

## Professional

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## Office of Civil Rights Distinguishes Between Sexual Harassment and Hostile Environment for Purposes of Title IX

Recently, the Office of Civil Rights (OCR) for the U.S. Department of Education issued commentary further illustrating OCR's aggressive enforcement of the prohibition on sex discrimination specified in Title IX of the Education Amendments of 1972. The commentary makes clear that OCR considers any unwelcome conduct of a sexual nature to constitute "sexual harassment," regardless of whether a reasonable person would find such conduct severe or pervasive. To comply with OCR's interpretation, institutions should revise their sexual harassment policies to define sexual harassment as "any unwelcome conduct of a sexual nature."

On May 9, 2013, OCR announced the resolution of its Title IX compliance review of the University of Montana, which was conducted jointly with the U.S. Department of Justice. As a result of the compliance review, the university entered into a lengthy resolution agreement that, among other components, requires the university to revise its definition of sexual harassment and clarify inconsistencies and overlap between its numerous sexual harassment policies.

According to the OCR findings letter issued with the resolution agreement, the university's sexual harassment policies improperly "conflate[d] the definitions of 'sexual harassment' and 'hostile environment' " by defining sexual harassment as conduct of a sexual nature that is "sufficiently severe or pervasive as to disrupt or undermine a person's ability to participate in or receive the benefits, services or opportunities of the university." Specifically, OCR's findings letter indicates that sexual harassment for purposes of Title IX should be defined as "any unwelcome conduct of a sexual nature." Period. Sexual harassment that is sufficiently severe or pervasive as to disrupt a

person's ability to participate in educational programs is a special type of sexual harassment – sexual harassment that creates a “hostile environment.” According to OCR, although a reasonable-person standard may be appropriate in considering whether sexual harassment rises to the level of a hostile environment, it cannot be used to determine whether there is sexual harassment generally.

Some media reports argue the findings letter vastly expands the type of conduct governed by Title IX by making sexual harassment a subjective inquiry. But these reports may be overstated. As OCR explained in the findings letter, an institution violates Title IX if: (1) a member of the institution's community is sexually harassed *and the harassment creates a hostile environment*; (2) the institution knew or reasonably should have known of the harassment; and (3) the institution fails to take immediate effective action to eliminate the hostile environment, prevent its recurrence and address its effects. According to OCR, if an institution has actual or constructive notice of possible sexual harassment, it is responsible for determining what occurred and acting appropriately.

Considered in light of the substantive reach of Title IX, OCR's decoupling of the definition of sexual harassment from the reasonable-person standard potentially expands the universe of possible sexual harassment that an institution is required to investigate. However, the reasonable-person standard remains a viable consideration in determining whether a hostile environment exists and, as a consequence, whether the sexual harassment rises to the level of requiring institutional action apart from the initial investigation to determine whether the sexual harassment creates a hostile environment. The findings letter should not be read to require institutions to remediate any type of sexual harassment, regardless of whether that sexual harassment rises to the level of a hostile environment, although an institution may choose to do so as a matter of prudence.

Although OCR's insistence that institutions define sexual harassment without incorporating the concept of a hostile environment may not result in a flood of additional Title IX remediation obligations, the cost to an institution of investigating every incident of reported “unwelcome conduct of a sexual nature” can be substantial. Defining sexual harassment without reference to hostile environment (which is what actually triggers an institution's obligation to take remedial action under Title IX), may encourage the reporting of conduct that comes nowhere close to meeting the hostile environment test, thus diverting institutional time and resources to investigating claims that do not require remediation under Title IX. Further, by requiring institutions to remove the concept of hostile environment from their policy definitions of sexual harassment, OCR may actually cause students to believe that all instances of sexual harassment require remediation under Title IX, rather than harassment that rises to the level of a hostile environment.

### **What This Means to You**

The findings letter represents OCR's current position on the definitions of sexual harassment and hostile environment and on the need to distinguish between these two concepts in policy statements.

All institutions should review their Title IX/sexual harassment policies and, if necessary, revise the policies to bring them into compliance with the findings letter. Additionally, the findings letter and resolution agreement with the University of Montana address several other Title IX compliance issues, including the need for clear, appropriately cross-referenced policies and adequate training. Thus, institutions should review all other portions of the findings letter and resolution agreement to determine whether their institution is deficient with respect to any areas addressed in the documents.

### **Contact Information**

If you have questions or require more information about the implications of this rapidly developing trend for your institution, please contact your Husch Blackwell attorney or Derek Teeter at 816.983.8331.

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