

ARCHIVED INFORMATION



U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights



July 12, 2013

Professor Ann Green and Professor Donna Potts
American Association of University Professors
113 19th Street, NW, Suite 200
Washington, DC 20036

Dear Professors Green and Potts:

This is in response to your June 6, 2013 letter regarding the May 9, 2013 Joint Findings Letter (Findings Letter) of the United States Department of Justice and the United States Department of Education resulting from our investigation of the University of Montana's handling of allegations of sexual assault and harassment at its Missoula campus. Thank you for writing and sharing AAUP's policy statement, *Campus Sexual Assault: Suggested Policies and Procedures*. We share your interest in creating equal opportunity on university campuses across the country and further share your commitment to the First Amendment and to the preservation of free speech in the university setting. We would like to allay the concerns you expressed in your letter, which appear to be based on a misunderstanding that the Findings Letter and terms of the University's voluntary Agreement (Agreement) with the United States "may pose a threat to academic freedom in the classroom." Letter at 2.

As you know, our investigation of the University of Montana addressed serious issues of sexual harassment and sexual assaults, including rapes. In 2012, in response to allegations that the University had a significant and unresolved problem with sexual assault and rape, the United States began its inquiry, which included interviews of more than 40 witnesses and review of thousands of documents. We found that students subjected to rape, sexual assault or harassment faced a hostile environment — they could not engage in or complete their academic work; they suffered mental health consequences, including suicidal thoughts; they felt unsafe on campus; and some left the University altogether. Findings Letter at 7, 23. The investigation further found that the University failed to eliminate this hostile environment or to adequately respond to complaints of sexual assault and harassment. *Id.* We also discovered that the University's numerous policies created confusion about when and how to report sexual harassment and found evidence that rapes, sexual assaults and sexual harassment short of assault were under-reported. *Id.* at 7-9.

The University cooperated with our investigation and voluntarily entered into an out-of-court Agreement to resolve these serious problems. Given the evidence of under-reporting of sexual assault and harassment, the Agreement aims both to create a safe space for students to raise concerns and report complaints of sexual harassment or assault and to give the University tools to address the concerns raised before they amount to a violation of federal civil rights law

or cause additional injury to students. Thus, the Agreement calls for the University's policies to clarify that reports of "unwelcome conduct of a sexual nature" can be made to enable the University to investigate *whether* the unwelcome sexual conduct has created a hostile environment, counter under-reporting and establish an early warning system that affords the University a chance to *prevent* such conduct from creating a hostile environment. Agreement ¶¶ II.A.1, II.A.8, II.A.9; *see also* Findings Letter at 8-9.

In your letter, you express concern that the resolution of the Montana case involved a "redefinition of sexual harassment" that threatens academic freedom. Letter at 2. We can assure you that the Findings Letter and Agreement do not redefine sexual harassment or eliminate the inquiry into whether the harassment is objectively offensive. Indeed, both documents' definitions of sexual harassment and hostile environment are completely consistent both with the First Amendment and with longstanding Title IX guidance that has been applied by three Administrations. *See* Department of Education, Office for Civil Rights (OCR), *Revised Sexual Harassment Guidance* (2001); Department of Education, OCR, *Dear Colleague Letter* (2006) (enclosing 2001 *Guidance* and explaining that "the guidance outlines standards applicable to OCR's enforcement of compliance in cases raising sexual harassment issues"); Department of Education, OCR, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011).¹ The standards outlined in the *Guidance* and the *Dear Colleague Letter* state that sexual harassment is "unwelcome conduct of a sexual nature"² but that sexual harassment does not create a hostile environment under Title IX unless "the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the [school's] program."³ In determining whether sexual harassment has created a hostile environment at the University or elsewhere, the United States looks to the "constellation of surrounding circumstances, expectations, and relationships," 2001 *Guidance* at vi (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999)), including whether the sexual harassment is objectively offensive to a reasonable person. 2001 *Guidance* at 5-7. The Findings Letter and Agreement reiterate and apply these standards.⁴

¹ The 2001 *Guidance* is available on OCR's website at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>. The 2011 and 2006 *Dear Colleague Letter* are available on OCR's website at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> and <http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>. The 2001 *Guidance* replaced OCR's 1997 Title IX Guidance, but the definitions of "sexual harassment" and "hostile environment" have remained the same since 1997. *See* OCR Guidance, "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 62 Fed. Reg. 12033, 12034, 12038, 12040-41 (Mar. 13, 1997) (1997 *Guidance*).

² 2011 *Dear Colleague Letter* at 3; 2001 *Guidance* at 2, 7.

³ Findings Letter at 4, 5, 8; 2001 *Guidance* at 5, 12; *Dear Colleague Letter* at 3. *See also* 1997 Guidance, 62 Fed. Reg. at 12038, 12041 ("Hostile environment sexual harassment . . . is created if conduct of a sexual nature is 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.") (footnotes omitted).

⁴ Findings Letter at 4-5, 8-9; Agreement at 2.

Thus, complaints of “unwelcome sexual conduct” are merely a starting point for investigation and do not alone establish a violation of Title IX; nothing in the Findings Letter or the Agreement contravenes this longstanding principle. Students should not, however, bear the burden of determining whether sexual harassment has created a hostile environment before they feel empowered to alert their universities to their concerns – and universities need not wait until the point at which legal liability attaches to take steps to protect their students. Under the Agreement, when 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. Agreement ¶ II.A.8. Where the University finds that a hostile environment exists, the University must eliminate it, prevent its recurrence, and remedy its effects.⁵ During the course of its investigation, moreover, the University must take steps, if necessary, to protect the complainant from further harassment or assault. Those steps can include, for example, separating the complainant from the alleged perpetrator, providing counseling to the complainant, or providing extensions of time on course work. *Id.* ¶ II.A.9. Neither the Agreement nor the Findings Letter mandates the imposition of discipline on the perpetrator,⁶ and the University must of course abide by Constitutional standards in determining when discipline is appropriate.

Your letter also outlines specific concerns related to curriculum taught on college campuses. Title IX does not reach curriculum or in any way prohibit or abridge the use of particular textbooks or curricular materials. *See* 28 C.F.R. § 54.455; 34 C.F.R. § 106.42. Furthermore, as OCR’s 2001 *Guidance* stated,

Title IX is intended to protect students from sex discrimination, not to regulate content of speech...[T]he offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.⁷

This document also stated that “a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights.”⁸ Consistent with these principles, neither the Findings Letter nor existing Title IX guidance inhibits academic freedom in the classroom.

⁵ Findings Letter at 4, 24; *Dear Colleague Letter* at 4, 15; *see also* 2001 *Guidance* at iii, 4, 12, 14.

⁶ *See, e.g.*, Agreement ¶ II.A.4 (identify the individual responsible for “seeking disciplinary action against the accused (where appropriate)”); *id.* ¶ II.A.14 (procedures should include “examples of the range of possible disciplinary sanctions”); *id.* ¶ VI.B (electronic database to include a field for “the name(s) of the person(s) assigned to ... bring disciplinary charges (where relevant)”); Findings Letter at 5 (“disciplining the harasser where appropriate”), *id.* at 6 (“Appropriate steps may include ... disciplinary action”), *id.* at 9 n. 11 (“may face disciplinary consequences”).

⁷ 2001 *Guidance* at 22. *See also* OCR *Dear Colleague Letter* on the First Amendment, July 28, 2003 (explaining that “OCR’s regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses”) (*available at* <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>).

⁸ 2001 *Guidance* at 22. The 2001 *Guidance* included an example of classroom assignments and presentations that some students found sexually offensive but that constituted academic discourse protected by the First Amendment. *Id.* at 22-23.

It is also important to note that the Findings Letter and Agreement in the Montana case represent the resolution of that particular case. We hope that these documents will be helpful for schools seeking to address problems similar to those that were identified at the University of Montana. Each school, however, will need to take into account the circumstances on its own campus in adopting practices to comply with Title IX.

Thank you for taking the time to contact the United States about your concerns. Please feel free to contact us again regarding this or any other matter.

Sincerely,



Jocelyn Samuels
Principal Deputy Assistant Attorney General
Department of Justice



Seth Galanter
Acting Assistant Secretary for Civil Rights
Department of Education