

From: Gwen Lexow
Sent: Fri, 11 Jun 2021 10:27:11 -0400
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (Sexual Harassment regulations)

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Bates

*Title IX & Civil Rights
Compliance Office*

11 June 2021

Ms.
Suzanne Goldberg
Acting
Assistant Secretary for Civil Rights
Office
of Civil Rights
U.S.
Department of Education

Via electronic submission at
T9PublicHearing@ed.gov

Re: Written Comment: Title IX Public Hearing

Dear Assistant Secretary Goldberg:

On behalf of Bates College, thank you for the opportunity to provide comments on the U.S. Department of Education's (DoE) regulations implementing Title IX.

Bates College shares the DoE's stated goal of ensuring that educational institutions address sexual harassment and discrimination in systematic and effective ways. As an educational institution, we must work to eradicate systems, climates, and behaviors, including those based upon sex and gender, that limit individuals' access to educational opportunities. We also agree that we must use equitable, fair, impartial, and transparent processes to produce reliable outcomes when resolving reports of discrimination and harassment. Prior to the passage of the current rule, policies and procedures at Bates already encompassed many of the regulations' provisions that reflected best practices in the field, including providing robust systems of support to all individuals involved, timely notice of allegations, an equitable opportunity to review and rebut relevant evidence, equity of participation in the investigation process, an opportunity to review and comment on a detailed and comprehensive investigation report, notice of outcomes and rationales, and equitable opportunities to appeal. We submit these comments and recommendations to assist the DoE in reviewing the regulations to ensure that the shared goal of eliminating sex-based discrimination is met.

We are concerned that these complex and prescriptive regulations have resulted in a significant chilling effect on individuals reporting concerns and by extension seeking support and have created challenges to the institution's ability to address and remedy Title IX reports in a comprehensive and timely manner.

It is our belief that recipients can provide a full, fair, and transparent process for the resolution of reports without creating additional barriers to reporting or an overly bureaucratic procedures.

DEFINITIONS

We encourage the Department to reconsider the current definitions for violations. The use of "Sexual Harassment" is confusing since it is both an umbrella term and specific violation equivalent to a hostile environment.

The definition is particularly problematic

because: 1) it is not compatible with Title VII, with which recipients must also comply; 2) it sets a higher bar for discrimination under Title IX than Title VII; and, 3) it does not match the definition for sexual harassment consistently used in Title IX

case law. This definition also does not address persistent conduct. We urge the DoE to use a definition consistent with best practices and prohibitions under Title VII: "Unwelcome sexual conduct, or conduct on the basis of sex, that is so severe or pervasive

(or persistent) and objectively offensive that it excludes a person from participation in, or denies a person access to or the benefits of the recipient's education program or activity."

Other definitions conflate crimes with civil rights protections in confusing and incoherent ways. In doing so, the regulations require recipients to determine the intent of the respondent rather than focus on the impact of behavior as is customary in civil rights based investigations.

INITIAL ASSESSMENT & SUPPORTIVE MEASURES

The preamble of the regulations effectively prohibits initial assessment or gatekeeping that allows the Title IX Coordinator to vet the sufficiency of a complaint. In certain instances, this prohibition results in the initiation of notice to the respondent followed by a nearly immediate dismissal of the complaint.

Many of these complaints are then reinstated under a different campus disciplinary process. This bureaucratic procedure is unnecessary and confusing for all involved. A Title IX Coordinator should be able to vet the complaint, make a jurisdictional determination, and route the complaint accordingly before having to send notice to the respondent.

In the early stages of resolution, institutions should be granted more flexibility in determining appropriate supportive and safety measures. The remarkably high threshold for emergency removal of a respondent limits an institution's ability to provide for the safety and well-being of individuals and the community. Interim suspension should never be taken lightly, but institutions need to have more discretion in taking this action than the current regulations allow. We encourage the DoE to lower the threshold for emergency removal. This lower threshold should be paired with guidance encouraging institutions to implement any emergency removal in ways that minimize the educational impact on respondents.

We also would ask the DoE to reconsider the conceptual framework of unreasonably burdening respondents or taking any action that penalizes them in any way prior to a finding. The current language of the regulations and the discussion in the preamble implies that the institution can take

no action

towards the respondent prior to the resolution of a complaint. This position often results in the complainant having to be unreasonably burdened to ensure their own safety and well-being.

Considering that the complainant has claimed that their access to educational programs has already been compromised by the actions of the respondent, this provision as written seems contrary to the goals of Title IX. This provision also prohibits recipients from restricting participation in co-curricular offerings (such

as athletics) when a respondent is under investigation for serious misconduct. Campus communities are rightfully bewildered why athletes who have broken team curfews are suspended from their teams, but those who have been credibly accused of sexual violence continue to participate.

LIVE HEARINGS with CROSS-EXAMINATION

We have heard from our students that they do not want to come forward or pursue formal resolution because of the live hearing and cross-examination requirements. Requiring direct, live cross-examination is antithetical to the administrative nature and educational goals of college disciplinary proceedings.

We assert that a robust investigation that includes opportunities to challenge evidence, to suggest questions, and to assess credibility, followed by an administrative hearing, can meet due process provisions and can produce reliable outcomes without the potential dangers and complexities of a hearing as prescribed in the regulations.

Live hearings with cross-examination may actually result in less reliable outcomes by discouraging the participation by witnesses who may have important information. In addition, suppression of all statements upon failure of a party or witness to submit to cross-examination runs counter to the goal of producing a reliable outcome. Decision-makers should be allowed to use all information available to them, assessing its veracity and value and weighing the credibility of its source.

Cross-examination conducted by skilled individuals who abide by clear and even-handedly administered rules of engagement can serve to test the veracity of factual assertions. Attorneys and judges learn to skillfully employ cross-examination and cultivate the ability to judge relevance in real time only after years of intensive training. It is unreasonable to expect higher education staff and amateur advisors to exhibit the same skill. Allowing potentially untrained advisors to conduct cross-examination in a live hearing, risks creating harms that outweigh the benefits. The preamble suggests that the potential for harm to parties can be mitigated. However, the regulations underestimate the potential impact this process might have in the hands of individuals who may or may not have any training and the potential inequities that emerge based upon each party's own resources.

We believe that parties can and should be allowed

to challenge evidence and credibility through neutral parties. Recipients should be required to craft processes that allow for parties to ask for clarity, to challenge statements of fact, and to question credibility. We encourage the DoE to consider revising the regulations to provide guiding principles and safeguards to ensure the aims of Title IX are achieved without prescribing rigid protocols as the current regulations do. We are particularly interested in the DoE considering how live hearing requirements might differ for private and public institutions. We also encourage the DoE to defer to federal and state court decisions on these matters.

Thank

you in advance for your consideration of the points we raise. We have worked very hard at Bates in recent years to develop policies and procedures that address issues of sex and gender-based discrimination in a way that is fair and equitable to all parties involved and promotes a positive climate on campus. We are concerned, as outlined above, that some of the provisions of the current regulations have caused us to go backwards on these vitally important issues in ways that are damaging to all students involved and to the Bates community as a whole. We look forward to working with you and the DoE as you continue to refine the regulations.

Sincerely yours,



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