



# ARCHIVED INFORMATION

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

August 27, 2015

The Honorable Bob Goodlatte  
Chairman  
House Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

Dear Representative Goodlatte:

Thank you for your August 10, 2015 letter in which you ask for information regarding whether the Office for Civil Rights (OCR) considers public criticisms of the merits of a Title IX complaint acts of retaliation against complainants and whether institutions should have procedures for dismissing complaints that, even if true, would not constitute violations of Title IX. In your letter you also ask about an investigation that Northwestern University conducted into written statements made by Professor Laura Kipnis. OCR has not investigated or otherwise evaluated any actions Northwestern University took with regard to the matter you raise involving Professor Kipnis, and this letter should not be regarded as commenting on those particular circumstances. With respect to your other inquiries we are happy to provide you with information regarding how Title IX applies generally.

As you note in your letter, OCR issued guidance on April 24, 2013 concerning the prohibition against retaliation under Federal civil rights laws, including Title IX. Consistent with U.S. Supreme Court precedent, OCR would not find an act to be retaliatory unless it is “materially adverse;” that is, unless it is likely to dissuade a reasonable person in the complainant’s position from making or supporting a charge of discrimination.<sup>1</sup> This standard looks to the factual circumstances of each case to separate significant from trivial harms.<sup>2</sup> Therefore, a school official’s public statements in response to a Title IX complaint could be materially adverse depending on the specific facts. In most instances, it is unlikely that a faculty member’s statement criticizing the merits of a complaint – including questioning the accuracy of the underlying factual allegations – would rise to that level. However, such a statement could be materially adverse if, for example, a reasonable person would find its contents to be so disparaging, threatening, or intimidating that it would deter him or her from pursuing the complaint or cooperating with investigators.

OCR has also made clear that the laws and regulations that protect students from prohibited discrimination are not intended to restrict the exercise of speech protected under the U.S. Constitution. OCR’s Dear Colleague Letter on the First Amendment states unequivocally that “schools in regulating

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<sup>1</sup> See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

<sup>2</sup> See *id.* at 68-69.

the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the rights of students and faculty, including those court precedents interpreting the concept of free speech.”<sup>3</sup> Likewise, OCR’s guidance on sexual harassment states that “a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights.”<sup>4</sup>

Title IX requires that institutions adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination, including retaliation.<sup>5</sup> Institution’s procedures will vary in detail, specificity, and components, reflecting differences in state or local legal requirements and each institution’s size, administrative structure, and what it has learned from past experiences.<sup>6</sup> In order for these procedures to comply with the prompt and equitable requirements of Title IX, they must include, among other things, a provision for an adequate, reliable, and impartial investigation of complaints.<sup>7</sup> The specific steps in an institution’s Title IX investigation will vary depending on the nature of the allegation.<sup>8</sup>

OCR does not require the use of a specific set of grievance procedures. Provided that an institution’s procedures meet the prompt and equitable requirements of Title IX, it has the flexibility to determine whether it is appropriate to include a procedure for dismissing complaints that, even if true, would not constitute violations of Title IX in its grievance procedures.

Thank you again for writing. I hope this information is helpful.

Sincerely,



Catherine E. Lhamon  
Assistant Secretary for Civil Rights

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<sup>3</sup> *Dear Colleague Letter: First Amendment* (July 28, 2003) (2003 DCL).

<sup>4</sup> 2001 Guidance at 22-23; see also 2014 Q&A at 43 (making clear that the OCR’s First Amendment DCL remains in effect ); 2010 DCL at 2 n.8 (recognizing free speech implications and referring readers to the 2003 DCL); *Racial Incidents and Harassment against Students at Educational Institutions: Investigative Guidance* at 59 Fed. Reg. 11448, 11450 n.7 (stating that OCR does not “endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the First Amendment”).

<sup>5</sup> 34 C.F.R. § 106.8(b).

<sup>6</sup> See, e.g., *Questions and Answers on Title IX and Sexual Violence at 14* (April 29, 2014) (2014 Q&A); *Dear Colleague Letter on Sexual Violence* at 9 (April 4, 2011) (2011 DCL); *Revised Sexual Harassment Guidance* at 20 (January 19, 2001) (2001 Guidance).

<sup>7</sup> See, e.g., 2014 Q&A at 12; 2011 DCL at 9; 2001 Guidance at 20.

<sup>8</sup> See, e.g., 2014 Q&A at 24; 2011 DCL at 4-5; *Dear Colleague Letter on Harassment and Bullying* at 2; (October 29, 2010) (2010 DCL).