

From: Jeff Simering
Sent: Fri, 11 Jun 2021 13:02:05 +0000
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (from the Council of the Great City Schools)
Attachments: TitleIXwrittencomments-CGCS(June112021).docx

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Office of Civil Rights:

Written Comment: Title IX Public Hearing (Council of the Great City Schools) [T9PublicHearing@ed.gov]

The Council of the Great City Schools, the coalition of the nation's largest central city school districts, resubmits the Title IX regulatory comments (attached) on the 2018 NPRM that remain basically applicable due to the minimal revisions in the 2020 final regulations for elementary and secondary schools. These comments are submitted in addition to the Council's June 10th oral presentation at the Education Department's Title IX hearing.

The fundamental unsuitableness of the 2020 Title IX regulatory requirements for elementary and secondary schools leads the Council to request: 1) the immediate rescission of the current regulations for K-12 schools prior to the start of school year 2021-2022, and 2) the reinstatement of the pre-2020 Title IX legal framework through an emergency K-12 interim final rule or through a compliance protocol that accepts either the provisions of the pre-2020 legal framework or the 2020 final rules at the discretion of the local education agency.

Please contact Jeff Simering at jsimering@cgcs.org if there are questions



Council of the Great City Schools®

Council of the Great City Schools®

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Written Comment: Title IX Public Hearing (Council of the Great City Schools)

T9PublicHearing@ed.gov

June 11, 2021

Attention:
Ms. Suzanne Goldberg, Acting Assistant Secretary
Office of Civil Rights
U.S. Department of Education

The Council of the Great City Schools, the coalition of the nation’s largest central city school districts, resubmits the Title IX regulatory comments (below) on the 2018 NPRM that remain basically applicable given the minimal revisions in the 2020 final regulations for elementary and secondary schools. These comments are submitted in addition to the Council’s June 10th oral presentation at the Education Department’s Title IX hearing.

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Please contact Jeff Simering at jsimering@cgcs.org if there are questions.

January 30, 2019

Docket ID ED—2018—OCR—0064

RIN 1870—AA14

NPRM Comments: Nondiscrimination on the Basis of Sex in Education Programs Receiving Federal Financial Assistance

U.S Department of Education
400 Maryland Avenue, SW, Room 6E310
Washington D.C. 20202

Attention: Brittany Bull

The Council of the Great City Schools, the coalition of the nation’s largest central city school districts, submits the following comments on the proposed Title IX regulations published in the November 29, 2018 Federal Register. The Council recognizes and values the important contribution that Title IX has made in developing and ensuring equitable treatment of students in education programs at all levels.

The Department’s “Directed Questions” (83 FR 61482-3), however, acknowledge that there are serious concerns about the applicability of the proposed regulatory changes in elementary and secondary school settings—concerns that the Council shares. Discussions with Great City Schools Title IX coordinators and general counsels underscore that the proposed regulations create an unduly formalized and litigation-like set of requirements unsuitable for elementary and secondary schools and the children they serve. While the handling of adult sexual harassment issues on college campuses has generated controversy, the handling of improper sexual conduct among school-age children in our public schools has been generally effective and largely noncontroversial. The Council, therefore, does not think that the proposed regulations affecting higher education should be applied to elementary and secondary education. Consequently, the organization opposes adopting the proposed Title IX rules for elementary and secondary schools. We request that the regulations be withdrawn, or that the proposed regulations be redrafted to allow current elementary and secondary school policies, procedures, and operations to be maintained.

The current Title IX regulations from 1975 pre-date the U.S. Department of Education and have been supplemented by federal guidance relating to sexual harassment issued in 1997, 2001, 2006, 2011, 2014, 2016, and 2017. The 1975 Title IX regulations, for example, are not overly prescriptive, and they have allowed school districts and others over the years to develop their own implementation policies, procedures, and practices consistent with state law and statewide policies.

If adopted, the newly proposed Title IX regulations, which will operate with the force of federal law, will undermine the current flexibility of public schools to handle incidents in a manner appropriate for school-age children and the specific circumstances involved.

The flexibility to establish policies and procedures at the state or local level will be significantly constrained under the proposed Title IX framework, requiring major revisions in the administration of Title IX by the nation’s school districts. Particularly at the elementary and secondary education level where current Title IX processes are generally working well, more than four decades of law, policy, and procedure would be subject to rescission or revision. Great City School officials have also expressed concern that the new “severity” threshold in the proposed federal regulations could ultimately lead to less attention to student incidents that do not rise to the new higher bar on sexual harassment but would nonetheless interfere with a child’s access to compulsory public education. Moreover, the proposed rules appear to reduce the federal obligation to address incidents of unwelcome conduct of a sexual nature that would typically be addressed under existing local school policies and procedures.

The proposed Title IX regulations were developed against the backdrop of numerous well-publicized higher education incidents involving campus-based sexual assault and how colleges and universities handled them. Numerous meetings were held between department officials and representatives of victims, those accused, and university administrators as the new regulations were being drafted. Much of the Title IX proposed rules, however, would also be applicable to the nation’s public schools, but we do not know that any of the Great City Schools were consulted or invited to any of the meetings on Title IX, despite operating the nation’s largest and arguably most complex school systems. In contrast to the consultations with higher education officials, it appears that elementary and secondary school officials were not formally consulted by the Department to determine current Title IX practices in public schools, how they were working, or to figure out what changing them might do. The proposed regulations, therefore, reflect a lack of understanding of how fundamentally unsuitable the new rules are to regular elementary and secondary school operations – a fact only tangentially conceded by the “Directed Questions” referenced above.

For instance, the proposed rules conflate federal requirements for processing and adjudicating sexual misconduct incidents involving adult college students who voluntarily attend higher education institutions with children/minors who attend public schools under compulsory attendance laws. The proposed rules attempt – albeit unsuccessfully -- to encompass and harmonize Title IX implementation at the higher education, preschool, elementary and secondary education levels, with Clery Act requirements in higher education, with state sexual misconduct laws, with state labor laws, with other public-school disciplinary proceedings along with collective bargaining agreements for public sector employees.

This results in a one-size-fits-all “fix” for all aspects of the Title IX sexual harassment framework, including procedures in elementary and secondary education that are not broken. Elementary and secondary schools should be allowed to continue to operate within the existing Title IX regulatory framework, supplemental Department guidance, and applicable state law in order to properly serve the interests of K-12 students and the local community.

On the subsequent pages is a non-exhaustive list of significant operational problems at the elementary and secondary school level that we would expect if the newly proposed Title IX regulations were implemented (*referencing the CFR numeration from the November 29, 2018 Federal Register*).

Major Problems with the Proposed Regulations

Unsuitability of Formalized, Litigation-like Procedures to the Developmental Stages of School-Age Children. The nation’s public schools serve pre-kindergarten to 12th grade school children, almost all deemed to be minors under state law. A school-age child’s physical, emotional, and mental development during his or her elementary and secondary school tenure is not complete. Instructional and support services in public schools are designed in recognition of the developmental stages of each child, and the courts have routinely recognized the developmental differences between K-12 students and students in higher education. School children have neither the judgment nor experience to interact or make decisions like an adult.

The process of handling complaints of sexual harassment or misconduct in a higher education setting is much more formalized and quasi-judicial, recognizing that most parties in this setting are legal adults. Even a cursory review of existing university procedures shows that official complaints are subject to complex procedural protocols, like those contained in the proposed rules that are not used or are not appropriate with minors. The formalized procedures contained in the rules for higher education are simply not suitable in the elementary and secondary education setting. Equating the two settings suggests that the Department did not adequately understand the two settings and the kinds of procedures that grow up over time to handle the differing needs of the students in each.

Many of the proposed regulatory requirements are simply not universally used by school districts when they address Title IX issues among preschool, elementary, and secondary school children. These requirements include the proposed formal complaints; the multitude of written notices; the prescribed content of notices; the right to inspect and review evidence, including the identification of witnesses; the presence of additional individuals at meetings or proceedings; responses to draft investigative reports and revisions; the distribution of investigative files; cross examination or directed questions submitted for the parties and witnesses; the cycle of follow-up questions; the content of written determination of responsibility; and a written notice and written mutual consent if informal resolution is used. School children, parents, and many K-12 administrators will not understand or be familiar with these judicial-like procedures. By analogy, the Council notes that even the nation’s court system has adopted different procedures for investigations, proceedings, and determinations of punishment for juvenile infractions than for individuals of legal age.

In addition, the confidentiality used in most schools to accommodate school-age parties and witnesses to sexual harassment will be breached by many of the proposed procedural requirements in the draft regulations. Student witnesses to sexual harassment – already hesitant to come forward with information – will likely be more reticent once they understand that their identity and statements as well as the school’s investigative files will be disclosed to each party. Peer pressure, bullying, and even retaliation at school, in the community, or online are expected to increase in schools as a result of these disclosures. School-age children, unfortunately, are more susceptible to these types of intimidating behaviors than are adult college students. More confidential and less formal procedures are more age-appropriate for grade-school children and provide important “teachable opportunities” to mold proper behavior at the elementary and secondary level -- behaviors that college students should have already learned. In short, these proposed litigation-like procedures will do more harm than good in an elementary and secondary

school setting, and decades of more child-oriented approaches to handling school misconduct will be negatively affected.

Incongruent Judicial-like Procedures to the Purpose and Functioning of American Public Schools. State compulsory attendance laws, with limited exceptions, require school-age children to attend public school during ten months of the year. Contemporary public schools are expected by their communities to provide a safe and nurturing learning environment as well as a variety of related social, nutritional, and health services. Resolution of student behavior issues, large and small, for some 50 million students is part of a daily school routine that is designed so kids will want to come to school every day, and not just because they are required to do so. The adversarial-based procedures of the proposed rules run contrary to the inclusive and communal environment of the modern-day public school.

Moreover, the proposed Title IX regulations require a more formalized set of procedures for addressing one specific area of student behavior, sexual harassment, differently from other student behaviors, including issues of discrimination. Even the informal resolution regulation, as proposed, includes formalized elements that are not required in existing site-based school resolution procedures. The increased “severity” threshold, for example, in the newly proposed definition of sexual harassment will likely result in school districts utilizing one set of procedures for federal Title IX sexual harassment incidents and retaining another set of procedures for “code of conduct” sexual harassment violations to ensure that a safe and unimpeded learning environment can be maintained. And waiting for indicators of impeded access, such as chronic absenteeism or dropping out, would unreasonably delay proper school-level responses to unwelcome sexual-related conduct. Further, the proposed rule separating the functions of Title IX coordinators, investigators, and decision makers would be markedly unworkable, inefficient, and costly for many school districts, particularly for large urban school districts with hundreds of school sites where one responsible school-level official is selected to perform these three functions.

Associated Problems in the Proposed Regulations

Privacy and Confidentiality -- Sec. 106.6(e)

Despite the proposed rule referencing FERPA, school officials remain uncertain and extremely concerned that the proposed grievance procedures for notice and disclosure of the identity of involved individuals and witnesses will lead to bullying, intimidation, or retaliation among students – which current school-level confidentiality procedures seek to minimize. And, even though the 2001 revised Title IX guidance has been retained, its equivocating language (“The Department currently interprets FERPA...” and “an additional statutory provision may apply”) adds to the uncertainty about the intersection of these two federal laws.

Officials Having Authority -- Sec. 106.30

While the adoption of “actual knowledge” rather than “imputed knowledge” is supportable, the proposed definition of actual knowledge creates multiple uncertainties in the elementary and secondary school setting. An “official ... who has the authority to institute corrective measures on behalf of the recipient” in the context of public schools lacks clarity. The proposed rule uses a rationale of “standing *in loco parentis*” to deem public school teachers as having enough authority under the proposed rules, and it draws a distinction with college-level instructors and professors who have less ongoing contact and control in teaching adult college students. The

nature of public school management, however, requires supervision of school-age children virtually every minute of the school day, and at times before and after school as well, thereby raising operational questions under the proposed rules regarding whether “officials” having the requisite authority would be extended to anyone in temporary supervision of school children from the lunch room monitors to bus drivers to other school support staff, employees that colleges and universities typically do not have. Various school-level employees have limited authority to institute a narrow set of corrective measures and do not have broad-based authority to implement a full range of disciplinary measures, leaving school districts with an ambiguous interpretation of the proposed rule.

Formal Complaint by a Child -- Sec. 106.30

The definition of a formal complaint further underscores the inappropriateness of the proposed regulation to elementary and secondary school settings involving young school children. While adult college students might be expected to have the capacity to file a formal “signed” complaint invoking an institution’s grievance procedures, the same capacity cannot be expected for preschool, elementary and most secondary school children.

Off Site and Cyber Harassment – Sec. 106.30

The definition of a formal complaint addresses only “conduct within the education program or activity” that is accompanied by a specific request to initiate grievance procedures. Although there is some applicable federal guidance and some history of local practices addressing school-related, off-site events, the proposed regulations offer little clarity about cyber-related harassment among students, including use of social media and other technology that are an acknowledged problem at the secondary school level.

New Definition of Sexual Harassment -- Sec. 106.30

The proposed definition of sexual harassment derived from related case law in private legal actions for monetary damages establishes a high bar of “severe” conduct effectively denying access to education programs. As mentioned above, under the proposed regulations, school districts would be required to establish one set of procedures for sexual harassment under the new “severity” threshold and utilize another set of procedures for other improper conduct of a sexual nature under the school district’s student code of conduct -- an unwarranted and cumbersome result of these regulations. Additionally, several school district legal counsels have questioned whether the proposed threshold could be more workable if defined as “so severe, pervasive, OR objectively offensive”.

Supportive (Interim) Measures – Sec. 106.30

The practice of implementing interim or supportive measures, whether or not a formal complaint has been filed, is a critical step in addressing incidents of potential misconduct. In elementary and secondary schools, it is often not feasible to implement supportive measures that may not burden one party somewhat more than the other. It is unclear from the regulatory language whether “without unreasonably burdening the other party” would prohibit reassigning one party to a different class without also reassigning the other party as well. This proposed rule could readily interfere with a school’s best judgment, experience, and training in handling incidents involving school children during investigations and adjudication, as well as during informal resolutions or even in restorative justice initiatives. Further, under the proposed regulations, “[t]he Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.” However, coordinating “individual” supportive measures in the context of

large or even moderate-sized school districts with dozens or even hundreds of schools under this rule would be unworkable. Operationally, a variety of designated non-teaching staff including counselors, school psychologists, social workers, assistant principals, or others may be responsible for coordination at the school site, since it is not feasible for one districtwide Title IX coordinator to oversee individual support at large numbers of sites. Moreover, how this provision interacts with the particularly problematic provision [sec. 106.44(b)(4)] mandating separation of the coordinator, investigator, and decision maker roles further complicates this coordination function in sizeable public-school systems.

Unfunded Training Requirements and Questionable Cost Analysis -- 106.45(b)(1)(iii)

Training for each of three mandated Title IX functions (coordinator, investigator, and decision maker) is required in the proposed rules. The Council acknowledges that some training is currently required in some states and in some school districts but not in others. The proposed federal Title IX training requirements unfortunately are not accompanied by any federal funding. Moreover, the cost analysis included in the preamble material of the NPRM does not account for large school districts that typically have one responsible official in each school – rather than a coordinator, an investigator, and a decision maker, as proposed -- to handle Title IX and other misconduct allegations. While the Department predicts that the volume of formal complaints will decrease under the proposed regulations, school districts will still have the obligation under Title IX to respond to informal reports or complaints at each school with trained personnel. At an estimated 16 hours of training for each of the three responsible individuals in each school, the cost burden for large districts, like the Great City Schools, will be substantial and likely has been underestimated by the Department.

Ten Notice Requirements -- Sec. 106.8(a), 106.8(b), 106.8(c), 106.45(b)(1)(v), 106.45(b)(2)(i), 106.45(b)(2)(ii), 106.45(b)(3)(v), 106.45(b)(4)(iii), 106.45(b)(5), and 106.45(b)(6)

The proposed regulations add multiple new formal notice requirements, as well as detailed content requirements for those notices that are not contained in most existing school district policies and procedures. The new notice requirements further formalize school district Title IX procedures and reduce the flexibility of school districts to properly address a wide range of student behaviors in an age-appropriate manner.

Additional Incompatible Grievance Procedures (below) – Sec. 106.45

As cited immediately above, there are multiple formal notice requirements included in the grievance procedures of the NPRM that are not contained in existing school policies and procedures. The proposed regulations also specify the content of these multiple notices, including matters not currently included in many existing local practices. Additionally, state law commonly proscribes grievance procedures for its public schools. Great City School officials, therefore, worry about how they will handle the inconsistencies between these overly prescriptive federal grievance procedures and their current state and local grievance systems. If these regulations are adopted, school districts would be forced to operate dual systems of grievance procedures – one for Title IX formal complaints of sexual harassment and another for other student code of conduct or employee conduct violations as well as for various forms of discrimination. Formal complaints regarding conduct that might constitute racial or ethnic discrimination would be handled under a set of procedures that are different from those proposed for formal sexual harassment complaints. Similarly, unwelcome student statements referring to appearance, body parts, or dress that would violate a school district’s student code of conduct – but not the proposed Title IX rules – would be handled under different procedures as well.

Both parties can discuss the allegations and gather evidence during investigations – 106.45(b)(3)(iii). Confidentiality for all individuals involved in incidents in elementary and secondary schools is generally an important element of the school-level investigative process. Investigations and the availability of both information and student witnesses will be severely compromised by this and other proposed rules.

Opportunity for others, including advisors and attorneys as well as parents, to attend meetings or proceedings – 106.45(b)(3)(iv). Providing for the presence of advisors and attorneys at the elementary and secondary school level during meetings or proceedings in a formal complaint – even though the level of participation may be limited by school officials – will add to the adversarial and litigation-like atmosphere established by these proposed regulations.

Quasi-cross examination allowed through written questions and follow-up questions to each party and any witness – 106.45(b)(3)(vi). With or without a live hearing, the Title IX decision maker of a public school must provide for parties to ask relevant questions and follow-up questions, at minimum in written form. It remains unclear how many back-and-forth follow-up questions would be allowable in this quasi-cross examination process. This quasi-cross examination/questioning of student witnesses at the elementary and secondary school level will result in even greater hesitation among classmates to offer information on the children involved. Peer pressure, which looks different among susceptible children and adolescents than it does with college-age students, already works against tattling or ratting on fellow students. Most existing school-level practices handle the disclosure of the identity of witnesses and their statements during investigations very carefully. The breach of this confidentiality under the proposed grievance rules would make investigation and resolution of sexual harassment incidents substantially more difficult to handle. Moreover, the disclosure of information and identities under these rules are likely to result in increased peer pressure, bullying, intimidation and retaliation against complainants and witnesses.

Option for Live Hearing at the Elementary and Secondary School Level – 106.45(b)(3)(vi). The proposed rule provides for a live hearing at the elementary and secondary school level at the option of the school district. A very small percentage of the Great City Schools use live hearings for Title IX sexual harassment complaints. If these regulations are adopted, additional requests for adversarial hearings are expected to increase in elementary and secondary schools nationally.

Review and inspect evidence gathered by the school district -- Sec. 106.45(b)(2)(i)(B) and 106.45(b)(3)(viii). The proposed regulations require school districts to review and inspect evidence by both parties at multiple stages of the proceedings, whether the evidence is intended to be used in determining responsibility, including prior to conclusion of the investigation, prior to the completion of the investigative report, or at a hearing itself. The school's ability to gather relevant evidence in an investigation will be constrained since students will know that their identity and statements will be provided to both parties. Sending all evidence to each party and their advisors in electronic format --106.45(b)(3)(viii). The proposed regulation would require all evidence gathered, whether or not used in a determination of responsibility and regardless of form, to be replicated in electronic format

and forwarded to the parties. The burden of reproducing the content of investigative files in digital form will be costly and burdensome for school staff.

Requiring separate Title IX coordinators, investigators, and decision makers will add major costs and staffing burdens to elementary and secondary schools – 106.45(b)(4)(i). School districts, particularly large school districts, assign Title IX responsibilities to a single staff person in each school, since a district-level administrator cannot oversee and supervise dozens or hundreds of school sites, thousands of students, and thousands of employees. The proposed regulations, however, expressly prohibit this common practice of one designated Title IX individual handling the coordination, investigation, and decision making at the school level. This proposed rule, perhaps more than any of the other proposed rules, will unnecessarily disrupt the current administration of Title IX at the elementary and secondary school level—a system that is current functioning effectively—and will add costs to public school systems that are already strained with limited resources.

Standard of Evidence Requirements – 106.45(b)(4)(i). Although the proposed regulations provide the option of applying either the “preponderance of evidence” standard or the “clear and convincing evidence” standard, the proposed rule imposes additional federal requirements if a preponderance of evidence standard is used. These additional evidentiary requirements reveal a preference for the clear and convincing standard by the Education Department. Adoption of a preponderance of evidence standard imposes an additional requirement that the same standard be used for other student code of conduct violations not involving sexual harassment but carrying the same maximum sanction. Moreover, the same standard of evidence must also apply for complaints against students as it does for complaints against employees. Since the most common standard of evidence used by public schools in student sexual harassment and in other incidents is the preponderance of evidence standard, the Great City Schools find these add-on requirements implicating other components of student conduct codes as well as employee-related collective bargaining agreements to be unusually overreaching and unworkable.

Formalizing the Informal Resolution Process – 106.45(b)(6)

The proposed regulations properly provide for an informal resolution option at any time prior to a determination of responsibility. The proposed rule, however, formalizes the informal resolution by requiring a written notice to the parties detailing the allegations, any limitations on resuming a formal complaint, consequences that may result from the resolution, and also requires the written consent of each party. Although the “Informal Resolution” regulation is contained within the grievance provisions of the proposed Title IX rules, it is not clearly communicated that alternative informal resolution procedures can be used by school districts in circumstances where a formal complaint is not filed. Moreover, this proposed rule also would result in a dual set of procedures for informal resolutions in elementary and secondary schools.

While the Council agrees with several of the provisions in the proposed regulations (including the Department’s not imposing monetary damages or second-guessing responsibility determinations by schools in administrative enforcement actions [sec. 106.3(a) and 106.44(b)(5)]; the application of actual knowledge rather than constructive notice [sec. 106.30]; and the posting of contact information by the name or title of the Title IX coordinator[s]

[106.8(a)], the Council cannot support the proposed regulations and its lengthy litigation-like procedures as they apply to elementary and secondary schools. The proposed rules are clearly unsuitable for child-serving institutions like the nation’s public schools.

The Council of the Great City Schools, therefore, requests the withdraw of the proposed Title IX regulations and the initiation of an extensive outreach effort during the remainder of 2019 to stakeholders of every type of recipient of federal funds, including extensive consultation with public elementary and secondary school officials.

[In the alternative, the Council recommends the following revisions to the proposed regulations:

1. Add a new sec. 106.46 -- “Sec. 106.46 Alternate Procedures for Local Educational Agencies and Other Child-Serving Recipients. Notwithstanding sec. 106.45, local educational agencies and other child-serving recipients may adopt grievance procedures consistent with Title IX of the Education Amendment of 1972 that comply with relevant state law, are age-appropriate for pre-school and school-age children and follow applicable collective bargaining agreements with employee organizations.
2. In sec. 106.44, strike “sec. 106.45” in each instance it appears and insert “sec. 106.45 or section 106.46”.
and
3. In sec. 106.30 under the definition of sexual harassment, strike “so severe, pervasive, and objectively offensive” and insert “so severe, pervasive, or objectively offensive”.]

Please contact me if there are questions on these comments at mcasserly@cgcs.org or Jeff Simering at jsimering@cgcs.org. Thank you for your consideration.

Sincerely,

(b)(6)

Michael Casserly
Executive Director