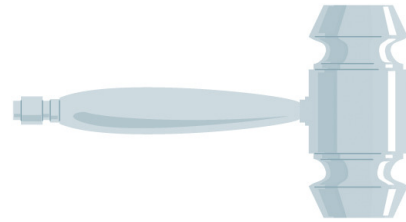


Legal Corner



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Responding to Bullying and Sexual Harassment in Light of Recent Guidance Provided by the U.S. Department of Education's Office for Civil Rights¹



I. Introduction

The purpose of this article is to provide an overview of the recent guidance on bullying and harassment (hereafter "bullying") and sexual harassment matters that has been provided by the U.S. Department of Education's Office for Civil Rights ("OCR"), and to offer some suggestions for how to comply with that guidance. In

that regard, in 2010 and 2011, OCR issued two comprehensive letters that describe how a school should deal with bullying and sexual harassment issues. OCR enforces key federal laws² that apply to "all state education agencies, *elementary and secondary school systems*, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries and museums that receive U.S. Department of Education funds"³ (emphasis added).⁴ Therefore, OCR's views have to be accounted for in a school's responses to incidents of bullying and sexual harassment. This is true even though school administrators may view OCR's guidance as setting a very difficult standard to meet in dealing with bullying and harassment, particularly given the reduced dollars and resources schools have in the current economic environment. Indeed, as explained in this article, OCR suggests that even timely and good faith efforts to detect, deter and punish bullying and harassment may not be sufficient to meet OCR's standards of how schools should respond to such conduct or avert OCR enforcement actions. Nonetheless, given OCR's role in enforcing key federal anti-discrimination laws, school administrators should understand OCR's guidance on bully-

ing and sexual harassment and take reasonable measures to meet the standards.

II. OCR's Guidance Letters as to Bullying and Sexual Harassment

OCR's guidance as to bullying and sexual harassment is contained in two letters, one from October 2010 that deals with bullying ("Bullying Letter"), and one from April 2011 that deals with sexual harassment ("Sexual Harassment Letter").⁵

A. OCR's Bullying Letter

OCR's Bullying Letter "focuses on the elementary and secondary school context."⁶ OCR's definition of the bullying and harassment at issue in its letter is as follows:

. . . [V]erbal 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 civil rights laws that OCR enforces.⁷

OCR states that a school is "responsible for addressing bullying incidents about which it knows or

reasonably should have known,¹⁸ and expects schools to promptly and thoroughly investigate such conduct. OCR does not set any definite standards for investigations of bullying or even discuss the characteristics of what OCR considers to be a sufficient investigation. Rather, OCR advises only that “the specific steps in a school’s investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school and other factors.”¹⁹

Schools must “take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects and prevent the harassment from recurring,”¹⁰ and must process complaints of discrimination even when they originate from acts that do not occur on school property.¹¹

OCR states that schools are responsible for providing training to students and teachers as to the schools’ discrimination policies, and may be required to issue entirely new policies as to bullying, harassment and discrimination in response to a single incident of such conduct.¹²

Finally, OCR emphasizes that schools can be held accountable for discriminatory conduct of students, even when schools address that conduct with discipline and other measures if, in OCR’s view, the schools did not adequately address discrimination.¹³

B. OCR’s Sexual Harassment Letter

OCR defines sexual harassment as “unwelcome conduct of a sexual nature.”¹⁴ OCR instructs that it will view as sexual harassment “. . . sexual advances, requests for sexual favors and other verbal, nonverbal or physical conduct of a sexual nature.”¹⁵ In the letter, OCR states that “[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence and address its effects.”¹⁶

According to OCR, schools must, among other things, promptly investigate complaints of sexual

harassment, proceed with investigations even when the conduct at issue is also the subject of a criminal investigation; process complaints of sexual harassment even as to incidents that occur away from school;¹⁷ provide sexual harassment training to employees at all levels;¹⁸ provide sexual harassment training for athletes and others;¹⁹ and take immediate steps to eliminate a hostile environment.²⁰

OCR suggests that schools should take a number of other steps as to sexual harassment such as providing a collection of services including having an employee who is “on-call” to assist sexual harassment victims²¹ and conducting periodic assessments of student conduct as to whether it violates sexual harassment policies.²²

As with bullying, OCR does not give any specific guidance as to the investigation of sexual harassment, stating that the requirements for an investigation hinge on “. . . the nature of the allegations, the age of the student or students involved (particularly in elementary and secondary schools), the size and administrative structure of the school and other factors.”²³ Similarly, OCR does not provide any concrete information as to what it views as sufficient training on sexual harassment and simply recommends that such training should “include practical information about how to identify and report sexual harassment and violence.”²⁴

III. Complying With OCR’s Standards

There is no definitive list of recommendations that, if followed, will guarantee that a school will avoid an OCR investigation or other action. However, the following suggestions take into account some of the issues OCR focuses on in its Bullying and Sexual Harassment Letters and, if incorporated in a school’s strategy for addressing bullying and sexual harassment, may assist a school in meeting OCR’s requirements and in defending itself if legal action is taken against the school. A school should keep its solicitor informed of bullying and sexual harassment incidents as the solicitor may be able to assist the school in avoiding legal problems and may detect legal issues that are not immediately apparent to schools.



A. Conduct Reasonable and Well-Documented Investigations

Conducting reasonable and well-documented investigations demonstrates a school's concern about bullying and sexual harassment and may increase the chances that the school will uncover such conduct so that it can be stopped and punished. As noted above, while OCR emphasizes the importance of investigating bullying and sexual harassment, OCR gives only general guidance as to what it considers to be a sufficient investigation. This leaves a school to make case-by-case judgments, with the advice of its solicitor, about the amount of time and resources to put into an investigation. It will be important to document with appropriate notes, reports, forms and other recordkeeping what was done in an investigation, such as the questioning of students, discussions with staff and meetings with parents. It is difficult and time-consuming to keep such records, however, they may later be used to defend a school's actions and the absence of records may be viewed as evidence that a school acted inadequately.

B. Provide Adequate Training

As noted above, in its Bullying and Sexual Harassment Letters, OCR refers to the need for a school to provide training for students and employees, though OCR does not give specific guidance as to what it views as proper training. Such training may, for example, explain bullying and sexual harassment, their causes and generally accepted strategies for dealing with those problems. It is recommended that if a school is not already doing so that it should provide training on bullying and sexual harassment to students and employees. The regularity and nature of such training will depend on factors such as the school's resources and if there are ongoing problems of bullying or harassment at the school that need to be addressed. A school should consult appropriately with experts on training, either internally in the school district or through an external source, before selecting a particular form of training. Training is especially important for school officials whose jobs require them to be responsible for dealing with bullying or sexual harassment. As with conducting reasonable and well-documented investigations, providing training will assist a school in meeting OCR's requirements and serve as evidence of the school's efforts to address bullying and sexual harassment should the school face action arising out of bullying or sexual harassment incidents.

C. Have Proper Policies

Under section 1303.1-A (a)²⁵ of the School Code, a school is required to adopt a policy or amend an existing policy relating to bullying and to incorporate it into the Code of Student Conduct. A school's policies on bullying and sexual harassment may, for example, define such conduct, contain examples of conduct that will constitute bullying and harassment and set out procedures for addressing such conduct. OCR's Bullying and Sexual Harassment Letters "encourage" schools to "reevaluate the policies and practices . . . use[d] to address bullying."²⁶ In doing so, OCR refers to a number of online and other resources that can provide information on policies.²⁷ According to OCR, it is particularly important that the policies comply with "mandates of the federal civil rights laws."²⁸ In evaluating policies, schools should consult with their solicitors and obtain any other guidance they need to arrive at policies that are clear, effective and comply with OCR's standards.

D. Criminal Proceedings Do Not Halt a School's Obligation To Take Measures in Response to a Sexual Harassment Incident

As noted above, OCR has stated that a school cannot wait for the conclusion of a criminal investigation or proceeding to pursue a Title IX investigation and take other steps in response to a harassment



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incident. Thus, a school must proceed to the extent it can when criminal proceedings are underway and take steps to protect a victim of sexual harassment. A school should review any memorandums of understanding it has with police departments because, according to OCR, those agreements cannot prevent a school from protecting students, advising victims of their rights under school grievances or taking other such steps. Of course, a school should take such actions in close cooperation with law enforcement authorities and with the advice of its solicitor.

IV. Conclusion

A school should pay careful attention to the information provided in the OCR Bullying and Sexual Harassment Letters. Given OCR's central role in enforcing key federal civil rights laws that apply to a school, it is essential for school administrators to be familiar with the guidance offered and take reasonable measures to incorporate that guidance into the school's response to bullying and sexual harassment incidents.

Endnotes

¹ This article should not be construed as legal advice or as pertaining to any specific factual scenario.

² See, e.g., Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000d, et seq.; Title IX, Education Amendments of 1972, 20 U.S.C. §1681, et seq.; Section 504, Rehabilitation Act of 1973, 29 U.S.C. §794; Title II, Americans With Disabilities Act, 42 U.S.C. §12131, et seq.

³ www.ed.gov (portion of web site regarding OCR).

⁴ Of course, state law also applies to bullying and sexual harassment incidents. See Pennsylvania Human Relations Act, 43 P.S. §951-963; Pennsylvania Public School Code, 24 P.S. §13-1303.1-A (a) (2008). However, the focus of this article is on responding to bullying and sexual harassment incidents in light of OCR's recent guidance, and therefore, we will not address the particulars of state laws.

⁵ October 26, 2010, letter from Russlyn Alli, OCR Assistant Secretary for Civil Rights, to all "Colleagues" re: "Harassment and Bullying ("Bullying Letter"); and April 4, 2011, letter from Russlyn Alli, OCR Assistant Secretary for Civil Rights, to all "Colleagues" re: Sexual Violence ("Sexual Harassment Letter"). Copies of the Bullying and Sexual Harassment Letters are on the web at <http://www2.ed.gov/about/offices/list/ocr/publications>.

⁶ Bullying Letter, p.1.

⁷ Bullying Letter, p.2.

⁸ Bullying Letter, p.2.

⁹ Bullying Letter, p.2.

¹⁰ Bullying Letter, p.3.

¹¹ Bullying Letter, p.4.

¹² Bullying Letter, p.3.

¹³ Bullying Letter, p.p. 4-9.

¹⁴ Sexual Harassment Letter, p.3.

¹⁵ Sexual Harassment Letter, p.3.

¹⁶ Sexual Harassment Letter, p.4.

¹⁷ Sexual Harassment Letter, p.10.

¹⁸ Sexual Harassment Letter, p.4.

¹⁹ Sexual Harassment Letter, p.14.

²⁰ Sexual Harassment Letter, p.4.

²¹ Sexual Harassment Letter, p.17.

²² Sexual Harassment Letter, p.18.

²³ Sexual Harassment Letter, p.5.

²⁴ Sexual Harassment Letter, p.4.

²⁵ 24 P.S. §13-1303.1-A (a) (2008).


²⁶ Bullying Letter, p.9.

²⁷ Bullying Letter, p.9, note 20.

²⁸ Bullying Letter, p.9.

Digital Literacy: Motivating Students with eReaders

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 **TIP:** Remind teachers to access their best resource in the classroom, the students. Digital readers are similar to technologies used by students outside of school.

Conclusion

Digital readers like the Nook have the capability of transforming the traditional methods of reading instruction, while supporting the need for inclusion of digital literacy in the school setting. The interactive features in the Nook excite and motivate students, thus creating enthusiasm as students engage in the reading process.

As students continue to enter schools with a tech-savvy skill set, educators and administrators need to support these skills by providing opportunities to interact with digital technologies. Addressing students' high-tech media environment is a priority for educators (Considine, Horton & Moorman, 2009). Incorporating

e-readers like the Nook into the classroom provides an avenue for educators to shift from the traditional method of using print-based texts to an approach that blends technology to create a digital literacy atmosphere.

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