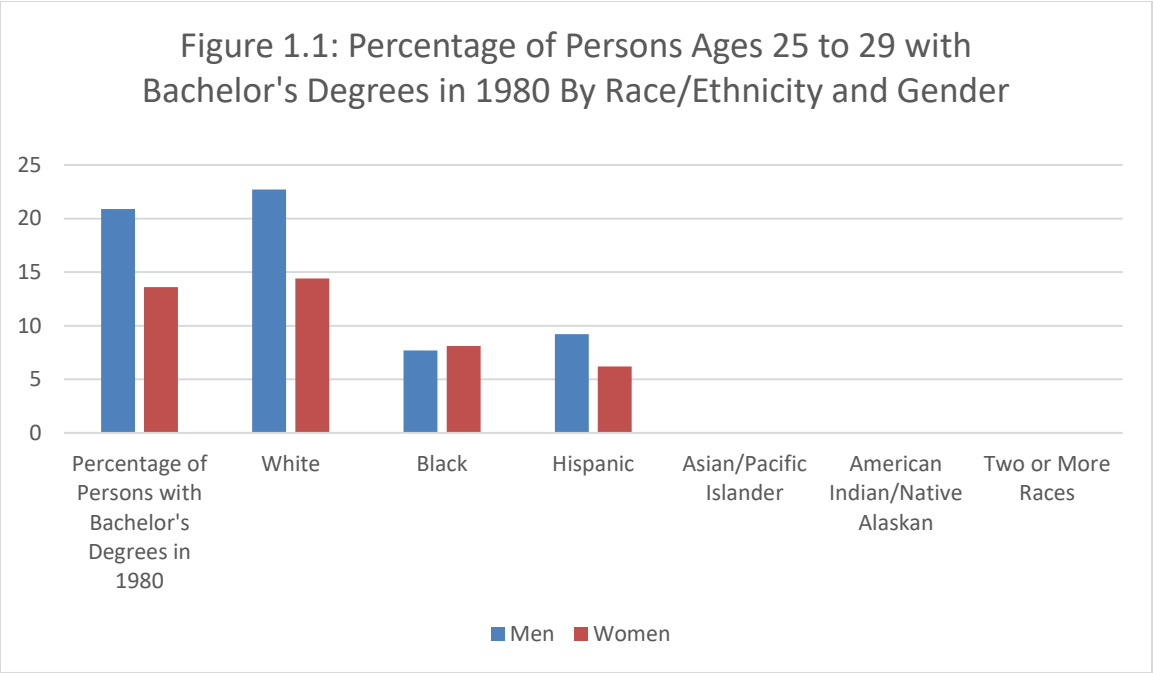
[36] National Center for Education Statistics, Digest of Education Statistics, Table 303.10: Total fall enrollment in degree-granting postsecondary institutions, by attendance status, sex of student, and control of institution: Selected years, 1947 predicted through 2027, https://nces.ed.gov/programs/digest/d17/tables/dt17_303.10.asp.

[37] Ibid.

[38] National Center for Education Statistics, Digest of Education Statistics, Table 104.20: Percentage of 25 to 29 years old with selected levels of educational attainment, by race/ethnicity and sex: Selected years, 1920 through 2017, https://nces.ed.gov/programs/digest/d17/tables/dt17_104.20.asp.

[39] Ibid; *see also* National Center for Education Statistics, The Condition of Education, Educational Attainment of Young Adults (April 2018), https://nces.ed.gov/programs/coe/indicator_caa.asp.

graduate degrees than men.[40] This trend cuts across every race and ethnicity.[41] Some researchers have credited Title IX with some of these gains in enrollment and attainment of degrees.[42]

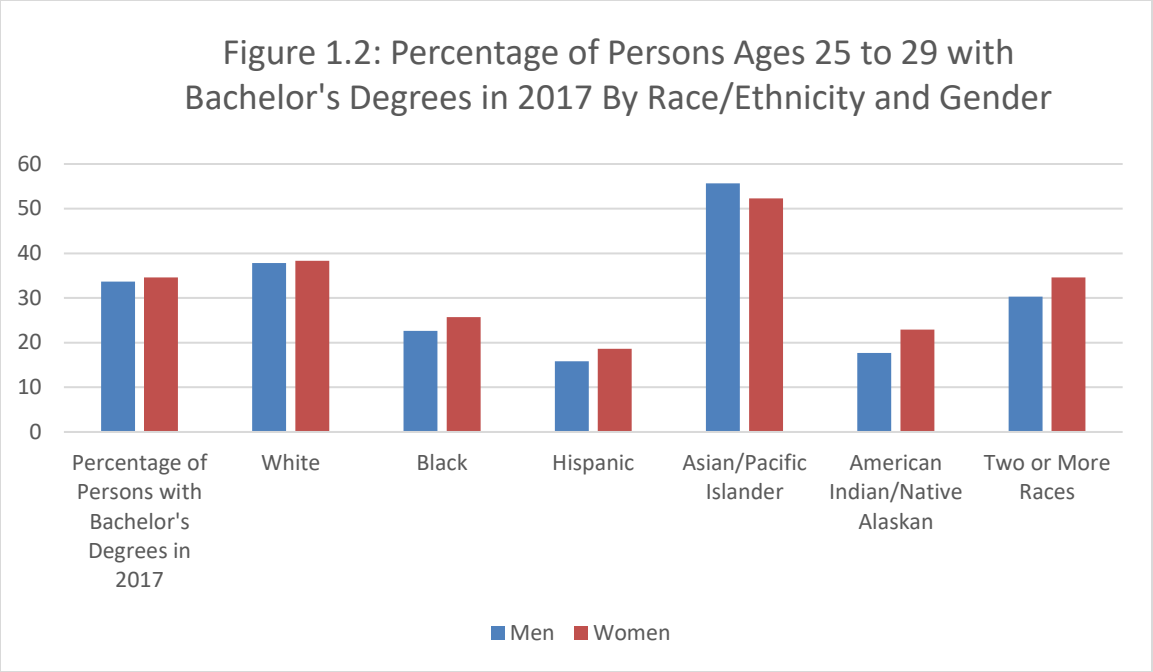


Source: National Center for Education Statistics, Digest of Education Statistics, https://nces.ed.gov/programs/digest/d17/tables/dt17_104.20.asp
**Data was not collected on Asian/Pacific Islander, American Indian/Native Alaskan, or two or more races in 1980

[40] *See supra* note 36 (Table 104.20: Percentage of 25 to 29 years old with selected levels of educational attainment, by race/ethnicity and sex: Selected years, 1920 through 2017).

[41] Ibid.

[42] *See, e.g.*, Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports*, University of Pennsylvania, Wharton School of Business (Jan. 31, 2010), (finding that "a 10-percentage point rise in female sports participation [in part from Title IX] generates a 1 percentage point increase in female college attendance and a 1 to 2 percentage point rise in female labor force participation"), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1017&context=psc_working_papers.



Source: National Center for Education Statistics, Digest of Education Statistics, https://nces.ed.gov/programs/digest/d17/tables/dt17_104.20.asp

Prevalence of Sexual Harassment

While enrollment and attainment rates have been increasing for women, the reported prevalence of sexual harassment in undergraduate and graduate programs has remained relatively consistent for the past forty-seven years. In 1987, researchers noted that "[i]f the occurrence of sexual harassment, as suggested in research, reflects reality, then it appears that about half of all women will face sexual harassment on the job or during their education."[43] These same researchers noted that due to the sensitivity of reporting sexual harassment the actual occurrence may be higher.[44] Twenty years later, in the early 2000s, researchers found that 58% of female academic faculty and

[43] *Sexual Harassment: An Overview*, Vol. 2., No. 1 (Feb. 1987) (considering research by Benson and Thomas (1982) finding that 30% of undergraduate women at the University of California, Berkeley, had been sexually harassed during their studies, and research by Schneider (1982) finding that 17% of women reported being sexually harassed by their teachers), https://archive.org/stream/ERIC_ED301755/ERIC_ED301755_djvu.txt.

[44] Ibid.

staff reported experiencing sexual harassment,[45] and another survey found that 62% of undergraduates reported experiences of sexual harassment.[46]

Recent Surveys

A few years ago, in 2015, the Association of American Universities surveyed 27 institutions of higher education and nearly half (47.7%) of all college students (undergraduate and graduate) in the study indicated that they had been subject to sexual harassment.[47] The rates of sexual harassment were highest among students who identified as transgender, genderqueer, non-conforming, or questioning (i.e., 75.2% of undergraduate students and 69.4% of graduate students).[48] This group was followed by female undergraduate students, 61.9% of whom

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[45] Remus Ilies, Nancy Hauserman, Susan Schwochau, and John Stibal, *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56(3) Personnel Psychology, 624-25 (2003), https://www.researchgate.net/publication/227604263_Reported_incidence_rates_of_work-related_sexual_harassment_in_the_United_States_Using_meta-analysis_to_explain_reported_rate_disparities. This study's main objectives were to 1) "provide cumulative estimates of the incidence of sexual harassment in the workplace [including higher education campuses] as assessed with different types of surveys" and 2) "account[] for . . . methodological factors on the reported incidence rate" and "investigate whether any inherent biases impacted those studies results. Ibid., 609. This study notes that surveys may rely on different definition of sexual harassment – and that surveys definitions may come from a legal or psychological perspective. Ibid. The study notes the value and limitations of both approaches in that "subjective measures make it difficult to assess the extent to which the difference in reported incidence rates between men and women is real or perceptual" though "this is not to say that perceptions of sexual harassment are less important than more objective measures" because "although objective measures may have stronger relationships with legal outcomes, perceptual measures may be more important in predicting victim responses and organizational outcomes." Ibid. (citing Lengnick-Hall, 1995). This study further states that the "behavioral experiences approach . . . minimizes respondent perceptual bias and if used consistently, allows for comparing incidence rates across studies and time." Ibid.

[46] Catherine Hill and Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, American Association of University Women Educational Foundation (2005) at Figure 2, p. 15, https://www.aauw.org/files/2013/02/drawing-the-line-sexual-harassment-on-campus.pdf.. The definition of sexual harassment for this survey was "Sexual harassment is unwanted and unwelcome sexual behavior which interferes with your life." Ibid., 6.

[47] WESTAT, REPORT ON THE ASSOCIATION OF AMERICAN UNIVERSITY CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 29 (2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf (AAU contacted Westat, a research firm, to help develop and conduct a survey of 27 institutions of higher education during the 2015 spring semester. The purpose of the survey was to assess the incidence, prevalence, and characteristics of incidents of sexual assault and misconduct, sexual harassment, stalking, and intimate partner violence) (hereafter *Campus Climate Survey*). This survey used the following definition of sexual harassment "as a series of behaviors that interfered with the victim's academic or professional performances, limited the victim's ability to participate in an academic program, or created an intimidating, hostile, or offensive social, academic, or work environment." Ibid., xv. The specific survey questions are included at ibid., xvi.

[48] Ibid at xvi. (Questionnaire item A11 asked participants to "best describe their gender identity." The options were "woman", "man", "transgender woman", "transgender man", "genderqueer or gender non-conforming",

responded that they had experienced sexual harassment. For racial and ethnic groups, the survey found that 53.4% of Native American or Alaska Native, 37.9% of Asian, 50.2% of Black or African American, and 47.8% of Hispanic students indicated that they had been subjected to sexual harassment.[49] Students who identified as having a disability reported being sexually harassed at a rate of 59.3%.[50] In addition, 60.4% percent of students who identified as gay or lesbian indicated that they had been subjected to sexual harassment.[51]

All Disciplines

Frequent reports of sexual harassment in higher education have occurred within multiple disciplines. In the science, engineering, and medical fields, for example, sexual harassment has been observed in off-campus, field science sites that are supported by funds administered by American institutions of higher education. A 2014 study revealed that 64% of students conducting research in field sites had experienced sexual harassment (e.g., inappropriate sexual remarks and comments about physical beauty).[52] The high rate of sexual harassment in the sciences has been attributed to 1) the apprenticeship model, 2) university investigations remaining confidential in "locked boxes," and 3) universities' dependence upon "superstar" professors for grant money.[53] While many are focusing on sexual harassment in the sciences (including Congress),[54] sexual harassment is not limited to any one discipline. For example, music and philosophy departments have been criticized for engendering cultures that enable sexual harassment to occur.[55]

"questioning", "not listed", and "decline to state." Participants that selected "not listed" were included in the group of students who identified themselves as transgender, genderqueer, gender non-conforming, and questioning.).

[49] Ibid., 104; *see also*, Kathryn B. H. Clancy, Katharine M. N. Lee, Erica M. Rodgers, and Christina Richey, *Double Jeopardy in Astronomy and Planetary Science: Women of Color Face Greater Risks of Gendered and Racial Harassment*, 122 J. Geophys. Res. Planets, 1610-1623 (July 12, 2017).

[50] Campus Climate Survey, *supra* note 47 at 104.

[51] Ibid.

[52] Kathryn B.H. Clancy et al., *Survey of Academic Field Experiences (SAFE): Trainees Report Harassment and Assault*, PLOS ONE, July 2014, at 1, https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0102172&type=printable; *see also* National Academies of Sciences, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Science, Engineering, and Medicine* (2018), [hereafter *National Academies Sexual Harassment Report*], https://www.linguisticsociety.org/sites/default/files/24994.pdf.

[53] Sarah Scoles, *Month by Month, 2016 Cemented Science's Sexual Harassment Problem*, Science (Dec. 29, 2016).

[54] *See, e.g.*, Combating Sexual Harassment in Science Act of 2018, H.R. 7031, 115th Cong. (introduced on Oct. 5, 2018); *A Review of Sexual Harassment and Misconduct in Science Hearing Before Subcommittee on Research and Technology to the H. Comm. On Science, Space, and Technology*, 115th Cong. (Feb. 27, 2018), https://science.house.gov/hearings/a-review-of-sexual-harassment-and-misconduct-in-science.

[55] *See, e.g.*, Colleen Flaherty, *Vulnerable Students*, Inside Higher Ed (July 30, 2013) (suggesting that "music professors, due to a mix of cultural factors and opportunity, may be more frequently involved in [sexual harassment]

Types of Harassers

Sexual harassment can occur by students against other students, by faculty/staff against students, by faculty/staff against other faculty/staff, or by students against faculty/staff. Of those who had experienced sexual harassment in the 2015 American Association of University Women's report, 80% of these students reported it was from peers (or former peers), with 18% reporting the harasser was a member of faculty or staff.[56] The participants in the Association of American Universities campus climate survey overwhelmingly identified the harasser as another student (91.6%).[57] Graduate students, on the other hand, were more likely to identify their harasser as a faculty member (e.g., 24% of female graduate/professional students compared to 5.9% of female undergraduate students).[58] Another survey of 525 graduate students regarding exposure to sexual harassment found that more than one-third (38%) of female graduate students experienced sexual harassment from faculty or staff (compared to 23.4% of male graduate students).[59] Lastly, "in the vast majority of incidents of sexual harassment of women, men are the [harassers]."[60]

Gender Harassment

The most common type of sexual harassment is often termed gender harassment, which includes verbal and nonverbal behaviors that convey insulting, hostile, and degrading attitudes about members of one gender.[61] Similarly, other researchers have found that "the majority of harassment experiences involved sexist or sexually offensive language, gestures, or pictures (59.1%), with 6.4% involving unwanted sexual attention, 4.7% involving unwanted touching, and 3.5% involving subtle or explicit bribes or threats."[62] Gender-based sexual harassment is not necessarily

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incidents than other professors."); Colin McGinn, *Philosophy Has a Sexual Harassment Problem*, Salon (Aug. 15, 2013) (discussing the extent of sexual harassment in philosophy programs).

[56] Drawing the Line, *supra* note 46 at 20-21.

[57] Campus Climate Survey, 31.

[58] Ibid.

[59] Marina N. Rosenthal et al., *Still Second Class: Sexual Harassment of Graduate Students*, 40 PSYCHOL. OF WOMEN Q. 364, 373 (2016) [hereafter *Sexual Harassment of Graduate Students*], https://dynamic.uoregon.edu/jjf/articles/rosenthalsmidtfreyd2016.pdf.

[60] *National Academies Sexual Harassment Report*, 43.

[61] Ibid., 25-26, 41-46 (collecting studies documenting that gender harassment is more prevalent than other types of sexual harassment); Jennifer L. Berdahl, Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy, 32 Acad. Mgmt. Rev. 641 (2007) (stating that "the most common form of sexual harassment is gender harassment, which involves . . . sexist comments, jokes, and materials that alienate and demean victims based on sex rather than solicit sexual relations with them").

[62] *Sexual Harassment of Graduate Students*, 370.

based or motivated by sexual activity.[63] "Both legal doctrine and social science research recognize gender as encompassing both one's biological sex and gender-based stereotypes and expectations, such as heterosexuality and proper performance of gender roles." [64] The National Academies of Sciences, Engineering, and Medicine note that their finding "that gender harassment is the most common type of sexual harassment is an unexpected finding in terms of what constitutes sexual harassment because unwanted sexual advances and sexual coercion are the most commonly reported both in official Title IX/Human Resources documents and in the media."[65]

Negative Effects

Sexual harassment can have a significant negative effect on the academic experiences, health, and well-being of those harassed.[66] Sexual harassment has been shown to relate to lower feelings of academic satisfaction, disengagement, and poor grades.[67] In one study involving graduate students, sexual harassment was associated with decreased feelings in campus safety.[68] Participants in that study also indicated a feeling of institutional betrayal when the sexual harassment was perpetrated by faculty or staff.[69] Sexual harassment has been shown to correlate with psychological distress, including symptoms of depression and anxiety.[70] In one study, individuals who had been sexually

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[63] Department of Education, Office for Civil Rights, *Questions About Sex Discrimination Harassment: What is Gender-Based Harassment?* (Answer: "Gender-based harassment is unwelcome conduct based on a student's actual or perceived sex. It includes slurs, taunts, stereotypes, or name-calling, as well as gender-motivated physical threats, attacks, or other hateful conduct."), https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html#sexhar1.

[64] *National Academies Sexual Harassment Report*, 25.

[65] Ibid., 43; *see also* Vikki Schultz, Reconceptualizing Sexual Harassment, Again, 128 Yale Law Rev. (Jun 18, 2018) ("In fact, contrary to popular perceptions, nonsexual forms of sex-based harassment and hostility are far more prevalent than unwanted sexual overtures. Harassment takes a wide variety of nonsexual forms, including hostile behavior, physical assault, patronizing treatment, personal ridicule, social ostracism, exclusion or marginalization, denial of information, and work sabotage directed at people because of their sex or gender."), https://www.yalelawjournal.org/forum/reconceptualizing-sexual-harassment-again#_ftnref32.

[66] *See* Marisela Huerta et al., *Sex and Power in the Academy: Modeling Sexual Harassment in the Lives of College Women*, 32 PERSONALITY AND SOC. PSYCHOL. BULL. 616, 625 (2006) (hereafter *Sex and Power in the Academy*); *Sexual Harassment of Graduate Students*, 373.

[67] *See Sex and Power in the Academy* at 625 (Academic satisfaction of undergraduate, female students was measured by answering two questions: (1) "I would recommend attending [this university] to others" and (2) "If I had to do it over again, I would still attend [this university]" on a 7-point Likert-type scale. Grades were measured by the students' grade point average (GPA)).

[68] *See Sexual Harassment of Graduate Students*, 373.

[69] Ibid., 374 (The top three types of institutional betrayal cited by the participants were: "creating an environment where this type of experience seemed more likely to occur," "not doing enough to prevent this type of experience," and "making it difficult to report the experience.").

[70] *See Sex and Power in the Academy* at 625.

harassed reported engaging in self-destructive, disordered eating behaviors.[71] Sexual harassment can also undermine career advancement for women. According to a 2017 study, 18% of women who are members of racial or ethnic minority groups, and 12% of white women, did not attend professional events due to harassment.[72]

In sum, unwanted gender based sexual harassment occurs with frequency in higher education institutions and can have life-changing impacts.

FIRST AMENDMENT AND FREE EXPRESSION

The First Amendment of the U.S. Constitution states "Congress shall make no law . . . abridging the freedom of speech, or of the press."[73] The First Amendment protects not only pure speech (speaking and writings) but also protects symbolic speech, which is nonverbal expression intended to communicate ideas.[74] The Supreme Court has described freedom of speech as "the matrix, the indispensable condition, of nearly every other form of freedom."[75] Some argue that freedom of expression should be expansively protected because:

> [(1)] freedom of speech is essential to freedom of thought; [(2)] it is essential to democratic self-government, and [(3)] the alternative – government censorship and control of ideas – has always led to disaster.[76]

The debate over how much the federal government should be able to regulate or restrict free speech has a long history. In 1918, Eugene Debs delivered a speech primarily about Socialism and was subsequently indicted for two counts under the Espionage Act, inciting insubordination and obstruction of recruitment and enlistment in the U.S. armed services and was jailed.[77] The majority

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[71] Ibid.

[72] Clancy, *supra* note 52 at 1610 (under plain language summary); ibid., 1619 ("Significant proportions of women compared to men, as well as men and women of color compared to white men and women, reported that they had ever skipped a class, meeting, fieldwork, or other professional event because they did not feel safe.").

[73] U.S. CONST. amend. I.

[74] *See, e.g.*, *Spence v. Washington*, 418 U.S. 405, 415 (1974); *Cohen v. California*, 403 U.S. 15, 91 (1971); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969); *Brown v. Louisiana*, 383 U.S. 131, 146 (1965); *Cox v. Louisiana* 379 U.S. 559, 574 (1965); *Garner v. Louisiana*, 368 U.S. 157, 200 (1961); *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Carlson v. California*, 310 U.S. 106, 112-13 (1940); *Stromberg v. California*, 283 U.S. 359, 369 (1931).

[75] *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); *see also* Erwin Chemerinsky and Howard Gillman, FREE SPEECH ON CAMPUS 23 (2017).

[76] Chemerinsky, *supra* note 75 at 23 (citing Laura Kipnis, *Sexual Paranoia Strikes Academe*, Chron. Higher Educ. (Feb. 27, 2015), http://laurakipnis.com/wp-content/uploads/2010/08/Sexual-Paranoia-Strikes-Academe.pdf.

[77] *Debs v. United States*, 249 U.S. 211 (1919).

of the United States Supreme Court held that *Schenck v. United States*,[78] decided one week earlier to the Court's decision in *Debs*, disposed of Mr. Debs' First Amendment defense. In *Schenck*, the Court held that freedom of speech is always subject to a "clear and present danger" inquiry, and upheld a similar indictment under the Espionage Act, explaining that during wartime it is especially important to hold a speaker liable for words obstructing the war effort.

Later the same year, in *Abrams v. United States*, the Court upheld the convictions under the Espionage Act of five men who distributed leaflets criticizing the United States' intervention in Russia, finding that they intended to frustrate the United States' military plans.[79] In dissent, Justice Holmes opined that the defendants did not intend to endanger the war effort and cautioned against attempts to suppress opposing opinions unless they pose such an immediate threat to a law's purpose that suppression is "required to save the country."[80] Justice Holmes also pointed out the value in facilitating diverse opinions, explaining that the "free trade in ideas" is the best way to reach truth and a desired result.[81]

Protection of Civil Rights Advocates

Between the 1930s and 1970s, the Supreme Court adopted the reasoning of Justice Holmes in the *Abrams* case. This resulted in what has been described as a "revolution" in free expression case law.[82] The beneficiaries were often those advocating for social change. For example, the Supreme Court found the First Amendment to protect symbolic speech in *Stromberg v. People of California*,[83] in which the Court held that displaying a red flag to oppose organized government was protected under the First Amendment. The Court also found the First Amendment to protect many forms of expression used by protesters in the 1960s, including peaceful marches, sit-ins, flag-burnings and litigation, and confirmed that the Constitution protects expression of dissenting views.[84] The Court continued to expand free speech protection, finding in the 1980s that it covered

[78] 249 U.S. 47, 52 (1919).

[79] *Abrams v. United States*, 250 U.S. 615 (1919).

[80] *Id*. at 630 (1919) (Holmes, J., dissenting).

[81] *Id.*

[82] Chemerinsky, *supra* note 75 at 40.

[83] 283 U.S. 359 (1931).

[84] *See Street v. New York*, 394 U.S. 576 (1969) (reversing the conviction of an activist burning the American flag in reaction to the shooting of civil rights leader James Meredith and explaining that constitutional guarantees include the freedom to express "defiant" opinions); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (overturning the convictions of 187 black American students who protested segregation with a peaceful march and explaining that the government cannot criminalize "the peaceful expression of unpopular views"); *NAACP v. Button*, 371 US 415 (1963) (holding Virginia's statutory limitations on the methods lawyers use to find clients unconstitutional as applied to the NAACP because the organization's litigation was "a form of political expression" protected by the First Amendment); *Garner v. Louisiana*, 368 U.S. 157 (1961) (overturning the conviction of five

non-violent boycotts.[85] In addition to reversing the convictions of those who were punished for expressing opinions that opposed the status quo, the Supreme Court's use of the First Amendment supported social activists' ability to express ideas safely. The First Amendment was held to protect the privacy of organizations' membership lists when hostility against members could result from their disclosure.[86]

Speech Codes

In the late eighties and into the 1990s, multiple universities adopted campus speech codes or "codes of conduct." Free speech advocates criticized these codes arguing they regulated how students could speak, and in turn, suppressed free speech. Courts have struck down challenged codes of conduct as infringing on free speech. For example, several courts have found campus speech codes overbroad or too vague to only reach conduct outside the scope of First Amendment protection.[87] For example, in *Doe v. University of Michigan,*[88] the court found the code overbroad when it prohibited behavior that "stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed . . . and that . . . creates an intimidating, hostile, or demeaning environment" for purposes related to education and employment. Courts have found campus speech codes could violate the First Amendment when they prohibit speech based on the reaction of the audience[89] or prohibit harassment without requiring that the harassment reach a certain level of severity.[90] In addition to overbreadth, codes regulating conduct can be struck down for addressing content instead of neutral limitations such as manner of speech. The Supreme Court

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black Americans for their peaceful sit-in, which Justice Harlan in his concurrence noted was as important to "the free trade of ideas" as verbal speech was).

[85] *NAACP v. Claiborne Hardware Co*, 458 U.S. 886 (1982).

[86] *See Louisiana v. NAACP*, 366 U.S. 293 (1961) (holding that the First Amendment protected the privacy of an organization's membership list because disclosure would stifle their freedom of association); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (same); *NAACP v. Alabama*, 357 U.S. 449 (1958) (same).

[87] *McCauley v. University of the Virgin Islands,* 618 F.3d 232 (3d Cir. 2010) (striking down provision as overbroad when it restricted conduct that caused emotional distress); *Corry v. Stanford*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (holding that the restriction on insulting speech violated the First Amendment); *Dambrot v. Central Michigan University*, 839 F. Supp. 477 (E.D. Mich. 1993) (striking down the speech code overbroad and vague because it failed to define an offensive environment); *UWM Post v. Board of Regents of University of Wisconsin*, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down the code because the speech regulated fell short of being deemed fighting words).

[88] 721 F. Supp. 852 (E.D. Mich. 1989).

[89] *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003).

[90] *DeJohn v. Temple University*, 537 F.3d 301 (3d. Cir. 2008) (finding code that prohibited gender-motivated harassment creating an "intimidating, hostile, or offensive environment" overbroad); *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (declining to enforce campus speech code prohibiting harassment unless the harassment was limited to that which threatened health and safety).

held that a city ordinance prohibiting the placing or symbols or graffiti on property that one knows or should know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" violated the First Amendment because it prohibited the expression of certain unpopular views.[91]

Time, Manner, and Place Restrictions

Today, the government can limit some protected speech by imposing "time, place, and manner" restrictions.[92] This is most commonly done by requiring permits for meetings, rallies and demonstrations.[93] A permit cannot be withheld or denied based on the type or content of the anticipated speech, what has become known as viewpoint discrimination.[94] Additionally, freedom of speech does not protect speech or conduct that intimidates or threatens another person with bodily harm.[95] Speech can be regulated if it is intended, and likely to produce, "imminent lawless action."[96] This has become known as the true threats test.[97] Limited categories of speech such as obscenity, defamatory falsehoods, and "fighting words" also receive no First Amendment protections.[98]

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[91] *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

[92] *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 481 (1988) ("regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.").

[93] *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

[94] *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

[95] *See Virginia v. Black*, 538 U.S. 343, 363 (2003) ("The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.").

[96] *See Brandenberg v. Ohio*, 395 U.S. 444, 447 (1969).

[97] *See Watts v. United States*, 394 U.S. 705, 708 (1969).

[98] *See, e.g., Roth v. United States*, 354 U.S. 476, 485 (1957) (finding obscene speech to be outside the bounds of protection by the First Amendment); *Osborne v. Ohio*, 495 U.S. 103 (1990) (finding child pornography may never be subject to First Amendment scrutiny); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (defamatory falsehoods are not protected by the First Amendment if published with actual malice and knowledge of the falsehood). *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) ("[F]ighting words . . . which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected under the First Amendment).

Speech and Academic Freedom

With regard to speech and higher education, the Supreme Court first acknowledged the relationship between the First Amendment and academic freedom in 1957.[99] The Court reasoned that in order for the nation to thrive as a democracy, the classroom required the freedom "to inquire, to study, to evaluate, to gain maturity and understanding" in an atmosphere that was free of "suspicion and distrust."[100] The Court noted that academic freedom was an area in which the "government should be reticent to tread."[101] In 1967, the Supreme Court stated that academic freedom was "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[102] Protection of academic freedom in classrooms is vital because that is where students should be exposed to a "marketplace of ideas" that will help them become the nation's next leaders.[103] At the same time, "[a]cademic freedom does not mean that professors are immune from all consequences of whatever they say or do."[104]

Students and Free Expression

In 1969, the Supreme Court considered the First Amendment rights of students in public schools. In *Tinker v. Des Moines Independent Community School District*,[105] the Court held that the school district could not punish students for wearing black armbands in protest of the Vietnam War, unless there were "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," as a result of the act of expression.[106]

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[99] *See Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

[100] *Id.*

[101] *Id.*

[102] *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

[103] *Id.*

[104] Lisa M. Woodward, *Collision in the Classroom: Is Academic Freedom a License for Sexual Harassment?*, 27 Cap. U. Law Rev. 667, 668 (1999) (citing *Mallioux v. Kelly*, 448 F.2d 1242, 1243 (1st Cir. 1971) ("[F]ree speech does not grant teachers a license to say or write in class whatever they may feel like . . . .")); *see also* Kenneth Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 16 William and Mary Bill of Rights Journal 1025, 1052 (April 2008) ("Students are no less vulnerable to harassment in the classroom than elsewhere, and the importance of academic freedom to the university does not provide faculty with carte blanche to engage in any form of harassment as long as they do so within their classrooms. Nevertheless, it must be acknowledged that any conduct regulation broad enough to encompass some amount of speech runs the risk of abuse. This is also true, however, with respect to other areas, such as antitrust and securities regulation, which lie outside the coverage of the First Amendment.").

[105] *Tinker*, 393 U.S. at 513.

[106] *Id.* at 513-4 ("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the

The Court further opined that any justification for the prohibition of speech must be more than just the school's "desire to avoid the discomfort and unpleasantness that . . . accompany an unpopular viewpoint."[107]

Student speech in classrooms is not afforded absolute First Amendment protection. The Supreme Court has held that elementary and high schools may limit the free speech rights of students for legitimate pedagogical concerns.[108] At least one Circuit Court has recognized the same limitations for students in higher education institutions.[109] In *Corlett v. Oakland University Board of Trustees*, a student was suspended for a school year for writing lewd and sexual comments about his English professor as part of a semester long journal-writing assignment.[110] The assignment required students to write down ideas, impressions, and observations related to classroom materials and the student's own creative entries.[111] Corlett included his English professor in an entry describing teachers to whom he has been sexually attracted in the past.[112] Corlett described his professor as "stacked" and compared her to the character of Ginger from the sitcom *Gilligan's Island*.[113] The district court ruled that Corlett's expression of lust for his professor and his descriptions of her physical appearance were "self-expressions" and not ideas or opinions that would be awarded First Amendment protection.[114] In sum, there appears to be less gray area when student speech is made with no connection to the classroom or curricular objectives. Limitation of student speech that is made outside the classroom setting or that does not have a connection to a legitimate pedagogical concern are generally upheld by the courts.[115]

Teachers and Free Speech

Regarding the free speech rights of teachers, the Supreme Court stated in 1968 that the free speech interest of the teacher, in speaking about matters of public concern, should be balanced by the needs of the school district to effectively fulfill their responsibilities to the public (the "Pickering"

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permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.").

[107] *Id.* at 509.

[108] *Hazelwood Sch. Dist. v. Kulheimer*, 484 U.S. 260, 273 (1988).

[109] *See Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (applying *Hazelwood* to higher education students).

[110] 958 F. Supp. 2d 795, 799-801 (E.D. Mich. 2013).

[111] *Id.* at 799.

[112] *Id.*

[113] *Id.* at 799-800.

[114] *Id.* at 809.

[115] *See, e.g., Doe v. Valencia Coll.*, 903 F.3d 1220 (11th Cir. 2018); *Marshall v. Ohio Univ.*, No. 2.15-cv-775, 2015 WL 1179955, at *1 (S.D. Ohio Mar. 13, 2015).

balancing test).[116] "[T]he qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees."[117] Later in the 1980s, the Supreme Court would specify that to determine whether a public employee's speech touched upon matters of public concern, the content, form, and context of the speech should be considered.[118] In 2006, the Supreme Court added to the confusion in *Garcetti v. Ceballos* when the Court restricted the free speech of public employees by holding that the First Amendment does not protect employees' speech that is made "pursuant to official responsibilities [or job duties]."[119] The dissenting Justices in *Garcetti* were concerned that this distinction could be applied to restrict academic speech, because when professors are teaching in a classroom this is arguably their official job responsibility and that speech would not necessarily be protected.[120]

TITLE IX

In 1972, Congress enacted Title IX and prohibited discrimination on the basis of sex in federally funded education programs and activities by stating:

> No 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.[121]

After a lengthy process, Congress enacted Title IX "without much debate as to several of its key provisions."[122] For example, Title IX does not contain a definition of "sex-based" harassment, and

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[116] *See Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 25*, 391 U.S. 563, 568 (1968).

[117] *See Garcetti v. Ceballos*, 547 U.S. 410, 430 (2006).

[118] *See Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

[119] *Garcetti*, 547 U.S. at 425.

[120] *Id.* at 431, n.2 ("I am pessimistic enough to expect that one response to the Court's holding will be moves by government employers to expand stated job description to include more official duties and so exclude even some currently protectable speech from First Amendment purview. . . . [T]he government may well try to limit the English teacher's options by simple expedient of defining teachers' job responsibilities expansively . . . Hence today's rule presents the regrettable prospect that protection under *Pickering* may be diminished . . . .).

[121] 20 U.S.C. § 1681.

[122] Department of Justice, Title IX Legal Manual, Legislative History, https://www.justice.gov/crt/title-ix#II.%C2%A0%C2%A0%20Synopsis%20of%20Purpose%20of%20Title%20IX,%20Legislative%20History,%20and%20Regulations. Congresswoman Bella Abzug recalls that "1972 was a watershed year. We put sex discrimination provisions into everything. There was no opposition. Who'd be against equal rights for women? So we just kept passing women's rights legislation." John David Skretny, *The Minority Rights Revolution*, p. 241 (Belknap Press of Harvard University Press, 2002).

subsequent congressional action clarified that Title IX applies to intercollegiate athletics.[123] Title IX applies to all educational institutions receiving public funds, which constitute most schools, colleges, and universities in the U.S. (other than private K-12 schools).[124] "Title IX is both a powerful symbol of our broad national commitment to gender equality in education and a complex . . . regulatory regime."[125]

Title IX was passed "with two principal objectives in mind: [1] 'to avoid the use of federal resources to support discriminatory practices' and [2] 'to provide individual citizens effective protection against those practices.'"[126] These goals have resulted in two enforcement mechanisms: one by federal agencies with the possibility of loss of federal funds, and the other by private lawsuits for money damages.

Federal Funds Should Not Further Discrimination

With regard to the first objective – that federal monies should not be used to further discrimination – Title IX allows for the termination of federal funds to schools in the event of discrimination that a school is unwilling to remedy.[127] In this way, Title IX was patterned after Title VI of the Civil Rights Act of 1964,[128] which forbids the use of federal funds to discriminate on the basis of race, color, and national origin.[129] To implement this goal of not using federal monies to further discrimination, Congress provided rulemaking authority to all federal agencies who provide

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[123] Department of Justice, Title IX Legal Manual, Legislative History, https://www.justice.gov/crt/title-ix#II.%C2%A0%C2%A0%20Synopsis%20of%20Purpose%20of%20Title%20IX,%20Legislative%20History,%20and%20Regulations.

[124] Only three post-secondary schools do not receive federal funds. Hillsdale College in Michigan, Grove City College in Pennsylvania, and Patrick Henry Collect in Virginia. *See* Katie Jo Baumgardner, *Resisting Rulemaking: Challenging the Montana Settlement's Title IX Sexual Harassment Blueprint*, 89 Notre Dame L. Rev. 1813, 1814, n. 3.

[125] R. Shep Melnick, *The Transformation of Title IX: Regulating Gender Equality in Education*, p. 5 (Brookings Institute Press, 2018).

[126] *See Gebser*, 524 U.S. at 286 (quoting *Cannon v. University of Chicago*, 411 U.S. 677, 704 (1979)); *see also* Statement by Senator Birch Bayh, 118 Cong. Rec. 5803 (1972) (while introducing Title IX in the Senate, describing its intent to redress "the continuation of corrosive and unjustified discrimination against women in the American educational system").

[127] 20 U.S.C. § 1682.

[128] *Grove City Coll. v. Bell*, 465 U.S. 555, 566 (1984) (Title IX was patterned after Title VI).

[129] Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352 (codified at 42 U.S.C. § 2000d (Title VI)) (Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance").

federal funds to educational institutions.[130] As discussed in more detail below, the Department of Health, Education and Welfare (the Department of Education's predecessor) enacted regulations implementing Title IX in 1975.[131]

Because many federal agencies provide funding or grants to educational institutions, multiple agencies are responsible for assuring that federal money is not being used to discriminate. For example, the National Science Foundation, NASA, and the National Institutes of Health provide grants to educational institutions. In 2000, twenty federal agencies (including the Department of Justice) jointly issued the common rule for enforcement of Title IX.[132] Of note, the public submitted 22 comments (5 of which came from other federal agencies) on the proposed Title IX common rule before its adoption.[133] "[T]he substantive nondiscrimination obligations of recipients [educational institutions receiving federal funds], for the most part, are identical to those established by the Department of Education under Title IX."[134] While the Title IX common rule does not contain a definition of sexual harassment, the Department of Justice's Title IX Legal Manual has a sexual harassment section that refers (and defers) to the Office for Civil Rights' 1997 and 2001 guidance (discussed in this report below).[135]

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[130] 20 U.S.C. § 1682 ("Each Federal department or agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate [Title IX].").

[131] 34 C.F.R. Part 106. Of note, Title VI of the 1964 Civil Rights Act prohibits recipients of federal funds (such as universities) from discriminating on the basis of race. Most federal agency regulations that govern the provision of federal funds to recipients provide the same procedural relief for allegations under either Title IX or Title VI.

[132] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Financial Assistance, 65 Fed. Reg. 52,858 (Aug. 30, 2000) (The Title IX common rule governs Title IX proceedings before the Nuclear Regulatory Commission, Small Business Administration, National Aeronautics and Space Administration, Department of Commerce, Tennessee Valley Authority, Department of State, Agency for International Development, Department of Justice, Department of Labor, Department of Treasury, Department of Defense, National Archives and Records Administration, Department of Veterans Affairs, Environmental Protection Agency, General Services Administration, Department of the Interior, Federal Emergency Management Agency, National Science Foundation, Corporation for National and Community Service and the Department of Transportation.).

[133] *Id.*

[134] *Id.* at 52,859. The Title IX common rule used ED OCR's Title IX regulations as the model because "the history of public participation in the development and congressional approval of [ED OCR's] regulations, [ED OCR's] leadership role in Title IX enforcement, judicial interpretations of [ED OCR's] regulations, and an interest in maintaining consistency of interpretation of regulations enforcing Title IX." *Id.*

[135] U.S. Department of Justice, Title IX Legal Manual (Jan. 11, 2001), https://www.justice.gov/crt/title-ix#D.%C2%A0%20Sexual%20Harassment.

Individuals Should Have Redress – Private Right of Action

With regard to the second objective that individuals should have protection and redress against discrimination, the Supreme Court has held that schools can be found liable for not redressing sexual harassment and may have to pay money damages to students due to sexual harassment from teachers (the *Gwinnett* case), or from other students (the *Davis* case).[136] Schools must knowingly disregard or inadequately address the sexual harassment to be liable for money damages (the *Gebser* case).[137] Additionally, the Title IX regulations require that schools establish "prompt and equitable" grievance procedures.[138] Aggrieved parties can file complaints of sexual harassment with the school, which the school then investigates per its grievance procedures.

Administrative Enforcement and the Department of Education's Office for Civil Rights

As discussed above, many agencies have administrative enforcement responsibilities under Title IX because they provide federal funds to educational institutions. This report focuses on the enforcement efforts of the Office for Civil Rights of the U.S. Department of Education (ED OCR). ED OCR has enforced Title IX and its regulations regarding sex-based discrimination through administrative investigation of complaints, compliance reviews, directed investigations, and monitoring resolution agreements. The Department of Education may undertake an investigation in conjunction with the Department of Justice. ED OCR may also refer cases to the Department of Justice for federal court litigation in certain circumstances.[139] The Department of Education

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[136] *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (school may be liable in money damages to students for sexual harassment from teachers); *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ*,. 526 U.S. 629 (1999) (schools may have to pay money damages as a remedy for sexual harassment by students against other students).

[137] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 278 (1998) (schools must have knowledge of the sexual harassment and "damages may not be recovered . . . unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."). Of note, this standard for liability on the part of the school (deliberate indifference) is higher than the standard for liability on the part of an employer for sexual harassment under Title VII. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (employers are liable for sexual harassment if they knew or should have known about the harassment and did not stop it).

[138] 34 C.F.R. § 106.8.

[139] *See* ED OCR/DOJ-CRT Memorandum of Understanding at https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf. The Department of Justice has three roles regarding Title IX. First, DOJ is responsible for coordination of federal agency implementation and enforcement per Executive Order 12,530. Second, DOJ is the federal government's litigator and may seek injunctive relief, specific performance, or other remedies against recipients based on referrals from other agencies. Finally, DOJ may itself have provided grants to educational institutions and may investigate

also issues policy guidance, and provides technical assistance to educational institutions.[140] Even though Title IX allows for the termination of federal funds, ED OCR has not withheld federal funds from any educational institution for violating Title IX, regarding sexual harassment.[141]

ED OCR has around 550 employees nationwide and is tasked with enforcement of multiple antidiscrimination statutes.[142] Along with Title IX, ED OCR is charged with enforcement of Title VI of the Civil Rights Act of 1964 (prohibits discrimination on the basis of race, color, and national origin), section 504 of the Rehabilitation Act (disability), the Age Discrimination Act, and Title II of the Americans with Disabilities Act, among other laws. ED OCR is responsible for ensuring that more than 18,200 local educational agencies and almost 7,200 postsecondary educational institutions that enroll more than 79 million students comply with these statutes.[143] To put its work in perspective, during the Obama Administration, ED OCR received 76,000 complaints, resolved 66,000 complaints, negotiated 5,400 resolution agreements, and issued 38 guidance documents.[144] These numbers are for all the statutes ED- OCR enforces. Specific numbers of complaints for sexual harassment over the years can be found below in the Complaints, Investigations, and Resolution Agreements section.

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complaints or conduct a compliance review. *See* Department of Justice, Title IX Legal Manual, at Department of Justice Role Under Title IX, https://www.justice.gov/crt/title-ix#D.%C2%A0%20Sexual%20Harassment.

[140] Department of Education, Office for Civil Rights, Sex Discrimination Frequently Asked Questions, "How does OCR address sex-based harassment against students?," https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html#sexhar4.

[141] ED OCR terminated federal funds (for financial aid) to Grove City College students when the college refused to sign Title IX compliance assurances. *Grove City v. Bell*, 465 U.S. 555, 561 (1984). In that case, the Supreme Court held that Title IX compliance was limited to the entity receiving federal funds, which at that college was just the financial aid program, rather than reaching all the activities of the institution. *Id.* at 573. In response to *Grove City*, Congress later passed, over President Reagan's veto, the Civil Rights Restoration Act of 1987. Pub L. 100-259. The law amended Title IX and other antidiscrimination laws to clarify that discrimination is prohibited throughout entire agencies or institutions (including colleges and universities) if any part receives federal financial assistance. *Id.*

[142] Department of Education, Office for Civil Rights, About OCR, https://www2.ed.gov/about/offices/list/ocr/aboutocr.html (last modified 9/25/2018); Department of Education, Office for Civil Rights, FY 2019 Budget Request at Z-9 (noting the request is to support 529 full time employees), https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf; ibid., Z-10 (noting a reduction in the number of full time employees in FY 2018 from 569 to 529).

[143] Department of Education, Office for Civil Rights, *Securing Equal Educational Opportunity: Report to the President and Secretary of Education,* p. 6 (2016), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf.

[144] Ibid., 4.

ED OCR's role has been contentious since its formation. ED OCR's initial task was to oversee the desegregation and racial integration of schools.[145] In the 1960s, ED OCR drew the ire of folks seeking to slow the pace of school desegregation[146] and then, from others upset about the use of bussing for integration.[147] In the 1970s, ED OCR received opposition to its support of bilingual education.[148] Additionally, in the 1970s and 1980s, the federal district court in the District of Columbia placed OCR under a consent decree as a result of the *Adams v. Richardson* case, in which civil rights groups had argued ED OCR was not sufficiently enforcing antidiscrimination statutes.[149] "For decades, OCR has been attacked from the left for insufficient vigor and from the right for exceeding its statutory mandate."[150]

ED OCR has enforced Title IX and its regulations regarding sex based discrimination through investigation of complaints, compliance reviews, directed investigations, and providing guidance and technical assistance to educational institutions.[151] ED OCR's Case Processing Manual sets out the procedures ED OCR will use to investigate and resolve complaints, and conduct

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[145] Beryl Radin, *Implementation, Change and the Federal Bureaucracy: School Desegregation Policy in H.E.W., 1964-1968* (New York: Teachers College Press, 1978). The Department of Education's predecessor was the Department of Health, Education and Welfare. ED OCR first existed in this department.

[146] *See also generally* Leon E. Panetta and Peter Gall, *Bring Us Together: The Nixon Team and the Civil Rights Retreat*, (J.B. Lippincott Company, 1971).

[147] Ibid.; Gary Orfield, *Must We Bus? Segregated Schools and National Policy*, (Brookings Institution, 1980).

[148] John D. Skrentny, *The Minority Rights Revolution* (Harvard University Press, 2002) p. 211-219 (discussing the writing and implementation of the May 25, 1970, OCR Memorandum, which stated that failure to provide for Limited English Proficient children was national origin discrimination and a violation of Title VI); *see also Lau v. Nichols*, 414 U.S. 563 (1974) (holding the failure of the school district to provide for Chinese-speaking students denied them a meaningful opportunity to participate in the educational program); Gary R. Hartman, Roy M. Mersky, Cindy L. Tate, *Landmark Supreme Court Cases: The Most Influential Decisions of the Supreme Court*, 87-88 (Facts on File, Inc., 2004) (discussing the aftermath of *Lau* and the development of the "*Lau* remedies" by ED OCR, and that "between 1975 and 1980 nearly 500 compliance agreements were negotiated [between ED OCR and] deficient school districts. The Regan administration withdrew a proposal to formalize the *Lau* remedies.").

[149] *Adams v. Richardson*, 351 F. Supp. 636 (D.D.C. 1973); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). *See also* Rosemary Salomone, "Judicial Oversight of Agency Enforcement: The Adams and WEAL Litigation" in Barbara Flicker, ed., *Justice and School Systems: The Role of Courts in Education Litigation* (Temple University Press, 1990); *Civil Rights Enforcement by the Department of Education: Hearing Before the Subcomm. on Human Resources and Intergovernmental Relations of the H. Comm. on Government Operations*, 100th Cong. (1987); MAJORITY STAFF OF H. COMM. ON EDUCATION AND LABOR, 100TH CONG. REP. ON THE INVESTIGATION OF THE CIVIL RIGHTS ENFORCEMENT ACTIVITIES OF THE OFFICE FOR CIVIL RIGHTS, US DEP'T OF ED. (1988).; and US. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, June 1996.

[150] Melnick, Transformation of Title IX, 55.

[151] *See generally*, Department of Education, Office for Civil Rights, Case Processing Manual (Nov. 19, 2018), https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf (hereafter *ED OCR Case Processing Manual*).

compliance reviews and directed investigations, including: 1) investigations of complaints, including on-site visits, interviews with students and school officials, and collection of documents, 2) "letters of findings," 3) negotiating resolution agreements, 4) monitoring compliance with resolutions, and 5) referrals to the Department of Justice.[152] Given ED OCR's small staff size in comparison to its responsibilities, resolution of complaints can take months and sometimes years.

In addition to complaint investigations, ED OCR also may investigate whether a school is complying with Title IX as part of a compliance review.[153] Compliance reviews are an assessment of "the practices of recipients to determine whether they are [in] compl[iance] with [Title IX]."[154] ED OCR has broad discretion in determining which recipients to target for compliance reviews, though this discretion is not unfettered.[155] The Fifth Circuit has suggested that the selection of a target for a compliance review is reasonable if the review is based on 1) specific evidence of an existing violation, 2) a showing that "reasonable legislative or administrative standard for conducting an . . . inspection are satisfied with respect to a particular [establishment],' or 3) a showing that the search is "pursuant to an administrative plan containing specific neutral criteria."[156]

While Title IX allows for federal agencies to terminate funding assistance to schools for failure to comply,[157] ED OCR does not immediately terminate or suspend federal funding after finding a violation. "[E]ven if OCR identifies a violation, Title IX requires OCR to attempt to secure

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[152] Ibid.

[153] 34 C.F.R. section 106.71 (incorporating by reference 34 C.F.R. section 100.7(a)); http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf (ED OCR's case processing manual at 25 (describing compliance reviews)). *See also* DOJ Title IX Legal Manual at pages 28-29, https://www.justice.gov/crt/title-ix (describing legal standards applicable to compliance reviews); "Compliance reviews are not random audits of schools — they are selected based on various sources of information, including statistical data, news reports and information from parents, advocacy groups and community organizations . . .Compliance reviews are initiated in order to remedy possible violations of students' rights." (ED OCR spokesperson Dorie Nolt, quoted in the Huffington Post, *see* http://www.huffingtonpost.com/2014/05/02/education-department-compliance-reviews-title-ix_n_5254075.html).

[154] ED OCR Case Processing Manual at 22 (Nov. 19, 2018); *see also* 34 C.F.R. § 106.71 (Title IX regulations on compliance reviews).

[155] ED OCR Case Processing Manual at 22 ("The compliance review regulations afford OCR broad discretion to determine the substantive issues for investigation and the number and frequency of the investigations."); *see also United States v. Harris Methodist Fort Worth*, 970 F.2d 94 (5th Cir. 1992)(addressing a compliance review under Title VI of the Civil Rights Act of 1964 by the Department of Health and Human Services).

[156] *Harris Methodist Fort Worth*, 970 F.2d at 101; *see also United States v. New Orleans Pub. Serv.*, 723 F.2d 422 (5th Cir. 1984).

[157] 20 U.S.C. § 1682.

voluntary compliance" before seeking to withdraw federal funding.[158] In addition, the Department of Education (or any federal agency with jurisdiction) must also have notified Congress and waited 30 days.[159] Schools under investigation that believe ED OCR is mistaken in its view of what Title IX requires of them may challenge a finding of violation and decision to terminate funding in an administrative proceeding or pursue federal court review.[160] In addition, the Department of Education (or any federal agency with jurisdiction) must also have notified Congress and waited 30 days before fund termination could commence.[161] After the final decision of suspension or termination of funds, a school may restore its eligibility by demonstrating compliance with the law.[162]

Title IX investigations that proceed to where ED OCR has identified a violation or compliance concern usually result in a resolution agreement with the educational institution. ED OCR's Case Processing Manual calls for resolution agreements to include "specific acts or steps" to address "compliance concerns and/or violations [found]."[163] Under Title IX, ED OCR does not have authority to collect fines, and resolution agreements generally result in a school agreeing to take corrective action going forward, i.e., prospective equitable relief. [164] For example, resolution agreements generally include elements such as revising anti-harassment policies and procedures,

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[158] U.S. Dep't of Ed. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 2001) at 15.

[159] 20 U.S.C. § 1682 ("In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.").

[160] *See* 34 C.F.R. § 108-11; 20 U.S.C. § 1683 (providing for judicial review).

[161] 20 U.S.C. § 1682 ("In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.").

[162] 34 C.F.R. § 100.10(g).

[163] ED OCR Case Processing Manual at 19-20 (providing guidelines for Resolution Agreements).

[164] Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 2001) at iii-iv ("The *Gebser* Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX. In *Gebser*, the Court was concerned with the possibility of a money damages award against a school for harassment about which it had not known. In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.").

training staff and students, addressing the incidents in question, and taking other steps to restore a nondiscriminatory environment.[165]

Sexual Harassment and Hostile Environment

Congress did not define what type of conduct or speech would be considered discrimination when it passed Title IX. Specifically, Congress did not define what would constitute discrimination "on the basis of sex." Defining this term has fallen to the courts and federal agencies. Again, most federal agencies that distribute federal funding to higher education institutions look to the Department of Education's Title IX regulations and guidance. Accordingly, we focus on the Department of Education's efforts.

There are two basic types of sexual harassment under Title IX: *quid pro quo* (Latin for "this for that") harassment, when for example a teacher says "sleep with me or you get a bad grade," and a hostile environment.[166] ED OCR has described these two types of sexual harassment as follows:

> The type of harassment traditionally referred to as *quid pro quo* harassment occurs if a teacher or other employee conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct . . . By contrast, sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct. Harassment of this type is generally referred to as hostile environment harassment. This type of harassing conduct requires a further assessment of whether or not the conduct is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program based on sex.[167]

Invoking free speech or expression would not be a defense to behavior in the first category (*quid pro quo* harassment). The second category (hostile environment) may overlap with an individual's right of free speech or expression at a public university or academic freedom at a private university.[168] As discussed in more detail below, "[f]or hostile sex-related or gender-related

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[165] Ibid., 17; *see also infra* text and notes 264-265 (discussing remedies found in resolution agreements).

[166] *Alexander v. Yale University*, 459 F. Supp. 1, 4 (D. Conn. 1977), aff'd 631 F.2d 178 (2d Cir. 1980) (finding that Title IX prohibits *quid pro quo* sexual harassment); *David v. Monroe Board of Education*, 526 U.S. 629 (1999) (Title IX prohibits hostile environment sexual harassment).

[167] U.S. Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* at 5 (2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[168] *See supra* text and notes 61-65 (discussing the prevalence of gender harassment).

behavior to be considered illegal sexual harassment, it must be pervasive or severe enough to be judged as having had a negative impact upon the work or educational environment."[169]

Shortly following the promulgation of the first Title IX regulations in 1975, Catharine MacKinnon brought a lawsuit on behalf of some Yale University students, advocating that Title IX prohibited sexual harassment.[170] A handful of years later, the Supreme Court first spoke to when sexual harassment constitutes a hostile environment under Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of sex in the workplace.[171] Proving a sexual harassment claim based on hostile environment in court under Title IX:

> requires evidence not only that the victim subjectively perceived the environment to be hostile or abusive, but also that the environment was objectively hostile and abusive, that is, that it was "permeated with 'discriminatory intimidation, ridicule, and insult,' . . . that is 'sufficiently severe or pervasive to alter the conditions'" of, in this case, the victim's educational environment. [172]

Whether conduct rises to a hostile environment is highly fact-specific. For example, a court will consider the context of the conduct (severity, persistence, pervasiveness), including: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with" the individual's academic performance.[173] "While the effect on a victim's psychological well-being

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[169] *National Academies Sexual Harassment Report*, 24.

[170] *Alexander v. Yale University*, 459 F. Supp. 1, 4 (D. Conn. 1977), aff'd 631 F.2d 178 (2d Cir. 1980) (finding that Title IX prohibits *quid pro quo* sexual harassment).

[171] *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986)(holding that sexual harassment can create a hostile environment, which is prohibited under Title VII).

[172] *See Hayut v. State University of New York*, 352 F.3d 733, 744-45 (2d Cir. 2003) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). The Supreme Court has described a hostile environment in the Title VII context as a mix between whether the conduct is subjectively or objectively offensive as follows:

> This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, "mere utterance of an . . . epithet which engenders offensive feelings in a[n] employee," does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

Harris, 510 U.S. at 21-22.

[173] *Hayut*, 352 F.3d at 744-45 (citing *Harris* 510 U.S. at 23).

is relevant to the subjective component in the analysis, its presence, or absence, is not dispositive on the issue of severity, as 'no single factor is required.'"[174] "Pervasive" sexual harassment means that the challenged behavior is "more than episodic; the[] [incidents] must be sufficiently continuous and concerted."[175]

Department of Education's Title IX Rulemaking and Guidance (1975-2018)

In 1975, Title IX's implementing regulations were issued. Of note, Congress added two unusual procedural elements to rulemaking under Title IX. First, Congress required that the president sign off on all rules issued under Title IX: "No such rule, regulation, or order shall become effective unless and until approved by the President."[176] Congress also added a congressional vote provision in 1974; this meant that Congress could invalidate an administrative regulation. The Supreme Court declared all legislative vetoes unconstitutional in 1983, eight years after the Department of Education enacted Title IX's implementing regulations.[177]

In addition to issuing regulations, ED OCR has periodically issued guidance documents explaining Title IX's requirements and providing information about how ED OCR will assess a school's compliance with Title IX. Since the enactment of Title IX in 1972, across Republican and Democratic administrations, ED OCR has issued guidance including Dear Colleague letters, and/or pamphlets discussing sexual harassment. Herein, we trace the guidance provided by ED OCR focusing on the definitions of sexual harassment and hostile environment along with the direction given to educational institutions regarding First Amendment rights.

Ford Administration - Title IX Regulations (1975)

The Title IX rulemaking process began in 1974 when the Department of Health, Education and Welfare issued an explanation of the proposed rules.[178] The Department of Health, Education and Welfare held hearings across the country, received 9,700 comments, and made changes in response.[179] In 1975, the Department of Health, Education and Welfare enacted regulations implementing Title IX.[180] The regulations require that schools designate at least one employee to

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[174] *Id*.

[175] *See Hayu*t (quoting *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 577 (2d Cir. 1989)).

[176] 20 U.S.C. § 1682.

[177] *INS v. Challa*, 462 U.S. 919 (1983).

[178] Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 39 Fed. Reg. 22,228 (Jun. 20, 1974).

[179] Department of Health, Education, and Welfare, Final Rule, 40 Fed. Reg. 24,128 (Jun. 4, 1975) (codified at 34 C.F.R. Part 106).

[180] *Id*.

carry out their responsibilities under Title IX(commonly referred to as a "Title IX coordinator"), establish "prompt and equitable" grievance procedures, and provide notice that they do not discriminate on the basis of sex in their educational programs or activities.[181] The regulations do not define sexual harassment or hostile environment. House members introduced resolutions to disapprove the regulations[182] and held hearings, mainly focused on intercollegiate athletics.[183] Disapproval resolutions were also introduced in the Senate.[184] None of the resolutions were passed, and the regulations went into effect as written.

Reagan and Bush I Administrations (1980s to early 1990s)

ED OCR issued internal guidance related to sexual harassment as early as 1981.[185] ED OCR's then-Director for Litigation, Enforcement and Policy Service, Antonio J. Califa issued a policy memorandum to ED OCR regional directors advising them that "[s]exual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX."[186] In 1988, ED OCR issued a pamphlet titled Sexual Harassment: It's Not Academic referencing the 1981 policy memorandum, which reaffirmed ED OCR's jurisdiction over sexual harassment complaints under Title IX and provided the working definition of sexual harassment adopted by ED OCR, which included verbal conduct.[187]

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[181] 34 C.F.R. §106.8 (designation of responsible employee and adoption of grievance procedures); 34 C.F.R. § 106.9 (dissemination of policy).

[182] H. Con. Res. 310, 94th Cong., 121 Cong. Rec. 19,209 (1975) (introduced by Rep. Martin to disapprove the regulations in their entirety); H. Con. Res. 311, 121 Cong. Rec. 19,209 (1975) (introduced by Rep. Martin to disapprove the athletic regulations); H .Con. Res. 330, 121 Cong. Rec. 21,687 (1975) (introduced by Rep. O'Hara to disapprove the Title IX regulations).

[183] Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. (Jun. 17-26, 1975); *see also* Hearings on H. Con. Res. 330 (Title IX Regulation), Hearings Before the House Subcommittee on Equal Opportunities of the Committee on Education and Labor, 94th Cong., 1st Sess., July 14, 1975.

[184] S. Con. Res. 46, 94th Cong., 121 Cong. Rec. 17,300 (1975) (introduced by Sen. Helms); S. Con. Res. 52, 121 Cong. Rec. 22,940 (1975) (introduced by Senators Laxalt, Curtis, and Fannin).

[185] Nancy A. Withers, Center for Sex Equity, The Ohio State University, College of Education, Instructional Materials Laboratory, *Sexual Harassment: An Overview Monograph*, Vol. 2, No. 1 (Feb. 1987), (quoting Aug. 1981 Memo from Director for Litigation, Enforcement and Policy Service Antonio J. Claifa to Office for Civil Rights Regional Directors), https://archive.org/stream/ERIC_ED301755/ERIC_ED301755_djvu.txt.

[186] Ibid.

[187] Department of Education, *Sexual Harassment: It's Not Academic Pamphlet*, (1988) (quoting Aug. 1981 Memo from Director for Litigation, Enforcement and Policy Service to Office for Civil Rights Regional Directors), https://files.eric.ed.gov/fulltext/ED330265.pdf.

Clinton Administration (1997 and 2001 Guidance)

In 1997, ED OCR issued additional sexual harassment guidance.[188] ED OCR put this guidance through notice and comment, publishing drafts in the Federal Register.[189] The Department of Education received 80 comments in response.[190] The 1997 guidance defines "Hostile Environment Sexual Harassment" as:

> Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) by an employee, by another student, or by a third party that is **sufficiently severe, persistent, or pervasive** to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.[191]

The guidance further states that "[i]n deciding whether conduct is sufficiently severe, persistent, or pervasive, the conduct should be considered from both a subjective and objective perspective. In making this determination, all relevant circumstances should be considered . . . ."[192] The 1997 guidance addresses gender-based harassment in terms of whether the behavior is severe, persistent, or pervasive.[193]

The Department of Education also received comments regarding the intersection of the First Amendment and sexual harassment in 1997. "For instance, one commenter requested that ED OCR tell schools that the First Amendment does not prevent schools from punishing speech that has no legitimate pedagogical purpose. Another commenter, by contrast, wanted ED OCR to state that classroom speech simply can never be the basis for a sexual harassment complaint. Other

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[188] Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (March 13, 1997) (notice of issuing final policy guidance).

[189] Office for Civil Rights; Sexual Harassment Guidance: Peer Sexual Harassment; Draft Document Availability and Request for Comments, 61 Fed. Reg. 42728 (August 16, 1996) (seeking comments on the standards used by ED OCR to investigate and resolve cases involving claims that peer sexual harassment has created a hostile environment in violation of Title IX); Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees 61 Fed. Reg. 52172 (October 4, 1996) (same as for school employees).

[190] Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (March 13, 1997) ("In response to the Assistant Secretary's invitations to comment, ED OCR received approximately 70 comments on the Peer Guidance and approximately 10 comments on the Employee Guidance.").

[191] *Id.* at 12038 (emphasis added).

[192] *Id.* at 12041.

[193] *Id.* at 12039 ("It is also important to recognize that gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, but not involving conduct of a sexual nature, may be a form of sex discrimination that violates Title IX if it is sufficiently severe, persistent, or pervasive and directed at individuals because of their sex.").

commenters requested that ED OCR include specific examples regarding the application of free speech rights."[194] The 1997 guidance contained a lengthy discussion of the First Amendment:

> Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX. In order to establish a violation of Title IX, the harassment must be sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment.
>
> Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently severe, persistent, or pervasive as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights. For instance, while the First Amendment may prohibit a school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard.[195]

Following the Supreme Court's decisions in *Gebser* and *Davis*, ED OCR issued revised guidance on sexual harassment the day before the end of the Clinton Administration on January 19, 2001 (2001 Guidance).[196] In both *Gebser* and *Davis*, the Supreme Court was considering the circumstances under which a school would be liable for money damages under Title IX. In *Davis*, the Supreme Court used the following definition of sexual harassment: "harassment that is so severe, pervasive, and objectively offensive" that it effectively bars access to an educational opportunity or benefit.[197]

ED OCR considered the definition of sexual harassment used in *Davis* ("severe, pervasive, and objectively offensive") and found it to be consistent with the definition used in the 1997 Guidance ("sufficiently severe, persistent, or pervasive"). In the preamble section on the definition of harassment, the 2001 Guidance sets out ED OCR's analysis of the definitions as follows:

> Although the terms used by the Court in *Davis* are in some ways different from the words used to define hostile environment harassment in the 1997 guidance . . . the definitions are consistent. Both the Court's and the Department's definitions

[194] *Id.* at 12035.

[195] *Id.* at 12045-46.

[196] U.S. Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[197] *Davis*, 526 U.S. at 633.

> are contextual descriptions intended to capture the same concept – that under Title IX, the conduct must be sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program. In determining whether harassment is actionable, both *Davis* and the Department tell schools to look at the 'constellation of surrounding circumstances, expectations, and relationships' (526 U.S. at 651 (citing *Oncale*)), and the *Davis* Court cited approvingly to the underlying core factors described in the 1997 guidance for evaluating the context of the harassment. Second, schools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose.[198]

The preamble to the 2001 Guidance noted that the Supreme Court's *Davis* definition of sexual harassment applies to the facts of that case for private damages actions and does not constrain federal enforcement policy from asserting a broader definition with respect to administrative investigations of schools accepting federal education funds.[199] The Department of Justice Title IX legal manual (issued around the same time as the ED OCR 2001 Guidance) states that "[i]t is important to remember that the standard for an agency to determine whether a recipient has violated Title IX differs from the higher liability standard of proof that must be met in a court action before monetary damages are awarded."[200]

Accordingly, the 2001 Guidance defines sexual harassment as "unwelcome conduct of a sexual nature," including "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[201] When determining if the conduct is serious enough that it "denies or limits a student's ability to participate in or benefit from the school's program based on sex," creating a hostile environment and therefore meeting the sexual harassment definition, ED OCR considered several factors.[202] It noted that the behavior should be considered from both subjective and objective viewpoints, that factors can include all relevant surrounding circumstances, and listed some factors that should be considered: the effect on students' education; the frequency, duration and type of conduct; the relationship between the alleged harasser and the person allegedly harassed; the identity, including age and sex, of the

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[198] Ibid., v-vi.

[199] Ibid; *see also Gebser*, 524 U.S. at 292 (noting that federal agencies can "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate," even in circumstances that would not give rise to a claim for money damages.).

[200] U.S. Department of Justice, Title IX Legal Manual, at 114 (Jan. 11, 2001), http://www.feminist.org/education/pdfs/ixlegalmanualDOJ.pdf.

[201] 2001 Guidance at 2.

[202] Ibid., 5.

persons involved; the number of people involved; location and context of the incident; whether other incidents occurred at the school, including gender-based nonsexual harassment.[203]

The 2001 Guidance also clarified a school's responsibilities as a two-step analysis:

> To determine a school's responsibilities, the "first issue is whether . . . the conduct denies or limits a student's ability to participate in or benefit from the program based on sex. If it does, the second issue is the nature of the school's responsibility to address that conduct . . . [T]his issue depends in part on the identity of the harasser and the context in which the harassment occurred."[204]

Finally, the 2001 Guidance repeats the same paragraphs as the 1997 Guidance regarding the First Amendment and provides additional examples of the First Amendment protecting speech in classrooms.[205] The 2001 Guidance states "[a]cademic discourse . . . is protected by the First Amendment even if it is offensive to individuals."[206] The 2001 Guidance clarifies that "[t]hreatening and intimidating actions targeted at a particular student or group of students, even though they contain elements of speech, are not protected by the First Amendment."[207]

Bush II Administration Guidance (Reissuance of 2001 Guidance, First Amendment Guidance, and 2008 Booklet)

The incoming Bush II administration postponed the effective date of the 2001 guidance on January 20, 2001.[208] In 2006, ED OCR issued a "Dear Colleague" letter and enclosed the 2001 Guidance as originally issued.[209] The letter distinguishes between federal and private enforcement by stating that "[t]he guidance outlines standards applicable to OCR's enforcement of compliance in cases raising sexual harassment issues" and that "[i]t does not purport to discuss standards applicable to private Title IX lawsuits for money damages."[210] The letter also states that resolution agreements are "fact-specific statements . . . in individual cases and are not formal statements of OCR policy."[211]

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[203] Ibid., 5-7.

[204] Ibid., 5.

[205] Ibid., 22-23.

[206] Ibid., 23.

[207] Ibid.

[208] Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 20, 2001).

[209] Assistant Secretary for Civil Rights, Stephanie Moore to Dear Colleague (Jan. 25, 2006), https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.pdf.

[210] Ibid., 1.

[211] Ibid.

Before reissuing the 2001 Guidance, in 2003, ED OCR issued a Dear Colleague Letter (2003 First Amendment Guidance) that addresses the First Amendment and anti-discrimination obligations of schools.[212] Since being issued, the 2003 First Amendment Guidance has remained in effect.[213] The 2003 First Amendment Guidance reiterates the 1997 Guidance's position on the First Amendment and states:

> OCR has consistently maintained that the statutes that it enforces are intended to protect students from invidious discrimination, not to regulate the content of speech. Harassment of students, which can include verbal or physical conduct, can be a form of discrimination prohibited by the statutes enforced by OCR.
>
> Thus, for example, in addressing harassment allegations, OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.
>
> In order to establish a hostile environment, harassment must be sufficiently serious (i.e., severe, persistent or pervasive) as to limit or deny a student's ability to participate in or benefit from an educational program.
>
> OCR has consistently maintained that schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech. OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment . . .
>
> Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's

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[212] Department of Education, Office for Civil Rights, *First Amendment: Dear Colleague* (July 28, 2003), http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

[213] As discussed below, ED OCR's subsequent guidance issued in 2010 and 2014 both referred readers to ED OCR's 2003 First Amendment Guidance. Assistant Secretary for Civil Rights Russlyn Ali to Dear Colleague (Oct. 26, 2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf at 2; Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf at 43. The 2014 Q&A explicitly stated that the 2003 First Amendment Guidance remained "fully in effect." Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf at 43.

> jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.[214]

In 2008, ED OCR released a publication, which defined sexual harassment as "conduct that: 1) is sexual in nature; 2) is unwelcome; and 3) denies or limits a student's ability to participate in or benefit from a school's education program."[215] The publication listed considerations in determining whether the incident created a hostile environment.[216] The listed factors mirror the 2001 Guidance, and provide examples of hostile environments.[217] The publication states that "[i]f sufficiently severe, single or isolated incidents can create a hostile environment."[218]

Obama Administration Guidance (2010 Dear Colleague Letter, 2011 Dear Colleague Letter, 2014 Q&As, 2015 Title IX Resource Guide)

During the Obama Administration, ED OCR issued four guidance documents about sexual harassment under Title IX. In October 2010 (2010 Dear Colleague Letter), ED OCR released an explanation of schools' obligations to protect students from student-on-student harassment on the basis of sex, race, color, national origin and disability that reiterated its definition of discriminatory sexual harassment.[219] In a footnote, the 2010 Dear Colleague Letter states, "Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression." It refers the reader to ED OCR's 2003 First Amendment Guidance discussed herein above.[220]

In April 2011, ED OCR released a Dear Colleague Letter (2011 Dear Colleague Letter) on Title IX sexual harassment, specific to sexual violence.[221] The 2011 Dear Colleague Letter defined "sexual violence" for purposes of the letter as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol."[222]

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[214] Ibid. The 2003 First Amendment Guidance has not been rescinded or modified by any subsequent administration and remains in effect.

[215] Department of Education, Office for Civil Rights, *Sexual Harassment: It's Not Academic* (Sept. 2008) p. 3, https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf.

[216] Ibid., 5-7.

[217] Ibid., 7 (providing an example of a hostile environment when a student repeatedly passes sexually explicit photographs to another student, which offend the student and make the student unable to concentrate on their schoolwork).

[218] Ibid.

[219] Assistant Secretary for Civil Rights Russlyn Ali to Dear Colleague (Oct. 26, 2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf at 2.

[220] Ibid.

[221] Assistant Secretary for Civil Rights Russlyn Ali to Dear Colleague (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[222] Ibid., 1.

The 2011 Dear Colleague Letter "supplement[ed] the 2001 Guidance by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence."[223] The 2011 Dear Colleague Letter defines sexual harassment as:

> unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.[224]

Looking to the 2001 Guidance, the 2011 Dear Colleague Letter describes a hostile environment as follows:

> When a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program. 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 harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe.[225]

ED OCR followed the 2011 Dear Colleague Letter in 2014 with a Questions and Answers (Q&As) document that supplemented the 2011 Dear Colleague Letter related to sexual violence.[226] The 2014 Q&As addressed the First Amendment and speech by stating "the [2011 Dear Colleague Letter] 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."[227] The 2014 Q&As then referred the reader to the 2003 First Amendment Dear Colleague letter, the 2001 Guidance, and the 2010 Dear Colleague letter on harassment and bullying, stating that all of these documents "remain fully in effect."[228] "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 US. Constitution."[229]

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[223] Ibid., 2.

[224] Ibid., 3. The letter also defined "gender-based harassment" as "include[ing] acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature." Ibid., 3, n. 9.

[225] Ibid., 3.

[226] Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[227] Ibid., 43.

[228] Ibid.

[229] Ibid.

The 2014 Q&As further clarified that sexual harassment under Title IX requires the behavior to be objectionable from a subjective and objective viewpoint:

> 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.[230]

The 2015 Title IX Resource Guide defined sexual harassment as "unwelcome conduct of a sexual nature," and prohibited sex-based harassment 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)."[231] The 2015 Title IX Resource Guide noted that when conduct is sufficiently severe, it may be infrequent and still fall under the definition of sexual harassment.[232]

Trump Administration Guidance and Proposed Rulemaking (2017-2018)

In 2017, the Department of Education issued a Dear Colleague letter withdrawing the statements of policy and guidance reflected in the 2011 Dear Colleague Letter on Sexual Violence and the 2014 Questions and Answers on Title IX and Sexual Violence.[233] Simultaneously, ED OCR issued the 2017 Q&As on Campus Sexual Misconduct.[234] The 2017 Dear Colleague letter also announced the Department's intention to engage in notice and comment rulemaking to "develop an approach to sexual misconduct that responds to the concerns of stakeholders and that aligns with the purpose of Title IX to achieve fair access to educational benefits."[235] The 2017 Dear Colleague letter noted that "the Department's enforcement efforts proceed from Title IX itself and its implementing regulations." The Q&A on campus sexual misconduct stated that during the interim period during the rulemaking process, "these questions and answers—along with the [2001 Guidance] previously issued by [ED OCR]—provide information about how OCR will assess a school's compliance with Title IX."[236] Similar to the 2001 Guidance, the 2017 Q&As define hostile environment as

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[230] Ibid., 44 (citing 34 C.F.R. § 106.42 [the Title IX regulations]).

[231] U.S. Department of Education, Office for Civil Rights, *Title IX Resource Guide*, 2015, p. 15.

[232] Ibid.

[233] Acting Assistant Secretary for Civil Rights, Candice Jackson to Dear Colleague (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

[234] Department of Education, Office for Civil Rights, *Q&A on Campus Sexual Misconduct* (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

[235] Ibid., 2.

[236] Ibid., 1.

"when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities."[237]

In 2018, the Department of Education proposed revisions to the regulations that implement Title IX.[238] The proposed revisions have received over 124,000 comments from the public. The proposed rules include a section intended to "correct" for "capturing too wide a range of misconduct resulting in infringement on academic freedom and free speech."[239] In addition, the proposed rules would define sexual harassment as:

> (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (2) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or (3) Sexual assault as defined in 34 CFR 668.46(a) [which defines it as rape, fondling, incest, or statutory rape].[240]

Subpart 1 of the proposed definition goes to *quid pro quo* sexual harassment and requests for a sexual favor in exchange for a benefit. Subpart 2 of the proposed definition would define sexual harassment and hostile environment. The proposed rules would adopt the *Davis* definition and require that the conduct must be severe, pervasive, and objectively offensive. In addition, the conduct must effectively deny, not just limit, educational access.[241]

The proposed regulations also add explicit language about enforcement of Title IX and free speech rights.[242] The revisions propose to add a subsection about the effect on Constitutional protections, which states that nothing in the rules require a recipient institution to "[r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution."[243] Similarly, the Office for Civil Rights' most recent Case Processing Manual, which became effective in November of 2018, states that ED OCR will not interpret any statute or

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[237] Ibid.

[238] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (Nov. 29, 2018) (seeking comments on proposed revisions to the Title IX regulations).

[239] *Id.* at 61,484.

[240] *Id.* at 61,496.

[241] *Id.*

[242] *Id.* at 61,464, 61,480 (noting that some believe Title IX chills free speech and encroaches on academic freedom).

[243] *Id.* at 61,495.

regulation to impinge on First Amendment rights or to require recipients to encroach on the exercise of those rights.[244] This section did not appear in the previous Case Processing Manual.[245]

Complaints, Investigations, and Compliance Reviews

The Department of Education has enforced Title IX and its regulations through administrative investigation of complaints, compliance reviews, directed investigations, and monitoring of resolution agreements. ED OCR may also refer cases to the DOJ for court review under certain circumstances.[246] The Obama Administration first published online a list of higher educational institutions that are under investigation for potential Title IX violations. ED OCR told the Commission that it took this action "to increase[] transparency [and] spur[] community dialogue about this important issue."[247] The Trump Administration has continued to maintain and update this list.[248]

Complaints

Anyone can file a complaint of discrimination with OCR for investigation.[249] As mentioned above, ED OCR has jurisdiction under a multitude of statutes, including Title IX.[250] By regulation, ED

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[244] U.S. Department of Education, Office for Civil Rights, *Case Processing Manual*, 2018, p. 12.

[245] U.S. Department of Education, Office for Civil Rights, *Case Processing Manual*, 2015.

[246] *See* ED OCR/DOJ-CRT Memorandum of Understanding at https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf. The Department of Justice has three roles regarding Title IX. First, DOJ is responsible for coordination of federal agency implementation and enforcement per Executive Order 12,530. Second, DOJ is the federal government's litigator and may seek injunctive relief, specific performance, or other remedies against recipients based on referrals from other agencies. Finally, DOJ may itself have provided grants to educational institutions and may investigate complaints or conduct a compliance review. *See* Department of Justice, Title IX Legal Manual, at Department of Justice Role Under Title IX, https://www.justice.gov/crt/title-ix#D.%C2%A0%20Sexual%20Harassment.

[247] Joint Written Statement of ED OCR and DOJ, p. 14.

[248] Department of Education, Office for Civil Rights, Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of March 1, 2019, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html (last modified 3/6/2019) (when filtered by "sexual harassment" as the type of discrimination, this list shows 278 open investigations with 122 of these at post-secondary schools. Of note, the website states that filtering by "sexual harassment" does not include "sexual violence" investigations.).

[249] 34 C.F.R. § 100.7(b) ("Complaints. Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.").

[250] ED OCR Case Processing Manual, 5-6 (listing the statutes under which ED OCR has jurisdiction).

OCR investigates all complaints "that indicate a possible failure to comply with [Title IX]."[251] ED OCR's Case Processing Manual sets out how ED OCR investigates complaints.[252] As seen in figure 1.3 below, historically, disability discrimination makes up the largest percentage of ED OCR's complaint caseload. In contrast, from January 2009 to 2014, ED OCR told the Commission that "sexual harassment and sexual violence complaints are less than one percent of the total number of complaints OCR receives."[253] As shown in figure 1.3, the percentage of sexual harassment and sexual violence complaints filed has appeared to increase to 4-5% of the total number of complaints ED OCR receives.

At least one recent ED OCR complaint concerns sexual harassment and speech. In 2015, ED OCR began investigating a complaint filed by students at the University of Mary Washington.[254] The complaint filed with ED OCR alleged retaliation on social media (Yik-Yak) for reporting bawdy songs by members of the men's rugby club at an off-campus party.[255] The students also filed a lawsuit against the University with allegations similar to those filed with ED OCR for failing to protect them from a sexually hostile environment, and from online sexual harassment.[256] The Fourth Circuit recently ruled students who have set out a case under Title IX may proceed against the University and that the First Amendment does not prohibit the University from disciplining

[251] 34 C.F.R. § 106.71 (incorporating Title VI's procedural provisions in 34 C.F.R. § 100.6 to § 100.11 and 34 C.F.R. Part 101) and § 100.7(c) ("Investigations. The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.").

[252] ED OCR Case Processing Manual, 5-6.

[253] Joint Written Statement of ED OCR and DOJ, p. 12.

[254] University of Mary Washington, *Campus-Wide Message About OCR Investigation*, Eagle Eye (Campus Newspaper), (Oct. 23, 2015) (notifying faculty and staff of a pending ED OCR investigation based on a complaint, alleging discrimination on the basis of sex and retaliation).

[255] T. Rees Shapiro, *Feminist Group Alleges Sexually Hostile Environment at University of Mary Washington*, (May 11, 2017), https://www.washingtonpost.com/local/education/feminist-group-alleges-hostile-environment-at-university-of-mary-washington/2017/05/11/58cbd916-35b4-11e7-b4ee-434b6d506b37_story.html?utm_term=.2d9088d0a07b.

[256] *Feminist Majority Foundation v. University of Mary Washington*, Complaint Civ. No. 3:17-cv-344-JAG (E.D. Va. May 4, 2017).

students for online "true threats."[257] It is unclear whether ED OCR continues to investigate the initial complaint.[258]

Figure 1.3: ED OCR Complaint Caseload by Jurisdictional Basis (Selected Fiscal Years 2006-2017)

Jurisdictional Basis	FY 2006	FY 2010	FY 2014	FY 2015	FY 2016	FY 2017[2]
Disability	3,025	3,405	3,909	4,052	5,063	5,567
Race	998	1,056	1,203	1,143	1,294	1,280
Sex (all)	**334**	**391**	**2,354**	**2,390**	**7,068[1]**	**2,249**
Sexual Harassment and Sexual Violence[3]	**95**	**35**	**128**	**536**	**637**	**N/A**
Age	86	131	122	147	108	156
Multiple	750	1,037	1,588	1,399	1,655	1,702
Other	612	913	813	1,261	1,532	1,883
TOTAL	5,805	6,933	9,989	10,392	16,720	12,837

Source: Data for overall numbers from Department of Education, Office for Civil Rights, FY 2019 Budget Request p. Z-21, https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf;
[1] In FY 2016, of the 7,068 Sex Discrimination complaints, 6,201 were filed by one individual who filed multiple Title IX complaints against school districts and elementary and secondary schools about athletics
[2] FY 2017 data is as of Sept. 30, 2017
[3]Data for break out of Sexual Harassment and Sexual Violence Complaints from FY 2006, FY 2009-2012, and FY 2015, and FY 2016 annual reports to congress. *See also* Appendix B for source documents.

[257] *Feminist Majority Foundation v. University of Mary Washington*, 911 F.3d 674, 691 (4th Cir. Dec. 19, 2018) ("We first address the University's expressed apprehension about punishing students for their speech. Put simply, we are satisfied its First Amendment concerns about penalizing speech lack a proper basis. The University could have vigorously responded to the threatening Yaks without implicating the First Amendment because "true threats" are not protected speech.").

[258] There does not appear to be a resolution with Mary Washington, and the pending investigation link lists a "sexual violence" complaint from Nov. 30, 2016. Department of Education, Office for Civil Rights, Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of March 29, 2019, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html?queries%5Bstate%5D=VA&page=2&offset=20 (last modified Apr. 3, 2019).

Compliance Reviews and Directed Investigations

ED OCR also conducts compliance reviews to determine if recipients of federal funds are complying with Title IX.[259] From January 2009 to 2014, ED OCR "initiated 25 proactive investigations (i.e., compliance reviews and directed investigations) focused on sexual harassment and sexual violence."[260] ED OCR stated that these compliance reviews comprised "almost sixteen percent" of the total number of reviews for this time frame.[261] For fiscal year 2015, ED OCR reported to Congress that it initiated seven proactive investigations under Title IX, including some investigations focused on sexual harassment.[262]

Resolution Agreements

"Under the statutory enforcement scheme, when OCR finds a recipient of Department of Education funding to have violated Title IX . . ., it attempts to obtain voluntary compliance" through a resolution agreement.[263] Between 2011 and 2017, ED OCR issued letters of findings and entered into 40 resolution agreements from investigations or compliance reviews based on sexual harassment (including sexual assault).[264] These resolution agreements contained various remedies, including updating grievance procedures, conducting campus climate surveys, and trainings. As shown in figure 1.4, updating grievance procedures and trainings were included in the most resolution agreements. Conducting campus climate surveys is also frequently included.

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[259] 34 C.F.R. § 106.71 (incorporating Title VI's procedural provisions into the Title IX regulations); 34 C.F.R. § 100.7(a) ("Periodic compliance reviews. The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.").

[260] Joint Written Statement of ED OCR and DOJ, p. 12.

[261] Ibid.

[262] Department of Education, Office for Civil Rights, *Securing Equal Educational Opportunity: Report to the President and Secretary of Education,* p. 24 (2016), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf (launched 4 proactive investigations under Title IX in FY 2016); Department of Education, Office for Civil Rights, *Delivering Justice: Report to the President and Secretary of Education,* p. 26 (2015), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf (launched 7 proactive investigations under Title IX in FY 2015).

[263] 20 U.S.C. § 1682; *see also* 34 C.F.R. § 100.8 (d)(1) (requiring an attempt to obtain compliance by voluntary means); *see also* Joint Written Statement of ED OCR and DOJ, p. 12.

[264] Excel Spreadsheet created by USCCR Staff based on review of ED OCR website and Chronicle of Higher Education's Title IX tracker, Appendix C.

Figure 1.4: Types of Resolution Agreement Remedies and How Often Required[265]

Type of Remedy	Required in Number of Agreements	Percentage
Update grievance procedures	35	92%
Training Employees (e.g., staff, employees, etc.)	33	86%
Training Students	32	84%
Training Individuals Involved in Title IX procedures	26	68%
Update Title IX coordinator information	26	68%
Campus climate surveys	25	65%
Update non-discrimination policies	24	63%
Data collection (for new complaints)	22	57%
Review reports (for old complaints)	16	42%
Creation of Campus Committee/Task Force	15	39%
Coordination with local law enforcement (e.g., Memo of Understanding)	11	28%
Have an individual "on call" 24/7	4	10%

Source: Excel Spreadsheet created by USCCR Staff based on review of ED OCR website and Chronicle of Higher Education's Title IX tracker, spreadsheet included as Appendix C.

[265] Ibid. Two of the resolution agreements were either heavily redacted or not public. Thus, data for these 2 has been excluded for the percentages in this table.

Of the 41 resolution agreements negotiated between the ED OCR and higher education institutions from 2011 to 2017, at least two have resulted in publicly expressed criticism about the agreement's coverage of speech and sexual harassment. Herein, we discuss these two resolution agreements with Yale University (2012) and the University of Montana-Missoula (2013).[266]

Yale University (2012)

In 2012, ED OCR secured a resolution agreement from Yale University.[267] The underlying allegations filed in the complaint involved an October 2010 incident in which "approximately 20 pledges from a fraternity [Delta Kappa Epsilon] stood blindfolded outside of the University's Women's Center . . . chanting sexually aggressive comments."[268] One of the chants was "No means yes, and yes means anal."[269] The event was video-taped and widely circulated both on and

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[266] We note that in 2016, the Department of Justice concluded a Title IV and Title IX investigation of the University of New Mexico, issued a letter of findings and entered into a resolution agreement. DOJ opened the investigation based on reports of sexual harassment (including sexual assault) because DOJ provides federal funding to the University of New Mexico. ED OCR was not a part of this investigation or resolution agreement. Concerns about the overlap with the First Amendment were raised by advocates about the findings and resolution agreement, though the facts leading to the investigation did not come from allegations involving sexual harassment based on speech. As part of its DOJ review, DOJ found fault with the policies in that the policies "conflated" the definition of sexual harassment with hostile environment. Letter from Damon Martinez, U.S. Attorney, District of New Mexico and Shaheena Simons, Chief, Educational Opportunities Section, Civil Rights Division, Department of Justice to President Robert G. Frank, University of New Mexico, p.9 (Apr. 22, 2016) (New Mexico Letter of Findings) (stating that the University's sexual harassment policies "mistakenly indicates that unwelcome conduct of a sexual nature does not constitute sexual harassment until it causes a hostile environment or unless it is quid pro quo."), https://www.justice.gov/opa/file/843901/download. As part of its review, DOJ found fault with the policies in that the policies "conflated" the definition of sexual harassment with hostile environment. Ibid. DOJ stated that "[u]nwelcome conduct of a sexual nature, however, constitutes sexual harassment regardless of whether it causes a hostile environment or is quid pro quo." Ibid. DOJ further stated that "hostile environment is not part of the definition, nor is it required for 'unwanted conduct of a sexual nature' to be deemed sexual harassment." Ibid. Instead, DOJ stated that "hostile environment" is the responsibility of the University to determine and "the threshold for determining the school's obligation under Title IX." Ibid.

[267] Resolution Agreement Yale University Complaint No. 01-11-2027, (Jun. 11, 2012), https://www.documentcloud.org/documents/2644754-Yale-Voluntary-Resolution-Agreement.html (hereafter Yale Resolution Agreement); *see also* Thomas J. Hibino, Regional Director, Department of Education to Dorothy K. Robinson, Yale President and General Counsel, Resolution Letter, Re: Complaint No. 01-11-2027 (Jun. 15, 2012), https://www.documentcloud.org/documents/2644753-OCR-Letter-to-Yale-Closing-Investigation.html (hereafter Yale Resolution Letter).

[268] Yale Resolution Letter, 9.

[269] Grigoriadis, Blurred Lines, 81; Zach Howard, *Yale Punishes Fraternity for Sexist Chanting*, Reuters (May 17, 2011), https://www.reuters.com/article/us-sexual-harassment-yale/yale-punishes-fraternity-for-sexist-chanting-idUSTRE74H06W20110518. The group Foundation for Individual Rights in Education (FIRE) asked Yale University's President to reverse the decision to suspend the fraternity's charter for five years. *See* https://www.thefire.org/cases/yale-university-fraternity-suspended-five-years-for-intimidating-satirical-chant/.

off campus.[270] "[F]raternities had staged similar events around the same time of year and in the same location with some regularity in the past."[271] For example, the complaint's multiple allegations included the Delta Kappa Epsilon chanting, pledges holding a sign saying "[w]e love Yale sluts," and a "preseason scouting report" that listed women based on how much alcohol it would take to "screw them."[272] Based on these events and others, "[t]he complaint alleged that a sexually hostile environment existed on campus . . ., to which the University had not responded in a prompt and equitable manner."[273] ED OCR's Resolution Letter sets out the University's obligations to respond to sexual harassment allegations, citing ED OCR's 2010 and 2011 Dear Colleague letters.[274]

ED OCR reviewed Yale's designation of a Title IX coordinator, its grievance procedures, and considered whether the October incident created a hostile environment.[275] ED OCR found that the Title IX coordinators' information was not widely known by students, there was no mechanism for disciplining students, no tracking of complaints, and no mechanism for consistency in decisions.[276] ED OCR found that the grievance procedures were divided into two processes – one that focused on complainants and one that focused on alleged perpetrators – and that neither had clear authorities for investigations or discipline.[277]

Before the conclusion of ED OCR's investigation, Yale had initiated multiple changes to its implementation of Title IX, including revising its definition of sexual misconduct, forming an Advisory Committee on Campus Climate, re-structuring the Title IX coordinators, designing a website with contact information, instituting revised training for students, holding discussions about responsible behavior regarding sexual misconduct and alcohol, studying hazing and initiations, and conducting periodic campus climate surveys.[278] In the resolution agreement, Yale committed to continuing these steps, and to submitting records of processed complaints and the campus surveys to ED OCR for review.[279]

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[270] Yale Resolution Letter, 9.

[271] Ibid., 10.

[272] Grigoriadis, Blurred Lines, 81. As one of the complainants stated "I can't imagine being a freshman. You got in because of your 4.0 GPA and 1600 SATs, and suddenly you're being told you're worth three beers." Ibid.

[273] Yale Findings of Investigation Letter, 1.

[274] Ibid., 3 n.1 (citing ED OCR 2010 Dear Colleague Letter on Harassment and Bullying and 2011 Dear Colleague Letter on Sexual Violence).

[275] Ibid., 5-11.

[276] Ibid., 5-6.

[277] Ibid., 6-9.

[278] Ibid., 8-11.

[279] *See generally* Yale Resolution Agreement.

University of Montana-Missoula (2013)

The Commission took up this study in part because of the resolution agreement with the University of Montana-Missoula in 2013, and the criticism that the agreement conflicts with First Amendment rights. The criticism and responses are discussed in the next section. In this section, we discuss the origin of the resolution agreement and the findings. The resolution agreement stemmed from a federal investigation by the Departments of Justice and Education into possible violations of Title IX concerning unlawful sexual harassment (including assault) among students and professor-on-student sexual harassment. [280]

In the fall of 2011, the University received multiple reports of sexual assault.[281] The University hired a retired Montana Supreme Court Judge to "conduct an independent investigation of these reports."[282] The Judge's final report to the University "concluded that the University 'has a problem with sexual assault on and off campus and needs to take steps to address it to insure the safety of all students as well as faculty, staff and guests."[283]

The federal investigation reviewed "the University's policies, grievance procedures, responses to reports of sex discrimination and retaliation, coordination of Title IX enforcement, training of those responsible for coordinating Title IX enforcement, and notice of nondiscrimination."[284] The investigation found: 1) "the University's sexual harassment and assault policies require revision to provide clearer notice of the conduct prohibited . . . and that the University's grievance procedures . . . have not ensured prompt and equitable resolutions of sexual harassment and assault complaints," 2) "the University did not take sufficient effective action to fully eliminate a sexually hostile environment, prevent its recurrence, and address its effects," and 3) "the University needs to coordinate its Title IX enforcement better, provide more training to those tasked with enforcing

[280] Resolution Agreement University of Montana-Missoula, DOJ DJ Number 169-44-9, OCR No. 10126001, (May 9, 2013), https://www.documentcloud.org/documents/2644744-University-of-Montana-Missoula-Resolution.html (hereafter University of Montana-Missoula Resolution Agreement); *see also* Anurima Bhargava, Chief, Educational Opportunities Section, Civil Rights Division, Department of Justice and Gary Jackson, Regional Director, Department of Education to Royce Engstrom, President, University of Montana, Findings of Investigation Letter, Re: DOJ Case No. DJ 169-44-9, OCR No. 10126001 (May 9, 2013, https://www.documentcloud.org/documents/2644791-OCR-Letter-to-the-University-of-Montana.html (hereafter Montana Findings of Investigation Letter). "The United States combined the Title IV [by DOJ] and Title IX compliance reviews [by Dept of Ed of the University." Montana Findings of Investigation Letter, 3.

[281] Montana Findings of Investigation Letter, 2.

[282] Ibid.

[283] Ibid.

[284] Ibid., 3.

and coordinating Title IX, devise a system to track Title IX complaints, and revise its notice of nondiscrimination."[285]

The investigation found that the University of Montana-Missoula's existing sexual harassment policies were inadequate because there were "eight policies and procedures that explicitly or implicitly cover[ed] sexual harassment and sexual assault, their sheer number and the lack of clear cross references among them leav[ing] unclear which should be used to report sexual harassment or sexual assault and when circumstances support[ed] using one policy or procedure over another."[286]

In the Letter of Findings, DOJ and ED OCR also criticized the University's definition of sexual harassment because it limited itself to sexual harassment that creates a hostile environment. The letter of findings set out the University's obligations to respond to sexual harassment allegations, citing ED OCR's 2010 and 2011 Dear Colleague letters and the definition of hostile environment under the 2001 Guidance.[287] The Letter of Findings explains its objections (internal markings omitted):

> The confusion about when and to whom to report sexual harassment is attributable in part to inconsistent and inadequate definitions of "sexual harassment" in the University's policies. First, the University's policies conflate the definitions of "sexual harassment" and "hostile environment." Sexual harassment is unwelcome conduct of a sexual nature.
>
> When sexual harassment is sufficiently severe or pervasive to deny or limit a student's ability to participate in or benefit from the school's program based on sex, it creates a hostile environment. The University's Sexual Harassment Policy, however, defines "sexual harassment" as conduct that "is sufficiently severe or pervasive as to disrupt or undermine a person's ability to participate in or receive the benefits, services, or opportunities of the University, including unreasonably interfering with a person's work or educational performance."
>
> While this limited definition is consistent with a hostile educational environment created by sexual harassment, sexual harassment should be more broadly defined as "any unwelcome conduct of a sexual nature." Defining "sexual harassment" as "a hostile environment" leaves unclear when students should report unwelcome conduct of a sexual nature and risks having students wait to report to the University until such conduct becomes severe or pervasive or both.

[285] Ibid., 7.

[286] Ibid., 7.

[287] Ibid., 4-5.

It is in the University's interest to encourage students to report sexual harassment early, before such conduct becomes severe or pervasive, so that it can take steps to prevent the harassment from creating a hostile environment.

Second, the University's policies do not define "sexual harassment" consistently. The Sexual Misconduct Policy incorrectly implies that sexual harassment must be both "severe and pervasive" to establish a hostile environment, as opposed to "severe or pervasive"—the longstanding Title IX administrative enforcement standard and Title IV injunctive standard. In contrast, the [school's] Sexual Harassment Policy states that "sexual harassment" must be "severe or pervasive." The SCC [Student Conduct Code] prohibits only "malicious intimidation or harassment of another" and does not explicitly reference or define "sexual harassment."

Third, [the University's] sexual harassment policy improperly suggests that the conduct does not constitute sexual harassment unless it is objectively offensive. This policy provides examples of unwelcome conduct of a sexual nature but then states that "whether conduct is sufficiently offensive to constitute sexual harassment is determined from the perspective of an objectively reasonable person of the same gender in the same situation."

Whether conduct is objectively offensive is a factor used to determine if a hostile environment has been created, but it is not the standard to determine whether conduct was "unwelcome conduct of a sexual nature" and therefore constitutes "sexual harassment." As explained in the Legal Standards section above, the United States considers a variety of factors, from both a subjective and objective perspective, to determine if a hostile environment has been created.

Finally, none of the policies explicitly defines "hostile environment," accurately defines "sexual harassment," or indicates that a single instance of sexual assault can constitute a hostile environment. To address these issues, the Agreement requires the University to revise its policies so that they provide accurate definitions of sexual assault, sexual harassment, and conduct that may constitute sex discrimination and may provide the basis for a Title IX complaint, and to dispel any confusion about when, where, and how students should report various types of sex discrimination.[288]

[288] Ibid., 8-9.

The Resolution Agreement requires the University to 1) revise its grievance procedures, 2) investigate allegations of retaliation, 3) eliminate hostile environments, 4) provide Title IX training to Title IX coordinators, and 5) revise its notice of nondiscrimination.[289]

Criticism and Support of Title IX Enforcement

ED OCR's enforcement and guidance about Title IX has been criticized for going too far and for not going far enough to remedy sexual harassment on campus. The main speech-based criticisms of ED OCR and over-enforcement are that ED OCR's definition of sexual harassment conflicts with Supreme Court precedent and the First Amendment, and that ED OCR's policies have resulted in higher education institutions over-enforcing Title IX leading to a "chill" in speech on campuses by students and professors.[290] The main criticisms of ED OCR and under-enforcement include not holding higher education institutions accountable for compliance with Title IX, not terminating federal funds, and prioritizing a process for remedying sexual harassment instead of focusing on reducing sexual harassment through cultural change.

Definition of Sexual Harassment: Consistency with Supreme Court Precedent and U.S. Constitution

The concerns raised by critics of ED OCR's 2011 Dear Colleague letter and the Montana Letter of Findings and Resolution Agreement center on the government's interpretation of Title IX; whether the government's definition of unlawful sexual harassment accords with judicial precedent and the Constitution; whether enforcement impinges on protected speech; whether the subjective and objective components are both included; and the absence of a notice and comment rulemaking that would have allowed such concerns about substantial changes in Title IX law enforcement to be openly discussed by the regulated community (schools, parents, students, advocates, etc.).[291]

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[289] Ibid., 30-31; *see generally* University of Montana-Missoula Resolution Agreement.

[290] Of note, the Department of Education has recently been criticized for censoring free speech and academic freedom in the context of providing federal funding under Title VI of the Higher Education Act of 1965 (20 U.S.C. § 1122(A)(1)(A)-(B)). *See* David M. Perry, *This is What a Real Threat to Campus Free Speech Looks Like*, CNN (Sept. 21, 2019) (Criticizing a letter from the Assistant Secretary for Postsecondary Education at the Department of Education to Duke and the University of North Carolina and stating that "[t]his is what a real threat to free speech on a college campus looks like. It looks like the federal government telling a university how and what to teach its students."), https://www.cnn.com/2019/09/21/opinions/duke-unc-middle-eastern-studies-controversy-perry/index.html. *See also* Letter from Robert King, Assistant Secretary for Postsecondary Education to Duke and the University of North Carolina (Aug. 29, 2019), published at Notice of a Letter Regarding the Duke-UNC Consortium for Middle East Studies, 84 Fed. Reg. 48919 (Sept. 17, 2019), https://www.govinfo.gov/content/pkg/FR-2019-09-17/pdf/2019-20067.pdf.

[291] *See e.g.*, Greg Lukianoff, President of the Foundation for Individual Rights (FIRE), Briefing Transcript, pp. 91-93 (summarizing concerns with the Montana Resolution Agreement: "The court [in *Davis*] ruled that for an institution to be liable in their Title IX for inadequately responding to harassment, the plaintiffs must prove that the

ED OCR responded directly to the question of how the Montana Resolution Agreement comports with the Supreme Court's definition in *Davis* in a letter to Congress, stating that the Clinton, Bush II, and Obama administrations found that the *Davis* description of sexual harassment ("severe, pervasive, and objectively offensive") is consistent with ED OCR's ("sufficiently severe, persistent, or pervasive).[292] Also, *Davis* cited the 1997 Guidance ("severe, persistent, or pervasive") in describing "actionable harassment": "Whether gender-oriented conduct rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships,' including but not limited to, the ages of the harasser and the victim, and the number of individuals involved, *see* ED OCR Title IX Guidelines 12041-12042 [1997 Guidance]."[293]

Similarly, ED OCR's website states that "OCR has consistently reaffirmed that the Federal civil rights laws it enforces protect students from prohibited discrimination, and are not intended to restrict expressive activities or speech protected under the U.S. Constitution's First Amendment."[294] ED OCR notes that "Schools can also encourage students on all sides of an issue to express disagreement over ideas or beliefs in a respectful manner. Schools should be alert to take more targeted responsive action when speech crosses over into direct threats or actionable speech or conduct."[295]

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institution was deliberately indifferent, the claims of sexual harassment and that the targeting conduct was so severe, pervasive, and objectively offensive that the victim was effectively denied equal access to an institution's resources and opportunities. The *Davis* standard is rigorous precisely because the Supreme Court knows they have to protect First Amendment rights. In the [Montana Resolution Agreement], however, OCR ignored these crucial limitations, explicitly overruling Montana's reasonable person standard. Under the [Montana Resolution Agreement], universities must investigate harassment claims even when a reasonable person would not have found this speech objectionable thereby weaponizing the sensitivities of the least speech tolerant members of the community. In sharp contrast to *Davis*, the [Montana Resolution Agreement's] definition of harassment was simply unwelcome verbal conduct AKA speech of a sexual nature. Such a vague and broad standard would never hold up in court, yet OCR sought to impose it nationwide.").

[292] Assistant Secretary for Civil Rights, Catherine E. Lhamon to Representative John Kline, Chair of the House Committee on Education and the Workforce, (July 15, 2016) (quoting the discussion of the *Davis* case in the preamble to the 2001 Guidance), https://www2.ed.gov/about/offices/list/ocr/correspondence/congress/20160715-t9-hostile-env-std-davis.pdf (hereafter *2016 Letter from OCR to House*); *see also* Fatima Goss Graves, then-Vice President for Education and Employment, National Women's Law Center, Briefing Transcript, p. 199 ("The [University of Montana Missoula] agreement that emerged applies the same standards to the Montana resolution that had been applied to OCR investigations and in injunctive relief cases in Title IX claims through multiple administrations, and it also repeated basic principles that really are not new.").

[293] 526 U.S. at 581 (quoting *Oncale* and citing ED OCR's 1997 guidance).

[294] Department of Education, Office for Civil Rights, *Frequently Asked Questions About Sex Discrimination – Harassment, How do educational institutions balance their Title IX obligations with individuals' First Amendment rights?*, https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html#sexhar3 (last modified 9/25/2018).

[295] Ibid.

ED OCR and DOJ also provided the following written testimony to the Commission stating that:

> Title IX does not reach curriculum or in any way prohibit or abridge the use of particular textbooks or curricular materials. Additionally, OCR has made it clear that Title IX and the other civil rights laws OCR enforces protect students from prohibited discrimination and are not intended to restrict the exercise of speech or other expressive activities protected under the U.S. Constitution. Therefore, OCR has consistently maintained that when schools work to prevent and redress discrimination, they must respect the free speech rights of students, faculty, and other speakers.[296]

ED OCR and DOJ's written testimony specifically addressed the First Amendment as follows:

> The [2014] Q&A reiterates OCR's previous guidance on the First Amendment, which makes clear that when a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers. [The 2014 Q&A] also clarifies that the 2011 [Dear Colleague Letter] 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.[297]

With regard to the subjective and objective standard for hostile environment, OCR told Congress with regard to the University of Montana-Missoula findings that Montana's prior definition had not included the subjective portion of the inquiry ("unwelcome conduct of a sexual nature"), while focusing on the objective offensiveness of the conduct.[298] OCR advised Congress that when a student reported conduct that was unwelcome (subjective) it then became Montana's obligation to

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[296] Joint Written Statement of Office for Civil Rights, Department of Education, Civil Rights Division, Department of Justice, and Office of Violence Against Women, Department of Justice to U.S. Commission on Civil Rights, p. 7 (July 25, 2014) (hereafter Joint Written Statement of ED OCR and DOJ). In 2012, the California State Advisory Committee to the U.S. Commission on Civil Rights recommended that student codes of conduct should be consistent with the *Davis* standard, and also that the "standard employed by the OCR should be used, i.e., in order to form the basis for any type of student disciplinary action, speech mush 'be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program." California State Advisory Committed to the U.S. Commission on Civil Rights, *Equal Educational Opportunity and Free Speech on Public College and University Campuses in California*, p. 11 (2012), https://www.usccr.gov/pubs/docs/CA-Free-Speech-Report.pdf.

[297] Joint Written Statement of ED OCR and DOJ, p. 10.

[298] *2016 Letter from OCR to House*, 2 (explaining that "[b]ased on evidence of under-reporting of sexual harassment and assault at UM, the resolution agreement . . . aimed to create a process for students to raise concerns and report complaints of sexual harassment and assault without feeling they bore the burden themselves of determining whether the sexual harassment they experienced created a hostile environment to a reasonable person in their circumstances.").

determine if that conduct was also offensive from an objective perspective and creating a hostile environment.[299] Likewise, ED OCR and DOJ told the Commission that:

> While it is true that sexually harassing conduct may take many forms, including verbal acts and name-calling and written statements, it is not enough that a person find the expression personally offensive. Rather, to create a hostile environment that requires the school to respond in ways that both eliminate and remedy that environment, the harassing conduct must be sufficiently serious to a reasonable person in that circumstance that it limits or denies a student's ability to participate in or benefit from a school's educational program or activity.[300]

The Department of Education's 2018 Proposed Regulations include language intended to clarify "that nothing in these regulations requires a recipient to infringe upon any individual's rights protected under the First Amendment . . . The language also makes it clear that, under the Title IX regulations, recipients—including private recipients—are not obligated by Title IX to restrict speech."[301] Additionally, the Department stated that "the proposed regulatory action will correct capturing too wide a range of misconduct resulting in infringement on academic freedom and free speech."[302] The 2018 Proposed Regulations would define sexual harassment as:

> (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (2) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or (3) Sexual assault as defined in 34 CFR 668.46(a) [which defines it as rape, fondling, incest, or statutory rape].[303]

Subpart 1 of the proposed definition goes to *quid pro quo* sexual harassment and requests for a sexual favor in exchange for a benefit. Subpart 2 of the proposed definition would define sexual harassment and hostile environment. The 2018 proposed rules would adopt the *Davis* definition and require that the conduct must be severe, pervasive, and objectively offensive and that the

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[299] Ibid. ("[W]hen someone reports an incident of sexual harassment, that report triggers 'an adequate, reliable, prompt, and impartial investigation' to determine whether the harassment created a hostile environment.").

[300] Ibid., 7.

[301] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,480 (Nov. 29, 2018) (seeking comments on proposed revisions to the Title IX regulations).

[302] *Id.* at 61,484.

[303] *Id.* at 61,496.

conduct must effectively deny, not just limit, educational access.[304] The proposed, revised definition of sexual harassment has received criticism and support.[305]

Implementation of Title IX Grievance Procedures

In recent years, the Title IX grievance procedures at schools have been characterized by some who have filed sexual harassment complaints and also some who have been the subject of an investigation as "kangaroo" proceedings.[306] Implementation of grievance procedures by schools have been criticized for a lack of transparency, lack of due process,[307] and the belief that they chill speech of both students and professors.[308] ED OCR's enforcement role has also been criticized

[304] *Id.*

[305] *Compare* Letter from National Women's Law Center to Assistant Secretary for Civil Rights Kenneth Marcus (Jan. 30, 2019) (comments opposing proposed regulatory changes), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf and Letter from National Center for Youth Law to Assistant Secretary for Civil Rights Kenneth Marcus (Jan. 30, 2019) (comments opposing regulatory changes), https://youthlaw.org/wp-content/uploads/2018/01/NCYL-Comment-on-Title-IX-regs-1.pdf *with* Foundation for Individual Rights in Education (FIRE) (Nov. 20, 2018) (supporting proposed definition of sexual harassment, cross-examination, respondent's opportunity to present witnesses, and barring of the single investigator model), https://www.thefire.org/responding-to-criticisms-of-the-proposed-department-of-education-title-ix-regulations/.

[306] Kirsten Lombardi, *A Lack of Consequences for Sexual Assault*, Public Integrity (Feb. 24, 2010) (quoting Margaux, who filed a sexual harassment complaint, discussing the proceeding as a "kangaroo trial with a kangaroo sanction."), https://publicintegrity.org/education/a-lack-of-consequences-for-sexual-assault/ (last updated July 14, 2014)(hereafter *A Lack of Consequences*); Kipnis, Unwanted Advances, 37 (the subject of a complaint characterizing the university grievance process as a "kangaroo court.").

[307] Like the First Amendment, constitutional due process protections do not apply in private schools. First Amendment on Private Campuses, Harvard Civil Rights-Civil Liberties Law Review, Dec. 1, 2015, https://harvardcrcl.org/first-amendment-on-private-campuses/ (citing Robert M. O'Neill, Free Speech in the College Community 225 (1997)). Nonetheless the Commission repeats the criticism here as it has been levied, notwithstanding its legal inapplicability.

[308] Laura Kipnis, Unwanted Advances: Sexual Paranoia Comes to Campus, p. 37-38 (HarperCollins Publishers, 2017), ("The specifics vary from school to school (and are often difficult for students and faculty), but typically the accused doesn't know the precise charges, doesn't know what the evidence is, and can't confront witnesses. Many campuses don't even allow the accused to present a defense, such as introducing [evidence that contradicts what a complainant has stated]."); 28 Harvard Law School Faculty, *Rethink Harvard's Sexual Harassment Policy*, Boston Globe (Oct. 15, 2014) (Harvard entered into a resolution agreement with ED OCR in December 2014 and revised its sexual harassment policy; this statement criticizes Harvard's prior policy (which ED OCR had not approved) as violating the due process rights of accused individuals); Kipnis, Unwanted Advances, 140 ("[N]early every academic I know – this includes feminists, progressives, minorities, and those who identify as gay or queer – now lives in fear of some classroom incident spiraling into professional disaster.").

for not holding universities accountable for following Title IX, issuing revised guidance, and also for enabling overzealous investigations.[309]

Higher Education Institutions' Responsibilities

Higher education institutions are tasked with implementing grievance procedures and investigating complaints. Under ED OCR's Title IX regulations, grievance procedures must "provid[e] for prompt and equitable resolution of student and employee complaints," which allege a violation of Title IX or the implementing regulations.[310] At times, ED OCR has opined on what standard should be used to consider and resolve complaints (clear and convincing versus preponderance of the evidence). This standard is discussed more in the due process section below.

Institutions of Higher Education are aware of the pressures and incentives to comply with Title IX from students, parents, and ED OCR. On one hand, schools can be sued for money damages for failing to protect students and employees from hostile environments, for not providing due process to subjects of complaints, or for "chilling" academic speech with school policies. ED OCR has also noted that schools may choose not to be transparent about their Title IX proceedings because schools have "incentives to keep the numbers low, because when they're doing a good job and encouraging reporting, the numbers may go up and then the parents may get worried."[311] Advocates have also encouraged schools to take proactive steps to address sexual harassment before the legal standards of a hostile environment have been met.[312]

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[309] Kirsten Lombardi, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, Public Integrity (Feb. 25, 2010), https://publicintegrity.org/education/sexual-assault-on-campus/lax-enforcement-of-title-ix-in-campus-sexual-assault-cases/ (last updated Marc. 26, 2015) (hereafter *Lax Enforcement of Title IX*); *see also* Eugene Volokh, Professor, University of California Los Angeles School of Law, Briefing Transcript, p. 178 (making the argument that ED OCR's resolution agreements signal to schools that they should be enforcing Title IX beyond constitutional limitations: "The definitions that the OCR has used in the past potentially cover speech that would under standard First Amendment law, fall within constitutional protection… This danger is exacerbated by the language in the University of Montana case, which suggested that OCR treats, and the Justice Department treats, harassment as including not just speech that is severe and pervasive to create a hostile environment . . . but even individual instances of this kind of speech that when added together may amount to a hostile environment.").

[310] 34 C.F.R. § 106.8 (b).

[311] Galanter, Briefing Transcript, pp. 66-67.

[312] Marcus, Briefing Transcript, pp. 86-87 ("[U]niversities need to start asking questions even before the standards of hostile environment are met because if a few things are happening there might be more things that happen later… Agencies can't require them to take actions if the legal standards are not met, and there might be Constitutional requirements that provide parameters on the action that they can take. But if students are offended by sexual actions that don't quite meet the levels of a federal violation and universities are aware of it, there are always things that they can do to articulate the institutions values, to educate so on and so forth.").

Higher Education Institutions are also responsible for responding to demands from their students and professors for cultural changes. Some advocates have criticized students for not wanting to be exposed to viewpoints they may find offensive, such as speech that is racist, sexist, or otherwise discriminatory.[313] Polls have found that 72 percent of students support disciplinary action against "any student or faculty member on campus who uses language that is considered racist, sexist, homophobic or otherwise offensive."[314] In 2016, students "generally preferred that campuses be open environments that encourage a wide range of expression," though some did support restrictions on certain types of speech.[315] In 2017, following the contentious presidential election and multiple incidents of objections to speakers on campuses, the Knight Foundation found that students "value both free expression and inclusion," and also that "the climate on campus prevents some students from expressing their views."[316]

Others have defended students as "the first generation of students educated, from a young age, not to bully," and have noted that "descriptions of this generation of students too often omit this sense of compassion and their admirable desire to protect their fellow students."[317] These students know that "[w]ords can cause real harm and interfere with a person's education," and thus mocking their "laudable desire to create a campus that is inclusive and conducive for learning by all students" undermines education.[318]

Holding Higher Education Institutions Accountable

Higher education institutions are subject to Title IX enforcement actions and the potential loss of federal funds. Schools may change their practices and policies in response to ED OCR's guidance and enforcement efforts. For example, investigative reporting has shown that lax enforcement by

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[313] Greg Lukianoff and Jonathan Haidt, *The Coddling of the American Mind*, Atlantic, 42-52 (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/.

[314] 2015 survey by Yale University's William F. Buckley Program, http://mclaughlinonline.com/2015/10/26/the-william-f-buckley-jr-program-at-yale-almost-half-49-of-u-s-college-students-intimidated-by-professors-when-sharing-differing-beliefs-survey/; *see also* Jacob Poushter, *40% of Millennials OK with Limiting Speech Offensive to Minorities*, Pew Research Ctr., https://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/.

[315] 2016 survey by Knight Foundation, https://knightfoundation.org/reports/free-speech-campus.

[316] 2017 survey by Knight Foundation, https://knightfoundation.org/reports/free-expression-on-campus-what-college-students-think-about-first-amendment-issues.

[317] Chemerinsky, Free Speech on Campus, 10.

[318] Ibid., 19; *see also* Mari M. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. Law. Rev. 2320, 2370 (1989) (noting that college students are at a "vulnerable stage of psychological development and especially subject to the harm of hateful speech.").

ED OCR can result in schools not taking claims of sexual harassment seriously.[319] This investigative reporting reviewed the 24 resolved sexual harassment investigations of colleges between 1998 and 2008; over that time, ED OCR found Title IX violations in five cases and "[n]one of the schools were punished . . . even when OCR found that colleges had acted indifferently."[320] Others have noted that schools have gotten the message from lax enforcement that "You don't have to do jack squat; [ED OCR is] not going to go after you."[321] This investigative reporting quoted the then-Assistant Secretary for ED OCR, Russlynn Ali as "promising the Education Department will issue new guidelines for schools, including 'remedies . . . that comport with the spirit and intent of Title IX.'"[322] ED OCR issued the 2011 Guidance in the wake of this investigative reporting.

Following the 2011 Dear Colleague Letter, "Colleges [have] redoubl[ed] their efforts," [323] and "many institutions were able to conform their policies and practices to align with the spirit, and some with the actual letter of [the 2011 Dear Colleague Letter]."[324] ED OCR received support for the enforcement taken under the 2011 Dear Colleague Letter from advocates, Senators and Members of Congress.[325]

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[319] Lombardi, *Lax Enforcement of Title IX*; *see also* Catherine Hill, Vice-President for Research, American Association University Women, Briefing Transcript, pp. 141-142 (noting that students may not understand what is available under Title IX: "So, in part, students are calling for some of the protections that Title IX and other federal statutes already call for [a person to talk to and resources to address sexual harassment], *but this is testimony to the fact that perhaps these Title IX rules are not being well enforced and well understood on campus by students*.").

[320] Lombardi, *Lax Enforcement of Title IX*.

[321] Ibid. (quoting Sarah Dunne, then-legal director of the American Civil Liberties Union in Washington and former attorney with the Civil Rights Division at the Department of Justice); *see also* Harvard Civil Rights – Civil Liberties Law Review, *In Their Own Words: Underenforcement Threatens Continued Vitality of Title IX* (Aug. 24, 2011) (quoting Neena Chaudry, Senior Counsel, National Women's Law Center "many schools are getting away with providing less opportunities to girls because they don't do what they're supposed to unless made to."), https://harvardcrcl.org/in-their-own-words-underenforcement-threatens-continued-vitality-of-title-ix/.

[322] Lombardi, *A Lack of Consequences*.

[323] Ada Meloy, General Counsel, American Counsel on Education, Briefing Transcript, p. 182; *see also* Naomi Shatz, *Will a Trump Administration Change Anything About College Sexual Assault?*, Boston Lawyer Blog (Dec. 27, 2016) (stating that "In the last five years colleges and universities have set up sexual harassment adjudication procedures, including revamping their school policies, creating Title IX offices, and hiring Title IX coordinators, in order to meet the DOE's guidelines, even when that meant going far beyond what Title IX and other federal statutes and regulations actually require. I do not think there is any question that DOE's action in this area spurred those changes."), https://www.bostonlawyerblog.com/will-trump-administration-change-anything-college-sexual-assault/.

[324] Meloy, Briefing Transcript, p. 183.

[325] *See, e.g.*, Letter from Sen. Patty Murray et al. to Secretary Betsy DeVos, Sept. 27, 2017, https://www.help.senate.gov/imo/media/doc/092717%20Title%20IX%20Guidance%20Rollback.pdf; Letter from Leadership Conference on Civil and Human Rights and 38 other civil rights organizations to Secretary Betsy DeVos, Jul. 13, 2017, https://civilrights.org/resource/sign-on_supporting_title_ix_guidance/.

At the same time, even after the 2011 Dear Colleague letter, ED OCR has been criticized for not "levy[ing] sanctions on offending schools."[326] With regard to claims that many schools ignore complaints enabling sexual harassment to continue,[327] students have attributed this, in part, to ED OCR: "Universities are not holding rapists accountable because the [Department of Education] does not hold schools accountable."[328] One advocate cited as support the Yale Resolution Agreement discussed above, and noting that "OCR found violation after violation" yet did not publicly reveal the extent of the violation; instead, ED OCR and Yale entered into an agreement, i.e., "a school's promise to do better in the future."[329] Of note, from the passage of Title IX, Yale has a long history of claims that it is not complying with Title IX.[330]

With regard to the responsibility on higher education institutions, the Commission heard testimony at the 2014 briefing that:

> [U]niversities need to start asking questions even before the standards of hostile environment are met because if a few things are happening there might be more things that happen later. And there might be things that are happening that they're not aware of. So this is very important. . . .[331]

Transparency

Transparency and confidentiality concerns can arise for those who are reporting sexual harassment and may be seeking support, and those who have been accused of harassing behavior. Many schools provide confidentiality to those filing complaints, due to the sensitivity of the allegations. Studies have shown that not guaranteeing confidentiality to those who report sexual harassment is

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[326] Alexandra Brodsky, *Stopping Campus Sexual Violence Starts with Title IX Enforcement*, Al Jazeera America, (Nov. 1, 2013), (characterizing Title IX as "a landmark law [being] reduced to a toothless reminder of good intentions [because of under-enforcement]") http://america.aljazeera.com/articles/2013/11/1/stopping-campus-sexualviolencestartswithtitleixenforcement.html.

[327] Grigoriadis, Blurred Lines, 80-82; Harriet Ryan, Matt Hamilton, and Paul Pringle, "*A USC doctor was accused of bad behavior with young women for years. The University let him continue treating students*," L.A. Times (May 16, 2018), https://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html (after receiving complaints of misconduct since the 1990s, in 2017, the University of Southern California's Office of Equity and Diversity found a doctor employed by the school had engaged in sexual harassment.).

[328] Brodsky, *Stopping Campus Sexual Violence Starts with Title IX Enforcement*.

[329] Ibid.

[330] *See, e.g., Alexander v. Yale University*, 459 F. Supp. 1 (D. Conn. 1977) (claiming that Yale violated Title IX by not acting on student's complaints of sexual harassment by faculty and administrators).

[331] Marcus, Briefing Transcript, p. 86. Ibid., 110 ("[U]niversities need to be urged to get out of a mindset that says that if something offensive is happening, either we punish or we do nothing. I think that they need to start thinking about responses to offensive conduct well before the standards of a federal civil rights violation are met.").

a barrier to reporting sexual harassment.[332] At the same time, those who are the subjects of complaints may not be able to present their side if the school does not disclose the allegations or the identity of the complainant.[333] Others have praised "the assertions in "[2011] Dear Colleague" that all parties (including the complainant) be notified of the outcome of the complaint and the institutional action be reasonably prompt are crucial to addressing gender inequity."[334] "In 2002, out of 149 higher education institutions, 52.6 percent of schools' policy materials mention that the complainant will be notified of the outcome of the complaint."[335]

Because schools are not required to provide the numbers of complaints filed, or track complaint resolutions, it is difficult to determine how many instances of speech and sexual harassment claims have been made or have led to disciplinary actions. Various sources have attempted to collect this information from newspaper reports and individual reports of their experience with a school's grievance procedures.[336]

Schools have applied their Title IX grievance processes to discipline students and professors for speech or conduct. For example, Colorado College suspended a student for 6 months after the student posted a comment about the attractiveness of black women on a social media website.[337]

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[332] Journal of American College Health, Vol. 55, No. 3, "Barriers to Reporting Sexual Assault for Women and Men: Perspective of College Students" (2006), http://www.middlebury.edu/media/view/240971/authentic/sable_article.pdf (finding that barriers to reporting continue to be fear of retaliation, shame and guilt, concerns about confidentiality, and fear of not being believed); *see also* Student Affairs Administrators in Higher Education, Priorities for Title IX: Sexual Violence Prevention and Response, 2 (compelling disclosures is not evidence-based and removes choice "from an adult whose very recovery depends on being able to regain control over their own lives."), https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

[333] Karjane, et al., Campus Sexual Assault: How America's Institutions of Higher Education Response, p. xii (In 2002, out of 149 higher education institutions, 61.9 percent with a disciplinary process notify the accused of the existence and nature of the complaint filed against them. Due process procedures for the accused are utilized at only 37.3 percent of Institutes of Higher Education); Kipnis, Unwanted Advances, 176 ("One reason to get rid of confidentiality in campus adjudications would be to cut down on abuses of the process. Another is to initiate an open discussion about what counts as injury and consent. The gender assumptions embedded in these verdicts should be open to public scrutiny.").

[334] Dr. Anita Levy, Ph. D., Senior Program Officer, American Association of University Professors, Briefing Transcript, p. 191; Heather Karjane, et al., Campus Sexual Assault: How America's Institutions of Higher Education Response, p. xii (Nat'l Criminal Justice Reference Serv., Oct. 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.

[335] Ibid.

[336] *See, e.g.*, Nancy Chi Cantalupo and William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, Utah Law Rev. (2018) (attempting to collect and analyze faculty sexual harassment cases by reviewing over 300 cases obtained from media reports, federal civil rights investigations by ED OCR and DOJ, lawsuits by students alleging sexual harassment and lawsuits by faculty fired for sexual harassment), https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1170&context=ulr.

[337] Sarah Larimer, *This Student's Sexist Yik Yak Comment About #blackwomenmatter Got Him Suspended*, Washington Post (Dec. 15, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/12/15/this-students-

Wichita State also moved to discipline fraternity members for hanging a banner saying "free house tours" under Title IX. [338] The fraternity had previous allegations of sexual assaults occurring; a student characterized the banner as having "sexual baiting undertones" and said it "brought back memories of being sexually assaulted."[339] After considering the First Amendment, Wichita State dropped the investigation, noting that "[t]he banner triggered uncomfortable feelings, but the banner was protected speech under the First Amendment" and that "[a]ny action taken by the fraternity chapter and its members is independent of the university decision."[340]

One highly publicized example of a complaint being filed against a professor for speech is that of Laura Kipnis and Northwestern University. Northwestern investigated Professor Kipnis based on a complaint that an opinion piece she wrote on sexual relations on campus, which was published online by the Chronicle of Higher Education, created a hostile environment.[341] Ms. Kipnis wrote a book about her experience with Northwestern's grievance procedures, and was also investigated in a second complaint for writing the book.[342] Another example of faculty speech and concern is when Professor David Barnett submitted a 38-page report questioning a Title IX investigation of

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sexist-yik-yak-comment-about-blackwomenmatter-just-got-him-suspended/?utm_term=.e18999ce096d; *see also* Letter from Vice President for Student Life/Dean of Students for Colorado College to Student (Dec. 3, 2015) (adjudicating appeal and reducing his suspension from 2 years to 6 months), http://www.thecollegefix.com/wp-content/uploads/2015/12/colorado-college-response-thaddeus-pryor-yik-yak1.jpg. Of note, based on a search of ED OCR's website and the Chronicles of Higher Education Title IX tracker, Colorado College does not appear to have any open or resolved ED OCR complaints or compliance investigations involving sexual harassment.

[338] Wichita State University Student Affairs Twitter "WSU does not condone sexual harassment in any form. The inappropriate banner and Phi Delt was addressed & sent on for further investigation," https://twitter.com/WichitaStateSA/status/906552052100333568.

[339] Andrew Linnabary, *2 Phi Delta Theta Members Suspended by Fraternity for "Free House Tours" Banner*, The Sunflower (Sept. 11, 2017), https://thesunflower.com/19837/news/2-phi-delta-theta-members-suspended-by-fraternity-for-free-house-tours-banner/. These types of sexually explicit banners have also been hung up at other public higher education institutions. https://www.thefire.org/public-universities-threaten-students-over-controversial-off-campus-banners/.

[340] Andrew Linnabary, *Wichita State Drops Banner Investigation*, The Sunflower (Sept. 14, 2017), https://thesunflower.com/19961/news/wsu-drops-banner-investigation/.

[341] Kipnis, Unwanted Advances, 127-157; *see also* Chemerinsky, Free Speech on Campus, 2 (citing Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON. HIGHER EDUC. (May 29, 2015), https://www.chronicle.com/article/Sexual-Paranoia-Strikes/190351.

[342] Kipnis, Unwanted Advances, 127-157. Ms. Kipnis was also sued for defamation, libel and slander by one of the students who filed the complaint with Northwestern. *Doe v. Harper Collins and Kipnis*, Case No. 17-cv-3688 (N.D. Ill. 2017). The judge upheld the case moving forward and denied a motion to dismiss filed by the defendants on First Amendment grounds, i.e., that the publication of her book was an exercise of her First Amendment rights. The parties engaged in settlement discussions after the ruling. Then, the case was voluntarily dismissed with prejudice by the student without entry of a settlement agreement.

another professor and was investigated under Title IX for retaliation.[343] The University took action to fire Professor Barnett; Barnett ultimately resigned and settled.[344] Louisiana State University fired Associate Professor Teresa Buchanan over her word choices (use of profanity and discussion of her sex life) in the classroom. The Fifth Circuit held there was no pedagogical reason for her comments and thus, her speech while teaching was not protected under the First Amendment.[345]

Due Process

In the 2011 Dear Colleague letter, ED OCR told schools that to satisfy Title IX their grievance procedures must use the preponderance of the evidence standard, as opposed to the clear and convincing standard for resolving sexual harassment complaints:

> [I]n order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.[346]

ED OCR also told students in a *Know Your Rights* pamphlet that "[y]our school must resolve your complaint based on what they think is more likely than not to have happened (this is called a preponderance-of-the-evidence standard of proof). Your school cannot use a higher standard of proof."[347] This part of the 2011 Guidance has produced a lot of debate as to what the standard should be. The 2011 Dear Colleague Letter and *Know Your Rights* pamphlet have been withdrawn. The 2017 Q&A states that "[t]he findings of fact and conclusions should be reached by applying

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[343] Colleen Flaherty, *Heavy-Handed or Spot On?* Inside Higher Education, (Aug. 26, 2014), https://www.insidehighered.com/news/2014/08/26/colorado-boulder-faces-criticism-over-handling-alleged-professor-misconduct.

[344] Charles Huckabee, *U. of Colorado Settles with Philosophy Professor It Was Seeking to Fire*, The Chronicle of Higher Education (May 13, 2015), https://www.chronicle.com/blogs/ticker/u-of-colorado-settles-with-philosophy-professor-it-sought-to-fire/98817.

[345] *Buchanan v. Alexander*, 919 F.3d 847, 853-54 (5th Cir. March 22, 2019).

[346] 2011 Dear Colleague Letter, 11.

[347] Department of Education, Office for Civil Rights, *Know Your Rights: Title IX Requires Your School to Address Sexual Violence*, 2.

either a preponderance of the evidence standard or a clear and convincing evidence standard."[348] The proposed amendments to the regulations propose the same, i.e., that either standard is equitable under Title IX within certain parameters.[349]

Advocates continue to debate what the standard should be. Support for the preponderance standard focused on this being the standard under other civil rights acts,[350] and that 80 percent of schools that identified a standard were using preponderance before the 2011 Guidance.[351] Some also argue that "[r]ather than leveling the field for survivors and respondents, setting a standard higher than preponderance of the evidence tilts proceedings to unfairly benefit respondents."[352] Support for the clear and convincing standard focused on court precedence saying that clear and convincing was more appropriate for situations where a person risks "having his reputation tarnished erroneously."[353] The Commission heard testimony in favor of both standards.[354]

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[348] 2017 Guidance, 5.

[349] 83 Fed. Reg. 61,477 (proposing adoption of same, i.e., that either standard is equitable under Title IX "only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction." It also requires recipients to "apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.)

[350] Title IX and the Preponderance of the Evidence: A White Paper (Aug 7, 2016) (supporting the preponderance standard), https://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-8.7.16.pdf; *see also* Association for Student Conduct Association, White Paper: Student Conduct Administration and Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses, p.2 (2014) (advocating use of the preponderance standard), https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf.

[351] Letter to Secretary Betsy DeVos, Department of Education, from Fatima Goss Graves, President and CEO, National Women's Law Center, p. 5, n.29 (July 11, 2017) (citing Heather Karjane, et al., Campus Sexual Assault: How America's Institutions of Higher Education Response, p. 122, table 6.12 (Nat'l Criminal Justice Reference Serv., Oct. 2002) (showing that of 149 higher education institutions that 81.4 percent of them used the preponderance standard in 2002) , https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf); *but see* Meloy, Briefing Transcript, p. 202 (stating that she was not aware of a survey of schools as to which standard was being used and that her "experience is that the clear and convincing was much more common.").

[352] Student Affairs Administrators in Higher Education, Priorities for Title IX: Sexual Violence Prevention and Response, 1, https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

[353] *See, e.g.,* American College of Trial Lawyers, White Paper on Campus Sexual Assault Investigations, p.16-17 (Mar. 2017), https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/task_force_allegations_of_sexual_violence_white_paper_final.pdf.

[354] Galanter, Briefing Transcript, pp. 50-51 (arguing in favor of the preponderance standard); Levy, Briefing Transcript, pp. 192-193 (arguing in favor of clear and convincing: "The A[merican] A[ssociation of] U[niversity] P[rofessors] advocates the continued use of clear and convincing evidence in both student and faculty discipline cases as a necessary safeguard of academic freedom, due process, and shared governance . . . Given the seriousness of accusations of harassment and sexual violence, and the potential for accusations, even false ones to ruin a faculty member's career, we believe that the clear and convincing standard of evidence is more appropriate than the

Chilling Speech

Some have speculated that ED OCR's resolution agreements would impact schools' implementation of grievance procedures particularly regarding speech because "as a practical matter, the [Montana Resolution Agreement] would be understood by risk-adverse general counsels that the federal government was now defining harassment as 'any speech that offends even if a reasonable person would not have been offended.'"[355] These folks argue that such actions by schools will chill speech by students and professors.

Others have noted that "In fact, it may be argued that the failure to enforce antidiscrimination law may have a more chilling effect on campus free expression than the exercise of this power" [356] and that:

> Unavoidably, antidiscrimination law will have the effect of silencing some discriminators, just as tort law silences some defrauders and conspiracy law silences some conspirators. This will be true as long as lawbreakers use words to further their malfeasance. The serious First Amendment question here is not whether any speech is silenced, but whether legitimate, protected speech is chilled in a manner that unacceptably hampers speech.[357]

Institutions of Higher Education have been sued following the application of grievance procedures where a student claims the student's conduct was protected by the First Amendment, and the holdings of these cases reiterate that harassing behavior is not protected by the First Amendment.[358]

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preponderance of evidence standard. Since charges of sexual harassment against faculty members often lead to disciplinary sanctions, including dismissal, a preponderance of the evidence standard could result in a faculty member being dismissed for cause based on a lower standard of proof than we consider necessary to protect academic freedom and tenure. We believe that the widespread adoption of the preponderance of evidence standard for dismissal cases involving charges of sexual harassment would tend to erode the due process protections for academic freedom.").

[355] Lukianoff, Briefing Transcript, p. 92; At the time, the federal government was also criticized for referring to the University of Montana-Missoula resolution agreement as a "blueprint." University of Montana Letter of Findings, 1. As such, the language of the agreement was interpreted by some colleges and other concerned parties to apply more broadly than just to the University of Montana. ED OCR later clarified that "[t]he Agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy." *See* Letter from Assistant Secretary Office for Civil Rights Catherine E. Lhamon to the Foundation for Individual Rights in Education (FIRE) (Nov. 14, 2013), https://www.thefire.org/letter-from-department-of-education-office-for-civil-rights-assistant-secretary-catherine-e-lhamon-to-fire/.

[356] Kenneth Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 1049.

[357] Ibid.

[358] *See, e.g., Doe v. Valencia College*, 903 F.3d 1220 (11th Cir. 2018) (holding that suspending a male student for engaging in persistent and excessive unwanted contact with a female student, including lewd, threatening text messages about the female's body, did not violate his First Amendment right to free speech); *Marshall v. Ohio*

Students

A subset of cases involve students who claim that their school's nondiscrimination policy has had a "chilling" effect on their ability to express certain viewpoints during classroom conversations.[359] For example, in *DeJohn v. Temple University*, a graduate student studying Military and American History felt he could not express his views in class about women in combat and women in the military because his opinions might fall within the scope of University's sexual harassment policy.[360] In *Doe v. University of Michigan*, a graduate student in biopsychology felt he could not freely and openly discuss controversial theories advancing sex- and race-based differences because they might be punishable by the University's discrimination policy.[361] In both cases, the graduate students alleged that the respective policies were unconstitutionally overbroad and vague.[362] The courts first highlighted the distinction between sexually harassing "pure speech/expression," which is typically afforded more First Amendment protection, and non-expressive, sexually harassing "conduct," that is typically afforded less First Amendment protection.[363]

In *DeJohn*, the court held that Temple University's sexual harassment policy was unconstitutionally overbroad because the policy's use of the words "hostile," "offensive," and "gender-motivated" could conceivably be applied to cover any speech of a gender motivated nature that offends someone."[364] The policy would have the potential effect of "chilling" "'core' political

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University, No. 2:15-cv-775, 2015 WL 1179955, at *6 (S.D. Ohio Mar. 13, 2015) (The court reviewed the university's sexual misconduct policy and held that it was "carefully drafted and narrowly tailored, balancing the need to prohibit certain types of harassing behavior with a student's free speech rights. The court further stated that the policy considered sexual harassment from both a subjective and objective viewpoint and that the policy puts individuals on notice by specifying the circumstances the university will consider when reviewing their alleged conduct. The court specifically noted the fact that the university policy looked at "the frequency, nature, and severity of the harassment, whether the harassment was physically threatening or humiliating, and other contextual issues such as the relationship between the parties.").

[359] *See, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (Sexual harassment policy); *Doe v. Univ. of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (Discrimination and discriminatory harassment policy, which includes sexual harassment); *see also Abbott v. Pastides*, 900 F.3d 160 (4th Cir. 2018). After receiving complaints about "racist and sexist statements" at a free speech event, school officials discussed the allegations with plaintiffs, who claimed the discussions chilled their speech. The Fourth Circuit noted that "[F]acts matter in [resolving harassment allegations] and we do not agree that school officials confronted with harassment allegations are required to resolve them in the abstract. . . . As this court has made clear, universities have obligations not only to protect their students' free expression, but also to protect students." *Id.* at 173.

[360] 537 F.3d 301, 305 (3d Cir. 2008).

[361] 721 F. Supp. 852, 858 (E.D. Mich. 1989).

[362] *DeJohn*, 537 F.3d at 305 (overbroad); *University of Michigan*, 721 F. Supp. at 861 (overbroad and vague).

[363] *DeJohn*, 537 F.3d at 316; *Doe v. Univ. of Mich.*, 721 F. Supp. at 861-62.

[364] *DeJohn*, 537 F.3d at 317 (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001). The challenged language in Temple's policy read as follows: "all forms of sexual harassment are prohibited, including . . . expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (c) such conduct has the

and religious speech, such as gender politics and sexual morality."[365] In *Michigan*, the court held that the University of Michigan's policy was unconstitutionally overbroad because it had the effect of regulating a substantial amount of constitutionally protected speech – in the form of academic classroom discussion.[366] The court also held the policy unconstitutionally vague because it was "impossible to discern any limitations on its scope or any conceptual distinction between protected and unprotected conduct."[367] These cases suggest that courts are concerned with how clearly sexual harassment policies are worded in terms of which type of sexually harassing speech is protected and which is not – with respect to free speech. Both cases mention that certain sexually harassing speech could be protected by the First Amendment, therefore clarity in the policies would be better to avoid the possibility of prohibiting constitutionally protected speech.

Faculty

Neither the Supreme Court nor the lower courts have clearly defined the extent to which academic freedom and the First Amendment protect a professor from sexual harassment claims.[368] Jurisprudence in this area has generally focused on fact patterns involving speech that occurs in the classroom. In these cases, courts are mixed in how they balance academic freedom and sexual harassment. In the mid to late 1990s, courts viewed academic freedom as a defense to sexual harassment claims for speech taking place inside the classroom with an educational purpose. For example, in *Cohen v. San Bernardino Valley College*, an English professor played the "devil's advocate" by stating controversial viewpoints to topics such as obscenity, cannibalism, and consensual sex with children.[369] At one point in the semester the professor read out loud in class articles he had previously written for Hustler and Playboy. He also assigned his students to write a paper requiring them to define pornography.[370] The court ruled that the professor's speech did not fall within the university's "vague" definition of sexual harassment in its policy, and was protected under the First Amendment.[371] Similarly, in *Silva v. University of New Hampshire*, a writing professor was accused of sexual harassment by comparing the "focus stage" of the

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purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment." *Id.* at 305.

[365] *Id.* at 317 (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) as to "'core' political and religious speech").

[366] *Doe v. University of Michigan*, 721 F. Supp. at 864-65.

[367] *Id.* at 867.

[368] *See infra*, 99 to 120 (introduction to Supreme Court cases about the First Amendment and academic freedom).

[369] 92 F.3d 968, 970 (9th Cir. 1996).

[370] *Id.*

[371] *Id.* at 972.

technical writing process to belly dancing[372] and using a vivid description of sexual intercourse.[373] The court held that the professor's speech was constitutionally permissible in part because the university's definition of sexual harassment was too subjective and failed to take into account the professor's academic freedom.[374]

In more recent cases involving speech in the classroom, courts have generally sided against claims of academic freedom and in favor of institutions' sexual harassment policies. In *Smith v. South Maine Community College*, an adjunct psychology professor was accused of sexual harassment for playing two video clips—World War II footage and video depicting consensual sexual activity between two men.[375] The court held that pursuant to the school's sexual harassment policy, the university's regulation of the professor's "speech was reasonably related to a legitimate pedagogical concern."[376] In *Piggee v. Carl Sandburg*, a cosmetology instructor was accused of sexual harassment for passing anti-gay pamphlets to a gay student in class.[377] The court held that the university's interest in effectively fulfilling the school's education mission by regulating the non-germane speech in the classroom outweighed the instructor's interest in engaging in anti-gay speech.[378]

Suspending or Terminating Federal Funding

ED OCR's enforcement of Title IX has also been criticized for not going far enough, and specifically for not terminating federal funding from higher education institutions.[379] As noted above, nearly every American university, public and private, relies on federal grants, and many students take out federally funded Pell grants and Stafford loans. Only a few universities could continue to operate without federal funding.[380]

How real the threat of the loss of federal funds is has been debated. Even though there is a process in the regulations (and statutory authority) for suspending or terminating federal funds from an educational institution, ED OCR has never suspended or terminated federal funds, as a result of sexual harassment. Some critics have speculated that ED OCR has not terminated federal funding

[372] 888 F. Supp. 293, 299-300 (D.N.H. 1994).

[373] *Id.* at 301.

[374] *Id.* at 314.

[375] *Smith v. Southern Maine Community College*, 2005 WL 2716529, at *1 (Me. Super. Ct. May 31, 2005).

[376] *Id.* at *3.

[377] 464 F.3d 667, 668 (7th Cir. 2006).

[378] *Id.* at 672.

[379] Vanessa Grigoriadis, BLURRED LINES: RETHINKING SEX, POWER, AND CONSENT ON CAMPUS 82 (2017).

[380] Ibid., 79; *see also* Unwanted Advances, 37 (noting that "[i]n 2013, [Northwestern] received roughly $350 million in federal funding, [which equates to] 70% of its research funds for the year.").

under Title IX due to sexual harassment because ED OCR didn't want to upset schools.[381] Others have concluded that "Title IX's central enforcement mechanism, the termination of federal funds, has proved unworkable in practice."[382]

ED OCR has responded that the regulations and ED OCR's Case Processing Manual have a process for terminating federal funds that they follow.[383] The statute (Title IX) requires multiple steps, including an opportunity for a hearing and appeal, along with notification to Congress, before federal funds can be terminated.[384] The regulations also require attempts at voluntary agreements before funds can be suspended or terminated.[385] DOJ explained the benefits of voluntary compliance and told the Commission that:

> It is true that we [the federal government] can't necessarily go after every institution that doesn't live up to its obligations under the statutes, but in addition to those enforcement actions we will certainly work -- and OCR has certainly done an enormous amount of work to bring institutions into voluntary compliance and reach agreements to take action that haven't needed to be referred to DOJ for investigation or further action.[386]

ED OCR also states it meaningfully threatens to terminate federal funds, which can assist in reaching voluntary resolutions with recalcitrant schools.[387] ED OCR told the Commission that ED

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[381] Blurred Lines, 82 (Comparing the amount of money assessed against Yale for misrepresenting data on forcible sex offenses under the Clery Act (a $165,000 fine, or "pittance" when compared to the University's endowment and operating budget) and remarking with regard to Title IX that "[t]he Obama administration had initiated a political dance: they promulgated a new set of standards and then didn't enforce them, perhaps to avoid infuriating colleges.").

[382] Melnick, Transformation of Title IX, 35.

[383] 34 C.F.R. § 106.71 (adopting the Title VI regulations including the fund termination process into the Title IX regulations); ED OCR Case Processing Manual, 18, 20 (discussing timing and drafting of a negotiation impasse or impending enforcement action letter consistent for carrying out the regulations for fund termination).

[384] 20 U.S.C. § 1682 ("In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.").

[385] U.S. Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html; *see also* 28 C.F.R. § 42.108(a).

[386] James Cadogan, Then-Senior Counselor to the Assistant Attorney General, Civil Rights Division, Department of Justice, Briefing Transcript, pp. 77-78.

[387] Tyler Kinkade, "Colleges Warned They Will Lose Federal Funding for Botching Campus Rape Cases," Huffington Post, July 14, 2014, https://www.huffpost.com/entry/funding-campus-rape-dartmouth-summit_n_5585654, (quoting then-Assistant Secretary for the Office for Civil Rights, Catherine E. Lhamon as

OCR would not shy away from pursuing the termination of federal funds: "[W]hen [OCR] investigate[s], we find a problem and we're not able to reach a voluntary resolution, the administration is committed to going to enforcement and, as the Title IX authorizes, terminating federal funds. And that stick that we have, and we've had it for a long time, is a very effective tool in reaching voluntary resolutions."[388]

Limitations of Title IX

Others have also criticized the statutory scheme of Title IX and noted that "the legal system alone is not an adequate mechanism for reducing or eliminating sexual harassment. Adherence to legal requirements is necessary but not sufficient to drive the change needed to address sexual harassment."[389] The criticism is that legal policies and procedures are "the triumph of form over substance in sexual harassment law" because "rules are developed and incentives are created with little to no attention paid to whether those legally mandated [] interventions are likely to prevent harassment or adequately redress the harm it creates when prevention fails," to wit focusing on Title IX coordinators, grievance procedures, and written policies, as opposed to combatting sexual harassment.[390]

The Department of Education has not just focused on enforcement to encourage the writing of policy documents, i.e., form over substance, but has also offered technical assistance on preventing and reducing sexual harassment on higher education campuses. ED OCR has described its technical assistance as providing "[e]ducators, parents, and students [with] the knowledge and skills to identify, prevent, and address discrimination or get help when [discrimination] occurs."[391] Between FY 2009 and FY 2016, ED OCR conducted over 1,800 technical assistance presentations on Title IX.[392]

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saying "It [the threat of termination of federal funding] is one I've made four times in the 10 months I've been in office. So it's one that's very much in use.").

[388] Galanter, Briefing Transcript, p. 44.

[389] *National Academies Sexual Harassment Report*, 93.

[390] Ibid., 98-99 (quoting Joanna Grossman).

[391] Department of Education, Office for Civil Rights, *Delivering Justice: Report to the President and Secretary of Education*, p. 26 (2015), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf.

[392] *See* Appendix A.

Congressional Efforts to Amend Title IX

Recent legislation offered by members of Congress generally focuses on the need for more strict procedural and reporting requirements,[393] more comprehensive training and resources for Title IX coordinators,[394] as well as introducing or reviewing the need for civil penalties for educational institutions that do not comply with Title IX requirements.[395] Legislation has also been introduced to address the lack of transparency in grievance procedures and would require schools to report the number of complaints filed and submit findings of sexual harassment to federal agencies.[396]

[393] *See* Campus Accountability Act, S. 856, 115th Cong., H.R. 1949, 115th Cong. (2018) (mandating implementation and reporting of student surveys); Education Department Civil Rights Transparency Act, H.R. 6537, 115th Cong. (2018) (mandating annual reporting of Title IX violations); Title IX Protection Act, H.R. 4030, 115th Cong. (2017) (codifying requirements that were previously included in Dep't of Education guidance); HALT Campus Sexual Violence Act, H.R. 6464, 115th Cong. (2018) (mandating the publishing of names of institutions under investigation or sanctions).

[394] *See* Patsy T. Mink and Louise M. Slaughter Gender Equity in Education Act, S. 3110, 115th Cong., H.R. 6184, 115th Cong. (2018) (mandating that Dep't of Education create an Office for Gender Equity to provide resources and training for Title IX coordinators).

[395] *See* Campus Accountability Act, S. 856, 115th Cong., H.R. 1949, 115th Cong. (2018) (authorizing civil penalties not to exceed $150,000 for each violation or misrepresentation for institutions failing to comply with Title IX requirements); HALT Campus Sexual Violence Act, H.R. 6464, 115th Cong. (2018) (creating a task force to review need for civil penalties for failure to comply with Title IX requirements).

[396] *See* Combating Sexual Harassment in Science Act of 2018, H.R. 7031, Section 7(d)(2) (requiring federal recipients to submit findings of sexual harassment to federal agencies); *see also id*, Section 7(e)(3) (requiring federal recipients to make public the number of complaints received); *see also* Federal Funding Accountability for Sexual Harassers Act, H.R. 6161, 114th Cong. (introduced Sept. 22, 2016), https://www.congress.gov/bill/114th-congress/house-bill/6161/text.

FINDINGS AND RECOMMENDATIONS

Findings

1. Education institutions that receive federal funds must maintain campuses free from sex-based discrimination. Federal courts and the federal government have recognized sexual harassment as one form of sex-based discrimination for decades.

2. Unwanted sexual harassment occurs with frequency in higher education institutions and can have life-changing impacts. Sexual harassment can have a significant negative affect on the academic experiences, health, and well-being of those being harassed. It has been shown to relate to disengagement, poor grades, symptoms of depression and anxiety, and raise concerns about campus safety. When perpetrated by faculty or staff, it can lead to feelings of institutional betrayal.

3. Sexual harassment can undermine career advancement, such as by being deterred from attending professional events due to harassment concerns.

4. The Department of Education enforces Title IX and its regulations through administrative investigation of complaints, compliance reviews, directed investigations, and monitoring of resolution agreements. The Department of Education also issues policy guidance, and provides technical assistance to educational institutions.

5. Since the enactment of Title IX in 1972, across Republican and Democratic administrations, the Department of Education's Office for Civil Rights has issued guidance including Dear Colleague letters and/or pamphlets discussing sexual harassment.

6. ED OCR continues to publicly address the question of how Title IX enforcement comports with the First Amendment. Across Republican and Democratic presidential administrations ED OCR has explained: "OCR has consistently reaffirmed that the Federal civil rights laws it enforces protect students from prohibited discrimination, and are not intended to restrict expressive activities or speech protected under the U.S. Constitution's First Amendment." It continues to note that "Schools can also encourage students on all sides of an issue to express disagreement over ideas or beliefs in a respectful manner. Schools should be alert to take more targeted responsive action when speech crosses over into direct threats or actionable speech or conduct."

7. Colleges and universities are not generally required to report to ED OCR or provide to the public the number of sexual harassment complaints filed or resolved, shielding information about rates of reported sexual harassment and institutional responsiveness.

8. Consistent with maintaining the right to free speech, courts have held that schools may still act to discipline students who harass or threaten other students.

a. The Fourth Circuit recently ruled that the First Amendment does not prohibit a University from disciplining students for online "true threats," explaining that "First Amendment concerns about penalizing speech lack a proper basis" where students set out a case under Title IX regarding online sexual harassment "because 'true threats' are not protected speech."

b. Similarly, the Eleventh Circuit held in 2018 that suspending a male student for engaging in persistent and excessive unwanted contact with a female student, including lewd, threatening text messages about the female student's body, did not violate his First Amendment right to free speech.

9. Investigative reporting has shown that lax enforcement from ED OCR can result in schools not taking claims of sexual harassment seriously.

Recommendations

1. ED OCR should vigorously enforce Title IX, consistent with the recognition that failure to enforce nondiscrimination principles may have deleterious effects on students, such as disengagement and psychological distress, and on campus communities more broadly.
2. ED OCR should continue its general practice to state that case resolutions address the specific facts identified in investigation in the specific cases and not refer to resolution of any particular case as a blueprint.
3. Given the significant level of concern expressed to this Commission on these topics, ED OCR should continue to make clear to the regulated community that ED OCR's enforcement standards comport with and continue to adhere to First Amendment principles.
4. ED OCR should continue to provide guidance and technical assistance to schools on prevention and reduction of sexual harassment on higher education campuses.
5. ED OCR should collect data from colleges and universities on the number of sexual harassment complaints filed with or incidents reported to the college or university, and how the college university investigated and resolved each complaint or report. The data should include whether the complaint or report resulted in a misconduct finding and whether the subject of the complaint or report was disciplined and how.

COMMISSIONERS' STATEMENTS AND REBUTTALS

Statement of Chair Catherine E. Lhamon

The Commission began the investigation that led to this report before I joined the Commission and while I was still Assistant Secretary for Civil Rights at the U.S. Department of Education. At that time, I welcomed the Commission's examination of federal civil rights enforcement of protections against sexual harassment in schools, and I was pleased to send my Principal Deputy Assistant Secretary, Seth Galanter, to testify at the Commission's briefing. While Commission staff were in process of drafting the report, I was surprised when the Commission sponsor for the report chose to dramatically narrow the scope of the investigation to the topic this report now covers: sexual harassment related to free speech in higher education institutions to the exclusion of K-12 schools and to the exclusion of the gamut of other issues Title IX protects related to sexual harassment. Nonetheless, out of courtesy to my Commission colleague who sponsored the project, I acceded to her narrowing of the investigation, and I continue to welcome the Commission's contribution, in this report, to debunking a false narrative that the Department of Education's Office for Civil Rights has been or is uninterested in free speech protection or that speech protection is incompatible with protection against harassment. As important as I know the full range of issues related to effective federal enforcement of Title IX's protection against sexual harassment in schools to be, I am grateful that the Commission could contribute even to this narrow topic.

Congress has for 47 years provided that "[n]o person" shall be subjected to discrimination on the basis of sex in schools,[1] and, as this report documents, the Office for Civil Rights has, for nearly all those years, explicitly recognized that that protection extends to sexual harassment of students in schools.[2] We are well past the time for debates over core coverage of that concept or for pretense that that protection irreconcilably conflicts with constitutional protection of speech. I thank my Commission colleagues for devoting resources to explaining this critical area of civil rights and for identifying the recommendations this report offers for improving students' learning experience.

[1] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

[2] Report at 32.

Statement of Commissioner Karen Narasaki

This report is the result of my first hearing as a Commissioner over five years ago. It was a bit of a shock to me the callousness with which some of the witnesses approached the topic which focuses on the balance between Title IX prohibitions on sexual harassment and the protection of free speech in a publicly funded institution of learning. Those witnesses alarmed by the effort of the Obama Administration to provide guidance to help schools to better protect their students against sexual harassment did not seem very concerned about the impact of such harassment on its victims and their education. One seemed to take the position that short of actual physical violence being involved in an incident, the school could not and should not take any disciplinary action, ignoring the very real impact other forms of harassment can have.[1]

At our hearing, a representative from AAUW presented survey results for middle and high school students, finding that a third of harassed students felt sick to their stomachs, 30% said they had a hard time studying as a result of harassment, 19% had trouble sleeping, 8% quit a sport or activity, and 4% actually changed school because of harassment.[2] She noted that they found similar results on campuses for students age 18 to 24. In both groups—the middle and high school students and the college students—the effects reached both boys and girls, but with stronger negative effects for girls.[3]

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[1] "*Enforcement of Sexual Harassment Policy at Educational Institutions by the U.S. Department of Education's Office for Civil Rights and the Civil Rights Division of the Department of Justice*," Briefing before the U.S. Commission on Civil Rights (July 25, 2014) (hereinafter "Briefing Transcript"), https://www.usccr.gov/calendar/trnscrpt/CommissionBriefingTranscript_July-25-2014_%20final.pdf, at 242-44:

> **COMMISSIONER NARASAKI**: So my example would be, say you have a whole ring of boys who are harassing a group of girls, calling them sluts, calling them, you know, herpes-carrying, you know just generally degrading them. To you, that would be protected by the First Amendment.
>
> **MR. VOLOKH**: Yes.
>
> **COMMISSIONER NARASAKI**: That no one could do anything about.
>
> **MR. VOLOKH**: Well, people could do things about it, but the government actors … can neither throw in jail or impose administrative punishment on students who are expressing this […], college and university students. I'm not talking about K through 12, who are expressing derogatory opinions about others. Again, Hustler v. Falwell is an example, that Jerry Falwell was ---
>
> **COMMISSIONER NARASAKI:** That's fine. That's fine.
>
> **COMMISSIONER HERIOT**: Herpes, I assume, is a fact issue. If it's a false statement --
>
> **MR. VOLOKH**: If it's a false statement, then yes, that is, indeed --- that falls in the slander section. If it's true, well, that's something people may very well talk to each other about.

[2] Ibid., 141.

[3] Ibid., 143.

Schools that understand this as a threat to their educational mission find themselves in a bind. Research suggests that sexual harassment is indeed a pervasive problem on campus: A 2015 survey of undergraduate and graduate students found that 48 percent of *all* students indicated they had experienced sexual harassment—including 62 percent of undergraduate females and 43 percent of undergraduate males.[4] Schools need government to give them guidance that gives the space to protect their students. Ignoring harassers until they cross the line into physical violence ignores the very real emotional and mental toll such harassment can take. Forcing victims to have to attend classes with or live in dormitories with their harassers unless there is a criminal procedure is cruel and makes the school complicit in the torture inflicted by the harasser. It also sends a message to others that reporting is useless and that such behavior will be condoned.

I have talked to too many parents whose daughters have been victimized by harassment and now suffer long term consequences to not believe that we must do better.

The responsibilities cannot be just on the government and the schools. Parents need to do better, too. At a dinner I attended during the height of one of the many school scandals after the hearing, mothers discussed their concerns that their sons might be falsely accused or might unwittingly cross a line. They derided a California effort to go beyond "no means no" and require an actual "yes" as being unrealistic. And one complained that now she would need to do more to "warn" her son. Yes, absolutely. Parents should be talking to their sons as much as they talk to their daughters. Society has for too long placed the responsibility for protecting against sexual harassment and unwanted sex solely and unfairly on the girls. A 2015 study, for example, evaluated 500 sexual assault prevent tips found on college websites, and found that over 80 percent of them were directed at women, less than 14 percent were directed at men, and six percent were gender neutral.[5] The researchers conclude: "Findings imply that the burden of college sexual assault prevention still falls primarily on female students."

We should be encouraging students, particularly young men and their families, to affirmatively promote respectful interactions and consent-driven sexual activity. The "It's on Us" campaign provides a refreshing alternative perspective.[6] Instead of painting boys and young men on campus primarily as bystanders to campus rape culture, it empowers them to drive positive change. It provides resources for bystander intervention, consent education, and survivor support. It places boys and young men as equal partners in making the necessary changes to campus culture to give everyone an equal right to succeed.

The focus that the last administration raised on this issue put universities on notice that they need to do better, and many of them have. Unfortunately, the current administration took issue with the Title IX guidance issued by the Obama administration and has rescinded that guidance,

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[4] Report at 10; Westat, Report on the Association of American University Campus Climate Survey on Sexual Assault and Misconduct (2017), p. 84, https://www.aau.edu/sites/default/files/AAU-Files/KeyIssues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf.

[5] Samantha Allen, "Rape Prevention is Still a Woman's Job, Campuses Say," *The Daily Beast*, April 13, 2017. https://www.thedailybeast.com/rape-prevention-is-still-a-womans-job-campuses-say?ref=scroll

[6] https://www.itsonus.org/

instead issuing a proposed new rule on Title IX[7] that falls far short of providing support for survivors.

The proposed rule by the new Administration would be both a step backward for schools that have already taken steps to do the right thing, as well as signaling a troubling shift in the government's attitude about who has responsibility for preventing campus sexual harassment and violence. Patsy Mink, the first woman of color and Asian American woman to serve in Congress, was a primary author and sponsor of Title IX. When speaking about her legislation, later posthumously named in her honor, she explained "Discrimination against women in education is one of the most insidious forms of prejudice extant in our Nation. Few people realize the extent to which our society is denied full use of our human resources because of this type of discrimination."[8] She recognized then, in 1972, what many are fully coming to recognize only now—limitations on women's access to education is a core issue of civil rights, with consequences for the entire country.

[7] Report at 40-42.

[8] Statement of Senator Daniel Inouye, Congressional Record, 107th Congress, 2nd Session, Issue: Vol. 148, No. 126, p. S9706.

Dissenting Statement of Commissioner Gail Heriot

"Move along. There's nothing to see here." That seems to be this report's message. It was supposed to take a hard look at how the Department of Education's Office for Civil Rights ("OCR") pushes colleges and universities to crack down on speech—speech that may be protected by the First Amendment or by academic freedom. Instead, the report and the two other Commissioner Statements glide over those issues. It assumes that as long as OCR denies an intent to require colleges and universities to violate the First Amendment, there can be no First Amendment problem. From there, it blandly concludes that, apart from people worrying too much, everything is fine:

> Given the significant level of concern expressed to this Commission on these topics, [OCR] should continue to make clear to the regulated community that [OCR's] enforcement standards comport with and continue to adhere to First Amendment principles.[1]

The problem isn't quite that simple. OCR has repeatedly warned schools that they must exercise control over students or faculty members who make "sexual comments, jokes or gestures," "spread sexual rumors" (even true ones), or apparently write just about anything deemed to be offensive "of a sexual nature."[2] If they don't, OCR tells them they can be subjected to a costly investigation and possibly denied federal funding. Or they can be sued. The standard for showing actionable harassment is *cumulative*, so schools have an incentive to discourage anything, even trivialities, that can add to the likelihood of Title IX liability.

It should be obvious that much of the expression OCR warned of is protected by the First Amendment and/or the norms of academic freedom. It should be equally obvious that as long as schools have more to fear from Title IX liability than from being accused of First Amendment violations, there will be a problem.

What might cause the Commission to dismiss so cavalierly issues that the First Amendment experts who testified as our briefing take seriously? Maybe the fact that our Chair, Catherine Lhamon, was previously the Assistant Secretary of Education for Civil Rights has something to do with it. While in that office from 2013 to 2017, she was in charge of OCR's Title IX enforcement. This report, which the Commission voted to undertake before she was appointed, was in many ways designed to examine her performance in that office.

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[1] See supra at Recommendation 3, p. 73.

[2] Dear Colleague Letter of October 26, 2010, available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf. See also "Sexual Harassment: It's Not Academic," September 2008, https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf (Archived.)

I am told that a Commissioner is not required to recuse herself from a report unless she has a financial interest at stake. One's professional reputation is not considered a financial interest for this purpose. I have no reason to doubt the accuracy of that legal analysis (though I have not studied the question carefully myself). There may well be good reason for it. But it is awkward.

At the very least, it is important for readers to be aware of the circumstances of the report. Situations like this tend to have an effect on content. For example, up until the week before the Commission voted on this report, its title was *Sexual Harassment and Free Speech on Campus*. At Chair Lhamon's request, it was changed to *Free to Learn: Speech and Sexual Harassment on Campus*.

See the difference? In the first version, by using the term "free speech," the report implicitly acknowledged the importance of the Constitution's insistence that speech be free of government control. The latter version sends a somewhat different message. In it, speech is just speech. But "freedom to learn" implicitly suggests that the government has a duty to intervene to prevent or discourage certain kinds of speech that may be deemed offensive.

The change in title is just one among many changes that this project has undergone since its inception. The final draft bears little resemblance to the first. I do not mean to suggest, however, that those changes were only the result of Chair Lhamon's appointment to the Commission. They were not. Long before Chair Lhamon arrived, my progressive colleagues (to my surprise) made it clear that they had very little interest in the First Amendment and academic freedom issues raised by Title IX enforcement methods.[3] Alas, this appears to reflect the shift in viewpoint many of

[3] In this vein, Commissioner Narasaki's Commissioner Statement mischaracterizes the testimony of one of our witnesses, UCLA law professor and First Amendment scholar Eugene Volokh. She writes that Volokh took the position that "short of actual physical violence being involved in an incident, the school could not and should not take any disciplinary action, ignoring the very real impact other forms of harassment can have." As support for this statement, she quotes an exchange between Volokh and her from the briefing transcript, in which Commissioner Narasaki posed a hypothetical to Professor Volokh involving a "ring of boys who are harassing a group of girls, calling them sluts, calling them, you know, herpes-carrying, you know just generally degrading them." Professor Volokh testified that "people could do things about it, but the government actors… can neither throw in jail or impose administrative punishment on students who are expressing this… college and university students. I'm not talking about K through 12…" I then jumped in to clarify, "Herpes, I assume, is a fact issue. If it's a false statement…" and then Professor Volokh agreed, "If it's a false statement, then yes, that is indeed – that falls in the slander section." In other words, the quoted statement does not support the proposition that a school cannot take any disciplinary action in cases not involving physical violence. Slander is not physical violence.

Elsewhere, Professor Volokh testified that types of speech not protected by the First Amendment in colleges and universities level include "threats," "fighting words," "libel or slander," (223) and "continued unwanted messages to someone after they said stop" (240.) He also testified that there are fewer legal protections on speech at the K-12 level. There, schools may restrict "vulgar" speech, "speech "encouraging illegal behavior or drug use," and speech "substantially disruptive of the environment." 227-8. None of these exceptions can be fairly characterized as "actual physical violence."

those on the left side of the political spectrum have undergone in the last few decades.[4] It saddens me. And it is a little frightening.

Commissioner Narasaki further states that "Schools need government to give them guidance that gives them the space to protect their students. Ignoring harassers until they cross the line into physical violence ignores the very real mental and emotional toll such harassment can take." None of our witnesses took the position that schools cannot separate students from one another until or unless one student commits physical violence. Also, generally schools are capable of figuring out how to separate students from one another appropriately without the express permission of the Department of Education.

She states that "Forcing victims to have to attend classes with or live in dormitories with their harassers unless there is a criminal procedure is cruel." No witness at our briefing took the position that the First Amendment prevents schools from separating harassers and victims. It is true that a student who is accused of harassment is entitled to due process. But nobody at our briefing or elsewhere, to the best of my knowledge, has argued that "due process" requires criminal prosecution before a university may act to keep students separate.

[4] Even the American Civil Liberties Union, long a champion of the right of free speech, is not immune. Cato Institute scholar Walter Olson wrote in the Wall Street Journal in 2017:

> Two hundred of [the ACLU's] 1,300 staffers signed a letter earlier this month calling on the group to reconsider its "rigid stance" in favor of the freedom of speech. Over the years the ACLU has expanded its mission to housing discrimination, LGBT issues, school finance and even supporting ObamaCare—issues with little connection to the Bill of Rights. The organization's joked-about "Civil Liberties Caucus" is fast becoming an old guard, giving way to progressives who are there for equality and social-justice work.

Walter Olson, The ACLU Yields to the Heckler's Veto, Wall St. J., October 24, 2017, available at https://www.wsj.com/articles/the-aclu-yields-to-the-hecklers-veto-1508884285.

Less than a year later, the ACLU's retreat from its role as the champion of free speech became even more evident. Former ACLU board member Wendy Kaminer wrote in the Wall Street Journal:

> The American Civil Liberties Union has explicitly endorsed the view that free speech can harm "marginalized" groups by undermining their civil rights. "Speech that denigrates such groups can inflict serious harms and is intended to and often will impede progress toward equality," the ACLU declares in new guidelines governing case selection and "Conflicts Between Competing Values or Priorities."

In some sense, this wasn't news. As Kaminer put it:

> This is presented as an explanation rather than a change of policy, and free-speech advocates know the ACLU has already lost its zeal for vigorously defending the speech it hates. ACLU leaders previously avoided acknowledging that retreat, however, in the apparent hope of preserving its reputation as the nation's premier champion of the First Amendment.

Kaminer noted that fundraising and communications specialists helped formulate the new guidelines and laments that the ACLU's donors have changed: "[T]raditional free-speech values do not appeal to the ACLU's increasingly partisan progressive constituency—especially after the 2017 white-supremacist rally in Charlottesville." That constituency has pushed for the ACLU to expend more of its resources fighting for progressive causes and less on free speech per se. In particular, the new guidelines "cite as a reason to decline taking a free-speech case

I proposed this project back in 2013. Since the Commission was then divided 4-4 between appointees chosen by Democratic and Republican office holders, I was looking for something that I thought would have a bipartisan and cross-ideological appeal.[5] At our meeting in November of 2013, several of my progressive colleagues voted to approve my proposal in exchange for my vote to approve Commissioner David Kladney's patient dumping concept paper.[6] Shortly thereafter President Obama made two new appointments to the Commission, resulting in a 6-2 Commission in favor of appointees chosen by Democratic office holders.

The patient dumping report proposed by Commissioner Kladney was completed and published in September of 2014—less than a year later. On the other hand, my project—i.e. this report—will in the end have taken more than six years (and many changes to its scope) to be completed. It has been astonishingly slow in coming to fruition.

'the extent to which the speech may assist in advancing the goals of white supremacists or others whose views are contrary to our values.'"

Wendy Kaminer, The ACLU Retreats from Free Expression: The Organization Declares that Speech it Doesn't Like Can "Inflict Serious Harms" and "Impede Progress," Wall St. J., June 20, 2018, available at https://www.wsj.com/articles/the-aclu-retreats-from-free-expression-1529533065.

Conservative/libertarian organizations like the Foundation for Individual Rights in Education (FIRE) and Speech First have taken up the "First Amendment banner."

[5] When I proposed the topic, I had become interested in the debate about a then-recent joint letter from the Department of Education's Office for Civil Rights ("OCR") and Department of Justice's Civil Rights Division to the University of Montana, which stated that it would "serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault." The letter required Montana to investigate harassment claims even if a reasonable person would not have found the speech in question objectionable. The blueprint defined harassment as "unwelcome conduct of a verbal nature" (that is, speech) of a sexual nature – a definition broader than that found in Supreme Court precedent, which requires that sexual harassment be severe, pervasive, and objectively offensive to be actionable.

Critics charged that this letter misstated applicable law and would chill some constitutionally protected speech of students, faculty and staff. Some of the criticism of this letter – and of OCR's efforts to increase enforcement of sexual harassment more generally – was coming from liberals, progressives, and moderates who might otherwise be inclined to support a Democratic administration. After an initial round of criticism, then-Assistant Secretary Lhamon even appeared to back away from some of the language in the Montana Letter that was most harshly criticized. I'd therefore hoped that the Commission might issue a report with a recommendation along the lines of "We have different views about how to interpret Title IX and the law of sexual harassment, but we all agree that the tension between free speech and sexual harassment law as currently interpreted is a serious problem that needs careful attention from OCR and DOJ."

[6] Transcript of Business Meeting of November 15, 2013 at 45-48.

As I alluded to above, the report was originally supposed to be fairly narrowly focused on the conflict between the First Amendment and free expression on the one hand and sexual harassment law as applied on college and university campuses on the other.[7] At the time I believed (and I continue to believe) that the Commission should try to select topics that are more modest in scope than it has selected in the past. When the Commission issues what I call "battleship reports," it seldom manages to make a genuine contribution to the literature. [8]

Alas, it was not to be. From the beginning, my colleagues successfully sought to expand the topic to include sexual violence, thus moving the topic away from First Amendment and free expression issues and toward the enforcement of Title IX more generally. Indeed, the first witness at the briefing (which took place on July 25, 2014) discussed *only* sexual violence in her

[7] A secondary issue for me was concern about how sexual harassment laws are interpreted at the K-12 level to restrict ordinary physical contact among young children or between them and their teachers. I had been told by schoolteacher acquaintances that they were counseled against hugging their young charges because of fears about sexual harassment liability. I started poking around the internet to see how common this sort of thing was and was startled to find news articles about kindergartners getting suspended for sexual harassment. See Juju Chang, Alisha Davis, Cole Kazdin, & Olivia Sterns, *First-Grader Labeled a Sexual Harasser*, ABC News (April 4, 2008), available at http://abcnews.go.com/GMA/AsSeenOnGMA/story?id=4585388; *6-Year-Old Boy Accused of Sexual Harassment*, WSPA-7-On-Your-Side (April 4, 2008); Yvonne Bynoe, *Is that 4-Year-Old Really a Sex Offender?*, WASH. POST (October 21, 2007), available at http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101901544.html; Gitika Ahuja, *First-Grader Suspended for Sexual Harassment*, ABC News (February 7, 2006), available at http://abcnews.go.com/US/story?id=1591633. According to the Maryland Department of Education, 166 elementary school students were suspended in the 2006-2007 school year for sexual harassment, including three pre-schoolers, sixteen kindergarteners, and twenty-two first graders. In Virginia, 255 elementary school students were suspended for offensive touching in that same year. Juju Chang, Alisha Davis, Cole Kazdin, & Olivia Sterns, *First-Grader Labeled a Sexual Harasser*, ABC News (April 4, 2008), available at http://abcnews.go.com/GMA/AsSeenOnGMA/story?id=4585388.

I thought persons across the political spectrum ought to be able to agree that this was absurd, and that maybe even our divided Commission could agree to recommend to OCR and DOJ that they should correct any misunderstandings that Title IX required this.

But almost from the start, my efforts to learn more about over-zealous interpretations of sexual harassment laws and training materials in K-12 got lost. The staff members who would have been assigned to the task clearly did not want to do it. Moreover, I was told by the Commission's then-General Counsel that we could not mail out an information request to K-12 school districts because it would violate the Paperwork Reduction Act. I sent out nine letters myself as Freedom of Information Act requests and submitted the responses I received to the Staff Director as part of the record. While they were discussed briefly in the first draft of the report (see draft at 23), none of the responses are discussed in the final report.

[8] In her Statement, Chair Lhamon says that she was "surprised that I wanted to "dramatically narrow the scope of the investigation" of this report. As I discuss above, my request wasn't to dramatically narrow the scope of the project, but to keep the project within the scope of the concept paper approved by the Commission, and I believe that the Commission had good reasons for keeping the scope of the project narrow.

testimony. One of our later witnesses that day, Kenneth Marcus (then of the Brandeis Center, now Assistant Secretary for Civil Rights at the Department of Education) noted sardonically, "the Commission has been exceptionally efficient at co-locating two different briefings in the same place at the same time, one on sexual violence, the other on speech issues."[9] I couldn't suppress a rueful smile.

In spite of these challenges, the 2014 briefing managed to attract a strong group of witnesses who were prepared to discuss free speech issues in detail. They included UCLA law professor Eugene Volokh, who is a leading scholar of the First Amendment, Greg Lukianoff, a public interest attorney and author who specializes in representing clients whose speech rights have been curtailed by colleges or universities, and the previously mentioned Kenneth Marcus.

The first draft of the report was an unusually long time in coming. I don't entirely know why. Ordinarily, the Commissioner who proposes a topic has a lot to do with shepherding the report through the drafting, editing, and approval process. That practice doesn't seem to apply when the Commission is 6-2 and the proposing Commissioner is in the minority. When the draft finally did come, it was essentially a lightly edited transcript of the briefing. That is not unusual for Commission reports. Commissioners are then given the opportunity to weigh in with their individual Commissioner Statements, and the Commission as a whole adopts "Findings and Recommendations."

I am told by Commission staff members that several of my fellow Commissioners made clear that they would not vote to approve that first draft. They thought it was too focused on First Amendment issues and not enough on the emotional toll on the victims of sexual assault and harassment. Moreover, it made OCR look bad. By this time, with the addition of Chair Lhamon and Commissioner Debo Adegbile, the Commission's membership had changed again (though it remained 6-2 in favor of Commissioners appointed by Democrats).

The General Counsel's office was directed to go back and do another draft. The resulting version – the one in front of you – has far less to say about free speech.[10] I appreciate the General Counsel and her staff's efforts to come up with a draft that could garner the support of a majority of the

[9] U.S. Commission on Civil Rights, Briefing Transcript, July 25, 2014, at 81, available at https://www.usccr.gov/calendar/trnscrpt/CommissionBriefingTranscript_July-25-2014_%20final.pdf.

[10] Some crude numbers that give a sense of the shift in the draft: of the witnesses whom I'd describe as broadly in favor of more protection for speech, Professor Eugene Volokh is cited once in the new report and seven times in the old report. Greg Lukianoff is cited three times in the new report and five in the old. Kenneth Marcus is cited five times in the new report and nine times in the old. The drop is all the more striking because some of the citations in the second draft refer to Marcus's work at the Department of Education post-2018 and not to his briefing testimony. Ada Meloy of the American Council for Education is cited three times in the current report and eight times in the previous draft.

Commission. Still, this is not the report or the findings and recommendations that I had hoped to see. It did not garner my vote or Commissioner Peter Kirsanow's.[11]

Ordinarily, that would not be the worst thing in the world. I am used to making my points in my Commissioner Statement rather than in the body of the report as approved by the Commission as a whole. Unfortunately, that won't be the case with this report. I had hoped to write a serious critique of OCR's Title IX enforcement methods (as well as the current state of harassment law more generally) as they affect free expression. And I still intend to do that as an independent article. But in 2019 there has been a sprint to get out a wave of long withheld reports before President Trump makes two new appointments and the Commission's partisan and ideological balance shifts. During this year, the Commission has published three reports and plans to publish three more (including this one) by year's end. Another was completed and approved this year, but will be published just after the new year. Like my Commissioner colleagues, I am a part-time Commissioner. My full-time job is elsewhere. In the 30 days I have been given to write this statement (with overlapping 30-day periods for other reports), I cannot do justice to this very important and complex topic.[12]

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[11] Among other problems, it sometimes misstates the law. For example, in a footnote inserted at Chair Lhamon's request, the report blithely suggests that there are no First Amendment concerns when a private college or university regulates the speech of its students and no Fifth Amendment due process concerns when it adopts adjudicative procedures that are unfair:

> Like the First Amendment, constitutional due process protections do not apply in private schools. *See* First Amendment on Private Campuses, Harvard Civil Rights-Civil Liberties Law Review, Dec. 1, 2015, https://harvardcrcl.org/first-amendment-on-private-campuses/ (citing Robert M. O'Neill, Free Speech in the College Community 225 (1997)). Nonetheless the Commission repeats the criticism here as it has been levied, notwithstanding its legal inapplicability.

Supra at _____.

This misses the point. What this report is supposed to deal with is the fact that the Federal government (or more particularly OCR) has been *requiring* private colleges and universities (as well as public ones) to regulate the speech of their students, faculty and staff.

A private college or university may, consistently with the Constitution, require its students to speak and act in ways that the federal government may not. But that doesn't mean the federal government can command a private college or university to do so. The Constitution does not prevent private schools from accepting only Roman Catholic, Baptist or Buddhist students. It does not even prevent private schools from accepting only Democrats, only Republicans or only students who promise to support all federal policies, right or wrong. But the federal government cannot require private schools to do this. Nor can it condition the receipt of federal funds on such an admissions policy, especially given that in today's world that would essentially be the same as a flat requirement.

[12] I asked Chair Lhamon for an extension of time to complete a decent Statement. The tradition as I understand it is that extensions that are asked for in good faith are routinely given; indeed they are expected when reports overlap in time (as they did in this case). For example, Commissioner Yaki received extensions that added up to about six months in our forthcoming Stand Your Ground report (though that was an extraordinary case in terms of length of time.) Nevertheless, she declined to do so in my case. She took the position that in order to accommodate the desire

In that independent article, I will address developments at the national level that have been more positive,[13] rendering some of the briefing testimony supporting this report outdated, as well as developments on campuses around the country that have been less positive.

One problem that I'm unlikely to have is finding college and university actions undertaken in the name of Title IX enforcement that are genuinely troubling. You can find them on practically every campus if you take the time to look.[14] A young intern who attended several of our meetings last year had a troubling personal story. At Yale University, as an undergraduate philosophy major, he wrote a paper criticizing Plato's tripartite theory of the soul as follows:

> I believe spirit can be allied with appetite against reason. Take any drunken-fest. People drink spiritedly even when they know it is against their greater good. Even if an argument will be presented in that case that people's reason is impaired at the time they drink, and thus not in conflict with their spirit, consider the case of a rapist. A rapist may rape with much vigor, or in anger. Here, presumably,

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of Commissioner Narasaki (whose term will expire shortly) to file a Statement, the due dates could not be extended. But Commissioner Narasaki's term ended on November 29, 2019. She will have to file any Statement and any rebuttal or surrebuttal material by that date in any event and, moreover, has no history of expanding her individual Statement to include individual rebuttal material (and apparently has not done so in this case). An extension of the date for other Commissioners to file either their Statements or their rebuttal material would not have interfered with her ability to file a Statement. If the Chair had extended the deadline for me and other Commissioners either for a Statement or for rebuttal material, it would have given us a longer period of time to write than Commissioner Narasaki. But it would not have prejudiced her ability to file her own Statement.

[13] Under the Trump Administration, OCR and DOJ have withdrawn some (but not all) of the guidances that I consider to be most problematic.

[14] During the time allotted for rebuttal to other Commissioners' statements, an interesting news story broke in this vein regarding Indiana University Kelley School of Business professor Eric Rasmusen's tweets about race, sex, and sexual orientation. After these tweets went viral, Indiana University was "inundated" with calls that he be fired. The Executive Vice President and Provost issued a memo in response, stating that the university could not fire Rasmusen for engaging in First Amendment protected speech. She said, however, that the tweets did raise concerns about whether Professor Rasmusen might illegally discriminate against students based on their sex, race, or sexual orientation. Although no students have complained about Rasmusen discriminating against them, the university was nonetheless going to take certain prophylactic actions against Rasmusen to avoid violations of anti-discrimination laws, such as making sure that no student is required to take Professor Rasmusen's classes and requiring that all of his class assignments be double blind graded. Memo available at https://www.rasmusen.org/special/2019kerfuffle/provost1.pdf.

Because these prophylactic measures still adversely affect Professor Rasmusen, even though not as drastically as firing him would, one constitutional law professor, Josh Blackman, has questioned whether they would also violate the First Amendment. See Josh Blackman, "What is the difference between firing tenured professors and removing them from required classes?" The Volokh Conspiracy, November 24, 2019. Since the facts are still being sorted out in this case, I flag it only as evidence that there are significant First Amendment issues arising on campuses today in this area of the law. The Commission should not have brushed them aside as it did.

> reason should dictate not to rape. Is spirit not allied with appetite against reason in case?"[15]

The teaching assistant of his course complained to the Title IX office about the paper, and he was ordered to attend sensitivity training and cease contact with her.[16] He later sued Yale, and the case was settled out of court.

There is much to worry about the fate of free and open expression on campuses these days. The Commission should have taken this situation—and the federal government's role in creating it—more seriously.

[15] Quoted in John Doe's complaint against Yale University, available at http://dailynous.com/2017/04/05/philosophy-papers-part-title-ix-lawsuit/.

[16] Complaint at 19-20.

APPENDIX A: SEXUAL HARASSMANT COMPLAINTS, COMPLIANCE REVIEWS, AND TECHNICAL ASSISTANCE BY FISCAL YEAR

	Overall # of Complaints	Overall # of Complaints based on Sexual Harassment/Sexual Violence	Overall # of Complaints based on Sexual Violence	Overall # of Compliance Reviews Initiated	Technical Assistance Provided	
2016	16720 (7747 total complaints arising from Title IX)	673	260	13	110	https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf
2015	10392 (2939 total complaints arising from Title IX)	536	226	7	130	https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf
2014	9989	854		38		
2013	9950 (5845 total complaints arising from Title IX 2013-2014)		192 (128 for FY '14; 64 for FY '13)	30	278	https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf; https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf
2012	7833	1137 (breakout by year not N/A)	31	More than 100 (37 in 2009)	1325 (breakout by year N/A)	https://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf
2011	7841		40			https://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf
2010	6933		35			https://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf

2009	6364 (4138 total complaints arising from Title IX 2009 to 2012)		22			https://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf
2008	6194	328		42	185	https://www2.ed.gov/about/reports/annual/ocr/annrpt2007-08/annrpt2007-08.pdf
2007	5894	327		23	165	https://www2.ed.gov/about/reports/annual/ocr/annrpt2007-08/annrpt2007-08.pdf
2006	5805	334	95 (sexual harassment)	9	170	https://www2.ed.gov/about/reports/annual/ocr/annrpt2006/index.html
2005	5533	319		73		https://www2.ed.gov/about/reports/annual/ocr/annrpt2005/index.html
2004	5044	283		53		https://www2.ed.gov/about/reports/annual/ocr/annrpt2004/index.html
2003	5141	335		74		https://www2.ed.gov/about/offices/list/ocr/annrpt2003/index.html
2002	5019	353		11		https://www2.ed.gov/about/offices/list/ocr/AnnRpt2002/index.html
2001	4571	313		21		https://www2.ed.gov/about/offices/list/ocr/AnnRpt2002/index.html
2000	4897	396		47		https://www2.ed.gov/about/offices/list/ocr/AnnRpt2000/edlite-index.html
1999	6628	1010		76		https://www2.ed.gov/about/offices/list/ocr/AnnRpt99/index.html
1998	4847	545		102		https://www2.ed.gov/about/offices/list/ocr/AnnRpt98/index.html

1997	5296	152	https://www2.ed.gov/about/offices/list/ocr/AnnRpt97/edlite-index.html
1996	4828	152	https://www2.ed.gov/about/offices/list/ocr/AnnRpt96/edlite-index.html
1995	4981	96	https://www2.ed.gov/about/offices/list/ocr/AnnRpt95/edlite-index.html
1994	5302	144	https://www2.ed.gov/about/offices/list/ocr/AnnRpt96/edlite-a96rpt03.html
1993	5090	101	https://www2.ed.gov/about/offices/list/ocr/AnnRpt96/edlite-a96rpt03.html
1992	4432	77	https://www2.ed.gov/about/offices/list/ocr/AnnRpt96/edlite-a96rpt03.html
1991	3809	41	https://www2.ed.gov/about/offices/list/ocr/AnnRpt96/edlite-a96rpt03.html
1990	3384	32	https://www2.ed.gov/about/offices/list/ocr/AnnRpt96/edlite-a96rpt03.html
1986	2648		https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf
1985	2199		https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf

1982	1840	https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf
1981	2887	https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf

APPENDIX B: CHART OF DEPARTMENT OF EDUCATION SEXUAL HARASSMENT GUIDANCE (1981-2018)

Date	Source	Definition of Sexual Harassment	Def. of Hostile Environment
1981	Sexual Harassment: An Overview Monograph, Vol. 2, No. 1 (Feb. 1987), https://archive.org/stream/ERIC_ED301755/ERIC_ED301755_djvu.txt.	"Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different or conditions the provision of aid, benefits, services or treatment protected under Title IX." (quoting Aug. 1981 Memo from Director for Litigation, Enforcement and Policy Service to Office for Civil Rights Regional Directors)	"
1998	Sexual Harassment: It's Not Academic Pamphlet, https://files.eric.ed.gov/fulltext/ED330265.pdf.	"Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different or conditions the provision of aid, benefits, services or treatment protected under Title IX." (quoting Aug. 1981 Memo from Director for Litigation, Enforcement and Policy Service to Office for Civil Rights Regional Directors)	
1997	Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, https://www.gpo.gov/fdsys/pkg/FR-1997-03-13/pdf/97-6373.pdf.	"Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) . . ."	Defines "Hostile Environment Sexual Harassment" as "Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) by an employee, by another student, or by a third

			party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment." 62 Fed. Reg. 12034, 12038 (Mar. 13, 1997). "In deciding whether conduct is sufficiently severe, persistent, or pervasive, the conduct should be considered from both a subjective and objective perspective. In making this determination, all relevant circumstances should be considered . . . ." *Id.* at 12041.
2001	Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, https://www.gpo.gov/fdsys/pkg/FR-2001-01-19/pdf/01-1606.pdf (notification of availability); https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (guidance).	"Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." At page 2 "Gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit	"[Hostile environment harassment] requires a further assessment of whether or not the conduct is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program based on sex." At page 5 For hostile environment, "OCR considers the conduct from both a subjective and objective perspective. In evaluating the severity

		from the educational program." At page 3.	and pervasiveness of the conduct, OCR considers all relevant circumstances, i.e., 'the constellation of surrounding circumstance, expectations, and relationships.'" At page 5 (quoting *Davis*, 526 U.S. at 634 (citing both *Oncale*, 523 U.S. at 82 and OCR's 1997 guidance).
2006	Dear Colleague Letter from then-Assistant Secretary for Civil Rights, Stephanie Moore (Jan. 25, 2006)(transmitting 2001 guidance), https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html (letter); https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (guidance).	Same as above.	Same as above.
2008	Sexual Harassment: It's Not Academic Pamphlet, https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf.	"Sexual harassment is conduct that: 1) is sexual in nature; 2) is unwelcome; and 3) denies or limits a student's ability to participate in or benefit from a school's education program." At page 3 "The conduct can be verbal, nonverbal, or physical." At page 3 "Examples of sexual conduct include: • making sexual propositions or pressuring students for sexual favors; • touching of a sexual nature;	"Sexual harassment also occurs when a teacher, school employee, other student, or third party creates a hostile environment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program. Whether such a hostile environment has been created depends on the particular

		• writing graffiti of a sexual nature; • displaying or distributing sexually explicit drawings, pictures, or written materials; • performing sexual gestures or touching oneself sexually in front of others; • telling sexual or dirty jokes; • spreading sexual rumors or rating other students as to sexual activity or performance; or • circulating or showing e-mails or Web sites of a sexual nature." At pages 3-4. "*Must the sexual conduct be unwelcome?* Yes. Conduct is considered unwelcome if the student did not request or invite it and considered the conduct to be undesirable or offensive." At page 5.	circumstances of the incident(s). Relevant considerations include, but are not limited to: • how much of an adverse effect the conduct had on the student's education; • the type, frequency, or duration of the conduct; • the identity, age, and sex of the harasser(s) and the victim(s), and the relationship between them; • the number of individuals who engaged in the harassing conduct and at whom the harassment was directed; • the size of the school, location of the incidents, and context in which they occurred; and • whether other incidents occurred at the school involving different students. The conduct does not necessarily have to be repetitive. If sufficiently severe,

			single or isolated incidents can create a hostile environment." At pages 6-7.
2010	Assistant Secretary for Civil Rights Russlyn Ali to Dear Colleague (Oct. 26, 2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf (Rescinded by the Trump Administration in 2017)	"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 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."
2011	Assistant Secretary for Civil Rights Russlyn Ali to Dear	"[U]nwelcome conduct of a sexual nature. It includes unwelcome	"When a student sexually harasses

	Colleague (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (Rescinded by the Trump Administration in 2017)	sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."	another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program. 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 harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe."
2014	Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (Rescinded by the Trump Administration in 2017)	"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 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."
2015	Title IX Resource Guide, https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf.	"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." At page 15 "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." At page 15 "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." At page 15	"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)." At page 15. "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." At page 15
2017	Dear Colleague and Q&As on Campus Sexual Misconduct https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf (letter); https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (Q&As on Campus Sexual Misconduct)	Same as 2001 Guidance	Same as 2001 Guidance
2018	Proposed Rule,	"(i) An employee of the recipient conditioning the provision of an aid,	

	https://www.regulations.gov/contentStreamer?documentId=ED-2018-OCR-0064-0001&contentType=pdf	benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (ii) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or (iii) Sexual assault, as defined in 34 CFR 668.46(a)." At page 133	

APPENDIX C: DEPT OF EDUCATION RESOLUTION AGREEMENTS WITH HIGHER EDUCATION INSTIUTIONS (2011-2016)

University Name	Update Grievance Procedures	Update Title IX Policy	Title IX Coordinator	Climate Survey	Data Collection	Review Old Complaints	Employee Training	Training for those involved in Title IX Grievance Procedures	Student Training	Campus Committee (including student representatives)	Coordination with Local Law Enforcement	"On Call" Individual	Documents
BioHealth College No. 09-11-2027 Complaint - Sexual Assault	Yes	Yes	Yes										Letter of Finding & Resolution Agreement: https://www.documentcloud.org/documents/3121525-BioHealth-College-09-11-2027.html
Buffalo State College No. 02-15-2085 Complaint - Sexual Assault			Yes		Yes		Yes						Letter of Finding: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02152085-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02152085-b.pdf

Butte College No. 09-13-2096 Complaint - Sexual Assault	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes				Letter of Finding: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09132096-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09132096-b.pdf
Cedarville University No. 15-13-2163 Complaint - University lacks Title IX Coordinator and prompt and equitable grievance procedures	Yes		Yes	Yes			Yes		Yes				Letter of Finding: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15132163-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15132163-b.pdf
Cisco College No. 06-14-2269 Complaint - Sexual Assault	Yes	Yes			Yes		Yes		Yes				Letter of Finding: https://www.documentcloud.org/documents/4361290-Cisco-College-06-14-2269-LOF.html Resolution Agreement: https://www.documentcloud.org/documents/4361289-Cisco-College-06-14-2269-RA.html
City University of New York Hunter College No. 02-13-2052 Complaint - Sexual Harassment & Sexual Assault	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes		Letter of Finding: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02132032-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02132032-b.pdf

Davis & Elkins College [several, if not all paragraphs have been redacted] No. 03-14-2370 Complaint - Sexual Assault													Letter of Finding: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03142379-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03142379-b.pdf
Elmira College No. 02-14-2316 Complaint - Sexual Assault	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Letter of Finding: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02142316-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02142316-b.pdf
Frostburg State University No. 03-13-2328 & No. 03-15-2032 Complaint 1: Alleged rape at an off-campus party Complaint 2: Alleged sexual assault by a campus police officer	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Letter of Findings: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03132328-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03132328-b.pdf

George Washington University No. 11-11-2079 Complaint - Sexual Assault	Yes	Yes	Yes	Yes			Yes		Yes	Yes			Letter of Findings: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11112079-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11112079-b.pdf
Glenville State College No. 03-11-2033 Complaint - Sexual Assault	Yes	Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes		Notification Letter: https://www.documentcloud.org/documents/3031911-Glenville-State-College-03-11-2033.html Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03112033-b.pdf
Harvard Law School No. 01-11-2002 Compliance Review [stemming from a student complaint that University's grievance policies and procedures fail to comply with Title IX].	Yes	Yes	Yes	Yes		Yes	Yes	Yes	Yes				Notification Letter: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01112002-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01112002-b.pdf
Humboldt State University No. 09-17-2481 Complaint - Sexual Assault	Yes							Yes					Letter of Finding: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09172481-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09172481-b.pdf

Kentucky Wesleyan College No. 03-12-2062 Complaint - Sexual Assault	Yes		Yes	Yes				Yes	Yes	Yes		Yes	Letter of Finding: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03122062-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03122062-b.pdf
Massachusetts Maritime Academy No. 01-13-2008 Complaint - Sexual Assault	Yes		Yes	Yes	Yes		Yes	Yes	Yes				Letter of Finding & Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01132008-a.pdf
Michigan State University No. 15-11-2098 & No. 15-14-2113 Student A: Complaint - Sexual Assault (Student-on-student) + Retaliatory Harassment + Retaliatory Harassment from University Student B: Complaint - Sexual Violence	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Letter of Findings: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15142113-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15142113-b.pdf

Minot State University No. 05-14-2061 Complaint - Sexual Assault	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Letter of Findings: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05142061-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05142061-b.pdf
New School No. 02-11-2094 Complaint - Sexual Assault No violations of Title IX found by OCR. Resolution Agreement is school agreeing to notify complainant of appeal rights.													Letter of Findings: https://www.documentcloud.org/documents/3986115-LOF-New-School-02-11-2094.html Resolution Agreement: https://www.documentcloud.org/documents/3986113-RA-New-School-02-11-2094.html
Northern New Mexico College No. 08-11-2125 Complaint - Sexual Assault	Yes	Yes					Yes	Yes	Yes				Letter of Findings: https://www.documentcloud.org/documents/3986118-LOF-Northern-New-Mexico-College-08-11-2125.html Resolution Agreement: https://www.documentcloud.org/documents/3986116-RA-Northern-New-Mexico-College-08-11-2125.html
Occidental College No. 09-13-2264 Complaint described allegations on behalf of 46 students, former students and staff/faculty.				Yes		Yes	Yes						Letter of Findings: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09132264-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09132264-b.pdf

Ohio State University No. 15-10-6002 Compliance Review.	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes				Letter of Findings: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15106002-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15106002-b.pdf
Pitzer College No. 09-12-2151 Complaint - Sexual Assault	Yes	Yes					Yes		Yes				Letter of Findings: https://www.documentcloud.org/documents/3986125-Pitzer-College-09-12-2151-LOF.html Resolution Agreement: https://www.documentcloud.org/documents/3986127-Pitzer-College-09-12-2151-RA.html

Princeton University No. 02-11-2025 Complaint - Complainants 1, 2, and 3 alleged failure to adopt and publish grievance procedures that provide for the prompt and equitable resolution of complaints and sexual assault	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Letter of Findings: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02112025-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02112025-b.pdf
Quincy College No. 01-12-2048 Complaint - Sexual Assault	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes				Letter of Findings & Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01122048-a.pdf
Southern Methodist University No. 06-11-2126, No. 06-13-2081, No. 06-13-2088 Complaint 1 - gender harassment, complaint 2 - sexual harassment, complaint 3 - sexual assault	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Letter of Finidngs: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06112126-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06112126-b.pdf

St. Mary's College of Maryland [Documents have not been made public]													
State University of New York system No. 02-11-6001 Compliance Review	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Letter of Findings: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02116001-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02116001-b.pdf
Tufts University No. 01-10-2089 Complaint - Sexual Assault	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes			Letter of Findings: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01102089-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01102089-b.pdf
University of Alaska system No. 10-14-6001 Compliance Review	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Letter of Findings: https://www.documentcloud.org/documents/3474135-U-of-Alaska-Resolution-Letter.html Resolution Agreement: https://www.documentcloud.org/documents/3673021-University-of-Alaska-System-10-14-6001.html

University of Kansas No. 07-12-2007 Complaint - Sexual Assault	Yes			Yes	Yes		Yes	Yes	Yes	Yes			Letter of Findings: https://www.documentcloud.org/documents/3900516-University-of-Kansas-Notification-Letters.html Resolution Agreement: https://www.documentcloud.org/documents/3900431-University-of-Kansas-Resolution-Agreement.html
University of Mississippi No. 06-10-20169 Complaint - Sexual Assault	Yes		Yes	Yes	Yes		Yes		Yes	Yes			Source Documents: https://www.documentcloud.org/documents/4811309-University-of-Mississippi-06-10-2069-NL.html Resolution Agreement: https://www.documentcloud.org/documents/2662415-U-of-Mississippi-Resolution-Agreement.html
University of Montana at Missoula No. 10-12-6001 Complaint - sexual assault	Yes		Yes	Yes	Yes		Yes	Yes	Yes				Letter of Findings: https://www.documentcloud.org/documents/2644791-OCR-Letter-to-the-University-of-Montana.html Resolution Agreement: https://www.documentcloud.org/documents/2644744-University-of-Montana-Missoula-Resolution.html
University of Notre Dame No. 05-11-6901 Compliance Review	Yes				Yes	Yes	Yes	Yes			Yes		Letter of Findings: https://www.documentcloud.org/documents/2652324-Notre-Dame-Letter-of-Findings.html Resolution Agreement: https://www.documentcloud.org/documents/2652325-Notre-Dame-Resolution-Agreement.html

University of Virginia No. 11-11-6001 Compliance Review		Yes	Yes				Yes	Yes	Yes				Letter of Findings: https://www.documentcloud.org/documents/2674809-University-of-Virginia-Letter-of-Findings.html Resolution Agreement: https://www.documentcloud.org/documents/2674808-University-of-Virginia-Resolution-Agreement.html
Virginia Commonwealth University No. 11-11-2031 Complaint - Sexual Assault, Sex Discrimination & Race Discrimination	Yes								Yes				Source Documents: https://www.documentcloud.org/documents/4045428-Virginia-Commonwealth-University-11-11-2031-NL.html Letter of Findings: https://projects.chronicle.com/titleix/campus/Virginia-Commonwealth-University/ Resolution Agreement: https://www.documentcloud.org/documents/4045429-Virginia-Commonwealth-University-11-11-2031-RA.html
Virginia Military Institute No. 11-08-2079 Complaint	Yes		Yes	Yes			Yes	Yes	Yes				Letter of Findings: https://www.documentcloud.org/documents/2678634-Virginia-Military-Institute-letter-of-findings.html Resolution Agreement: https://www.documentcloud.org/documents/2678635-Virginia-Military-Institute-resolution-agreement.html

Wesley College (Del.) No. 03-15-2329 Complaint	Yes	Yes	Yes	Yes			Yes	Yes	Yes	Yes			Letter of Findings: https://www.documentcloud.org/documents/3132356-Wesley-College-Letter-of-Findings.html Resolution Agreement: https://www.documentcloud.org/documents/3132357-Wesley-College-Resolution-Agreement.html
Wittenberg University No. 15-11-2115, No. 15-13-2141 Both Complaints - Sexual Assault	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes		Yes		Letter of Findings: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15112115-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15112115-b.pdf
Xavier University (Ohio) No. 15-12-2048, No. 15-11-2117, No. 15-12-2018 Complaint - Sexual Assault	Yes	Yes		Yes	Yes		Yes	Yes	Yes	Yes			Letter of Findings: https://www.documentcloud.org/documents/4811308-Xavier-University-15-12-2048-NL.html Resolution Agreement: https://www.documentcloud.org/documents/2644794-Xavier-Resolution-Agreement.html
Yale University No. 01-11-2027 Complaint - Sexually Hostile Environment	Yes		Yes	Yes			Yes	Yes	Yes			Yes	Letter of Findings: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01112027-a.pdf Resolution Agreement: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01112027-b.pdf