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November 30, 2017

Helen A. Friel, Ed.D.
Assistant to the Superintendent/
Clerk of the School Committee
Worcester Public Schools
20 Irving Street
Worcester, MA 01609-2493

RE: Title IX Policy

Dear Dr. Friel:

I write to respond to the School Committee's request for a legal opinion regarding Title IX and to provide the legal opinion and a revised policy for review.

On September 22, 2017, The U.S. Department of Education- Office for Civil Rights issued a Dear Colleague Letter ("2017 Letter") formally withdrawing the statements of policy and guidance previously issued by that office. Specifically withdrawn are the April 4, 2011 *Dear Colleague Letter on Sexual Violence* ("2011 Letter") and the *Questions and Answers on Title IX and Sexual Violence*, dated April 29, 2014 ("2014 Q&A").

Dear Colleague Letter

The recent Dear Colleague letter is highly critical of the 2011 Dear Colleague Letter and 2014 Q&A for a number of reasons, including the following:

- The requirement that schools adopt a minimal standard of proof – the preponderance of the evidence standard – in administering student discipline, rather than the higher clear and convincing evidence standard.
- The suggestion that schools with an appeals process allow complainants to appeal not-guilty findings, even though many schools previously followed procedures reserving appeal for accused students.
- The 2011 Dear Colleague Letter discouraged cross examination by the parties.
- The requirement that schools cannot rely on law enforcement investigations of criminal conduct to resolve Title IX complaints, and therefore "forc[e] schools to establish policing and judicial systems while at the same time direct[] schools to resolve complaints on an expedited basis."
- The recommendation that due process protections afforded to accused students should not "unnecessarily delay" resolving the charges against them.

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- The fact that the 2011 Letter and 2014 Q&A were imposed without affording notice and the opportunity for public comment.

The 2017 Letter also states that the 2011 Letter and 2014 Q&A are widely criticized by universities for placing “improper pressure upon universities to adopt procedures that do not afford fundamental fairness.” The Department stated it intends to “develop an approach to student sexual misconduct that responds to concerns of stakeholders and aligns with the purpose of Title IX”. Such policy changes will be implemented through a rulemaking process that responds to public comment. The Department indicated that the 2017 Letter does not add requirements to the applicable law.

At the same time it issued the 2017 Letter formally withdrawing the above-referenced guidance documents, the Department of Education issued a *Q&A on Campus Sexual Misconduct* (2017 Q&A). According to the Department, the purpose of the 2017 Q&A is to provide information about how OCR will assess a school’s compliance with Title IX during the interim period while the notice and public comment process is underway. The Department noted that the *Revised Sexual Harassment Guidance* issued in 2001 is still considered applicable guidance.

Q&A on Campus Sexual Misconduct

The 2017 Q&A is a seven page document that outlines the following:

- The school’s responsibility to address sexual misconduct complaints.
 - A school must take action when it knows or reasonably should know of an incident of sexual misconduct. A response by the school is required when the misconduct is so severe, persistent or pervasive as to deny or limit a student’s ability to participate in or benefit from the schools programs or activities and thus a hostile environment exists.
 - Schools must designate at least one employee to act as the Title IX Coordinator
- The relationship between Title IX and the Clery Act
 - Higher education institutions that participate in federal student financial aid programs are subject to requirements of the Clery Act, as well as Title IX. The Clery Act requires institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault and stalking and to include certain policies, procedures, and programs pertaining to these incidents in the annual security reports.
 - The Clery Act does not apply to K-12 educational institutions.

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- Examples of interim measures that may be appropriate under the circumstances
 - Interim measures – individualized services offered as appropriate to either party (reporting and responding) prior to the investigation or while an investigation is pending.
 - Examples: counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, leaves of absence, increased security or monitoring of certain areas, etc.
 - A school cannot rely on fixed rules or operating assumptions that favor one party over another, nor may measures only be made available to one party.

- What procedures should be followed to adjudicate a finding of responsibility for sexual misconduct
 - Grievance procedures must be adopted and published by the school and must provide for a prompt and equitable resolution of complaints.
 - Prompt Investigation – There is no fixed time that a school must complete a Title IX investigation (previously was recommended that the investigation period be completed within 60 days). A school must engage in a good faith effort to conduct a fair, impartial investigation in a timely manner.

- Informal Resolution of Complaints
 - If all parties voluntarily agree to participate in an informal resolution and a school determines that the particular complaint is appropriate for such a process, the school may facilitate an informal process, including mediation.

- What constitutes an “equitable” investigation
 - Burden on the school – not on the parties – to gather sufficient evidence to reach a fair and impartial determination.
 - A trained investigator should analyze and document evidence, evaluate credibility of witnesses and take into account the unique circumstances of each case.
 - Any rights or opportunities that are made available to one party must be made available to the other party on equal terms.
 - Written notice must be provided to responding party of allegations and potential violation of the sexual misconduct policy.

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- Each party must receive written notice in advance of any interview or hearing with time to prepare for meaningful participation. The investigation should result in a written report summarizing relevant evidence.
- A school's obligation concerning notice of outcome and appeals
 - Written notice of the outcome of disciplinary proceedings should be provided to the parties concurrently and schools may set an appeals process that allows appeals by both parties or by the responding party. A school may not only allow right of appeal to the complainant.
- Appropriate evidentiary standards
 - Standard of Proof – Schools will have the option to continue to use the preponderance of evidence standard or a higher standard, the clear and convincing evidence standard, in the decision-making process for all claims of student misconduct.

Impact of Interim Guidance

It is important to note that the 2017 Letter does not add requirements to applicable law. It did however withdraw the 2014 Letter which provided a much higher level of detail as to how schools and universities should respond to complaints of sexual harassment and how Title IX investigations should be conducted.

The general message of the interim guidance is to enhance protections for the accused. It achieves this by providing for a greater degree of flexibility in Title IX procedures than the withdrawn guidance (2011 Letter and 2014 Q&A Guidance). For example, it eliminates any suggested timeframe in which to complete an investigation, allows informal resolution like mediation, and allows either a preponderance of the evidence or clear and convincing standard of proof, as long as institutions use the same standard in all disciplinary proceedings.

The interim guidance makes clear that the institution bears the burden to gather sufficient evidence, and, in a further departure from the prior guidance, which discourages cross-examination by the parties, the interim guidance states that institutions should ensure that any procedure afforded to one party be afforded to the other, including cross-examination of witnesses.

There will be a notice and public comment period and at some point in the future, the Department will issue updated guidance in this area. In the meantime, it is advised for schools and universities to review their Title IX policies to ensure they are in line with the 2017 Letter and Q&A.

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Worcester's Title IX Policy

Worcester has a Title IX policy currently in place. Included in the "Legal Policies" section of the "Policies Handbook for the Worcester Public Schools" the District has a lengthy "Nondiscrimination" policy prohibiting discrimination on the basis of race, color, religion, national origin, ancestry, sex, gender identity, age, criminal record, handicap, mental illness, retaliation, sexual harassment, genetics or military service. This policy specifically outlines the District's Sexual Harassment Policy as well as the grievance procedures for complaints of sexual harassment. The Policy sets forth a five (5) step grievance procedure.

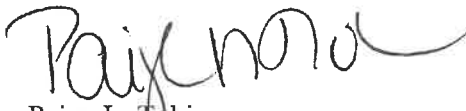
Worcester's policy on sexual harassment includes the majority of the requirements set forth in the relevant guidance. The District has designated a Title IX Coordinator and provided contact information for this person. The Policy sets forth its goal of prompt and equitable resolution of complaints and outlines detailed grievance procedures.

There are a few areas where the District's policy may fall short of what is advised in the interim guidance. Specifically, the Title IX policy does not mention interim measures and does not clearly outline written notice requirements.

Although the interim guidance recently issued did not make any changes to the law, a review of the District's current policy in light of the recent guidance suggests that minor revisions to the policy would be appropriate. I have taken the liberty of revising the policy and enclose it for your review.

In the interim, please do not hesitate to contact me with any questions. Thank you.

Very truly yours,


Paige L. Tobin

PLT/cmw
Enclosures (as stated)

cc: Maureen Binienda, Superintendent