UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Francisco M. Negrón, Jr.
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1680 Duke Street
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MAR 25 2011

Dear Mr. Negrón:

Thank you for your letter to Charlie Rose dated December 7, 2010, regarding the Dear Colleague letter (DCL) on harassment and bullying issued by the U.S. Department of Education's Office for Civil Rights (OCR) on October 26, 2010. I am pleased to respond on his behalf. We share your deep concern for protecting students and helping school districts develop and implement policies to address bullying and harassment. I appreciated the opportunity to address your letter during our telephone conversation on December 8, 2010. Consistent with our discussion, we provide below the Department's written response to the issues raised in your letter.

In your letter, you express concern that "absent clarification," the DCL will "invite misguided litigation that needlessly drains precious school resources and creates adversarial climates that distract schools from their educational mission."[1] While we share your concern that schools spend their resources efficiently and equitably in pursuit of their educational mission, we disagree with you that the DCL will invite "misguided litigation." The DCL alerts schools that discriminatory harassment that is sufficiently serious to create a hostile environment, may undermine schools' ability to effectively pursue their educational mission. The DCL is designed to equip schools to better prevent and appropriately respond to harassment to ensure that all students have the opportunity to achieve their full potential in school. Vigilance in identifying and effectively responding to harassment described in the DCL should help to insulate schools from liability, not increase it.

Your letter states that the DCL "significantly expands the standard of liability set forth in *Davis v. Monroe County Board of Education*."[2] As explained during the December 8th call, the standards articulated in the DCL are not new, and do not expand the standard of liability for

[1] Letter from Francisco M. Negrón, Jr., National School Boards Association at 1-2 (December 7, 2010) (NSBA Letter).
[2] *Id.* at 2, *citing Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

administrative enforcement of federal civil rights laws with respect to harassment. The DCL specifies "the legal standards that apply in administrative enforcement and in court cases where plaintiffs are seeking injunctive relief."[3] They are the same standards that were set forth by OCR in its 1994 guidance on racial harassment, 1997 guidance on sexual harassment, 2000 guidance on disability harassment, 2001 revised guidance on sexual harassment, which was reissued with an accompanying Dear Colleague Letter in 2006, and a 2008 pamphlet on sexual harassment.[4] The DCL also cites prior OCR guidance documents on peer harassment under federal civil rights laws throughout the letter, including a list at the end of the DCL with web links to those documents.

As you know, *Davis* was a case involving a claim for monetary damages; it was not a case involving administrative enforcement by a federal agency. In 2001, OCR revised its 1997 guidance on sexual harassment to specifically address the impact of *Davis* and *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).[5] Both the 1997 and 2001 guidance went through a formal notice-and-comment process. OCR's 2001 Sexual Harassment Guidance explains in detail why the standards OCR uses for administrative enforcement are different from the liability standards established in *Davis* for private lawsuits seeking monetary damages.

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[3] *See* DCL at 1 n.6.

[4] *See Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance*, 59 Fed. Reg. 11,448 (March 10, 1994) (Racial Harassment Guidance); *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,* 62 Fed. Reg. 12,034 (March 13, 1997) (1997 Sexual Harassment Guidance); Letter from Secretary Riley to School Superintendents (August 31, 1998) (informing school officials that the *Gebser* decision did not change a school's obligations to take reasonable steps under Title IX and the regulations to prevent and eliminate sexual harassment as a condition of receipt of Federal funding); Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000) (Disability Harassment DCL); *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* at i (January 19, 2001) (2001 Sexual Harassment Guidance) ("The revised guidance reaffirms the compliance standards that OCR applies in *investigations and administrative enforcement* of Title IX... regarding sexual harassment. The revised guidance re-grounds these standards in the Title IX regulations, *distinguishing them from the standards applicable to private litigation for money damages.*") (emphasis added); Dear Colleague Letter: Sexual Harassment Issues at 1 (January 25, 2006) (2006 Sexual Harassment DCL) ("You should be aware that the guidance outlines standards applicable to OCR's enforcement of compliance in cases raising sexual harassment issues. It does not purport to discuss standards applicable to private Title IX lawsuits for monetary damages"); *Sexual Harassment: It's Not Academic* (September 2008) (2008 Sexual Harassment Pamphlet).

[5] 2001 Sexual Harassment Guidance at ii ("... although in most important respects the substance of the 1997 guidance was reaffirmed in *Gebser* and *Davis*, certain areas of the 1997 guidance could be strengthened by further clarification and explanation of the Title IX regulatory basis for the guidance.").

We noted therein that "[c]ommenters uniformly agreed with OCR that the Court limited the liability standards established in *Gebser* and *Davis* to private actions for monetary damages."[6] Section IV of the 2001 Sexual Harassment Guidance specifically grounds OCR's enforcement of Title IX in the assurance of compliance signed by every recipient of Federal financial assistance, in which the recipient agrees to comply with the agency's regulations. The Supreme Court acknowledged the power of Federal agencies, such as the Department, to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate" in circumstances that would not give rise to a claim for monetary damages.[7] Thus, the DCL explains clearly that the standards described in the guidance are those used by OCR for determining whether a school district is in compliance with federal civil rights laws.

Once we clarified this distinction in the DCL for you, it was clear from our conversation that many of the specific concerns in your letter about how OCR interprets *Davis* appear to have been based on a misreading of the DCL. As promised, the following are written responses to those concerns.

You correctly point out that *Davis* holds that school districts may be liable for monetary damages for harassment about which they have "actual knowledge," whereas the DCL states that a school is responsible for harassment about which it "knows or reasonably should have known."[8] As we discussed, the standard articulated in the DCL is the standard OCR used in the 2001 Sexual Harassment Guidance and other prior guidance documents.[9] The Supreme Court

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[6] *Id.* at iv.

[7] *Gebser,* 524 U.S. at 292 ("[T]he failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute. *E.g., Grove City*, 465 U.S. at 574-575 (permitting administrative enforcement of regulation requiring college to execute an 'Assurance of Compliance' with Title IX). We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.").

[8] NSBA Letter at 2.

[9] *See* 2008 Sexual Harassment Pamphlet at 10 ("If the harasser is another student,... the school is responsible for investigating the conduct and taking appropriate steps to resolve the situation only when it knows or should have known that the harassment occurred"); 2001 Sexual Harassment Guidance at 12 ("If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its

in *Gebser* and *Davis* was explicit that the liability standards established in those cases are limited to private actions for monetary damages.[10] The Court was concerned with the possibility of a monetary damages award against a school for harassment about which it had not known. In contrast, the process of OCR's administrative enforcement requires OCR to make schools aware of civil rights violations and to seek voluntary corrective action to achieve compliance before pursuing fund termination or other enforcement mechanisms. The Court has acknowledged the authority of Federal agencies, such as the Department, to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate" in circumstances that would not give rise to a claim for monetary damages.[11]

You also note that *Davis* holds that only "'harassment that is so severe, pervasive and objectively offensive'" may result in liability for school districts, whereas the DCL states that a hostile environment is created when the conduct is sufficiently "'severe, pervasive, or persistent.'"[12] Again, the definition of hostile environment found in the DCL is taken from OCR's prior guidance on peer harassment.[13] Although the terms used by the Court in *Davis* are in some ways different from the words used to define hostile environment harassment in OCR's guidance documents, the definitions are consistent. As we explained in our 2001 Sexual Harassment Guidance: "Both the Court's and the Department's definitions are contextual descriptions intended to capture the same concept—that under Title IX, the conduct must be

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recurrence."); Racial Harassment Guidance at 11450 ("A recipient is charged with constructive notice of a hostile environment if, upon reasonably diligent inquiry in the exercise of reasonable care, it should have known of the discrimination.").

[10] *See Davis*, 526 U.S. at 639; *Gebser*, 524 U.S. at 283.

[11] *Gebser*, 524 U.S. at 292.

[12] NSBA Letter at 2-3.

[13] *See, e.g.*, 2008 Sexual Harassment Pamphlet at 7 ("The conduct does not necessarily have to be repetitive. If sufficiently severe, single or isolated incidents can create a hostile environment."); 2001 Sexual Harassment Guidance at 5 ("OCR considers a variety of related factors to determine if a hostile environment has been created, *i.e.*, if sexually harassing conduct by an employee, another student, or a third party is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program based on sex."); Disability Harassment DCL at 3 ("When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student's rights under the Section 504 and Title II regulations"); 1997 Sexual Harassment Guidance at 12041 ("Hostile environment sexual harassment of a student or students by other students, employees, or third parties 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."); Racial Harassment Guidance at 11449 ("To determine whether a racially hostile environment exists, it must be determined if the racial harassment is severe, pervasive or persistent.").

sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program. In determining whether harassment is actionable, both *Davis* and the Department tell schools to look at the 'constellation of surrounding circumstances, expectations, and relationships,' and the Court in *Davis* cited approvingly to the underlying core factors described in the 1997 guidance for evaluating the context of the harassment."[14]

In your letter, you state that "the DCL expands the second prong of *Davis*' hostile environment test by declaring that a hostile environment exists when the harassment 'interfere[s] with or limit[s]' participation rather than 'effectively bar[ring]' access to an 'educational opportunity or benefit.'"[15] Again, this definition is neither new nor inconsistent with *Davis*. The definition is drawn from OCR's regulations,[16] and OCR has long used it in guidance on discriminatory harassment.[17]

You also state that *Davis* does not require schools to prevent recurrence of harassment, whereas the DCL requires schools to eliminate harassment and prevent it from occurring again.[18] Again, the obligation to eliminate the hostile environment and prevent its recurrence is based on long-standing policy with respect to the standards used by OCR in administrative enforcement of federal civil rights laws.[19] Further, even in the case of private suits for monetary damages, schools

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[14] 2001 Sexual Harassment Guidance at vi (citations omitted).

[15] NSBA Letter at 3.

[16] *See, e.g.*, 34 C.F.R. §§ 106.31(a) and (b).

[17] *See, e.g.*, 2001 Sexual Harassment Guidance at 2 ("Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program."); Disability Harassment DCL at 3 ("A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student's ability to participate in or benefit from the educational program."); Racial Harassment Guidance, 59 Fed. Reg. at 11,449 ("A violation of title VI may also be found if a recipient has created or is responsible for a racially hostile environment—*i.e.*, harassing conduct (*e.g.*, physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient.").

[18] NSBA Letter at 3-4.

[19] *See, e.g.*, 2008 Sexual Harassment Pamphlet at 11, 13 ("If the school determines that a student was sexually harassed, the school must take reasonable, prompt, age-appropriate, and effective action to end the harassment and prevent it from happening again to the victim or to others.... If the school's initial response does not stop the harassment and prevent it from happening again, the school may need to take additional, stronger measures."); 2006 Sexual Harassment DCL at 1 (describing "an educational institution's responsibility, as a condition of receiving Federal financial assistance, to take immediate and effective steps to end sexual harassment when it occurs, prevent its recurrence, and remedy its effects."); 2001 Sexual Harassment Guidance at 12 ("if the school knows or

have a duty to take action to prevent recurring harassment where its remedial actions have proven inadequate or ineffective.[20]

Finally, with regard to OCR's interpretation of *Davis,* you state that "nothing in *Davis* suggests that some undefined threshold exists where responding to specific incidents of sexual harassment is not enough and instead school districts must implement a more 'systematic' response to 'end' a 'hostile environment.'"[21] The DCL does not state that schools must address harassment in one particular way. Rather, the DCL provides examples of the types of remedies a school *may* be required to take to meet the obligation to eliminate a hostile environment and prevent its recurrence. Indeed, each of the examples you cite from the DCL uses the word "may" to describe the school's obligation to pursue a given remedy. The examples in the DCL are designed to help schools better understand their responsibilities and their options for responding to harassment. Again, the remedies in the DCL may not be required or appropriate in every case. Each case is fact-specific, and OCR will make individual determinations based on the particular circumstances at a school. The DCL does not change this. We agree with your statement that, when deciding what remedies are appropriate, it is important to consider the "administrator's own education experience, judgment, and personal knowledge."[22] Indeed, the 2001 Sexual Harassment Guidance notes that a fundamental aim of the guidance is to "emphasize that, in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX."[23] The DCL does not diminish the importance of administrators' professional judgment; rather it provides examples of appropriate remedies to help inform administrators' decisions.

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reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence."); Racial Harassment Guidance, 59 Fed. Reg. at 11,450 ("Once a recipient has notice of a racially hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it.... [T]he responsive action must be reasonably calculated to prevent recurrence and ensure that participants are not restricted in their participation or benefits as a result of a racially hostile environment created by students or non-employees.").

[20] *See, e.g., Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000) ("Where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.").

[21] NSBA Letter at 4.

[22] *Id.*

[23] 2001 Sexual Harassment Guidance at ii.

You raise some other concerns in your letter that we discussed on December 8th and to which I am happy to provide this written response. You state that the DCL implies that schools may be required to respond to the remedial requests of parents whose child was the target of harassment.[24] However, the suggested remedies in the DCL are not framed as requests of the parents. Rather, the DCL explains that remedial steps such as separating the target and the harasser may be necessary for a school to meet its legal obligations under the civil rights laws, and the target should not be disadvantaged when taking such steps. The DCL does not state or imply that schools may need to take these steps *because* they are requested by the parents. Of course, a parent's request may be relevant to determining whether a school's response is adequate and whether it unduly burdens the target. However, the school is not required to implement the remedy suggested by the parent if the school's remedy is otherwise adequate.

You also state that publicly labeling an incident as harassment may violate the Family Educational Rights and Privacy Act (FERPA).[25] The DCL gives the example of publicly labeling incidents as harassment because it may be important for the school to clearly articulate to its students what types of behaviors may constitute discriminatory harassment. Younger students, in particular, may not understand the hurtful nature of their conduct, and it may be important for schools to explain to students the link between certain misconduct and harassment based on race, sex, or disability. The example you cite as a possible FERPA violation describes certain conduct, but nowhere does the DCL state or imply that districts should repeat the harassing language verbatim or identify the harassers so that everyone knows about them. We agree with your statement that a school should not publicly attribute harassing conduct to a particular student, and the DCL does not suggest otherwise.[26] When providing technical assistance, OCR will inform schools about the potential FERPA implications of their responses to harassment.

Your letter raises the concern that the DCL only minimally acknowledges students' free speech rights and the First Amendment limitations on schools' ability to discipline students.[27]

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[24] NSBA Letter at 5.

[25] *Id.* at 5-6.

[26] *See also* 2001 Sexual Harassment Guidance at 36 n.97 ("In addition, if information about the incident is contained in an 'education record' of the student alleging the harassment, as defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, the school should consider whether FERPA would prohibit the school from disclosing information without the student's consent.").

[27] NSBA Letter at 6.

But the DCL expressly refers readers to our prior First Amendment guidance, which remains in effect.[28] As the DCL makes clear, peer harassment gives rise to possible violations of the anti-discrimination laws within OCR's jurisdiction only if it is sufficiently serious that it creates a hostile environment. The DCL also explains that schools should consider a number of remedies apart from discipline, and those do not implicate First Amendment concerns. In addition, OCR's regional offices will provide technical assistance to schools on First Amendment free speech issues to the extent necessary.

You also point out in your letter that "[b]ullying and harassment that takes place over the internet or through other electronic communication often occurs entirely off-campus," and the DCL fails to discuss the fact that, due to the First Amendment, "disciplining students for speech is even more difficult when the speech occurs off-campus."[29] Again, the DCL notes that there are many remedial measures that schools can employ to respond to harassment that cannot be resolved by discipline or otherwise prevented. In some such cases, a school may be able to effectively remedy a hostile environment by, for example, making available counseling services and resources, and educating the school community on civil rights laws and expectations of tolerance—all of which do not implicate the First Amendment.

In your letter you expressed concern that schools should not be expected to recognize racial harassment against members of religious groups that violates Title VI or gender-based harassment against gay, lesbian, bisexual, and transgender students that violates Title IX.[30] Schools are responsible for harassment based on race, sex, or disability regardless of the label attached to it. The DCL simply clarifies that these statutes prohibit harassment based on race or sex even where the conduct at issue may overlap with or is perceived to be harassment based on religion or sexual orientation. The fear expressed on page 8 of your letter that the DCL makes "nearly every teasing/bullying incident with a sexual orientation or religious component eligible for the letter's remedial measures" is unfounded: the DCL addresses a school's responsibilities with respect to harassment under the civil rights laws enforced by OCR when that harassment rises to the level of a hostile environment. The point of the examples in the DCL is to describe the kinds of conduct that may constitute harassment under the federal civil rights laws, so that school officials can take appropriate action to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

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[28] DCL at 2 n.8.

[29] NSBA Letter at 7.

[30] *Id.* at 7-9.

As we state on the first page of the DCL: "School personnel who understand their legal obligations to address harassment under these laws are in the best position to prevent it from occurring and to respond appropriately when it does."

Finally, your letter suggests that the Department issue a clarifying document acknowledging that state and local laws also affect a district's response to bullying and harassment.[31] We believe the DCL addressed that concern. It expressly states that "some schools have adopted anti-bullying policies that go beyond prohibiting bullying on the basis of traits expressly protected by the federal civil rights laws enforced by OCR," that "other federal, state, and local laws impose additional obligations on schools," and that "districts should review these statutes to determine what protections they afford (*e.g.*, some state laws specifically prohibit discrimination on the basis of sexual orientation)."[32] In addition, on December 16, 2010, Secretary Duncan distributed a memorandum to state leaders outlining key components of state bullying laws and policies, which was intended to serve as a reference for state and local officials developing or revising anti-bullying legislation or policies.

I trust this letter captures accurately our December 8th discussion and addresses your concerns. We look forward to continuing to work with you and students, educators, and communities to ensure all students have equal access to education.

Sincerely,

Russlynn Ali
Assistant Secretary for Civil Rights

[31] *Id.* at 9-10.
[32] DCL at 1-2 & n.7.