From: Mary Keating
Sent: Tue, 8 Jun 2021 10:10:25 -0700
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing, Comments of the Berkeley Unified School District Relating to Flaws in the New Title IX Regulatory Scheme
Attachments: OCR Comments Berkeley Unified School District.docx

Please see attached comments. Thank you.
Sincerely, Mary Keating
--
Mary Keating
Title IX Investigator
District Civil Rights and Compliance Office
Berkeley Unified School District
2020 Bonar Street
Berkeley, CA 84702
(b)(6)

Written Comment: Title IX Public Hearing, Comments of the Berkeley Unified School District Relating to Flaws in the New Title IX Regulatory Scheme

To the Office of Civil Rights
Regarding the New Rule, Title IX Regulations

To whom it may concern:

Berkeley Unified School District serves approximately 10,000 public school students in Northern California, from transitional kindergarten through 12th grade. Our high school population tops 3,100 students. Berkeley, California, is a diverse community and BUSD educates students learning English, special education students, students of a variety of ethnic and racial backgrounds, and a substantial number of LGBTQ youth.

In early 2020, students at Berkeley High School staged a walkout of class, and held a public meeting to air the students' dissatisfaction with the culture of sexual harassment permeating the school, as well as to share personal accounts of sexual assault. Berkeley students and the community at large have a long history of activism; in addition, the United States Department of Education has been sued over the 2020 regulations by the Women's Student Union of Berkeley High School. The District has responded by devoting additional resources to its efforts to address sexual harassment and provide support for students. Specifically, the District hired a full-time Title IX Coordinator and a Title IX Investigator in the fall of 2020, and has been exploring ways to bolster prevention and restorative justice efforts.

Even given this commitment to addressing issues of sexual inequity and harassment, BUSD has faced costly and confusing hurdles in complying with the overly complex regulations that went into effect in August 2020. These burdens are not unique to BUSD; they are doubtlessly shared by many school districts, especially smaller ones.

1. The requirement of multiple additional roles in the Title IX investigation process detracts from the school district's ability to focus specialized resources on addressing the problems of students and staff affected by sex-based and other forms of discrimination.
    a. Under the regulations, a Title IX Coordinator must be designated; that person may act as an investigator but not the decisionmaker. The District also needs at least two other separate individuals to fill the roles of appeal decisionmaker and appeal overseer. In addition, the provision of informal resolutions such as restorative justice should ideally be undertaken by someone not involved in fact gathering and determination.
    b. This separation of roles imposes undue burdens on K-12 school districts. First, the coordinator is the most highly trained and, more importantly, experienced person with respect to Title IX, yet the coordinator's role is artificially constrained.

c. Second, other than in the EEOC process in the federal employment realm, the investigator of allegations under civil rights laws often makes a decision. This is the most rational way to handle this procedure as well,, since the investigator has pledged to be unbiased, and is in the best position to make credibility determinations. To require a second individual to become a decisionmaker at the K12 level, someone who makes a determination based on reading an investigative report, without having met the witnesses, needlessly introduces an element of unfairness.

2. The alteration of the definition of sexual harassment to deviate from Title VII, as well as the definition under prior law and many state laws, including that of California, causes inordinate difficulty in investigating alleged misconduct. More importantly, the more narrow definition inevitably causes confusion with complainants and respondents contending with the process.
    a. The definition of sexual harassment under the new regulations requires that sexual harassment, to be addressed under Title IX, must be severe, pervasive, and objectively offensive. Many commenters in this proceeding and in the earlier comment period have critiqued this standard as unsupported by existing law, and BUSD agrees with these criticisms.
    b. In addition, it introduces confusion about seriously damaging conduct, or conduct causing serious harm. For example, while the regulation comments state that a rape can be severe and pervasive, the application of the term "pervasive" to a single criminal act is questionable.
    c. Further, sexual harassment of a particularly vulnerable student may not be deemed "objectively" offensive (which is itself subject to the particular viewpoint of the person making such a determination). Yet in a school setting, someone who targets a vulnerable student, such as a special education student, or a student known to be suffering from mental health struggles, may escape justice under the Title IX regulations simply because that person's foreseeable reaction to sexual harassment was more severe than another person's might have been.
    d. Finally, as addressed further below, the unnecessary alteration of the definition introduces a dichotomy between two standards that at least a California school district must employ in remedying sexual harassment. It can only baffle students and their families if their complaint is held substantiated under state law and unsubstantiated and dismissed under federal law.

3. The omission of Title VI of the Civil Rights Act of 1964 from the regulations' enforcement requirements is irrational, and makes investigations of intersectional complaints unduly complex.
    a. While some complaints are clearly limited to allegations of sexual harassment or assault, many complaints received by a school district identify multiple potential bases of discrimination, or allege bullying (illegal under California law).

b. Moreover, the omission by the Department of Education of its enforcement obligations under Title VI wastes an opportunity to clarify how school districts should address race or national origin harassment, for example, under federal law. The omission of Title VI from the regulations highlights the true motivation behind the new structure: to dissuade sexual harassment complainants from coming forward, and to diminish the likelihood that perpetrators of sexual harassment will be disciplined.

4. Imposing the new regulations on complaints involving only staff members creates an inevitable conflict between adequate state and federal remedies for employee complaints, and Title IX's process.
    a. This conflict is similar to the one identified above, relating to student complaints identifying conduct that could violate both Title IX and state law forbidding sexual harassment.
    b. In addition, it is not clear from the regulations that employees only tangentially involved in the education of K-12 students, such as maintenance personnel, are "participating in or attempting to participate in an educational program or activity." Yet without such clarity, districts ignore the Title IX process at their peril. The school district may also need to investigate the alleged conduct under Title VII and/or analogous state law fair employment laws simultaneously, since any future lawsuit is likely to arise under those employment-focused laws rather than Title IX.
    c. Similarly, the new regulations do not clarify, with respect to staff only complaints of sexual harassment, when a person is considered to have provided actual notice to "any employee." If a student comes to a staff member at any level with a report of sexual harassment, the new regulations state that the school district is on notice. Is the same situation to prevail if an administrative assistant confides to a coworker at the same level of responsibility that she has been subject to sexual harassment? Such a result is not only inconsistent with Title VII but imposes an unfair burden of omniscience upon the school district.

5. A substantial majority of the students at BUSD are under the age of 18, and therefore the Family Educational Rights and Privacy Act ("FERPA") applies to student privacy rights, allowing only a parent or guardian to authorize release of otherwise protected records.
    a. These provisions conflict in many cases with the requirement that each party be provided equal opportunities to inspect and review any "evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination." (Section 106.45(b)(5)(vi)) Either the Investigator, if faced with a reluctance of the parent or guardian to agree to a blanket waiver, avoids collecting certain potentially important evidence, or the district follows the Title IX regulation and violates FERPA. Neither choice is acceptable.

b. Moreover, the provision of protectible or graphic information to young children presents issues related to whether such information is appropriate to share. For example, if the evidence gathered uncovers unclothed pictures of the complainant and others, best child protection practices may support shielding children from exposure to this evidence. And the pictures or other evidence related to other potential victims, while probably "directly related" to the allegations, should not be shared with others.

6. Of particular concern to 21st Century school districts is the ubiquity of social media use by minors. The regulations limit their application to conduct occurring on school grounds or in school-sponsored activities. Unlike institutions of higher education, which may control many non-classroom settings such as on and off-campus housing and campus-wide wifi, BUSD, in common with many school districts, sees its students in only a few settings. While we do not request that the District be held responsible for investigating such incidents as weekend off-campus private parties, the seeming exclusion of social media harassment ignores the realities of modern student life, particularly since students had few other outlets on which to interact during the pandemic. If the regulations are read to require investigation of social media activity if a student uses the school district's wifi, and otherwise not, then they erect an irrational distinction, and one not easy to investigate.

In addition to these points, BUSD joins the Los Angeles Unified School District in its commentary which highlights the broader perspective of the harm presented by a regulatory scheme which dissuades reporting and thus remediation of sexual harassment and sexual assault.

As the LAUSD stated in its comments:

> By aligning the definition of sexual harassment with court decisions determining monetary damages, the New Rule narrows the definition of sexual harassment in the K-12 administrative context. It creates a higher bar in that misconduct of a sexual nature will only be considered "sexual harassment" if it rises to the above definition. Under the New Rule, the student who may be still engaged in some school activities despite being subjected to unwelcome conduct of a sexual nature would be ignored because that level of exposure to sexual misconduct is not "harassment" and does not obligate anyone to investigate and follow up. Conversely in K-12, it is too late to formally address misconduct after students have been effectively denied equal access (e.g., student is failing, late to or ditching classes, declining attendance, dropping out of school, hospitalized, suicidal, physically assaulted, etc.). K-12 education is compulsory and students have a fundamental right to an education, thus K-12 students do not have the choice to attend school or not despite the misconduct or climate issues, whether minor or severe. The onus should not be on a child target of misconduct to remove him/herself from his/her fundamental right to an education in order to be taken seriously. The new definition of sexual harassment suggests otherwise. K-12 educators must ensure student safety before students can be educated. Educators act in loco

parentis and thus are obligated to take more affirmative protective measures with children/students rather than waiting for a student to disengage from school. Likewise, much behavior in the K-12 setting involves teaching proactively or in the moment and should not always be driven by formal grievance procedures. The goal of nondiscrimination laws should be to guard against the misconduct escalating to the point that a child's access to education is in jeopardy and thus, the New Rule should allow school districts to use this prerogative in proactively implement grievance procedures, consistent with State law requirements.

Sexual harassment as currently defined (unwelcome conduct of a sexual nature) is already historically underreported because survivors are often embarrassed, fear blame and are concerned about not being believed. In a report by the American Association of University Women (AAUW), it was shown that among students in grades 7-12 who were sexually harassed, only about 9 percent reported the incident to a teacher, guidance counselor, or other adult at school.[1] The definition with the more narrowly tailored language expressly allows lesser offenses along the continuum to be disregarded, further compromising reporting efforts. The United States has not eradicated harassment of a sexual nature using the current definition, which begets the question why the definition is being narrowed in the K-12 setting where the safety and well-being of students are paramount.

Research has shown that lesser forms of misconduct left unchecked lead to escalation of the behavior and ultimately disengages and disempowers targets. In a study published by the Centers for Disease Control and Prevention, it was found that "bullying behavior and homophobic teasing, if not resolved or redirected, may escalate in nature. This escalation may increase the potential for sexually harassing behavior." (https://www.cdc.gov/violenceprevention/pdf/asap_bullyingsv-a.pdf) If the New Rule was final, K-12 educational settings would not be obligated to intervene at earlier stages of misconduct thus empowering the accused parties to engage in more egregious behavior leading to proven larger societal issues, such as physical abuse, drug abuse, and even criminal behavior. The New Rule should recognize that this behavior occurs along a continuum. In the K-12 educational setting, where social emotional learning is part of the development of a positive school climate, there should be more flexibility to resolve these issues locally at earlier stages to proactively ensure student and campus safety. That flexibility exists for school districts addressing any other nondiscrimination complaint under federal laws and regulations.

Undermining Student Safety with Interim Measures Process

Safety is paramount. Remedies that involve immediate safety regardless of findings should be implemented and should not be contingent upon a lengthy investigation or appeal processes similar to court proceedings. It is to the benefit of all the parties to minimize further recurrence of allegations or suggestions of allegations immediately. Educators are in the best position to determine student needs at the local level, which is

echoed in the Federal Commission on School Safety's recent report. An external agency of non-educators should not dictate when is best to implement remedies. While Section 106.44 suggests remedies may be implemented immediately, the New Rule also seems to suggest certain remedies should not be decided upon until the investigation is completed and by a party not directly involved with the primary sources, and therefore less able to determine credibility and/or be familiar with the documentary evidence. As noted in the recently issued Federal Commission on School Safety Report (Dec. 2018, at p. 68), "We see victims of bullying and harassment tend to miss more days of school and are more likely to leave the district when the perpetrators are not removed from school."

Overly Prescriptive Application of Interim Measures

The New Rule requires that when providing remedies and an accuser is seeking relief from contact with the alleged abuser, the relief cannot "burden" the accused. While due process is important, in the K-12 setting, there are times where the remedy cannot be of equal impact for both parties who are children. For example, site administrators by State law have discretion to move K-12 students in and out of classes and in some cases may absolutely have to move a student out of a class away from another student as an interim safety measure. One party will be "burdened" and the regulations suggest such a burden could be a violation of Title IX. This hampers a school administrator's ability to make an educated decision regarding a remedy based on their training and experience. K-12 settings should have more flexibility in separating students in compulsory education without invoking a violation since students are still receiving a free appropriate education regardless.

The New Rule allows for the parties, in preparation for responding to the investigation, to discuss K-12 student information with others such as the name of the students involved and that they are alleging sexual misconduct. The trauma, increased risk of retaliation, and FERPA violations from these disclosures required by the New Rules are potentially exponential. The New Rule is unrealistic, unwieldy, and time consuming, as they expressly require a minimum of three individuals to coordinate efforts under the new grievance procedures as outlined below.

Thank you for considering the perspective of diverse public school districts serving younger students.

Respectfully submitted,

Berkeley Unified School District, Berkeley, California
Stephen Jimenez-Robb; stephenjimenezrobb@berkeley.net, Title IX Coordinator
Mary T. Keating; marykeating@berkeley.net, Title IX Investigator