



U.S. DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Washington, D.C. 20530

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DRAFT MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: THE U.S. DEPARTMENT OF JUSTICE – CIVIL RIGHTS DIVISION

In 1972, Congress enacted Title IX with two principal objectives in mind: to avoid the use of federal resources to support discriminatory practices in education, and to give citizens effective protections against those practices.¹ Since then, the Department of Justice (“the Department”) has supported access to justice for victims, held schools liable for violations, prevented retaliation against those who exercised their rights, and enforced Title IX to prevent sexual harassment and assault.

The purpose of this memorandum is to provide an overview of Title IX and to make recommendations on the interpretation and enforcement of Title IX. Generally speaking, a school must effectively address any such alleged assaults and take additional steps, as needed, to ensure a safe educational environment.

However, in an effort to meet Title IX requirements, schools have in recent years subjected students accused of harassment and assault to disciplinary proceedings which violate the Title IX rights of the accused. This includes two types of treatment prohibited by Title IX: the disparate treatment of male students and the disparate impact on male students. In this context, disparate treatment refers to actions that treat similarly situated persons differently on the basis of his or her sex. Claims of intentional discrimination need not be supported by direct proof. Instead, adequate facts only need to be alleged to support the legal claim; after which the burden shifts to the opposing party.²

In comparison to disparate treatment, the focus of disparate impact is on the consequences of a sex-neutral policy, regardless of the intent of the actor. To establish discrimination under a disparate impact

¹ See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

² *McDonnell Douglas Corp. v. Green*, 441 U.S. 792, 802 (1973).

scheme, the Department must determine whether the policy had a disproportionate impact on the basis of sex and whether the party can challenge the practice.³ If in this case the school cannot articulate a “substantial legitimate justification” for the challenged practice, the party must show that there would be “equally effective alternative practices” that would result in less adverse impact.⁴

There are a number of Title IX requirements a school must meet in order to be in compliance when knowledgeably responding to complaints of sexual violence. This includes the preponderance of the evidence standard currently used by schools, those involved in executing grievance procedures having knowhow or experience in handling these types of complaints and knowing the school’s grievance procedures. At this time a hearing is not required under Title IX, although state or federal laws may require otherwise.

In order to protect the due process of all parties involved in a school’s sexual violence investigation, the Department should take the following actions and implement the following policies:

- Witness must be available to be cross-examined, including the parties involved.
- Every complainant’s sexual history, if relevant, may be introduced at the hearing. Currently, questions about the complainant’s sexual history with anyone other than the accused perpetrator should not be permitted.
- Although schools must ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant, this concern must be weighed against the accused perpetrator’s right to a fair hearing.
- A school must allow a complainant to be present for the entire hearing. Current Office for Civil Rights (OCR) policy guidance does not allow a complainant to be present for the entire hearing if not allowed by a school.
- The review of reports, investigations, and resolutions of student and employee conduct to ensure the preservation of the rights of the accused.

We anticipate no problems with regard to compliance with these proposed measures. Awards of financial assistance are valid and ensure compliance and continued cooperation with the policies advanced by the Department.⁵ The temporary deferment of assistance, pending compliance, is not precluded by statutory guidelines.⁶ A school’s failure to incorporate the recommended changes is anticipated and, though the regulations are silent on compliance reviews,

Please consider this a draft memorandum, limited in scope in accordance at the request of the Department.

If you have any questions about this memorandum, please contact:

³ See *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); *New York Urban League v. New York*, 71 F.3d 1031, 1037-38 (2nd Cir. 1995).

⁴ See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

⁵ See *Grove City College v. Bell*, 465 U.S. 555, 574-75 (1984).

⁶ 28 C.F.R. § 50.3 I.A.