NEW OFFICE OF CIVIL RIGHTS GUIDANCE ON
STUDENT-TO-STUDENT AND
EMPLOYEE-TO-STUDENT SEXUAL HARASSMENT

AND

HOW TO INVESTIGATE A
SEXUAL HARASSMENT CLAIM

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LIABILITY FOR STUDENT-TO- STUDENT
SEXUAL HARASSMENT

I. INTRODUCTION

A. For a number of years, several federal district courts have struggled with the issue of whether a school should be liable for the sexual harassment of one student by another. The vast majority of these cases have been in the K-12 setting, but the cases appeared to have implications for higher education institutions.

B. Confirming that conclusion, the Office for Civil Rights of the U.S. Department of Education (OCR) has issued for comment its first policy guidance statement on liability for student-to-student ("peer") sexual harassment under Title IX of the Education Amendments of 1972 in which it draws few distinctions between the liability of primary/secondary schools and postsecondary institutions. OCR published the document, entitled "Policy Guidance Regarding Peer Sexual Harassment" (Peer Guidance), in the August 16, 1996 Federal Register. Comments on the draft Peer Guidance were due to OCR September 30, 1996. A final promulgation is expected in mid-February, 1997.

II. TITLE IX REQUIREMENTS

A. Under Title IX of the Education Amendments of 1972, any school receiving federal funds cannot, on the basis of sex, exclude any person from
participation in, be denied the benefits of, or be subjected to any discrimination. 20

B. The Office of the Civil Rights in the Department of Education (OCR) has
interpreted this language as prohibiting peer-to-peer student harassment in several
investigations it undertook of complaints prior to the issuance of the proposed Peer
Guidance. It has used the Equal Employment Opportunity Commission (EEOC)
regulations and case law developed in sexual harassment employment situations for
its definition of sexual harassment and to impose liability.

C. Specifically, OCR has defined student-to-student sexual harassment as:
unwelcome sexual advances, requests for sexual favors, and other verbal or physical
conduct of a sexual nature when the conduct 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.

III. TITLE IX STANDARD OF LIABILITY

A. The proposed Peer Guidance says a college or university will be liable
under Title IX for peer hostile environment harassment if the institution knew or
should have known of the harassment and failed to take immediate and appropriate
steps to remedy it. While this standard is consistent with that imposed by several
courts, including the Eleventh Circuit in Davis v. Monroe County Board of Education,
74 F.3d 1186; previous opinion vacated and rehearing en banc granted, 92 F.3d 1418
(11th Cir. 1996), OCR acknowledges that it is higher than that imposed by the U.S. Court of Appeals for the Fifth Circuit in Rowinsky v. Bryan Independent School District, 80 F.3d 1006 (5th Cir. 1996) in which the U.S. Supreme Court recently refused to grant certiorari. 1996 U.S. LEXIS 5384, ___ U.S. ___ (1996), 117 S.Ct. 165, 136 L.Ed.2d 128 (1996).

B. In Rowinsky, two eighth grade sisters who rode a school bus to and from school were subjected to a variety of verbal and physical sexual abuse from male students. Repeated complaints by the girls to the bus driver and their parents to various school administrators resulted in temporary, ineffectual solutions. Finally, their mother sued the school district and its officials alleging they had condoned and caused hostile environmental sexual harassment in violation of Title IX.

1. The trial court held that Rowinsky failed to state a claim under Title IX because there was no evidence that the school district had discriminated against students on the basis of sex. The court focused on the fact that there was no proof that boys who assaulted girls were punished any less harshly than boys who assaulted boys. Also, the district’s failure to train administrators in how to deal with sexual harassment, the court said, would equally harm male and female students.

2. On appeal, two on the three judge panel concurred, saying that a school district is not liable under Title IX for failing to address peer harassment,
even when given specific notice of it, but only has liability for its own intentional acts of discrimination towards students.

3. The Rowinsky majority reached its conclusion by rejecting the legal standard for liability applicable to sexual harassment in the work place, developed under Title VII of the Civil Rights Act of 1964. The Rowinsky majority said importing the Title VII legal principle that an employer is responsible for the acts of its adult employees, including co-worker sexual harassment, if the employer should have known of them and fails to address them, into a situation involving children is highly problematic.

4. Rather, the Rowinsky majority said, a school district is only liable for peer sexual harassment when discriminatory intent on the part of the school district can be specifically shown. An example of such, it said, would be if a school district treated student sexual harassment of one sex more seriously than sexual harassment of the other.

IV. FOURTEENTH AMENDMENT STANDARD OF LIABILITY

A. The court's conclusion in Rowinsky is consistent with the analysis made by the Seventh Circuit in a peer sexual harassment case brought under the Fourteenth Amendment to the U.S. Constitution. In Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996), a male student, who had been mock raped, urinated on and beaten to the point of internal injuries by other male students because he was a homosexual,
brought suit against several school officials and the school district pursuant to 42 U.S.C. §1983 alleging violation of his equal protection rights. He alleged that the principal's response when confronted with the mock rape complaint was "boys will be boys." Nabozny tried to kill himself several times and eventually dropped out of school. The trial court granted summary judgment for the defendants.

B. The appellate court reversed, finding the student was treated differently because of his sex. It said that to find liability under §1983, the student had to show that the defendants acted with a nefarious discriminatory purpose, and discriminated against him based on his membership in a definable class.

C. The student met this burden by showing that the defendants had a strong record of enforcing their anti-harassment policies when female students were the victims, but had apparently made an exception in his case. The student also produced sufficient evidence to show that the discriminatory treatment was motivated by the school officials' disapproval of his sexual orientation, such as statements that the student should expect to be harassed because he was gay. As the defendants had stipulated that they knew sexual orientation discrimination was prohibited under state law, they knew homosexuals were a protected minority.

D. The school district itself was not entitled to qualified immunity from this civil suit. The Seventh Circuit held that the school officials were not either because immunity only applies when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
The defendants did not have to treat every harassment complaint the same way, the court said, but they did have to treat each person with equal regard, as having equal worth, regardless of his status. As the Fifth Circuit held in Rowinsky, the Seventh Circuit found that the school officials had to give male and female students equivalent levels of protection from sexual harassment. The court said a reasonable school official would have known that his actions in not providing equivalent protection, viewed in the light of the law at the time, were unlawful.

E. The Seventh Circuit also said that if there were a rational basis for the defendant’s conduct, there would be no constitutional violation. However, the court said it was unable to garner any rational basis for permitting one student to assault another based on the victim’s sexual orientation.

F. On remand to the federal district court, the school officials settled the case, agreeing to pay Nabozny $900,000 plus up to $62,000 for his potential medical expenses.

V. USING TITLE VII LEGAL STANDARDS IN TITLE IX CASES

A. The appropriateness of using standards developed for assessing employer liability for coworker-to-coworker sexual harassment in the workplace under Title VII of the Civil Rights Act of 1964, to assess institutional liability for student-to-student sexual harassment under Title IX is a major issue still to be decided by the courts. At present, OCR defends doing so by referencing the 1992 U.S. Supreme Court case of

B. In Franklin, the high court was examining whether a student was entitled to protection from sexual harassment by a teacher, not a student. The court used Title VII principles, OCR says, in determining the school’s liability under Title IX.

C. The comments made by the Supreme Court in that case regarding the application of Title VII law to Title IX cases, however, were very limited. The high court only made two comments on the subject. First, it said that when a supervisor sexually harasses a subordinate because of sex, that supervisor discriminates on the basis of sex, citing the Title VII case of Meritor Savings Bank v. Vinson, 477 U.S. 57, 64, 91 L.Ed.2d 49, 625 S.Ct. 430 (1986), and that it believed the same rule should apply when a teacher sexually harasses and abuses a student. The only other comment made by the Court was that Congress surely did not intend for federal monies to be expended to support the "intentional" actions it sought by statute to proscribe.

D. The dissenting judge in Rowinsky argued that these comments by the Supreme Court inferred that sexual harassment by students may be attributed a school board.

E. The majority in Rowinsky rejected that argument saying Franklin only involved the harassment of a student by a teacher, who was an agent of the school, and that is why it fell within the framework of Meritor which makes employers liable
for acts of their agents. Second, the Rowinsky majority dismissed any language in Franklin regarding teacher-student sexual harassment as "pure dictum," that is, extraneous language by the court unnecessary to the holding of the case and therefore of no precedential value.

VI. STANDARDS OF LIABILITY USED BY OTHER COURTS

A. A different standard of liability for schools for peer harassment was used by the Eleventh Circuit in Davis v. Monroe County Board of Education, 74 F.3d 1186; previous opinion vacated and rehearing en banc granted, 91 F.3d 1418 (11 Cir. 1996), and federal district courts in California in Patricia H. v. Berkeley Unified School Dist., 830 F. Supp. 1288 (N.D. Cal. 1993) and Doe v. Petaluma City School District, 830 F. Supp 1560, 1996 W.L. 432298 (N.D. Cal. 1993). These courts ruled that Title IX proscribes the same type of hostile environment sexual harassment for peer harassment as that prohibited by Title VII for coworker harassment and the institution is not in compliance with Title IX if it fails to respond adequately to actual or constructive notice of harassment.

1. In Patricia H., the federal district court said that distinctions between the school environment and workplace serve only to emphasize the need for zealous protection against sex discrimination in schools since students look to their teachers for guidance as well as protection and thus, the ability to
influence behavior exists to an even greater extent in the classroom than in the workplace.

2. The court said the damage caused by sexual harassment also is arguably greater in the classroom because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school.

3. The court also said that a nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.

4. The federal district court in *Doe v. Petaluma City School Dist.* in 1996 concurred with *Patricia H.* It reexamined an order it had issued in 1993 and changed its original standard for institutional liability. In *Doe,* a junior high girl was subjected to two years of sexually harassing comments and bathroom graffiti by male and female students. Her complaints to her counselor were met with such responses as he could do nothing because the students were exercising their first amendment rights to free speech, "boys will be boys," and it was not important. Some students eventually were given minor suspensions.
but the harassment continued. Doe’s parents ended up enrolling her in a
different school and suing the school and school officials under Title IX, § 1983
and state civil rights statutes.

5. In its 1993 decision, found at 830 F. Supp. 1560, reversed on
other grounds, 54 F.3d 1447 (9th Cir. 1995), the Doe federal district court said
that the Title VII standard was inapplicable to a Title IX claim and that, in
proving intentional discrimination, it is not enough that the institution knew or
should have known of the hostile environment and failed to take appropriate
action to end it but rather the student would be required to prove that the
school district intentionally discriminated against the student on the basis of
sex and that its failure to take appropriate action could be circumstantial
evidence of intent to discriminate.

6. However, in 1996, the Doe federal district court said that case
developments since 1993 caused it to change its earlier ruling. It said that it
was now clear the U.S. Supreme Court considers hostile environment sexual
harassment to be a type of intentional discrimination, citing Landgraf v. USI
Film Products, 511 U.S. 244, 128 L.Ed.2d 229, 114 S.Ct. 1483 (1994). The
intent is established by proof of the elements required to prove the cause of
action, that is, the harasser’s intentional disparate treatment based on gender
and the employer’s act of implicitly condoning it by knowingly failing to take
steps to remedy it, and needs no additional proof.
7. The Doe court therefore adopted the standard of liability that if the school district knew or should have known of hostile environment sexual harassment of a student by his or her peers and fails to take prompt and effective remedial action that will be proof of intentional discrimination necessary for the imposition of damages liability under Title IX for the school district.

8. The Doe court then said that because a 1993 study found that 85 percent of girls and 76 percent of boys report being the victim of unwanted sexual comments or touching in school, and that one of the school’s experts opined that sexual harassment is not only very common among junior high students but "developmentally correct" in that population, school districts are on notice that student-to-student sexual harassment is very likely in their junior high schools. In light of that, the court said, if a school district fails to develop and implement policies reasonably designed to bring incidents of severe or pervasive harassment to the attention of the appropriate officials, it must be inferred that the district intended the inevitable result of that failure, that is, a hostile environment.

9. The Petaluma City School District agreed December 24, 1996, to pay $250,000 to Doe to settle her case.

B. Other federal district courts, in New York, Missouri and Iowa, in Bruneau v. South Kortright Central School District, 935 F. Supp. 162 (N.D. N.Y. 1996), Bosley
v. Kearney R-1 School District, 904 F. Supp. 1006 (W.D. Mo. 1995), Burrow v. Postville Community School District, 929 F. Supp. 1193 (N.D. Iowa 1996), and Wright v. Mason City Community School District, 940 F. Supp. 1412 (N.D. Iowa 1996), have not adopted the "should have known" standard and have said a school district must have actual notice of the harassment and intentionally fail to take the proper remedial action to find institutional liability.

1. In Bruneau, a sixth grader alleged that male students called her and other girls sexually harassing names and physically harassed them by grabbing breasts, snapping bras, stuffing paper down blouses and running their fingers down backs. After complaints to teachers and administrators proved unsuccessful, she sued the school and school officials under Title IX and §1983.

2. The court held that to the extent that Title IX prohibits the same conduct prohibited by Title VII, Title VII legal standards may be applied by the court to guide its analysis of Title IX claims. The court said actual notice of the harassment to the school had to occur because constructive notice only is applicable when an "agency" relationship exists, as between employer and employee, and students are not agents of a school.

3. The Bruneau court said that to be liable for peer harassment, the student would have to demonstrate that a school district either provided no reasonable avenue of complaint or knew of the harassment but did nothing
about it. At trial on remand, a jury found for the school district, according to the district's counsel, because the harassment did not rise above that considered run-of-the-mill among adolescents and the school district had taken appropriate remedial measures.

4. In Burrow v. Postville Community School District, a student alleged she had been harassed daily for three years in high school with vulgar names, threats and obscenities, as well as being kicked between the legs. She repeatedly informed school officials who did nothing to discipline the harassers. She sued the school and school officials for violating Title IX.

5. The Burrow court held that she could sue the school district for its knowing failure to take appropriate remedial action in response to the student harassment because of her gender. While it said Burrow had to prove an intent by the district to discriminate on the basis of gender, she would be allowed to do so by indirect as well as direct evidence, including its knowing failure to act.

6. In Wright v. Mason City Community School District, a student alleged that the school did not take adequate action to stop other students--primarily girls--from calling her names such as "whore," "bitch" and "slut," writing graffiti about her, and accosting her physically after she pressed charges against her ex-boyfriend for raping her. In a Title IX suit against the school district, a jury awarded the student $5,200 for future medical expenses.
The court granted the district’s motion to set the verdict aside and dismiss the case, citing *Burrow, supra.*

7. The Wright court said that the school district’s failure to have a sexual harassment policy in place was negligence at best. The court found the school did try to deal with known incidents of harassment, such as quickly removing the graffiti, trying to ensure the student did not meet her ex-boyfriend at school, and reprimanding students. The court said that no evidence existed to prove the district “went past negligence into reckless or intentional discrimination.”

8. In another case, *Seamons v. Snow,* 84 F.3d 1226 (1996), the Tenth Circuit was clearly troubled by the idea of liability on the basis of constructive notice alone in student to student harassment, but did not have to reach that issue to resolve that case.

VII. LIABILITY FOR PEER HARASSMENT IN A POSTSECONDARY INSTITUTION

A. One of the few reported cases of this type is *Linson v. The Trustees of the University of Pennsylvania,* 1996 U.S. Dist. LEXIS 12243, __ F. Supp. __ (E.D. Pa. 1996). In this case, Linson, a male graduate student, claimed he was sexually harassed by Matsuda, a fellow male student. The harassment was only brought to the attention of college officials when Matsuda complained that Linson had tampered with his computer files. Linson said he did it because Matsuda had engaged in repeated
unwelcome solicitations for sexual contact and unwanted touching of the private areas of his body. Linson sued the University alleging violation of Title IX and retaliation for reporting the matter after he was dismissed from his program for alleged poor academic performance.

B. The court said a Title VII analysis is appropriate in a Title IX case, citing a Title IX employment case, Ward v. Johns Hopkins University, 861 F. Supp. 367 (1994), even where the complainant is a student. It appeared to agree with the line of cases that requires intentional discrimination by the institution on the basis of sex before liability will be found. The court decided that the school had taken remedial action after the complaint was made—an attempt to have the head of the graduate program meet with Matsuda to tell him not to touch any person without his or her permission—and the refusal of the department head to thereafter meet with Linson did not mean there was discrimination based on Linson’s sex.

VIII. LIABILITY UNDER THE PROPOSED PEER GUIDANCE

A. The Peer Guidance takes the position that constructive notice as well as actual notice is sufficient to create liability, that is, the institution will be liable if it should have known of the harassment and fails to act.

B. OCR justifies its inclusion of the "should have known" standard by a reference to Rosa H. v. San Elizario Ind. School Dist., 887 F. Supp. 140 (W.D. Tex. 1995). The court there noted that a school is in the best position to be on the
lookout for discriminatory conduct and that the "should have known" standard makes it self monitor and prevents it from turning a blind eye to harassment.

IX. KEY POINTS IN THE PEER GUIDANCE

A. Return of In Loco Parentis

1. While the Peer Guidance illustrates the policy only with examples drawn from primary and secondary school situations, it applies to post-secondary institutions as well.

2. This is problematic as the amount of control that can be exercised by a college or university, which long ago relinquished the role of in loco parentis, is considerably different than for a school district for which that role remains.

3. Additionally, the Peer Guidance makes a university as well as a school liable for determining when repeated requests for dates or attempts to make contact by one student to another have escalated into sexual harassment, which is very troubling.

B. Type of Harassment Covered

1. The Peer Guidance is only meant to address peer sexual harassment, not situations in which a student is an employee or agent of the institution and harasses a fellow student. While those also violate Title IX, they are not covered in the Peer Guidance.
2. The Peer Guidance applies to same sex harassment, but not to harassment on the basis of sexual orientation.

C. Liability for Third Party Harassment

1. The Peer Guidance makes colleges and universities liable for harassment by third parties, that is, non-students.

2. OCR justifies this heavy burden by saying it will consider the level of control that the institution has over the alleged harasser in determining whether it took appropriate measures to remedy the harassment.

D. "Unwelcomeness" Standard

1. The Peer Guidance says conduct must be "unwelcome" to be harassment, but then creates a difficult standard to apply noting the conduct may be unwelcome even though there is acquiescence in it, lack of complaints may occur, and a student may willingly participate in conduct on one occasion.

2. OCR says it will take into consideration the age of the student, the nature of the conduct involved, and "other relevant factors" in determining whether a student had the capacity of welcoming the conduct.

3. Determinations of unwelcomeness or whether the harassment occurred will be made on the "totality of the circumstances."

   a. The Peer Guidance gives as examples of evidence that might be helpful in resolving the issue of welcomeness 1) Statements by witnesses, 2) Relative credibility such as level of detail and consistency
of accounts, lack of corroborative evidence when it logically should exist, 3) Evidence of others harassed or history of false accusations, 4) Reactions or behavior immediately after the event, 5) Filing of a complaint or other action to protest the conduct soon after the event, and 6) Other contemporaneous evidence.

E. Harassment Standard

1. Conduct violates Title IX if it is sufficiently severe, persistent or pervasive to limit a student’s participation in or benefit from an educational program, or to create a hostile or abusive educational environment.

2. Determinations of whether harassment occurred will be made by considering “all relevant circumstances” objectively and subjectively.

   a. "Relevant circumstances" include: 1) The degree to which the conduct affected one or more students’ education; 2) The type, frequency and duration of the conduct; 3) The number of individuals involved; 4) The age and sex of the alleged harasser and the subject(s); 5) The size of the school, location of the incidents, context in which they occurred; 6) Other incidents at the school; and 7) Incidents of gender-based, but non-sexual harassment.
F. Grievance Procedures

1. Because Title IX requires colleges and universities to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, institutions will be liable for the absence of such, regardless of whether sexual harassment occurred.

2. An institution of higher education does not have to have a policy specifically prohibiting sexual harassment or provide separate grievance procedures for sexual harassment complaints, but its Title IX grievance procedures must provide an effective means for responding to alleged sex discrimination.

3. The Peer Guidance provides a list of elements OCR will examine in determining whether a school's grievance procedures are prompt and equitable.

   a. The Peer Guidance notes that a police investigation or report of criminal conduct does not relieve the college or university of its duty to respond promptly, nor does an insurance investigation or the filing of a complaint with OCR.

G. Constructive Notice

1. The Peer Guidance provides liability for a college or university for failing to remedy harassment of which it has constructive notice even if a student does not use the school's Title IX grievance procedures to complain.
2. Constructive notice means that the institution would have found out about it through a "reasonably diligent inquiry."

H. Reasonable Responses

1. The Peer Guidance recognizes what constitutes a reasonable response by a school to harassment will differ. It lists factors it will consider to determine if a school’s response was appropriate where information was indirect about possible harassment.

2. It also gives examples of appropriate steps to take to end harassment, corrective action to address the effects of it on its subjects, and steps to prevent its reoccurrence.

I. Confidentiality

1. When a complaining student requests confidentiality, the Peer Guidance says reassurances about a school’s responding strongly to retaliation should be made.

2. If a student continues to ask for confidentiality, the Peer Guidance says a college or university must take all possible steps to investigate and respond to the complaint consistent with that request, such as counseling the complainant, general training about harassment, and reporting the incident to the Title IX coordinator as it may confirm a pattern of harassment reported by other students.
J. Interface with FERPA

1. While the Peer Guidance says parties to a complaint need information such as whether sexual harassment was found to have occurred and, if so, the steps that the school has taken or will take to correct it, the Peer Guidance recognizes the Family Educational Rights and Privacy Act (FERPA) may not permit the disclosure of the sanction or discipline imposed on a student as it is protected under FERPA if that information is in the harassing student’s educational record.

2. However, if the harassment involved a crime of violence or sexual assault, an exception to FERPA then applies and the information can be given to the complainant.

K. Interface with the First Amendment

1. The Peer Guidance provides a brief summary of the impact of a student’s First Amendment right of free speech on the student’s alleged harassment.

2. The Peer Guidance notes the offensiveness of a particular expression, standing alone, is not legally sufficient to be Title IX sexual harassment.

3. It also recognizes the rights of students to express opinions derogatory of one sex in classroom lectures and discussions and all other education programs and activities of public schools, such as student
newspapers, public meetings and speakers on campus, campus debates and school plays.

4. The Peer Guidance further acknowledges the age of the students involved and the location or forum where the speech occurred may affect how the school can respond consistent with the First Amendment.

5. While the summary is an accurate statement of the law, its brevity and lack of examples for guidance will continue to cause uncertainty among school administrators about when they should and can act to discipline harassing speech.

X. CRITICISM OF THE PROPOSED PEER GUIDANCE

A. The comment period for the new Peer Guidance has now ended. The criticisms most frequently made by commentators were:

1. The need to acknowledge differences between the needs of elementary schools and institutions of higher education.

2. The requirement that sexual harassment be “persistent” as well as severe and pervasive.

3. The need to address discrimination on the basis of sexual orientation.

4. The need to balance conflicting student rights.
5. The need to address the conflict between free speech rights and sexual harassment, particularly in the higher education setting.

B. Another criticism was the use of court precedent on harassment of employees because schools must take all students as they come because each child has a right to an education, as contrasted with an employer’s latitude in hiring and firing employees.

XI. CONCLUSION

A. There is much in the Peer Guidance that will assist institutions in being in compliance with Title IX, but there are also areas that continue to be unclear.

B. The legal underpinnings for the entire premise of the policy continue to be in dispute, that is that colleges and universities should be liable for failing to take appropriate corrective action to end peer harassment to the same extent as employers should for co-worker sexual harassment.

LIABILITY FOR EMPLOYEE-TO-STUDENT HARASSMENT

I. INTRODUCTION

A. In 1992 the U.S. Supreme Court made it clear in Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 117 L.Ed.2d 208, 112 S. Ct. 1028 (1992), that
a student who is sexually harassed by a teacher is entitled to damages under Title IX of the Education Amendments of 1972.

B. The Office of Civil Rights in the U.S. Department of Education (OCR) issued for comment a draft policy guidance entitled, "Sexual Harassment Guidance: Harassment of Students by School Employees" (Employee Guidance) on October 4, 1996 concerning the liability of schools for the sexual harassment of students by school employees under Title IX. This Employee Guidance is to be read in conjunction with OCR's August 28, 1996 draft guidance focusing on the liability of schools for student to student harassment (Peer Guidance). (See outline on this subject prepared for this conference by the authors). After the comment period passes, a single, final document combining the Employee Guidance with the Peer Guidance will be issued by OCR, which is expected in mid-February, 1997.

II. KEY ASPECTS OF THE EMPLOYEE GUIDANCE

A. **Definitions:** OCR defines prohibited sexual harassment as including:

1. **Quid pro quo harassment:** A school employee explicitly or implicitly conditions a student's participation in an educational program or school activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.
2. **Hostile environment harassment:** A school employee’s sexually harassing conduct is sufficiently severe, persistent, or pervasive as to limit a student’s ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment. It can include unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

3. **Gender based harassment,** which, when combined with incidents of sexual harassment, can create a hostile environment even if each incident by itself would not be sufficient to do so.

B. **Liability for Quid Pro Quo Harassment:** Agency principles will be used to impugn liability to the institution for quid pro quo harassment by its employees. Thus, if an employee is in a position of authority vis-à-vis the student, such as a professor or administrator or teaching assistant, the school will be liable even for a single incident of quid pro quo harassment, whether the institution knew about it or not.

C. **Agency principles also will be used to impugn liability to the institution for hostile environment harassment by its employees if the employee 1) reasonably appears to be acting on behalf of the institution, whether or not the employee acted with authority, or 2) was aided in carrying out the harassment by his or her position of authority within the institution.** Note: This standard is higher than the one under
Title VII which only imposes agency liability for non supervisory co-worker hostile environment harassment when the employer knows or should have known of it.

D. **Liability for Hostile Environment Harassment:** Additionally, the institution will have liability for hostile environment sexual harassment if the institution had actual or constructive notice of it but failed to take appropriate steps immediately to correct it. The school will be held to a "knew, or in the exercise of reasonable care, should have known" standard. Notice received by a responsible employee, from a parent, the media, a student, personal observation or another employee, will be imputed to the school.

E. **Grievance Procedures:** Failure to have a published grievance procedure will violate Title IX.

F. **Unwelcome Behavior:** A student's acquiescence in conduct, failure to complain about it, or occasional willing participation in it will not be dispositive of whether the conduct was welcome. The Employee Guidance notes that a student may be reluctant to object to harassment by a person in authority for fear of retaliation.

G. **Consensual Relations:** Under the Employee Guidance, sexual conduct between a school employee and an elementary student will never be viewed as consensual. In cases involving secondary students, there will be a strong presumption that it was not consensual. If that presumption is challenged for older secondary students and for post-secondary students, OCR will consider the following factors:

1. The nature of the conduct.
2. The relationship of the school employee to the student, including the degree of influence, authority or control the employee had over the student.

3. Whether the student was legally or practically unable to consent (due to age or disability) to the conduct in question.

Note: Nothing in the Employee Guidance or Title IX prohibits a school from adopting policies prohibiting sexual conduct between adult employees and students.

H. First Amendment: The Employee Guidance only states the protections of the First Amendment must be considered if issues of speech or expression are involved and that this is a particularly important consideration in classroom and related activities by teachers. Three examples of the application of First Amendment principles to alleged sexual harassment by a school employee are cited in the Employee Guidance’s footnotes:

1. Silva v. University of New Hampshire, 883 F. Supp. 293 (D. N.H. 1994), finding that a university professor was wrongly disciplined when he was fired for using classroom examples that seemed sexual in nature to some students, based on an impermissible subjective sexual harassment policy.

2. George Mason University, OCR Case No. 03-94-2086, law professor’s use of a racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment.

3. Portland School Dist. 1, OCR Case No. 10-94-1117, reading teacher’s choice to substitute a less offensive term for a racial slur when
reading an historical novel aloud in class constituted an academic decision on presentation of curriculum, not racial harassment.

III. RECENT DECISIONS ON INSTITUTIONAL LIABILITY FOR SEXUAL HARASSMENT BY FACULTY OR STAFF TO STUDENTS

A. A school is not strictly liable for Title IX hostile environment sexual harassment by a teacher to a student because Title IX fails to mention liability standards. Congress must be clear about the conditions it imposes in a statute such as this that was passed under the Congress’ spending clause power because states agree to comply with federal stipulations in return for federal funds. Canutillo Independent School District v. Leija, 1996 U.S. App. LEXIS 30910, ___ F.3d ___ (5th Cir. 1996), (Note, two of the three judge panel ruled this way. The third, who dissented, also dissented in the Rowinsky case).

1. The case involved a second grade student who alleged her physical education teacher would ask her to sit on his lap, and then would place his hands under her undergarments and rub her chest, buttocks and between her legs. She complained to her homeroom teacher who told her to avoid the teacher but did not tell school officials. Her parents sued the school district in federal district court under Title IX and a jury awarded the student 1.4 million in damages. The court reduced the award to only her medical bills, mental health treatment costs and special education expenses saying to do otherwise would expose schools to potential insolvency. The school appealed
to the Fifth Circuit which reversed the district court's ruling that strict liability applied.

2. The Fifth Circuit said that, as horrible a crime as child abuse is, we do not live in a risk-free society and it contorts "public policy" to suggest that communities should be held financially responsible in this manner for such criminal acts of teachers. The court said because even vigilance, alertness and awareness are insufficient to shield a school from potential financial ruin under the strict liability approach, even with the district court's limited damages, that strict liability goes a step too far making schools not only the educators of children but their "insurers" as well.

3. The Fifth Circuit then considered, but rejected, three other bases for finding the school liable: Intentional discrimination based on sex; Title VII's employer "know or should have known" standard; and an agency standard.

   a. Intentional discrimination: The Fifth Circuit found no direct involvement by the school in the harassment. It commented that even notice, absent direct involvement by the school, would not impute liability to it.

   b. "Employer knew or should have known": The Fifth Circuit said a management level employee had to be given notice of the harassment for employer liability to follow because it made little sense to make liability contingent on whether an employer takes prompt
remedial action and at the same time to define "employer" broadly enough to include employees who have no authority to take such action. In this case, the only teacher who received notice did not have the requisite authority; she had no job-related authority over the harasser or any other teacher. Additionally, the Fifth Circuit said there was no constructive notice because there was no evidence that the harasser's conduct was so pervasive that a reasonable juror could conclude the school should have known of the abuse.

c. Agency standard: The Fifth Circuit said for the reasons' listed above for there to be no liability for the school under the Title VII "knew or should have known" standard that the requirements of the Restatement (Second) of Agency § 219 were not met.

4. The dissenting judge said that a reasonable juror could have concluded the harassment was quid pro quo harassment, for which there is strict liability, because the student received gifts and special attention from the harasser and at her young age the student could have believed that she had to tolerate sexual touching as the price for the teacher's continued favoritism and goodwill.

5. The dissenting judge also said that the school's failure to have a policy directing students and parents as to how to make a report of sexual harassment was a failure of the school to comply with Title IX regulations
requiring such and itself could be reason that the school was liable for the 
harassment.

B. Common law agency principles applicable in Title VII claims do not apply 
in Title IX cases and thus, a college cannot be liable for conduct committed by one 
of its professors towards a student unless the administration knew of or participated 
in the alleged acts of sexual discrimination. Slaughter v. Waubonsee Community 
College, 1995 U.S. Dist. LEXIS 14236, F.3d ___ (N.D. Ill. Sept 25, 1995). Note: This 
is in direct contravention to the statement in the Employee Guidance that agency 
principles will be used in this type of situation.

Howard v. Board of Education of Sycamore Community Unit School District No. 
427, 876 F. Supp. 959 (N.D. Ill. 1995), the Slaughter court said that, because 
under Title VII the definition of "employee" includes "any agent of such a 
person," agency principles apply in Title VII cases. However, the court noted, 
under Title IX there is no such definition. Liability under Title IX for a school’s 
"program or activity," the court therefore decided, does not include liability for 
agents.

2. In Slaughter, a professor allegedly offered to increase a student’s 
grade in exchange for sexual favors. The college’s investigatory panel 
concluded some sexual harassment had occurred, but could not determine the 
severity of it because it was the student’s word against the professor’s. The
college had previously received two complaints about the professor, one about an in class remark comparing bra sizes to grade curves and the other about an inappropriate sexual remark he made when rebuffed by an employee he had asked out. The student brought a Title IX action against the college.

3. The court concluded the two prior incidents were significantly different than the quid pro quo harassment alleged so that the college could not have been on notice such that it should have anticipated or prevented the professor’s later actions, and therefore it had no liability for the alleged quid pro quo harassment.

4. Regarding the plaintiff’s claim that the college’s inaction forced her to endure a hostile environment whenever she went to the professor’s class, the court said that while his conduct was offensive, it was not so severe or pervasive as to create a hostile environment. It occurred only once, it was at the end of the school year, and the placing of the investigation results in the professor’s personnel file was an appropriate remedy, the court held.

C. A college is not liable for failing to terminate an alleged sexual harassing professor if the complaining students refuse to press formal charges and testify at a hearing to revoke tenure. Pallett v. Palma, 914 F. Supp. 1018 (S.D. N.Y. 1996). The college had suspended the professor upon learning of his alleged hostile environment sexual harassment but did not proceed further.
1. The case involved complaints by two students at Iona College about a tenured professor of English. An undergraduate student claimed that, in a discussion with the professor at a campus facility, he used lewd and vulgar language, discussed his own sexual experiences, ordered her to read pornographic poetry, asked about her sexual experiences, and expressed his interest in having sex with her.

2. A graduate student complained the individualized reading list the professor prepared for her on modern American poetry contained vulgar and sexually explicit material. Also, she claimed the professor often engaged in "uncomfortable" conversation with her primarily about sex.

3. The court said, "The conflict between the obligations of a teaching institution under Title IX and its obligations to its faculty members under the First and Fourteenth Amendments and principles of academic freedom which necessitate faculty tenure, were known to Congress in enacting Title IX and are a part of the historical and factual background against which the adequacy of the response of the College is to be judged." Without the voluntary participation of the students, the court said the college "was, and indeed remains, powerless to do anything more about terminating [the professor.]"

D. There is no liability for an employer for failure to investigate a claim of sexual harassment if the harassment is later shown not to have existed. Karabian v. Columbia University, 930 F. Supp. 134 (S.D. N.Y. 1996).
E. In Jane and Janet Doe v. Claiborne County Board of Education et al, 1996 U.S. App. LEXIS 33521, ___ F.3d ___ (December 26, 1996), the Sixth Circuit held, in a case of first impression for that Circuit, that Title VII agency principles apply to a Title IX hostile environment sexual harassment claim.

IV. RECENT DECISION ON INDIVIDUAL LIABILITY FOR SEXUAL HARASSMENT BY FACULTY OR STAFF TO STUDENTS

A. A professor can be liable under §1983 for touching a student because it is a misuse of power, and it is irrelevant whether the student knew he was a state actor at the time of the incident. Padgett v. Wilson, No. 94-2499 (4th Cir. Oct 18, 1995) (reported in Table Case Format 68 F.3d 461). The Fourth Circuit confirmed a jury verdict of $25,000 for the student.

1. The student claimed the South Carolina State University professor approached her in a school hallway, placed his finger on her lips, smeared her lipstick and made a suggestive comment. She sued under §1983 and for battery.

2. The professor unsuccessfully argued that §1983 did not apply because, as a professor, he was not entitled to touch students and therefore could not be acting under color of state law.
V. RECENT DECISIONS REGARDING THE INTERSECTION OF CONSTITUTIONAL RIGHTS AND SEXUAL HARASSMENT

A. A college may not discipline a faculty member for a long standing, confrontational teaching style that allegedly creates a hostile environment without a clear, precise policy prohibiting such or authoritative interpretive guidelines for a general policy if that policy merely prohibits conduct which has the "effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile or offensive learning environment." Cohen v. San Bernadino Valley College, 92 F.3d 968 (9th Cir. 1996).

1. In Cohen, a female student complained of a remedial English professor's teaching style, saying he repeatedly focused on topics of a sexual nature, used profanity and vulgarities, and directed comments at her and other female students in a humiliating and harassing manner. The professor admitted discussing topics such as pornography, cannibalism and consensual sex with children. He required the student to write an essay defining pornography, refusing to assign her a different topic when she requested one. The student stopped coming to class and failed the course.

2. A hearing panel determined the professor had created a hostile learning environment in violation of the college's recently adopted sexual harassment policy. The college's board concurred, ordering the professor to provide a syllabus explaining his teaching style to students at the beginning of classes, to attend a sexual harassment seminar, to become sensitive to the
particular needs an backgrounds of his students, and to alter his teaching style where it appeared to interfere with the students’ ability to learn. He was also warned that further violations could result in his suspension or termination. The professor sued the college and certain college officials claiming violation of §1983 by their infringement of his First Amendment right to academic freedom saying he was punished under a policy that gave insufficient notice that his conduct was prohibited. The district court sided with the college, but the Ninth Circuit Court of Appeals reversed.

3. The Ninth Circuit did not rule on the precise contours of the protection the First Amendment provides the classroom speech of college professors because it decided the policy’s terms were too vague as applied to the professor in this case. NOTE: This is important as the language used by the college is identical to that used by most colleges and universities in their sexual harassment policies as it paraphrases that used by the Office of Civil Rights in the Department of Education to define hostile environment sexual harassment in the educational setting.

4. The Ninth Circuit called the action of the college a "legalistic ambush." It said that the professor’s speech did not fall within the core region of sexual harassment as defined by the Policy, that officials on an entirely ad hoc basis had applied the policy’s nebulous outer reaches to punish teaching methods that the professor had used for many years, and that the professor
was without any notice that his long-standing teaching style would result in his punishment. The court precluded the college from applying any further disciplinary measures to the professor and ordered any reference to the discipline removed from his personnel file.

B. This same requirement of notice of what conduct is prohibited before discipline can be contemplated was required by the court in Silva v. University of New Hampshire, 888 F. Supp. 293 (D. N.H. 1994). Additionally, the Silva court found the university had violated a professor’s constitutional rights by disciplining him for classroom speech under a sexual harassment policy that was not reasonably related to the legitimate pedagogical purpose of providing a congenial academic environment because it employed an impermissible subjective standard that failed to take into account the nation’s interest in academic freedom.

1. The case involved complaints by female students that a tenured technical writing professor’s classroom statements were offensive and outrageous. The professor had compared the concept of "focus" in technical writing to sexual intercourse and stated as an example of a simile that "belly dancing is like jello on a plate with a vibrator under the plate." After a campus hearing, the professor was suspended without pay for a year. He sued the university and certain school officials under §1983 claiming violation of his First and Fourteenth Amendment rights.
2. The court said the university's sexual harassment policy that stated in relevant part, "Unwelcome...verbal...conduct of a sexual nature constitute[s] sexual harassment when such conduct has the purpose or effect or unreasonably...creating a hostile or offensive...academic environment," and which gave as examples of such: "unwelcome sexual propositions, graphic comments about a person's body, sexually suggestive objects or pictures in the workplace, sexually degrading words to describe a person, derogatory or sexually explicit statements about an actual or supposed sexual relationship, unwelcome touching, patting, pinching or leering, and derogatory gender-based humor" gave the professor insufficient notice that his classroom statements would violate the policy. The court said the belly dancing statement was not of a sexual nature and the vibrator remark was misunderstood by the students to connote a sexual device.

3. The court also used the test enunciated in *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) for determining the validity of governmental regulation of classroom speech. That says, "[F]ree speech does not grant teachers a license to say or write in class whatever they may feel like... and... the propriety of regulations or sanctions must depend on such circumstances as the age and sophistication of the students, the closeness of the relation between the specific technique used and the concededly valid educational objective, and the context and manner of presentation."
4. Using that test, the court found that the students in the professor’s class were exclusively adults presumed to have the sophistication of adults, the classroom statements advanced the professor’s valid educational objective of conveying certain principles related to the subject matter of his course, and the remarks were made in the professionally appropriate manner as part of a college class lecture.

5. The court then said the discipline was imposed simply because six students had found the professor’s statements to be "outrageous." The court said that as the U.S. Supreme Court has said, "'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression...” Hustler Magazine v. Falwell, 485 U.S. 46, 55, 99 L.Ed.2d 41, 108 S.Ct. 876 (1987), that use of such a standard would violate the professor’s First Amendment right of free speech and that right would not be outweighed by the university’s interest in providing a congenial academic atmosphere.

C. For a ruling upholding punishment for classroom speech, see Rubin v. Ikenberry, 933 F. Supp. 1425 (C.D. Ill. 1996), in which a court found, using a subjective standard, that a professor had made offensive comments not connected to course content and the objective of teaching how to teach elementary school social studies. The court said the university’s response of removing him from the classroom,
monitoring his teaching methods, asking him to reexamine his classroom speech and considering the allegations in relation to a future salary review were reasonable.

1. In Rubin, a tenured professor teaching an all female class on how to teach social studies was alleged by two students to have frequently made sexual comments, inquiries and jokes during class. For example, he called students "babe," recommended his students buy French underwear, told a student she was "smart" for a woman, asked students if they would cook breakfast while naked for their husbands, and discussed his married life, divorce and sex life in detail. After he was removed from teaching the class, the professor filed §1983 claims against certain school officials claiming violation of his constitutional rights.

2. Regarding the professor’s First Amendment claims, the court said that, although the professor claimed his comments were pedagogically correct and that through them he taught modern values, morals and social conditions, the professor failed to explain how his teaching style justified some of the sexual comments.

3. The court also found adequate Fourteenth Amendment due process occurred before the professor was removed as teacher of the class. He had notice as he was given a copy of the grievance and informed of the evidence against him, and he had an opportunity to be heard as he was allowed to explain his teaching method and his reasons for making the remarks.
4. In addition, the court found adequate due process occurred after the professor was removed from the class because he signed a letter agreeing to his removal after he knew the complaints had been resolved in the students' favor and after he acknowledged his removal was appropriate in a letter to a school official.

5. The court also dismissed the professor's substantive due process claims that he had been deprived of liberty interests in an arbitrary and capricious manner because it found a rational relationship existed between the finding of sexual harassment and the university's legitimate objective of providing students with a healthy learning environment.

VI. OTHER RECENT DECISIONS
A. A professor's propensity to commit bad acts (an accusation of raping a student, the incident described in Pagett v. Wilson, supra) is inadmissible under Rule 404(b) of the Federal Rules of Evidence to prove quid pro quo harassment. Parks v. Wilson, 68 F.2d 461 (4th Cir. Oct. 18, 1995) (unpublished opinion). The Fourth Circuit affirmed a jury verdict for the professor.

1. A student alleged that the professor told her that if she agreed to have sex with him, she would graduate despite a misplaced exam. She refused, but allegedly agreed to let him take nude photos of her. She allegedly took her
father with her to the photo shoot and the professor allegedly said, "I give up, you graduate."

2. The professor alleged that he met with two assistant professors regarding the missing exam and they agreed to graduate the student. He claimed he called the student’s home to so inform her mother and the student asked to come by to get something in writing from him.

3. The court refused to allow the evidence of the previous acts of the professor to be presented to the jury as neither involved the offering of academic benefits for sexual favors.

B. A professor who had been terminated following sexual harassment charges was not a "qualified individual with a disability" under the ADA because he was not capable, with or without accommodation, to perform an essential function of his job, to teach. The professor claimed he was presently not qualified to teach because of a psychological disorder causing "disinhibition." Motzkin v. Trustees of Boston University, 938 F. Supp. 983, (D. Mass. 1996).

VII. CONCLUSION

A. This continues to be a developing area of the law. Liability for colleges and universities for acts of their faculty towards students remains unclear. One certainty is that institutions need to avoid actions that appear to treat some complaints less seriously than others. Additionally, any incidents involving classroom
speech must be carefully analyzed to avoid any violation of civil rights of the faculty
member in question.

HOW TO CONDUCT A SEXUAL HARASSMENT INVESTIGATION

I. CONDUCTING AN APPROPRIATE AND TIMELY INVESTIGATION OF A COMPLAINT OF SEXUAL HARASSMENT IS IMPORTANT BECAUSE:

A. It is more likely to result in a swift resolution of disputes.

B. It probably will decrease or minimize the liability exposure for the institution -- an employer is liable if it knew or should have known of harassment and failed to take prompt and reasonable corrective action -- and therefore will cost the institution less.

C. It will demonstrate the institution's commitment to ending sexual harassment on campus and will build credibility for the process and its investigators.

D. It generally is less destructive to employee morale and less divisive to the unit involved than one by an outside agency.

E. The institution can use its own standard of behavior that it expects in the academic community rather than that of an external entity.

F. There is likely to be less publicity and privacy concerns are more likely to be met.
II. BIGGEST MISTAKES IN INVESTIGATING

A. Excessive delay in beginning the investigation.
B. Inadequate feedback to the complainant and alleged harasser during the investigative process.
C. Inappropriate disclosure of confidential information.
D. Lack of thoroughness or failure to complete an investigation.
E. Failure to recognize first amendment/academic freedom issues.

III. CHOOSING AN INVESTIGATOR

A. An institution’s written procedures for investigating a sexual harassment complaint may dictate who the investigator(s) of the matter will be. However, if there is discretion permitted under the policy for selecting an investigator, the following is recommended.

B. Choose individuals who have credibility with and are respected by their colleagues. Consider how well they will perform if called upon to be witnesses in subsequent litigation.

C. Choose individuals with good people skills who can be both empathic and objective, and who can read non-verbal cues.

D. Note: Do not assume choosing the institution’s attorney as the investigator will protect the investigative materials with the attorney/client privilege or the attorney work product exception. Courts have ruled otherwise, exposing the
thought processes of legal counsel and making the attorney a witness and ineligible to represent the institution.

E. Have at least one investigator of the incident be of the same or superior rank as the alleged harasser to give immediate credibility to the investigation. This is particularly true when the alleged harasser is a faculty member or medical doctor at the institution’s hospital or medical school.

F. Consider having at least one male and one female on the investigative team. They should both be present throughout the initial intake interview and each part of the investigation. Women complainants are more likely to be open with other women and may code their responses if only a male is present. Male and female investigators may hold different beliefs as to the seriousness of an event. Having both present avoids the female investigator falling into a counseling role, resulting in her being sympathetic rather than interrogative. Having two investigators provides a reality check and support for each other if the investigation proves time consuming and/or emotionally draining.

G. Despite the advantages listed above, it is always more important to get acting on a complaint than to get the optimum pairing.

H. The investigator must have autonomy and power.

1. The investigator acts on behalf of the educational institution trying to find facts and remedies for the educational institution and make the best possible decision.
2. The investigator does not represent the complainant or the alleged harasser.

3. The investigator is a neutral party but available to both sides.

4. The investigator should report directly to the administrator who can determine the organizational response for the investigator to be most effective.

I. The investigator must be someone with sufficient time and stamina to handle the crucial but draining daily telephone calls and reassurance that must be given during an investigation.

J. The investigator is NOT a counselor but is there to provide information, to acknowledge the emotions that are felt and to refer that person to the proper resources if counseling is indicated.

K. Committee Approach to Investigation

1. Advantages: A committee is a familiar part of campus life and therefore may be more readily acceptable than a single or pair of investigators.

2. Disadvantages: Generally no special skills if the committee is pulled together just for the investigation, more unlikely to come to a speedy resolution, not in a position to take appropriate action, difficult to maintain the appropriate level of confidentiality with an increased number of individuals aware of the facts, hard to disband this type of committee if it is not proving effective.
3. Possible Solution: Have a periodic review of the work of the sexual harassment investigators by a committee to reduce suspicion of the investigators.

IV. CREATING A STRATEGY FOR ACTION

A. An institution’s procedures may outline a specific time table for the investigation. More likely, it will merely give a deadline for the investigation to be completed. In that event, it is important to create a time frame for action.

1. Remember that it is absolutely critical as part of any policy or procedure that there be prompt investigation and resolution of complaints.

2. A delay indicates to employees lack of interest or commitment which leads to demoralization of the work force and to legal liability.

B. The investigator should create a preliminary time line for conducting the investigation before starting it. The initial one should have general time frames for interviewing witnesses, gathering documents, completing a draft report, etc. that allows the investigation to be completed within any time period required by the institution’s procedures. The time line should be regularly updated as events warrant, such as illness or absence of witnesses.

1. As soon as the investigator realizes there may be a problem completing the investigation within a required time, the investigator should so notify the complainant and the alleged harasser with the reason for the delay
and, if possible, get their written consent to extend the time to complete the investigation.

C. The procedure needs to be coordinated with procedures in other policies on campus that may apply to the situation. For example, the faculty code or tenure policy may contain grievance procedures that must be respected if the accused is a faculty member. Grievances against staff employees may be best investigated and resolved by use of already existing procedures to solve other discrimination actions. Union contracts may dictate how an investigation is to proceed.

V. THE COMPLAINT INTAKE

A. It is important to have an intake procedure in place because the institution needs to be able to take a complaint immediately when first contacted by the complainant.

1. Many complainants have “second thoughts” and will not return for another appointment if an intake person is not ready to act.

2. Try to avoid having to send the complainant to more than one office because the first one approached is the wrong one to handle this type of grievance.

B. It may be preferable, depending on the size of the institution, to have more than one place to take complaints, to increase the comfort level of the complainant with the process.
C. The initial intake person needs to get sufficient information about the situation to turn the matter over to the appropriate administrator to initiate an investigation. The intake person may or may not be the person assigned to do the investigation.

D. If drafted with the assistance of the intake person, the complaint should be as specific as possible, i.e. it should provide the who, what, when, where and how of the incident(s) complained of, and be dated and signed by the complainant and the intake person.

1. Note, however, that even vague complaints may put the institution on notice requiring some investigation to occur to gather the missing information needed to decide if an investigation should occur.

VI. THE ANONYMOUS COMPLAINANT

A. It is not uncommon for a complainant to be unwilling to reveal his/her identity to the alleged harasser or return the day after filing a complaint wishing to withdraw it. There are several ways to deal with this situation.

B. The intake person can reassure the complainant that the institution will protect the complaint from retaliation by the alleged harasser, that it has a very strong policy against retaliation and will vigorously enforce it. This may encourage the complainant to allow his/her name to be shared.
C. The intake person can reassure the complainant of the importance of the issue, that the institution does not want to ignore it because of its moral responsibilities. The intake person can explain how limited options are to resolve a problem without sharing the complainant’s name because of due process rights of the accused.

D. The intake person can try to get the complainant to consider returning to file a complaint once the alleged harasser is no longer in a position to do harm to the complainant, e.g. when the class term is over, when the dissertation is approved, when a job situation changes.

1. The intake person should then follow up with the complainant at some future time to see if there is no longer reluctance to go forward with the complaint.

E. If the complainant still wishes to remain anonymous, the intake person should share what can be shared with the administrator responsible for overseeing the institution’s sexual harassment policy to determine what the institution can do about the situation, such as conducting a workshop on sexual harassment in the unit that employs the alleged harasser, or communicating in a general way with the alleged harasser about the behavior complained of.

F. Consider initiating the complaint on behalf of the institution, in the institution’s complaint procedures allow it. This often relieves the fears of the
complainant who becomes willing to pursue the action. It also protects the institution.

VII. TIMELINESS OF THE COMPLAINT

A. Often an institution’s procedures will specify a time period within which a complaint must be filed. If they are silent on this, there is a time period beyond which it is unreasonable to conduct an investigation, e.g. three years, which is the statute of limitations for bringing a sexual harassment action in court in most jurisdictions.

B. The complaint should be examined by the investigator to determine if it is timely. If it does not so appear, the investigator should question the complainant about the reasons for the delay. Legal counsel should be consulted to determine if the reasons are such that the matter should still be investigated.

VIII. SETTING UP THE FILE

A. A separate investigative file should be established apart from the personnel or student file of the alleged harasser or the complainant. Only when allegations are substantiated should a report be prepared for the alleged harasser’s personnel or student file.

B. Should the matter being investigated end up in litigation, the investigation file can be required to be turned over to the party suing the institution. In some states,
investigative files are public records subject to disclosure. It is also possible that an alleged harasser may attempt to intimidate the investigator by filing a defamation action against him/her and try to use the investigative file as evidence of such. Therefore, only factual matters, not idle speculation, should be maintained in the file. Consider discarding initial drafts of documents once they are no longer needed.

C. Include in the file a copy of the policy and procedures that are being followed in the investigation. If litigation does occur, it may be sufficiently remote in time that the procedures and policy may have been amended and it will be important to know which were in place at the time of the investigation.

D. Have a sheet inside the cover of the file on which the date of each activity that is part of the investigation can be recorded. This may be needed later to confirm the existence of a prompt investigation.

E. Include all written documentation, evidence and relevant institutional policies in the file, beginning with the complaint. Also include notes from interviews with the complainant, the alleged harasser, witnesses and others.

IX. INTERVIEW OF THE COMPLAINANT

A. The first step in the investigation will be interviewing the complainant, if the intake person is different that the investigator. A sufficient amount of time should be set aside for the initial interview, preferably at least two hours.
1. A complainant is usually very emotional, often embarrassed with low self-esteem, and is discussing a very private matter. A complainant often has history of being abused or vulnerable. Therefore, the investigator must allow time for the conversation to wander.

2. The goal should not be to be as efficient as possible in the interview. Time is needed to allow a rapport to develop to reduce stress.

3. The use of a tape recorder will probably inhibit the interviewing process. However, at the professional level, note taking by the investigator is acceptable. Taking notes with a blue collar worker may result in distrust.

Solution: have one person ask questions and one person take notes.

B. If the institution’s procedures permit it, tell the complainant when scheduling the interview he/she is allowed to bring a support person or advocate to the interview. If the complainant wishes to bring an attorney, and the institution’s procedures permit it, be sure the attorney knows the limits of his/her participation, e.g., to advise the complainant, but not ask questions or comment on the matter.

C. Choose a site for the interview that will make the complainant comfortable and where privacy is assured, such as his/her residence or an adequately sized office.

1. If an advocate attends, place him/her in a place where visual cues are inhibited, such as side by side or a little behind the complainant.
D. Begin the interview by describing the purpose of it, the institution’s strong desire to eradicate sexual harassment, and its non-retaliation policy, without implying it will occur but also telling who to contact if it does. Remind the complainant of the need to give his/her name to the alleged harasser, that no face-to-face meeting with that person need occur during the investigation unless the complainant wishes it, and respect for confidentiality and privacy should be maintained by the complainant as well as the investigator to the extent possible during the investigation and thereafter. Do not promise absolute confidentiality.

E. Questions to ask the complainant during the initial interview:

1. What happened and what was the complainant’s reaction to it?
   It is important that the individual describes concrete situations rather than just “he propositioned me.”

2. When did it happen?

3. Who in the unit knows that it happened?

4. Did it affect the complainant’s work and how?

5. Who does the complainant know has experienced the same type of behavior?

6. Who in administration or which supervisor has been previously notified by the complainant about the incident?

7. What did that person do?
8. What documentation does the complainant have that supports her story?

9. What does the complainant expect as an outcome, i.e., to have the behavior stopped, counseling, back wages, etc.? Note: Often the complainant does not know what he/she wants, just wants the investigator to tell him/her what to do. Note also: Avoid making implied promises that what the complainant wants is what will occur.

F. Remind the complainant not to discuss the investigation with others in the workplace. Explain doing such might give rise to a claim of defamation by the alleged harasser. Explain also that to do so increases the perception by the harasser that he/she needs to retaliate in some way against the complainant for making the complaint. Often the complainant will talk anyway. However, other complainants with similar experiences with the alleged harasser may come forward as a result who have prepared themselves emotionally for the interview with investigators.

G. If appropriate, suggest that the complainant talk to a source of outside support or get counseling. However, it is important that this is not done in a way that can be interpreted as validating the complaint as it is important for the investigator to remain neutral.

H. Avoid making premature commitments to the complainant.

I. Outline the timetable of the investigation and the actions that the investigator will take.
1. Example: Within 15 working days of receipt of the complaint the investigator shall interview the alleged harasser and his/her supervisor and determine if there exists probable cause to conduct a full investigation of the allegation.

J. Thank the complainant for coming forward with the issue.

X. AFTER THE INTERVIEW WITH THE COMPLAINANT

A. The individuals who need to know about the complaint should be limited to as few as possible.

B. In a workplace situation, the immediate supervisor of the complainant needs to know because there may be a change in the complainant’s work performance and no disciplinary action should be taken against the complainant because of that.

C. The supervisor of the alleged harasser needs to know so the supervisor can watch for further incidents of harassment and understand why the alleged harasser may need to be gone for interviews during work hours.

1. It is preferable too for the supervisor to hear of incident first from the investigator rather than a colored version from alleged harasser.

2. It is important for the supervisor to feel he/she is kept informed so that it does not appear that the investigator is interfering in operation of the employing unit.
D. The alleged harasser needs to be told that a complaint has been lodged against him/her.

XI. MEETING WITH THE ALLEGED HARASSER

A. Arrange the meeting as soon as possible. Inform the alleged harasser when scheduling the meeting of its purpose. If the institution’s procedures so permit, notify him/her that he/she may have a support person present. Note: this may be required by some institution’s procedures or by union contracts. Wait to go into detail over the allegations until the face-to-face meeting, but assure him/her that he/she will have an opportunity to refute the allegations.

B. At the interview, describe the behaviors and ask if they have occurred. Do so without any judgmental comments or inferences.

C. After the behavior has been described, if the alleged harasser agrees that the behavior happened, then label it as sexual harassment, if appropriate, and tell the alleged harasser that it is unacceptable. Note: Many alleged harassers agree that they did in fact do the action complained of but tend to interpret the action differently as far as its severity or intent. If the alleged harasser denies that the behavior happened, invite him/her to tell his/her side of the story. Ask the alleged harasser if he/she has an explanation or theory why the accusation was made.

D. Tell the alleged harasser that the organization takes complaints seriously and has an obligation to investigate them.
E. Explain the institution's definition of sexual harassment and give a written copy of it and the institution's sexual harassment policy and procedures to the alleged harasser. Also explain it is against the law to retaliate against a complainant, and that could include actions or comments by the alleged harasser.

F. Share a copy of the written complaint with the alleged harasser, but only after redacting names and identifying information about individuals other than the complainant who have not yet indicated a willingness to have their names shared with the alleged harasser.

G. Ask the alleged harasser for a written version of his/her side of the story.

H. Ask for a list of character witnesses or witnesses to the alleged behavior.

I. Ask for any documents that would substantiate his/her version of the incident(s).

J. Encourage the alleged harasser to limit his/her dissemination of the complaint and conversation about it. Explain that the investigator will try to keep the matter confidential to the extent permitted by law.

K. Give an estimate as to how long the investigation will take. Explain that new information will be shared with alleged harasser as the investigation progresses.

L. Consider if the type of allegation and the circumstances are such that the complainant should attend the meeting, should the complainant so desire. If the harasser has no prior history of harassment and only one complainant is involved, this may give the complainant some control and power over his/her own problem.
XII. OTHER WITNESSES

A. Contact as soon as possible. Find out if there are any availability problems to determine the order of interviewing. Keep track of who suggested interviewing a witness. Prepare a list of questions to ask.

B. Explain that the information they share will be kept confidential to the extent permitted by law, but that absolute confidentiality cannot be promised. Do not share with them the details of the complaint other than those they need to know to provide information.

C. Do not ask if they have seen or experienced "sexual harassment," ask instead about specific behaviors that they have observed.

D. Ask if from their point of view the alleged harasser was bothering the complainant and why.

E. Ask if there are others who might be able to comment on the interaction or if there is any documentation of which they are aware that might relate to the alleged behavior.

F. Ask if the complainant complained to them about the harasser’s behavior.

G. While it is acceptable to ask about a complainant’s attire and appearance to determine if the conduct in question was welcomed, questions about the complainant’s past and present sexual history may be limited by state law. Before asking such questions, the investigator should consult with legal counsel about the appropriateness of such.
H. Explain the institution’s definition of sexual harassment and give a copy of it to them in writing.

I. Explain the need to limit speculation and conversation about the matter in order to protect themselves from allegations of defamation. Also explain the institution’s policy against retaliation for participating as a witness in an investigation and to whom any retaliation should be reported.

J. Find out if they anticipate leaving the area for any period of time. If so, it may be appropriate to get a signed statement about the incident prior to their departure. Counsel should be consulted about the proper form of such a statement to preserve it for use in subsequent legal proceedings.

K. Determine if a written statement should be obtained of witnesses who will be available. Such statements are discoverable and may lock a witness into a set of facts that the witness may want to change later. Again, consult with counsel about the advisability of obtaining such signed statements.

XIII. OTHER PROCEDURAL MATTERS

A. Type up notes from interviews as soon as possible after they occur and ask the interviewee to verify them. Make a separate report of the interview that contains the investigator’s impression of the witness’ credibility, nervousness, or nonverbal behavior.
B. Maintain a current list of addresses and phone numbers of all individuals contacted.

C. Obtain and review relevant employment and student records.

D. Check with legal counsel about any First Amendment/academic freedom concerns raised by the allegations.

E. Keep the complainant and the alleged harasser apprised of the progress of the investigation.

F. Sometimes a complainant will file a sexual harassment complaint with an outside state or federal agency before the internal institutional investigation is completed. Courts divide as to whether an institution can elect to stop its investigation at that point. Some view it as unlawful retaliation to do so; others believe it is not. Legal counsel should therefore be consulted before a decision is made to terminate an investigation because a complaint with an outside agency has been filed.

XIV. WEIGHING THE EVIDENCE

A. Most institution’s procedures will specify what standard of proof the evidence must meet to find that there is reasonable cause to believe sexual harassment has occurred and state that the burden of proof to produce such will be on the complainant. In the absence of a standard of proof, the one most likely to be employed is the preponderance of evidence standard, that is, the complainant must
demonstrate it is more likely than not that sexual harassment occurred in violation of the institution’s policy.

B. In the situation where there are no witnesses and it is the complainant’s word against the accused harasser, the investigative team will have to look at all the facts and circumstances surrounding the allegation to determine if there is reasonable cause to believe the harassment occurred. This includes considering:

1. If the complainant told anyone else of the harassment,

2. If there was a change in behavior or either or both of the individuals after the alleged harassment incident(s),

3. The internal consistency of their statements compared with other statements made and behaviors observed,

4. The timing of the complaint in relations to the occurrence of the alleged behavior,

5. The existence of similar complaints by others, and

6. How credible the complainant and the alleged harasser are. The investigative team should tie credibility assessments to concrete behavior or incidents as much as possible, such as the individual’s demeanor or nonverbal behavior.
XV. THE ADMINISTRATION OR MANAGEMENT’S ROLE DURING THE INVESTIGATION

A. The administration must be willing to stay out of the way during the investigation.

B. The administration must maintain an open mind to evaluate the results of the investigation.

C. The administration must promise no retaliation and the administration must be sensitive to the need to heal the work place after the investigation is concluded.

XVI. CONCLUDING THE INVESTIGATION

A. Review notes and determine if all relevant facts have been gathered, all witnesses have been interviewed, all relevant documents have been obtained. Seek clarification of such as needed.

B. Make a list of all facts and the data that supports each one.

C. Evaluate each fact and determine if the majority of the evidence supports or refutes it.

D. Determine if additional investigation would resolve disputed facts, and, if so, conduct it.

E. Consult with legal counsel regarding any questions of law that might affect the evaluation of the facts.
F. Review the components of sexual harassment and determine if the facts exist to support each component, e.g. was the conduct "unwelcomed," was it based on gender, was it quid pro quo or hostile environment harassment, was it abusive or hostile. The institution’s procedures or state law may dictate the viewpoint from which to make these assessments. If not, use the viewpoint of a reasonable person.

G. Prepare a written report describing the complaint allegations and the factual findings. A chronological presentation may be the easiest to follow. Include a description of all the interviews and any documents reviewed. Distinguish between first hand knowledge and hearsay. Determine if reasonable cause exists to believe the institution’s sexual harassment policy has been violated and state the rationale for such.

H. Depending on the institution’s procedures, the report may also include a recommendation for a particular corrective, disciplinary sanction if cause is found. The sanction proposed needs to be one reasonably calculated to end the harassment and avoid its repetition.

XVII. POST-INVESTIGATION

A. Share the outcome of the investigation separately with the complainant and the alleged harasser. If harassment has been found, meet first with the alleged harasser to allow one additional opportunity for an explanation of his/her side of the story. Inform the alleged harasser of the institution’s procedure from that point, e.g.
that the supervisor will determine the discipline to be imposed, that the alleged harasser may request a hearing on the proposed discipline, that the decision may be appealed within the institution, etc.

B. The alleged harasser should receive a copy of the document that will be used to support disciplinary action. The complainant need not receive such but should have the results summarized orally or in writing, unless state law prohibits this, and be told if the allegations were substantiated and that appropriate disciplinary action will be taken. The complainant needs to know of any proposed restrictions on the behavior of the alleged harasser that if violated would affect the complainant so that, the complainant can notify the institution if that occurs.

C. If a complainant decides not to go forward at some point during the investigation, the institution may still be liable for any future incidents. Therefore, do not require a complaint to have been investigated to a conclusion to warn an alleged harasser of inappropriate behavior.

D. If the conclusion is that offensive remarks were made but no threats and the complainant is annoyed but not damaged, one possible resolution is to recommend the harasser be told to stop and that be followed up with a written letter to the harasser stating the same. People tend to take a written letter more seriously than an oral warning.

E. If the conclusion is that it was not harassment but welcomed, consider recommending a reprimand to the alleged harasser for poor judgment.
F. If there are multiple complainants or the complainant is badly hurt, a recommendation of a suspension, transfer or termination of the sexual harasser may be in order.

G. Consider recommending paid counseling for the complainant.

H. If it is workplace harassment, consider recommending transfer of the harasser or the complainant - consider the latter only if some disciplinary action occurs against the harasser so the complainant is not penalized for complaining.

I. Always be aware of an over reaction to allegations of sexual harassment because of other work performance problems that the employee has. To over-punish, for a particular sexual harassment incident will result in the loss of credibility for the investigative program. Consistency in recommended disciplinary sanctions is important.

J. Share the report with the appropriate administrators responsible for supervising the alleged harasser and imposing discipline.

K. Follow up at reasonable intervals to ensure there is no recurrence of harassment and no retaliation.

L. Maintain the investigative file in a location which preserves the confidentiality of the file.