

# ***Sexual Harassment Update***

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In preparing for a seminar on preventing sexual harassment in schools, I discovered three publications that I recommend to principals for practical advice. What follows is a summary of some practical key points in those documents and Internet addresses so that you can retrieve the guidance for your own use.

## **Harassment of Students**

On November 2, 2000, the Office of Civil Rights of the U.S. Department of Education ("DOE") published a request for comments on "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties." This document will replace the 1997 Guidance in light of the recent Supreme Court cases relating to sexual harassment in schools. It is available on the Internet at <http://www.ed.gov/legislation/FedRegister/other/2000-4/110200b.html>. The two decisions specifically addressing sexual harassment of students were *Gebser v. Lago Vista Independent School District (Gebser)*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education (Davis)*, 526 U.S. 629 (1999).

## **Damage Standard**

In *Gebser*, the Supreme Court held that a school can be liable for monetary damages if a teacher sexually harasses a student, an official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment. In *Davis*, the Court again held that a school may be liable for monetary damages if one student sexually harasses another student and the specific conditions of *Gebser* are met: a) an official who has authority to address the harassment has actual knowledge of the harassment and b) that official is deliberately indifferent in responding to the harassment. Deliberate indifference is clarified to mean that the response to the harassment, or lack thereof, is clearly unreasonable in light of the known circumstances.

## **OCR Responsibility Standard**

DOE points out that these liability standards are limited to private actions for monetary damages. DOE makes clear that regulatory compliance has a stricter standard of responsibility enforced by OCR through review and hearings with a possible penalty of forfeiture of federal funds and the obligation to remediate discriminatory actions. The Revised Guidance explains what DOE considers

to be the meaning of “to be responsible for the discrimination.” If the school district that is a recipient of federal funds discriminates on the basis of sex, it must take action necessary to overcome the effects of the discrimination. Thus, under the regulations, if the recipient discriminates against a student, the recipient must remedy the effects of that discrimination on the victim. This includes situations in which discrimination occurred because an employee of the recipient, in the context of providing aid, benefits or services to students, took action that denied or limited a student’s ability to participate in or benefit from the school’s program. The example given is an OCR investigation that finds a teacher of an advance placement math class routinely and without an educational basis gave female students lower grades than their male counterparts. OCR would find that the district has discriminated against students on the basis of sex and that corrective action is required. In order to resolve the discrimination in providing aid, benefits or services, of which other school officials subsequently became aware through the investigation, OCR would not only require a recipient to take proactive steps to end the discrimination and prevent its recurrence, but would also require the recipient to remedy the effects of the discrimination on the victims.

The Revised Guidance reiterates that schools are required by the regulations to disseminate a policy against sex discrimination and to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment. The *Gebser* court specifically affirmed DOE’s authority to enforce this requirement administratively in order to carry out Title IX’s non-discrimination mandate. DOE states, “*Strong policies and effective grievance procedures are essential in order to let students and employees know that sexual harassment will not be tolerated, to ensure that they know how to report it, and to let students and employees know that students can report harassment without fear of adverse consequences.*”

The Revised Guidance distinguishes notice of harassment under the regulations from notice as required for a damage suit. Under the Revised Guidance, notice may be given to a responsible school employee who would include any employee who either has the authority to take action to address harassment or **has the duty to report sexual harassment or other misconduct by students or employees to appropriate school authorities, as well as an individual whom a student could reasonably believe has the authority to either address the harassment or the responsibility to report it to someone with the authority to address it.**

The Revised Guidance explains that OCR will consider whether B 1) the school has a policy prohibiting sex discrimination under Title IX and effective grievance procedures, 2) the school appropriately investigated or otherwise responded to allegations of sexual harassment, 3) the school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent recurrence and, as appropriate, remedy its effects.

OCR outlines a variety of factors it considers to evaluate the severity and pervasiveness of the conduct.

- § The degree to which the conduct affected one or more students' education
- § The type, frequency and duration of the conduct
- § The identity of and relationship between the alleged harasser and the subject or subjects of the harassment
- § The number of individuals involved
- § The age and sex of the alleged harasser
- § The size of the school, location of the incidents and context in which they occurred
- § Other incidents at the school
- § Incidents of gender-based, but non-sexual harassment

## **FERPA Connection**

The introduction to the Revised Guidance discusses the relationship between the Family Educational Rights and Privacy Act ("FERPA") and Title IX, both of which are administered by DOE. The requirements of FERPA are involved if there are questions about disclosure of information from a student's educational records in cases of student-on-student harassment. The 1997 Guidance interpreted FERPA generally to prevent a school from disclosing to a student who complained of harassment, information about the sanction or discipline imposed upon a student who was found to have engaged in harassment. The exceptions noted are the case of a sanction that directly relates to the victim who was harassed, such as an order that the harasser stay away from the victim; or sanctions related to offenses for which there is a statutory exception, such as crimes of violence. In addition, if OCR is conducting a civil rights investigation, FERPA does not prohibit schools from disclosing information from a student's educational records, including information about applicable sanctions or discipline, to OCR.

The Revised Guidance clarifies that DOE interprets FERPA to permit a student who filed a harassment complaint to learn the outcome of his or her complaint, "that is, to learn whether the complaint was investigated and whether harassment was found B because the information directly

relates to the victim.” However, it remains the DOE’s position that FERPA prevents a school from disclosing to a victim the sanction or discipline imposed upon the student found to have harassed the victim (unless, as previously described, the sanction is directly related to the victim or there is a statutory exception). DOE recognizes that information about the sanction is important to the victim’s remedy because this information enables the victim to determine whether the school responded appropriately. As a result, DOE is supporting a statutory amendment to FERPA to permit this disclosure.

## **Response to Complaint**

A relevant section to administrators is the subtopic of “Response to Student or Parent Reports of Harassment; Response to Direct Observation of Harassment by Responsible Employee.” If a student or a parent complains about sexual harassment of a student, OCR recommends that the school initially discuss what actions the student or parent is seeking in response to the harassment. The school is advised to explain the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works. Regardless of whether the student who was harassed or his/her parent decides to file a formal complaint or request action, the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.

OCR also explains that it may be appropriate for a school to take interim measures during the investigation of a complaint. For instance, if the student alleges that he/she has been sexually assaulted by another student, the school may decide to place the students immediately in separate classes pending the result of the school’s investigation. Similarly, if the alleged harasser is a teacher, allowing the student to transfer to a different class may be appropriate. In cases involving potential criminal conduct, school personnel should determine whether appropriate law enforcement authorities should be notified. OCR advises that schools should make every effort to prevent disclosure of the names of all parties involved except to the extent necessary to carry out the investigation.

The Revised Guidance speaks to appropriate steps to end the harassment. One example is to counsel, warn or take disciplinary action against the harasser. A series of escalating consequences may be necessary if initial steps are ineffective in stopping the harassment. The harasser may be specifically directed to have no further contact with the harassed students. Any responsive measures should be designed to minimize the burden on the student who was harassed. Steps should also be taken to eliminate any hostile environment that has been created. The school may need to deliver special training or other interventions for students in a class to repair the educational environment. If the school offers the student the option of withdrawing from a class in which a hostile environment occurred, the school should assist the student in making program or schedule changes and ensure that none of the changes adversely affect the student’s academic record. Other measures may include directing a harasser to apologize. An effective response may include dissemination of information, the issuance of a new policy statement or other steps designed to communicate the message that the school does not tolerate harassment and will be responsive to any student who reports that conduct.

In some instances, OCR may require other services to the harassed student, if necessary, to address the effects of the harassment. For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances, the school may make arrangements for an independent reassessment of the student's work and change the grade accordingly or make arrangements for the student to take the course again with a different teacher or provide tutoring or offer reimbursement for professional counseling. To prevent any retaliation or future harassment, the school should make sure that harassed students and their parents know how to report any subsequent problems and the school should make follow-up inquiries to see if there have been any new incidents or any retaliation. To prevent recurrences, counseling for the harasser may be appropriate to ensure that he/she understands what constitutes harassment and the effects it may have. Depending upon the widespread nature of the harassment and the number of incidents, the school may need to provide training for the larger school community to ensure that students, parents and teachers can recognize harassment and know how to respond.

## The Investigation

A second source of valuable assistance is published by the U.S. Equal Employment Opportunity Commission and is entitled "Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors" ("Enforcement Guidance"). The Enforcement Guidance can be found on the Internet at <http://www.eeoc.gov/docs/harassment.html>.

This Guidance is particularly helpful in laying out an effective investigative process. There are two pages of specific questions to ask parties and witnesses. In the investigation of sexual harassment complaints, credibility determinations are often necessary. The Enforcement Guidance suggests the following factors to consider:

- § **Inherent Plausibility:** Is the testimony believable on its face? Does it make sense?
  
- § **Demeanor:** Did the person seem to be telling the truth or lying?
  
- § **Motive to Falsify:** Did the person have a reason to lie?
  
- § **Corroboration:** Is there **witness testimony** (such as testimony by eyewitnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?

- § **Past Record:** Did the alleged harasser have a history of similar behavior in the past?

The Enforcement Guidance emphasizes that a determination must be reached following finalization of interviews and resolution of credibility issues. **The parties should be informed of the determination.** If direct contradictions between parties and the lack of corroboration occur, a credibility assessment may form the basis for the determination based on the factors set forth above. If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures such as training and monitoring.

### Remedies for Employee Harassment

As to remediation, the Enforcement Guidance stresses that the measures should be designed to stop the harassment, correct its effect on the employee and ensure the harassment does not recur. To balance the competing concerns of liability of the school district if the harassment continues against liability for wrongful discharge, disciplinary measures should be proportional to the seriousness of the offense. If the harassment is minor, such as a small number of off-color remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that are necessary. However, if the harassment is severe or persistent, then suspension or discharge may be appropriate. The Enforcement Guidance advises that remedial measures should not adversely affect the complainant. For example, if the parties are separated, the harasser should be transferred unless the complainant prefers otherwise. The Enforcement Guidance sets forth examples of measures to stop the harassment and ensure that it does not recur: oral or written warning or reprimand; transfer or reassignment; demotion; reduction of wages; suspension; discharge; training or counseling of harasser to ensure that s/he understands why his or her conduct violated the employer's anti-harassment policy; and monitoring of harasser to ensure that the harassment stops. Examples of measures to correct the effects of harassment are: restoration of leave taken because of harassment; expungement of negative evaluations in employee's personnel file that arose from the harassment; reinstatement; apology by the harasser; monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the harasser or others in the workplace because of the complaint; and correction of any other harm caused by the harassment.

### **Miscellaneous Recommendations**

The Enforcement Guidance suggests that all supervisors and managers should be instructed to report complaints of harassment regardless of whether they are officially designated to take complaints and regardless of whether a complaint was framed in a way that conforms to the organization's particular complaint procedures. For example, if an employee files a PHRC charge alleging unlawful harassment, the employer should launch an internal investigation, even if the employee did not complain to management through its internal complaint process. EEOC indicates it is advisable for an employer to retain records of all complaints of harassment. Without such

records, the employer could be unaware of a pattern of harassment by the same individual. Such a pattern is relevant to credibility assessments and disciplinary measures. One recommendation to improve employees' reliance on the process and their confidence in the commitment to eradicate harassment is for the employer periodically to release general information to employees about corrective and disciplinary measures undertaken to stop harassment.

## Protecting Students from Harassment

The final resource on harassment was a joint venture by the National Association of Attorneys General ("NAAG") and the Office for Civil Rights of the U.S. Department of Education. The guide is titled *Protecting Students from Harassment and Hate Crimes*, issued January, 1999. The guide is available on the U.S. Department of Education web page at <http://www.ed.gov/pubs/harassment>. The appendices are particularly valuable and present sample school policies prohibiting harassment and violence. There is also an appendix on protocols and checklists for complaint investigation and evaluation of grievance procedures. The checklist provides important information on the issue of the investigator assuring confidentiality. This includes "not disclosing facts about the investigation to others, warning those interviewed against discussing the case with others, keeping records of the investigation in locked files, and limiting information dissemination to those who absolutely must receive it and need to know." This is even more urgent when the investigator considers the necessity of protecting her/himself against charges of defamation by the accused harasser.

The basic investigation protocol recommends that a thorough written statement of what is alleged to have happened based on the interview with the complainant be prepared, signed by the complainant and placed in the file. The basic checklist outlines a plan for the investigation that should include the determination of "**who** the alleged harassers were, **when and where** the incident took place, **what** was said or done by the parties, **whether** the incident was isolated or part of a continuing practice, the reaction of the complainant, **how** the complainant was affected, **whether** anyone else witnessed the incident, **whether** the complainant has talked to anyone else about the incident, **whether** there is any documentation about the incident and **whether** the complainant has knowledge of any other target of harassment." At a minimum, an interview with the alleged harasser must also occur.