



GARRETT HEMANN ROBERTSON PC

Sex Discrimination under Title IX

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New Requirements of Federal Guidance

- OCR “Dear colleague” letters TIX
 - OCR DCL/Guidance 2010, 2011, 2013, 2014
 - Guidance documents
 - “on the basis of sex”
 - “gender based harassment”
 - “sex or sex-stereotyping”
 - Definitions, breadth of coverage
 - Notice
 - Title VII prohibits employment discrimination on basis of sex



Peer Harassment on the Basis of Federally Protected Class

“School districts may violate these civil rights statutes when peer **harassment** based on race, color, national origin, sex or disability is sufficiently serious that it creates a **hostile environment** and such harassment is encouraged, tolerated, **not adequately addressed**, or ignored by school employees”



Federal Standards of Harassment

- Does not have to include intent to harm, be directed at a specific target, or involve repeated incidents
- 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



Federal Standards of Harassment

- Must address harassment incidents about which it knows or reasonably should have known
 - **May be a single incident of misconduct or**
 - **Signs sufficient to put the school on notice**



OCR Appropriate Steps in Response

- Duties are based on knowledge of harassment, not on complaint or request for action
- Must take prompt, effective steps reasonably calculated to:
 - End harassment
 - Eliminate hostile environment and its effects
 - Prevent recurrence
 - Policies to protect from retaliation
 - Don’t penalize target of harassment



Title IX Discrimination Covers...

- Access to education programs or activities
- Discrimination based on sex or sex characteristics
- Sexual violence
- LGBT(QI)
 - Lesbian, Gay, Bisexual, Transgender
 - (Queer, Intersex)
- Transgender employees under TVII



LGBT(QI)

- Harassment of LGBT students as a form of discrimination
- OCR Transgender cases for students provide guidance on appropriate treatment
- Students/Families identifying at early ages



Definitions

- Lesbian: homosexual woman.
- Gay: exhibiting sexual desire or behavior directed toward a person or persons of one's own sex; homosexual. Of, indicating, or supporting homosexual interests or issues.
- Bisexual: the condition of having characteristics intermediate between those of a male and a female. An individual exhibiting such physiological characteristics.
- Transgender: A person appearing or identifying as a member of the opposite sex.
- Queer: 'umbrella term' for non-heterosexuals or non-traditional gender identities, may also be associated with cultural or political identity; also Q - 'questioning'
- Intersex: the condition of having characteristics intermediate between those of a male and a female. An individual exhibiting such physiological characteristics.



LGBT Discrimination

Minnesota district 'gag policy'

- Staff not to comment on LGBT issues
- 7 LGBT suicides in 1 yr
- Pattern of indifference to known bullying and harassment;

Southern Poverty Law Center, OCR, DOJ, USDOE

- Letter
- Lawsuit
- Consent decree



Transgender Students

Acadia SD case

- OCR defines terms
- OCR TIX, DOJ TIV
 - Gender 'assigned at birth'
 - Identifies as...
 - Sex specific facilities

Guidance

- Treat the student at [identified gender] "in all respects"
- Access to gender specific facilities: concerns related to safety and privacy of all students
- Provide access to sex specific facilities, accommodate request for access to private facilities
- Confidentiality



Response

Response

- Identify and base on actual issues, concerns
- Individualized approach
- Family communication
- Community communication
- Consider reasonable alternative arrangements
- Identify/train for in-school resources, identify contacts

Resources

- Consult attorney
- Review OCR Guidance
- Update policies
- ODE training



Sexual Violence

- Sexual harassment includes “acts of sexual violence” and is a form of sex discrimination prohibited under TIX
 - Sexual violence: physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent
 - Includes rape, sexual assault, sexual battery, sexual abuse, and sexual coercion
 - Can be carried out by school employees, other students, or third parties.



OCR Obligations

- Knows or reasonably should know of possible sexual violence – “immediate and appropriate steps”
- **Investigate** or otherwise determine what occurred
- If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps:
 - reasonably calculated to end the sexual violence
 - eliminate the hostile environment
 - prevent its recurrence, and,
 - as appropriate, remedy



Confidentiality

- Before a student reveals information
 - A responsible employee “should make every effort to ensure that the student understands”
1. Employee’s obligation to report:
 - names of alleged perpetrator and student
 - relevant facts regarding the alleged incident
 2. Student’s option:
 - to request that school maintain his/her confidentiality, **which the school will consider**, and
 - student’s ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services



Confidentiality

- If the parents/student request confidentiality, the Title IX coordinator is responsible for evaluating requests for confidentiality and should make every effort to respect this request
- District should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.
- DOES NOT excuse reporting obligations such as TIX, child abuse, sexual conduct, etc.



Notice: Responsible Employee

- District has notice of its obligations when a "responsible employee" knows or reasonably should have known about possible sexual violence
- Responsible Employee:
 - authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.
 - will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct
- Notice of responsible employees so that students can make informed decisions about whether to disclose information to those employees
- Responsible employees must report to TIX Coordinator



TIX Requirements

- Notice of non-discriminations rights
- TIX Coordinator designated:
 - Must have knowledge of **all** TIX complaints, reports and oversee responses
 - Identify/address patterns or systemic problems
 - Confidentiality issues
- Grievance procedures
 - Can be the same as other disciplinary procedures IF meets TIX standards
 - Investigation now required?



Training Issues for Sexual Violence

- **Title XI Coordinator**
- **Responsible Employee reporting obligations**
- How to respond appropriately to report
- "Practical information about how to prevent and identify sexual violence, including same-sex violence; behaviors that may lead to and results in sexual violence; the attitudes of bystanders that may allow conduct to continue, the potential for revictimization by responders and its effect on students"
- Confidentiality obligations for sexual violence
- Proactive process for requests, identifying issues
- What is notice? Responsible employee?
- Related reporting issues
- Investigations
- Grievance processes for complaints



Different Standards for Liability: OCR and Federal Courts

- **OCR (Monitoring)**
 - **Notice:**
Knows or should have known
 - **Hostile Environment:**
Conduct is sufficiently severe, pervasive or *persistent*
Interferes with or limits a student's ability to participate in or benefit from educational opportunities or benefits
- **Federal lawsuits (Monetary damages)**
 - **Notice:**
Deliberate indifference to conduct of which they had *actual* knowledge
 - **Hostile Environment:**
Conduct is sufficiently severe, pervasive and *objectively offensive*
Deprives victims of access to educational opportunities or benefits



State Bullying, Harassment, Cyberbullying Requirements

- ORS 339.356
- Requires a school employee to report an act of harassment, intimidation, bullying, cyberbullying to identified official
- Requires school to have process to allow student or volunteer to anonymously report
- Must "encourage" reporting of "reliable information" by student or volunteer
- Districts must incorporate information on policies in trainings



Sexting: Special Concerns

- Child pornography ORS 163.665 through 163.693
 - Under 18 years of age, visual recording of sexually explicit conduct including lewd exhibition of sexual or other intimate parts
 - Child abuse: conduct that is a crime in which the victim is a child
 - Use of child in display of sexually explicit conduct if one authorizes, permits, compels child to participate or engage in sexually explicit conduct to record in photograph
 - Possession of materials: felony to knowingly possess visual depiction of sexually explicit conduct involving a child
- Failure to report child pornography is a misdemeanor
- Child Abuse Reporting obligations



Sexting Response

- Does the conduct violate policy? Law?
- Contact law enforcement if nude pictures/videos (mandatory reporting)
 - Seal in envelope
 - Sign and date on envelope closure
 - Lock in secure place until law enforcement arrives



Sexting Response

- If school (not law enforcement investigation)
 - What is the phone number, email, etc. involved?
 - Who knows about it? Who has seen it?
 - Nail down initial statements
 - Get help from tech department to preserve records
 - Contact parents of involved students



When is it okay to search a student's phone?

- Reasonable suspicion of violation of school policy or law
 - Credible tip from another student
- Search limited in scope
 - Don't search pictures if you're looking for a text message related to a drug deal
 - Don't search if phone only confiscated because student had it out in class
- Seeing something in plain view ≠ search

Cyberbullying

- Differs from Bullying:
 - Electronic media
 - Highly accessible, can occur anytime, off or on campus
 - Message distributed to wide audience quickly
 - Anonymous, not face-to-face, may encourage behavior
 - May not report due to fear of limited access to technology
 - Bystanders and witnesses anonymous

Off-Campus Cyberbullying/Harassment

- Did speech occur on or off campus?
- A **material or substantial disruption**, in most cases, is defined as a physical disturbance
- Can also include conduct that would cause severe stress.
- If imposing discipline for off-campus speech, must meet one of these:
 - Nexus to school
 - Material or substantial disruption
 - Direct or immediate threat of danger to the safety of others

Free Speech

- First Amendment rights limit a school's right to discipline a student for expressing opinions at school
 - May discipline speech that could reasonably be forecast to cause a substantial disruption in the school
 - *Tinker v. Des Moines Indep Comm. Sch. Dist.* 393 US 503 (1969)
 - May discipline lewd, vulgar, indecent or plainly offensive speech in school
 - *Bethel Sch. Dist. v. Fraser*, 478 US 676 (1986)
 - May regulate school sponsored speech such as a school newspaper
 - *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 US 260 (1988)
 - May restrict student speech seen as promoting illegal drug use
 - *Morse v. Frederick*, 551 US 393 (2007)



OCR: First Amendment

- "Physical harassment, violence, and threats are never constitutionally protected"
- "[S]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech"
- "We interpret our regulations... consistent with constitutional principles of the first amendment"
- **In response to questions on LGBT protections:**
"We would balance first amendment protections of that case. But together working with school and faculty officials we would work to make sure that all students had a safe place and a healthy place to learn."

OCR Assistant Secretary Russlyn Ali, *Peer-to-Peer*, p. 77



Free Speech and Harassment

- "Day of Silence" intended to draw attention to harassment of homosexuals, students remain silent
- Some students, teachers wear supportive t-shirts
- "Day of Truth" held day after by those who objected to homosexuality on religious basis
- Student wore t-shirt "My Day of Silence, Straight Alliance" and "Be Happy, Not Gay"
- School rule against derogatory comments that refer to sexual orientation among other protected classes
- Official marked out the "Not Gay" portion of shirt



Free Speech

- T-shirt worn to school stated “Homosexuality is shameful. Romans 1:27” and “Be ashamed. Our school has embraced what God has condemned.”
 - Not in response to Day of Silence
- Court stated that schools had right to restrict injurious speech, duty to protect young students, and “legitimate pedagogical concern of promoting tolerance and respect for differences among students”
 - Also failed to show this was protected religious expression
 - 9th Circuit did not address as ‘moot,’ students had graduated and policies were revised



School Policy Requirement

- ORS 339.362 prohibits retaliation against victim of, witness to or person with reliable information about
 - Federal law notice required
- Policy must include:
- Definitions consistent with state law
 - Behavior expected
 - Statement of the scope (authority) of the policy
 - Consequences and remedial action



School Policy Requirements (cont'd)

- Policy must include:
- Uniform reporting procedure including **job titles** of school and district officials
 - Procedure to request review by the school district of a school's report of response of an action
 - Uniform “prompt” investigation procedures including **job titles** of school and district officials
 - Annual notice of policy in handbook and “readily” available (website)



Oregon State Law

Definitions of Bullying and Harassment.

ORS 339.351

- Harassment, intimidation or bullying means any act that substantially interferes with a student's educational benefits, opportunities or performance
- Cyberbullying is the use of any electronic device to harass, intimidate or bully



Definitions

- Location: takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop
- More clear than federal law standard which examines "free speech," which has focused on effect of school and not where it occurs



Sexual Harassment ORS 342.704

- Prohibits sexual harassment, requires policy *and posting of policy*
- Sexual harassment of students includes:
 - A demand for sexual favors in exchange for benefits;
 - Unwelcome conduct of a sexual nature that has the purpose or effect of unreasonably interfering with a student's educational performance or that creates an intimidating, offensive or hostile educational environment
- By staff or students



State Definitions for Harassment, Discrimination

- Protected class: Group of persons distinguished or perceived to be distinguished by race, color, religion, sex, sexual orientation, national origin, marital status, familial status, source of income, or disability.
- Sexual orientation: an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth. ORS 174.100(6)



OAR 581-021-0045 Discrimination

Prohibits any act "that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on age, disability, national origin, race, color, marital status, religion, sex or sexual orientation"



Sexual Harassment Policy Requirements OAR 581-021-0038

- All staff and students
- States definition, quoting law
- Requires complaint investigation
- Notification of student and parents that initiated complaint after investigation
- Posting in all grade 6 through 12 schools
- No retaliation
- Encouraged to address?:
 - Name and position of employee to report to and how to contact

ODE will assist with training and technical assistance



Resources

- OCR Dear Colleague letter at www2.ed.gov/about/offices/list/ocr/letters/colleague.201010.html
- www2.ed.gov/policy/speced/guid/idea/memosdccltrs/bullyingdcl-8-20-13.pdf
- www2.ed.gov/policy/speced/guid/idea/memosdccltrs/bullyingdcl-enclosure-8-20-13.pdf



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