

**STATEMENT OF DEBORA L. OSGOOD
PARTNER, HOGAN, MARREN, BABBO & ROSE, LTD.**

**BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS
Washington, D.C.**

Briefing:

“In the Name of Hate: Examining the Federal Government’s Role in Preventing Hate Crimes”

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I. Introduction

Commission Chair Lhamon, and members of the Commission, thank you for inviting me to participate as a panelist in today’s briefing. My name is Debbie Osgood. Since March 2016, I have been a partner at the law firm of Hogan Marren Babbo & Rose, Ltd., where I specialize in the legal issues related to educational civil rights. Previously, I had the privilege of working with the U.S. Department of Education, Office for Civil Rights (OCR), for 25 years. During my OCR tenure, I served as a National Enforcement Director and, previously, as Director, Chief Attorney and staff attorney in the Chicago regional OCR office. I worked as a career federal employee at OCR under four different Presidential Administrations, the last being the Obama Administration during which I had the pleasure of working closely with the Commission’s Chair in her role then as OCR’s Assistant Secretary. I am proud of my years of public service with OCR and was honored to contribute to OCR’s vital role in ensuring the civil rights of students in our country.

Based on my experiences at OCR and in private practice representing schools, colleges and universities, I will present my perspective on the critical leadership and enforcement role that OCR has played and must continue to play in preventing and addressing harassment.

II. Harassment in Education

Our common goal is, of course, is to ensure that students at all levels of education – from preschool through graduate school -- can learn in an educational environment free of harassment on the basis of race, color, national origin, sex, or disability. Unfortunately, the ongoing sexual assault scandals, and the #MeToo and other social movements show that as a society we are nowhere near where we want and need to be in this area. This is particularly

heartbreaking in the area of education given the incredibly high and frequently life-changing stakes involved for students as they progress through their educational journeys.

Data collected by the Department show that unacceptably high rates of harassment continue at all levels in our nation’s education system, affecting elementary, middle and high school students as well as college and university students.

At the elementary-secondary level, according to the recent results of OCR’s 2015-2016 Civil Rights Data Collection (“CRDC”), “approximately 135,600 individual allegations of harassment or bullying on the basis of sex, race, sexual orientation, disability, or religion were reported during the 2015–16 school year.”¹ The allegations included harassment or bullying on the basis of: race, national origin or color (23%); sex (sexual and sex-based) (41%); sexual orientation (16%); disability (11%) and religion (8%).²

At the post-secondary level, the Department’s website shows that in 2016, the number of reported hate crimes was 1,300, based on the annual security reports provided by 6,506 post-secondary institutions.³ This information was collected and posted on the website pursuant to the requirements of the Clery Act and the Violence Against Women Act of 2013 (VAWA).⁴

¹ <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2015-16.html> (released April 24, 2018). The data include information collected about more than 50 million students from 17,300 public school districts and 96,400 public schools and educational programs.

² The terms, “harassment and bullying,” are defined for CRDC purposes as: “[I]ntimidation or abusive behavior toward a student from another student, school employee, or non-school employee third party. It can take many forms, including verbal name-calling, insults, or intimidation, as well as non-verbal acts or behavior such as graphic or written statements, or conduct that is physically threatening, harmful, or humiliating.” <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf> (*School Climate and Safety Issue Brief*) (brief accompanying CRDC data that includes a specific discussion of the data relating to harassment or bullying).

³ <https://ope.ed.gov/campussafety/Trend/public/#/answer/2/201/main?row=-1&column=-1>. The term, “hate crime,” is defined in this context as: “A crime reported to local police agencies or to a campus security authority that manifests evidence that the victim was intentionally selected because of the perpetrator’s bias against the victim . . . [T]he categories of bias include the victim’s actual or perceived race, religion, gender, gender identity, sexual orientation, ethnicity, national origin, and disability.” 34 C.F.R. § 668.46(a).

⁴ Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, Pub. L. No. 101-542, 20 U.S.C. § 1092(f). The Clery Act and the VAWA, which amended the Clery Act, are enforced by the Department’s Office of Postsecondary Education and require postsecondary institutions to submit annual security reports to the Department.

III. OCR Role in Addressing Harassment

In discussing OCR's role in addressing harassment, let me first provide some background on OCR's responsibilities as a federal civil rights enforcement agency. The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through the vigorous enforcement of the civil rights laws. OCR is responsible for enforcing the federal civil rights laws and regulations that prohibit educational institutions from discrimination and harassment on the basis of race, color, national origin, sex and disability. The federal statutes that OCR enforces include Title VI of the Civil Rights Act of 1964,⁵ which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972,⁶ which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973⁷ and Title II of the Americans with Disabilities Act of 1990 (ADA),⁸ which prohibit discrimination on the basis of disability.⁹ Title VI, Title IX and Section 504 apply to programs and entities that receive federal funds from the Department, including but not limited to all state educational agencies, elementary and secondary school systems, colleges, and universities. Title II of the ADA applies to public educational entities and institutions, including public elementary and secondary schools and public colleges and universities, regardless of whether they receive federal funds. Pursuant to these statutes, OCR has jurisdiction over alleged acts of harassment based on race, color, national origin, sex, or disability.

OCR uses multiple approaches to comprehensively address the harassment of students. First, the agency promulgated the current regulations that accompany the statutes discussed above.¹⁰ OCR has also issued numerous policy guidance documents to assist educational institutions in understanding the applicable requirements relating to harassment. The agency's current policy documents concerning harassment include, but are not limited to, OCR's October 26, 2010 *Dear Colleague Letter on Harassment and Bullying*, which focused on peer harassment based on race, color, national origin, sex or disability in the elementary and secondary

⁵ 42 U.S.C. § 2000d *et seq.*

⁶ 20 U.S.C. § 1681 *et seq.*

⁷ 29 U.S.C. § 794.

⁸ 42 U.S.C. § 12131 *et seq.*

⁹ OCR also enforces the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, and the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905. My statement today does not address those statutes.

¹⁰ See 34 C.F.R. Part 100 (Title VI), Part 104 (Section 504), Part 106 (Title IX), and 28 C.F.R. Part 35 (Title II).

context,¹¹ OCR's September 2017 *Interim Guidance on Campus Sexual Misconduct*,¹² OCR's July 25, 2000 *Dear Colleague Letter on Prohibited Disability Harassment*,¹³ and OCR's March 10, 1994 *Investigative Guidance: Racial Incidents and Harassment against Students at Educational Institutions*.¹⁴

Second, OCR has investigated and resolved thousands of cases with harassment allegations. These investigations have taken place as part of OCR's complaint process under which complaints may be directly filed with OCR and as part of OCR's compliance review and directed inquiry processes, under which OCR proactively identifies schools and discrimination issues for investigation. During my tenure with OCR, the office obtained numerous agreements with schools, colleges and universities that required the institutions to take specific steps to comply with the regulatory requirements relating to harassment, including the requirements for having identified compliance coordinators, non-discrimination policies, and prompt and equitable grievance procedures, and the obligation to promptly and appropriately respond to allegations of harassment. According to OCR's current website, as of April 27, 2018, OCR's 12 regional offices had a total of 1528 open harassment cases under investigation, including 980 involving elementary-secondary institutions and 548 involving post-secondary institutions.¹⁵

Third, OCR has provided technical assistance to a wide range of stakeholders, including schools and districts, state education agencies, colleges and universities, parent groups, nonprofit and advocacy organizations, and other federal agencies schools. These activities include making presentations, conducting outreach, issuing pamphlets,¹⁶ and publishing data and other information, such as the results of the CRDC and annual security reports discussed above. OCR currently posts on its website information about open cases under investigation

¹¹ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>. OCR stated that the legal principles discussed in the letter also apply to postsecondary institutions covered by the laws and regulations enforced by OCR.

¹² <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

¹³ <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>.

¹⁴ <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html>. For a listing of the agency's current harassment policies, see the "harassment" category on the topical subject listing on OCR's website. <https://www2.ed.gov/about/offices/list/ocr/topics.html?src=rt#H>. In addition, in OCR's February 22, 2017 *Dear Colleague Letter Withdrawing Previous Guidance on Transgender Students*, OCR specifically stated that the withdrawal of its previous guidance documents "does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment." <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹⁵ <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/index.html>.

¹⁶ *E.g.*, archived 2008 brochure entitled, "Sexual Harassment: It's Not Academic," at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html>.

under each of its statutes, as noted above, and also posts resolution letters with agreements for cases resolved on or after October 2, 2013.¹⁷

IV. Recommendations

The Commission requested input on strategies and best practices that federal law agencies can engage in to aid in the documentation, prosecution, and prevention of hate crimes. There are many federal, state and local agencies that must be involved in this effort. My recommendations are directed to the steps that the Department and OCR, as part of this broader effort, can and should take going forward. The Department and OCR have an obligation to provide responsible leadership for schools, colleges and universities across the country on how to prevent and respond appropriately to harassment.

A. OCR must continue to vigorously enforce the civil rights laws prohibiting harassment in education.

My first recommendation should come as no surprise given my legal background and the enormous respect that I have for the Office for Civil Rights in its historic and ongoing role in protecting the civil rights of students in our nation's schools. OCR must continue to vigorously enforce the civil rights laws that prohibit harassment and must be provided adequate resources to do so. This commitment to OCR's critical role in addressing harassment is one that has been shared for many years across administrations by leadership at the Department and in OCR. Just last month, Secretary DeVos again reaffirmed this commitment in her announcement about the results of the 2015-2016 CRDC, stating that "[p]rotecting all students' civil rights is at the core of the Department's mission," and commending "the many educators, school leaders and OCR staff who put in countless hours to produce this data and who work tirelessly to ensure all students are able to learn in a safe and nurturing environment free from discrimination."¹⁸

OCR's comprehensive approach to preventing and addressing harassment -- through regulations and policy guidance, investigations, and technical assistance -- has resulted in tremendous progress and greater compliance by educational institutions in the area of harassment. For example, because of OCR's policy guidance and robust enforcement work in the area of sexual harassment and sexual violence, expectations at the post-secondary level

¹⁷ <https://www.ed.gov/ocr-search-resolutions-letters-and-agreements>.

¹⁸ <https://www.ed.gov/news/press-releases/us-department-education-releases-2015-16-civil-rights-data-collection> (April 24, 2018).

have changed dramatically in recent years. “Title IX compliance” – preventing and effectively responding to sexual harassment and sexual violence -- is now part of the educational package that students, their parents, and communities expect, and deserve, from their educational institutions. OCR must continue to use all of the regulatory, policy, enforcement and technical assistance tools available to it as a federal civil rights law enforcement agency to promote and ensure compliance with the federal laws prohibiting harassment in education.

B. OCR should use public input and lessons learned to further improvement in this area.

Currently, the Department is reviewing all of its regulations as part of the Administration’s regulatory review and reform initiatives.¹⁹ The Department also plans to issue a notice of proposed rulemaking (“NPRM”) regarding the Title IX regulations “to clarify schools’ obligations in redressing sex discrimination, including complaints of sexual misconduct, and the procedures by which they must do so.”²⁰

I fully expect that the debates over possible future changes to OCR’s regulations as well the development of any new policy guidance under Title IX, Title VI and/or the disability laws and policies, will be exceptionally heated and raucous, given the stakes involved. In my view, these discussions present an important opportunity for the federal government and the entire education community – including students, parents, teachers and faculty members, and administration officials, as well as advocates -- to address these issues in a reasonable, collaborative, and equitable way. It is my hope that this type of policy-making will lead to greater understanding by educational institutions of their obligations and increased compliance by these institutions.

Here are several key principles that I believe should guide the discussions:

1. *Moving Forward.* Regardless of the possible regulatory and policy changes ahead, in my view, the obligation and the responsibility of schools at all educational levels to address harassment is not going away. Schools must continuously affirm that they will

¹⁹ The initiatives include Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," and Executive Order 13777, "Enforcing the Regulatory Reform Agenda."
<https://www2.ed.gov/policy/gen/reg/retrospective-analysis/index.html>.

²⁰ https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1870-AA14&operation=OPERATION_PRINT_RULE.

not tolerate harassment – on any protected basis -- at their institutions and must take the necessary steps to address harassment in an effective manner. Our discussions should focus on how to get better from this fundamental principle forward.

2. *Use the Lessons Learned.* Over the years, federal officials and educational institutions have learned a lot about developing and implementing effective anti-harassment policies, procedures and practices. The education community has devoted tremendous resources to improving how institutions prevent, respond, and handle harassment, including by formalizing and publicizing their anti-discrimination policies and grievance procedures, conducting thorough and equitable investigations, training staff, improving systems of documentation, providing resources to both parties in grievance procedures, and assessing the effectiveness of their anti-harassment efforts. At the same time, questions have been raised about the appropriate scope of harassment policies and procedures. In the spirit of continuous improvement, we should use this opportunity to assess and discuss what has been working and what has not worked in this area so that we all can become even better at addressing these difficult issues.

As a federal civil rights agency, OCR has had many years now of working through the facts of specific cases to assess what it means to provide a prompt and equitable response to a complaint of harassment. As a result, OCR itself has also become more sophisticated and nuanced in assessing the compliance issues relating to harassment. This body of administrative case law – including past and current OCR cases -- should be instructive for OCR and for educational institutions going forward.

3. *Provide Clear, Reasonable Rules.* In my view, OCR is at its most effective as a federal civil rights agency when it makes clear to all, including students and school officials, what compliance requires under each of the statutes it enforces. Educational institutions need clear and reasonable guidance for developing and implementing policies, procedures and practices. In my practice, as in the OCR investigations I worked on, I have seen many schools, colleges and universities trying to take the right steps to prevent harassment and to respond to it appropriately if and when it occurs.

In withdrawing the 2011 and 2014 OCR policy guidance documents on sexual violence, Education Secretary Betsy DeVos highlighted her desire for greater clarity regarding what constitutes harassment within the contours of free speech and academic

freedom and the need for heightened due process protections for all students involved in the grievance process.²¹ Again, I do not pretend to think that answers in this area will be easy to obtain or agreeable to all, but greater clarity as to what the answers are will help schools better comply with the rules.²² With clear and reasonable guidance, I am confident that educational institutions can have appropriate policies and fair and equitable processes in place that protect the safety and welfare of students and the community and that include appropriate due process protections and do not infringe upon free speech rights.

C. OCR should consider publishing all of its compliance determinations related to harassment.

As discussed, the issuance of clear and reasonable rules as part of regulations and policy guidance is an important part of making clear to all what compliance requires. In addition, there is a treasure trove of guidance available from OCR's own experience in making determinations, based on the facts at a particular institution and involving specific parties, as to whether an institution is or is not in compliance with Title VI, Title IX, and/or the applicable disability laws. My recommendation is that OCR consider publishing all of its compliance determinations related to harassment, taking into account appropriate privacy and fairness considerations that may necessitate the redacting of party names and other information.

Currently OCR publishes on its website a monthly list of pending cases and the resolution letters with resolution agreements obtained on or after October 2, 2013. The website provides only a partial picture of the agency's compliance determinations, as the website does include cases where OCR has determined that the institution is *in compliance* with the applicable statute at issue.²³

²¹ <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement> (Sept. 7, 2017). See also OCR's September 2017 *Interim Guidance on Campus Sexual Misconduct*, at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

²² For the same reason, I was pleased to see the Department discuss the overlapping requirements of Title IX, the Clery Act and VAWA in its September 2017 *Interim Guidance on Sexual Misconduct*.

²³ For example, after OCR issued its *Interim Guidance on Campus Sexual Misconduct* in September 2017, OCR concluded that an institution did not violate Title IX promptness requirement when it took 143 days to conclude an investigation. OCR noted that there is "no fixed time frame under which a recipient must complete a Title IX investigation." OCR stated that it could not conclude that the process was not prompt, particularly when the circumstances included the need to provide the parties with sufficient time to prepare for meaningful participation in the investigation and hearing process. See OCR Chicago Letter of Insufficient Evidence, St. Norbert College, (05-17-2441) (October 16, 2017). The analysis in this "insufficient evidence of a violation" letter would be useful as guidance for other schools. The letter was obtained from OCR through a Freedom of Information Request.

Specifically, I recommend that OCR publish all resolution letters related to harassment, including non-violation letters as well as other letters where OCR obtains an agreement from the institution. All of these types of compliance decisions will be instructive to students, schools, colleges and universities in understanding what does and what does not constitute harassment prohibited by federal law. Again, if our common goal is to increase compliance with the civil rights laws, greater understanding of the compliance requirements will, in my view, promote greater compliance.

D. OCR should provide more technical assistance on harassment.

Recently, OCR has had to scale back its technical assistance efforts relating to harassment and other issues because of its high complaint load. This is unfortunate and in my view represents a missed opportunity for OCR to work with educational institutions in a proactive and constructive manner that increases compliance. I recommend that OCR provide more technical assistance on issues relating to harassment. My specific suggestions include:

1. *Update (or prepare a new version of) the “NAAG Guide.”* In 1999, OCR and the National Association of Attorneys General (NAAG) issued a multijurisdictional guide for schools entitled, *Protecting Students from Harassment and Hate Crime: A Guide for Schools*.²⁴ The 169-page archived NAAG Guide provided a comprehensive approach to eliminating harassment and hate crime based on race and national origin, sex, and disability. OCR’s website notes that since the issuance of the NAAG guide, “[S]ignificant changes have occurred in relevant statutes, case law, and Department policy guidance. For example, the guidance does not reflect the U.S. Supreme Court’s 1999 decision in *Davis v. Monroe County Board of Education* and subsequent federal case law, new or revised federal civil-rights and hate-crimes statutes, such as the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 and the ADA Amendments Act of 2008, and other federal and state laws that have been enacted or revised since 1999 . . . The Department has issued substantial legal policy guidance related to harassment that is not reflected in this document . . .” An updated or new version of a “NAAG” or a similar type of comprehensive guide that addresses these significant changes, incorporates lessons learned from OCR’s cases and reflects current law and policy about harassment would be very helpful to educational institutions.

²⁴ <https://www2.ed.gov/offices/OCR/archives/Harassment/harassment.pdf> .

2. *Develop a Model Grievance Policy.* OCR should develop a model grievance policy that can be used by schools in investigating complaints of harassment in a prompt and equitable manner. This type of policy would be useful to complainants and recipients in promoting the resolution of complaints internally, without resort to OCR's complaint process or the courts.
 3. *Provide More Local Technical Assistance.* Regional OCR offices should provide more local technical assistance to the educational institutions in their jurisdictions. For example, as Director of the Chicago OCR Office, I instituted an annual seminar on civil rights for schools within OCR Chicago's six-state region. The seminar provided an important opportunity for educational institutions and OCR Chicago staff to meet and discuss recent developments in OCR policy and enforcement. OCR regional offices should be encouraged and supported in their efforts to provide technical assistance to schools in their areas.
- E. The Department should utilize its own educational data to promote greater understanding of the issues relating to harassment.

The Department has access to voluminous data relating to the nation's schools, colleges and universities, including access to the CRDC and Annual Security Report data described above as well access to the resources of the Department's Institute of Education Sciences (IES) and its National Center for Education Statistics (NCES). NCES' mandate is to collect, collate, analyze, and report statistics on the condition of American education; conduct and publish reports; and review and report on education activities internationally. In its role as a leader in this area, the Department should work with IES and NCES to analyze civil rights complaints and reports to inform policy, impact behavior, spot problem areas, and identify trends relating to harassment and effective prevention and responses to harassment.

V. Conclusion

In conclusion, OCR must continue to play a vigorous role in the enforcement the civil rights laws prohibiting harassment and in working to guide educational institutions to compliance.

I want to thank the Commission for the opportunity to speak today on this important topic.