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Sent: Fri, 11 Jun 2021 21:37:02 +0000
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (New York City Department of Education)
Attachments: NYCDOE & City of New York_2021 Title IX Comment (SUBMITTED 6.10.21).pdf

Good Evening,

The City of New York and the New York City Department of Education submit the attached comment in response to the United States Department of Education's public hearing announcement and request for public comment regarding the amended sexual harassment regulations implementing Title IX of the Education Amendments of 1972, 34 C.F.R. pt. 106, which took effect August 14, 2020.

Thank you for your consideration.

Sincerely,
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OFFICE OF THE MAYOR
THE CITY OF NEW YORK

June 10, 2021

Submitted Via Email
Kenneth L. Marcus
Acting Assistant Secretary for Civil Rights
United States Department of Education
T9PublicHearing@ed.gov

Re: **FR Doc. 2021-10629**
Written Comment for Public Hearing, Title IX of the Education Amendments of 1972

The City of New York (the City) and the New York City Department of Education (NYCDOE) submit the following comment in response to the United States Department of Education's (the Department's) public hearing announcement and request for public comment[1] regarding the amended sexual harassment regulations implementing Title IX of the Education Amendments of 1972 (Title IX),[2] 34 C.F.R. pt. 106, which took effect August 14, 2020 (2020 Regulations).[3]

I. Introduction

New York City is home to the largest school district in the United States, with over 1.1 million students and 1,606 schools.[4] Given the NYCDOE's educational mission and size, it is uniquely positioned to provide important input to the Department from the local educational agency (LEA) perspective.

[1] 86 Fed. Reg. 27429.

[2] 20 U.S.C. § 1681 *et seq.*

[3] 85 Fed. Reg. 30026.

[4] For more information, visit https://www.schools.nyc.gov/about-us/reports/doe-data-at-a-glance.

As set forth below, the 2020 Regulations unacceptably limit the definition of sexual harassment and impose requirements that interfere with a school system's ability to adequately address Title IX sexual harassment in a K-12 context. Consequently, we request that the 2020 Regulations be rescinded to allow the Department to meaningfully consider the input of LEAs instead of imposing a one-size-fits all regulation on both elementary and secondary schools and higher education institutions.

The 2020 Regulations significantly amend and narrow the definition of sexual harassment prohibited under that federal law, and amend the procedures for investigating allegations of Title IX sexual harassment. The NYCDOE strongly opposes the new Regulations, which roll back federal protections for students under Title IX and impose a lengthy adversarial grievance system upon students and employees alike that is inappropriate for the K-12 environment. The 2020 Regulations' requirements are pedagogically unsound and inconsistent with other state and federal laws which impose an obligation on school districts to provide compulsory education, maintain safe learning environments, protect the due process rights of students who are disciplined for misconduct, and protect the confidentiality of student records and information. Further, implementation of the 2020 Regulations results in an enormous disservice to students and employees, and requires significant resources, training, and funding, which is currently particularly challenging due to the COVID-19 pandemic.

In the broader Title IX context, the NYCDOE supports additional steps to ensure – consistent with its own policies and guidance – that students of all sexual orientations, gender identities, and gender expressions have equal access to covered education programs and activities. This comment focuses on rescinding the highly problematic 2020 Regulations.

Accordingly, the NYCDOE supports the Biden Administration's *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (No. 13988)*,[5] *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity (No. 14021)*,[6] and the Department's April 6, 2021 letter to stakeholders[7] announcing the public hearing, question and answer period, and anticipated Notice of Proposed Rulemaking.

The NYCDOE also supports the following additional steps to codify the protections outlined in both recent Executive Orders:

- Withhold enforcement of the 2020 Regulations and issue related guidance to covered education institutions or LEAs for K-12 districts in particular;

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[5] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/

[6] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/

[7] https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf

- Support (either through Rule revision, or by supporting new federal legislation) a new Title IX Rule reverting to the standards in the *2001 Revised Sexual Harassment Guidance (2001 Guidance)*,[8] and principles of fundamental fairness from the *2011 Dear Colleague Letter on Sexual Violence*[9] and *2014 Questions and Answers on Sexual Violence*[10] as long as they are tailored to K-12, which provided discretion to covered education institutions to implement Title IX;

- Codify a definition of gender in Title IX that relies on the Supreme Court's *Bostock v. Clayton County*[11] decision to clarify that transgender and gender expansive students and employees are protected against discrimination and harassment under Title IX, and students receive equal access to education programs and activities, *including athletics*, consistent with their gender identity (not only "male" and "female") and not "biological sex";[12] and

- Re-issue an updated, more comprehensive version of the *2016 Dear Colleague Letter on Transgender Students*.[13]

II. Rescind the 2020 Regulations, Which are Inappropriate and Harmful for K-12 Schools

Given the ongoing COVID-19 pandemic and the shift to remote learning and working for many students and employees for the majority of the 2020-2021 school year since the 2020 Regulations took effect, the NYCDOE has not received the volume of formal complaints under those Regulations that we expect during a fully in-person school year.

For the reasons set forth below, the NYCDOE strongly recommends that the Department take this opportunity to rescind the 2020 Regulations prior to the start of the 2021-2022 school year before they result in further harm to students.

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[8] U.S. Dep't of Educ. Office for Civil Rights ("OCR"), *2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, (Jan. 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [hereinafter "*2001 Guidance*"]; 62 Fed. Reg. 12034 (Mar. 13, 1997) (original 1997 guidance) and 66 FR 5512 (Jan. 19, 2001) (notice of availability of revised guidance).

[9] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf

[10] https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

[11] In *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020), the U.S. Supreme Court held that Title VII protections based on "sex" include gender identity and sexual orientation.

[12] *See also* Pamela S. Karlan, *Memorandum on Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972*, (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download.

[13] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

A. 34 C.F.R. § 106.30: Limited Definition of Sexual Harassment

The City affirms its strong, longstanding commitment to ensuring a safe and supportive school and work environment that is free of sexual harassment. The NYCDOE's specific policies and procedures implementing this commitment can be found in Chancellor's Regulations A-830, A-831, and A-832,[14] which together cover conduct by both students and employees and prohibit sexual harassment and other discrimination based on actual or perceived sex, sexual orientation, gender identity, and/or gender expression. Consistent with this commitment, and to effectively prevent and address sexual harassment, the applicable Chancellor's Regulations prohibit a broader range of conduct than the definition of "sexual harassment"[15] under the 2020 Regulations.

Chancellor's Regulation A-831[16] sets forth NYCDOE's policy prohibiting sexual harassment committed by students against other students and covers conduct between students that occurs during, before, or after school hours, on school property, at school-sponsored events, on NYCDOE-funded transportation, or off school property, if the conduct disrupts or would foreseeably disrupt the educational process or endangers or would foreseeably endanger the health, safety, morals, or welfare of the school community. The regulation prohibits unwelcome conduct or communication of a sexual nature which is sufficiently severe, pervasive, *or* persistent as to: (1) substantially interfere with a student's ability to participate in or benefit from an educational program, school-sponsored activity, or any other aspect of a student's education; (2) create a hostile, offensive, or intimidating school environment; or (3) otherwise adversely affect a student's educational opportunities. Sexual harassment may be a single incident or a series of related incidents. Chancellor's Regulation A-831 expressly covers sexual harassment committed through social media and/or other electronic communications. In addition, A-831 covers conduct that constitutes sexual harassment regardless of the gender, sexual orientation, gender identity, or gender expression of any of the students involved.

Chancellor's Regulation A-832[17] prohibits gender-based discrimination, harassment, intimidation, and bullying between students that is non-sexual in nature. Like A-831, A-832 covers conduct that occurs during, before, or after school hours, on school property, at school-sponsored events, on NYCDOE-funded transportation, or off school property, if the conduct disrupts or would foreseeably disrupt the educational process or endangers or would foreseeably endanger the health, safety, morals, or welfare of the school community.

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[14] *Chancellor's Regulations A-830, Anti-Discrimination Policy and Procedures for Filing Internal Complaints of Discrimination*, https://www.schools nyc.gov/docs/default-source/default-document-library/a-830; *A-831, Student-to-Student Sexual Harassment*, https://www.schools.nyc.gov/docs/default-source/default-document-library/a-831-english; *A-832, Student-to-Student Discrimination, Harassment, Intimidation, and/or Bullying*, https://www.schools nyc.gov/docs/default-source/default-document-library/a-832.

[15] 34 C.F.R. § 106.30.

[16] https://www.schools nyc.gov/docs/default-source/default-document-library/a-831-english

[17] https://www.schools nyc.gov/docs/default-source/default-document-library/a-832

In addition, NYCDOE's Citywide Behavioral Expectations to Support Student Learning (Discipline Code),[18] which is NYCDOE's statutorily required code of conduct, sets forth a code of conduct,[19] describes prohibited behavior, including sexual harassment and gender-based harassment, and the range of penalties and supports and interventions for engaging in such behavior.

In contrast to Chancellor's Regulations A-831 and A-832, the 2020 Regulations define "education program or activity" for LEAs in a much more limited manner, as those "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs" and require LEAs to dismiss complaints alleging conduct that "did not occur in the recipient's education program or activity, or did not occur against a person in the United States."[20]

Thus, this new definition creates confusion as to what incidents, particularly those occurring off-campus and via social media and other electronic means, would trigger the 2020 grievance procedures that are discussed in the next section. This is particularly problematic given the proliferation of remote learning and working. We commit to maintaining our standards and ensuring that sexual harassment is not tolerated in our schools. We therefore strongly oppose the definition in the 2020 Regulations and request that the Department maintain the definition from the *2001 Guidance*.[21]

The remainder of our comment focuses on the extensive, adversarial grievance procedures required under the 2020 Regulations, which are developmentally and pedagogically inappropriate for elementary and secondary students and conflict with constitutionally-mandated compulsory education and other fundamental legal requirements in the K-12 environment.

B. NYCDOE Policies and Procedures Appropriately Address Sexual and Gender-Based Harassment

1) Student-to-Student Sexual Harassment: A-831

Pursuant to Chancellor's Regulations A-831 and A-832, as required under the New York Dignity for All Students Act (DASA),[22] all employees are required to report incidents of sexual or gender-based harassment between students and the NYCDOE is required to investigate such allegations. These requirements place an affirmative obligation on the NYCDOE to prevent and address such misconduct, rather than placing the onus on young student victims, or on their parents

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[18] https://www.schools nyc.gov/school-life/know-your-rights/discipline-code

[19] *See* N.Y. Educ. Law § 2801.

[20] 34 C.F.R. §§ 106.44(a), 106.45(b)(3).

[21] *Supra* note 8.

[22] N.Y. Educ. Law art. 2; 8 NYCRR §§ 100.2(l)(2)(ii)(b), (jj), (kk), (x).

or guardians, to informally or formally request an investigation before the NYCDOE takes this investigative and remedial action.

These prompt and equitable procedures require: (1) immediate notice to the victim and accused students and their parents; (2) a completed investigation by the school principal or their designee (principal/designee) within five school days of receipt of the report, including interviews and obtaining written statements from both parties and witnesses, collection of all relevant evidence; (3) an evaluation by the principal/designee of whether the evidence substantiates the allegations and whether Chancellor's Regulation A-831 or A-832 was violated using the preponderance of the evidence standard; and (4) within ten school days of receipt of the report, written notice to the parents of the victim and the parents of the accused student regarding whether any allegations are substantiated and whether the conduct constitutes a violation of Chancellor's Regulation A-831 or A-832.

Prompt resolution is crucial in the K-12 context in order for schools to provide pedagogically sound discipline to accused students and fulfill their responsibility to maintain an environment free of discrimination and harassment. A delayed response, which the 2020 Regulations necessarily impose, interferes with the school's ability to effectively address the behavior and school environment.

Students are not permitted to question each other directly or through the principal/designee or, consistent with the Family Educational Rights and Privacy Act (FERPA),[23] to see the evidence that is collected, except as provided for in connection with a student's rights related to the imposition of a disciplinary suspension. Indeed, NYCDOE does not place a student directly in an adversarial position with another student or employee under any circumstances.

Chancellor's Regulations A-831 and A-832 also require the principal/designee to provide interventions or supports to the victim, witnesses, and the accused student after the conclusion of the investigation as well as before or during the investigation, as appropriate. Examples of such interventions include counseling support, education or mental health services, and academic supports and adjustments such as changes in classes, lunch/recess, or after-school program schedules, to the extent possible. Principals/designees are required to develop individual support plans for students who have been the victim of, or students found to have engaged in, two or more violations of A-831 or A-832 within any school year.

If the principal/designee determines that the accused student violated Chancellor's Regulation A-831 or A-832, they are required to take appropriate steps to ensure the conduct has stopped. Where appropriate, the principal may also impose a disciplinary response consistent with the Discipline Code.[24] The Discipline Code utilizes a progressive model of discipline, which emphasizes social emotional learning and incremental interventions for positive behavioral change and accountability.

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[23] 20 U.S.C. § 1232g; 34 C.F.R. pt. 99.

[24] *See* N.Y. Educ. Law § 2801.

As described further below, if a principal/designee seeks to impose a disciplinary response that involves the removal of a student from a classroom or a suspension, Chancellor's Regulation A-443[25] sets forth detailed due process procedures and requirements that must be followed in order to afford the student appropriate due process, as required by the Constitution and applicable laws.[26]

2) Staff-to-Student Sexual Harassment

It is NYCDOE's policy that sexual behavior of any form by a NYCDOE employee where a student is involved is misconduct and will not be tolerated.

Chancellor's Regulation A-830[27] requires any employee who witnesses sexual harassment by a NYCDOE employee or who has knowledge that a student may have been the victim of such behavior to report the conduct to the principal/designee within one school day and to submit an electronic complaint within two school days to the NYCDOE Office of Equal Opportunity & Diversity Management (OEO). Any individual, including parents and students, may file a complaint with OEO. Interim supports and interventions are available for students.

Chancellor's Regulation A-412[28] also requires NYCDOE employees to immediately report any information concerning sexual misconduct by NYCDOE employees involving students to their principal/supervisor and to the Special Commissioner of Investigation for the New York City School District (SCI), who operates independently of NYCDOE and investigates, among other things, allegations of sexual misconduct by NYCDOE employees and vendors. Parents and vendors may also report directly to SCI. When the alleged misconduct would constitute a crime, NYCDOE principals and supervisors must also notify the police.[29]

Depending on the nature of the allegations, SCI or OEO will conduct an investigation and depending on the nature of the allegations, an employee who is the subject of the investigation may be removed or reassigned from their position while the investigation is pending. NYCDOE may also provide interventions and supports to the victim and witnesses of the reported sexual harassment or misconduct, as appropriate.

If the allegations are substantiated, NYCDOE can proceed to disciplinary proceedings, which vary dependent upon the title and status of the subject employee. Discipline may include immediate termination, suspension, a letter of discipline, training, and/or a disciplinary hearing, consistent with state law and collective bargaining agreements.[30]

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[25] https://www.schools nyc.gov/docs/default-source/default-document-library/a-443-3-5-04-english

[26] *See, e.g., Goss. v. Lopez*, 419 U.S. 565 (1975) (due process requirements for student discipline); N.Y. Educ. Law § 3214 (codifying same).

[27] https://www.schools nyc.gov/docs/default-source/default-document-library/a-830

[28] *Chancellor's Regulation A-412 (Security in the Schools)*, https://www.schools.nyc.gov/docs/default-source/default-document-library/a-412-security-in-the-schools-english.

[29] *See id.*

[30] *See* N.Y. Educ. Law § 3020-a; N.Y. Civ. Serv. Law § 75.

In short, the NYCDOE already has a robust system in place to address sexual harassment of students by employees which addresses the behavior in an age-appropriate manner for students.

C. Rescind the 2020 Regulations' Grievance Procedures and Related Provisions

The 2020 Regulations subject K-12 schools to unique harm by imposing the new grievance procedures without regard to and in a manner that conflicts with the unique, fundamental Constitutional and statutory obligations and responsibilities K-12 schools have to the children they are required to educate in a safe and secure school environment. The 2020 Regulations put K-12 schools in the untenable position of having to reconcile these conflicting obligations to their students.

1) Conflicting and Unworkable Preemption, Retaliation, and Constitutional Law Provisions

While the 2020 Regulations note that dismissing a formal sexual harassment complaint "does not preclude action under another provision of the recipient's code of conduct,"[31] it is unclear how an LEA would be permitted to take such action at all prior to an investigation (addressed below), or even after a determination under the 2020 grievance procedures, given the apparently conflicting preemption, Constitutional law, and retaliation provisions.

The preemption provision[32] requires schools to comply with the 2020 Regulations to the extent a conflict with state or local law exists. The retaliation provision specifies that "charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by [T]itle IX or this part, constitutes retaliation."[33] Therefore, the 2020 Regulations undermine school officials' ability to effectively prevent, and promptly address, the full range of sexual harassment that can negatively impact the learning, wellbeing, and safety of our students. The Constitutional law provision[34] further provides that nothing under the 2020 Regulations restricts an individual's Constitutional rights, but many of the grievance procedure requirements do interfere with students' rights to prompt substantive and procedural due process in discipline proceedings as described below.

In contrast, the *2001 Guidance* acknowledged that additional and separate rights may exist for students and school staff under the United States Constitution and state law and that LEAs' procedures should be consistent with and protect such rights:

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[31] 34 C.F.R. § 106.45(b)(3).

[32] *Id.* at § 106.6(h).

[33] *Id.* at § 106.71(a).

[34] *Id.* at § 106.6(d).

> A public school's employees have certain due process rights under the United States Constitution. The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding. . . . Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions. Of course, schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant. In both public and private schools, additional or separate rights may be created for employees or students by State law, institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements. Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment.[35]

2) Untenable Grievance Procedures Inappropriate for K-12

Many of the procedural requirements in 34 C.F.R. § 106.45(b) conflict with other federal and New York State law requirements, including those that govern student disciplinary proceedings. Given this legal overlay, aspects of the grievance procedures are untenable in the K-12 context and hinder the ability of the schools to respond to alleged sexual harassment in a timely, age-appropriate, and effective manner.

New York's Existing Anti-Bullying Law Is Designed for K-12 Schools

As described above, in New York, DASA is the existing state law prohibiting sexual and gender-based harassment, discrimination, bullying, and intimidation against public school students by other students and employees,[36] and which may cover conduct also actionable under Title IX. DASA already prescribes strict reporting timelines and requires prompt investigations and does so in a manner specifically designed for the K-12 environment that does not disrupt disciplinary requirements. Unlike DASA, the 2020 Regulations require students or their parents or guardians to file a "formal complaint"[37] in order to request that the school investigate the alleged sexual harassment.

Promptly Redressing Misconduct, and the Complex Constitutional and State Requirements for Student Discipline

Furthermore, the 2020 Regulations do not clarify how the Title IX grievance procedures function in tandem with concurrent school-based investigations and/or student disciplinary hearings. Students already have a constitutional and statutory right to receive substantive and procedural due process. The 2020 Regulations fail to take into account these existing heightened

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[35] *2001 Guidance* at 22.

[36] *Supra* note 22.

[37] 34 C.F.R. § 106.30(a).

protections in the K-12 context, where education is compulsory, schools are obligated to educate children within the state, and schools act in loco parentis during the school day. The 2020 Regulations impose significant new administrative requirements and redundancies that unnecessarily impede school officials' ability to resolve matters expeditiously and with the flexibility needed to fashion remedies, supports, and interim relief as needed to maintain a safe school environment and address young students' needs.

For instance, the limited remedial action the 2020 Regulations do permit without a formal complaint and concluded investigation is inappropriately narrow. The definition of "supportive measures"[38] is not as broad as the NYCDOE's provisions on supports and interventions and does not contemplate an individual support plan, which is an important tool in K-12 schools. Moreover, the narrow "emergency removal"[39] provision, requiring "immediate threat to the *physical* health or safety of any student or other individual arising from the allegations of sexual harassment," hinders school officials' ability to provide timely and crucial safety measures and other supports. In particular, limiting removal to address only threats to the physical health of students completely ignores the wellbeing of students who suffer trauma and significant psychological harm.

In fact, this provision is in direct conflict with New York State law that appropriately gives schools discretion to suspend a student pending a hearing for any conduct that "poses a continuing danger to persons or property or an ongoing threat of disruption to the academic process."[40] It may prevent NYCDOE from removing a student that poses harm to other students or disrupts the school environment during the weeks, even months, of the required grievance procedures, which will frustrate NYCDOE's obligation to ensure a safe school environment.

Indeed, the 2020 Regulations – which require ten separate notices[41] – unduly prolong the grievance process to a minimum case timeline of 90 days in most cases. For example, LEAs are required to "[p]rovide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, *with sufficient time for the party to prepare to participate*."[42]

Even in cases where NYCDOE could meet the emergency removal standard to remove a student, the 2020 Regulations' grievance procedures and their timelines conflict with the complex legal framework for student disciplinary proceedings required by Constitutional mandates[43] and

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[38] 34 C.F.R.

[39] *Id.* at § 106.44(c) (emphasis added).

[40] N.Y. Educ. Law § 3214 (3)(b)(1).

[41] *See* 34 C.F.R. §§ 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).

[42] *Id.* at § 106.45(b)(3)(v).

[43] *See, e.g., Goss*, 419 U.S. at 565.

obligations with regard to students with disabilities promulgated under the Individuals with Disabilities Education Act (IDEA).[44]

In the context of student disciplinary proceedings, including those against students with disabilities, the NYCDOE is subject to New York State laws and regulations[45] implementing the IDEA requirements.[46] This is a complex legal framework with specific procedural obligations and timelines, including those for hearings and for manifestation determination reviews (MDRs), that conflict with the timeline and procedural steps outlined in the new grievance procedures. For example:

- If a student is removed in excess of five school days, a due process hearing (with the opportunity to present evidence and question and present witnesses) must be offered within five days of the date of the imposition of the suspension;[47] and

- for students with disabilities, an MDR must be held within ten school days after the decision is made to impose a disciplinary removal that constitutes a disciplinary change in placement.[48]

These proceedings would occur prior to the completion of the protracted grievance proceedings, and essentially require findings of fact to be made before completion of the 2020 Regulations' grievance proceedings. Thus, in combination with state requirements and other federal requirements, the 2020 Regulations untenably impose on schools, parties, and witnesses multiple and redundant fact-finding hearings throughout the Title IX process, where student victims could be asked to testify repeatedly. Moreover, the Regulations place school districts in the impossible position of complying with timelines and procedures that conflict with other obligations under federal law, and significantly hinder a school district's ability to timely and appropriately address the very behavior which these Regulations are designed to remediate.

Adversarial Process is Traumatizing for Students and Pedagogically Unsound

There are also fundamental systemic incompatibilities between the 2020 grievance process—which is adversarial—and student disciplinary proceedings, in which the NYCDOE and the respondent are the two parties. The 2020 Regulations impose a process that does not seem compatible with investigations of student misconduct in the K-12 setting when the "parties" are children. (Similarly, the grievance process does not seem workable for allegations of harassment of a student by an employee, when one party is a child and one is an adult.) The NYCDOE has

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[44] 20 U.S.C. § 1400 et seq.; 34 C.F.R. pt. 300; codified with respect to New York State at *e.g.*, N.Y. Educ. Law §§ 3214, 4404; 8 NYCRR pt. 201.

[45] *E.g.*, N.Y. Educ. Law §§ 3214, 4404; 8 NYCRR pt. 201.

[46] 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. pt. 300.

[47] *See* N.Y. Educ. Law § 3214(3)(c).

[48] 8 NYCRR § 201.4(a)(3).

grave concerns that the procedural requirements will traumatize elementary and secondary students by forcing them to participate in adversarial processes that are not developmentally appropriate, pedagogically sound, or suitable for children or the K-12 school environment.

This new system requires vulnerable children to be repeatedly questioned by multiple adults about the details of their sexual harassment and abuse. For example: (a) the victim may make an initial report to an employee;[49] (b) the victim will have to discuss the allegations with the Title IX Coordinator;[50] (c) if the victim or the Title IX Coordinator files a formal complaint, the victim will be re-interviewed and witnesses will be interviewed as part of the school's investigation under Chancellor's Regulation A-831 or A-832 as required under DASA; and (d) the victim and witnesses will have to submit to written cross-examination (and further follow up questions) directly by the accused student or employee, or their advisor.[51]

Children who allege sexual harassment by an employee, or another student where the student conduct is criminal in nature, will also face further questioning.

Moreover, requiring the three distinct roles of Title IX Coordinator, investigator, and decision-maker[52] unnecessarily splinters students' support system and takes the student outside their school instead of focusing resources at the child's home base – their school. This is incompatible with the K-12 model for receiving reports and conducting investigations where a duly trained administrator (often the principal) both conducts the investigation and determines responsibility under the applicable Chancellor's Regulation. This process is separate from the hearing and sanctioning when required under the student Discipline Code.

Complying with 2020 Grievance Procedures and Privacy Requirements Is Untenable and May Cause Chilling Effect (Underreporting)

Finally, it is unclear how these procedures could be implemented in a manner that protects student privacy in compliance with FERPA,[53] New York law,[54] and NYCDOE policy.[55]

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[49] 34 C.F.R. § 106.8(a).

[50] *Id.* at § 106.44(a).

[51] *Id.* at § 106.45(b)(6)(ii).

[52] *Id.* at § 106.45(b)(4).

[53] *Supra* note 23.

[54] *E.g.*, N.Y. Educ. Law § 2-d.

[55] *Chancellor's Regulation A-820 (Confidentiality and Release of Student Records; Records Retention)*, https://www.schools nyc.gov/docs/default-source/default-document-library/a-820-6-29-2009-final-combined-remediated-wcag2-0.

The 2020 Regulations provide at § 106.6(e) that the "obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99." However, the 2020 Regulations also contain sweeping requirements for schools to:

- "[p]rovide both parties an equal opportunity 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 regarding responsibility[.]"[56]

- prepare an investigative report that summarizes the relevant evidence and send it to both parties at least ten days before the determination of responsibility for their review and response.[57]

- as part of the response to the investigative report, provide the victim and the accused employee or student the opportunity to submit written cross-examination questions to the other party (other than certain prohibited questions) and to the witnesses. After receiving the answers, provide the parties the opportunity to submit follow-up questions.[58]

These requirements, unprecedented in Title IX regulations or guidance, place unreasonable expectations on children who do not have the maturity or experience to understand the obligation to keep such information confidential, and as a result may result in the disclosure of sensitive and/or confidential information regarding other students or employees.

In addition, the grievance procedures create a chilling effect on the reporting of sexual harassment and impede schools' ability to prevent and address this misconduct. Children are often already reluctant to cooperate with investigations due to social pressures and safety concerns and will be even less likely to do so with this level of expansive disclosure.

The recent Congressional Research Service report similarly offers little practical guidance for LEAs in this area: "[m]oreover, as a practical matter, even if compliance with certain Title IX requirements might appear to conflict with FERPA's provisions in a particular situation, schools that comply with Title IX regulations by disclosing evidence to parties in a disciplinary proceeding are unlikely to face legal repercussions."[59]

This scope of information sharing goes well beyond that contemplated in the *2001 Guidance*, which struck a tenable balance between the privacy rights of both parties and which prohibited LEAs from disclosing information to a complainant regarding another student's

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[56] 34 C.F.R. § 106.45(b)(5)(vi).

[57] *Id.*

[58] 34 C.F.R. § 106.45(b)(6)(ii).

[59] *The Family Educational Rights and Privacy Act (FERPA): Legal Issues*, (May 24, 2021), https://crsreports.congress.gov/product/pdf/R/R46799.

education record except when "the information directly relates to the complainant (e.g., an order requiring the student harasser not to have contact with the complainant)."[60]

Moreover, in contrast to the blanket statement in the 2020 Regulations, the *2001 Guidance* provided a clear standard: "FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions."[61]

Waiver or Safe Harbor for LEAs

If the 2020 Regulations are not rescinded in their entirety, the NYCDOE requests a revised Title IX Rule that includes a provision for an LEA to apply to the Secretary of Education for the waiver of all or any specific requirements enumerated in 34 C.F.R. § 106.45(b); or, in the alternative, a carve-out or safe harbor provision for LEAs to the extent they meet certain procedural requirements in a manner consistent with state and other federal laws.

III. Closing

Thank you for the opportunity to provide comment on the 2020 Regulations. We again affirm our strong, longstanding commitment to ensuring a safe and supportive school and work environment that is free of sexual harassment. Departure from the definition of sexual harassment in the *2001 Guidance* is an unacceptable step backwards. Further, the 2020 Regulations are not at all tailored to elementary and secondary schools. Accordingly, we request that the Department rescind the 2020 Regulations.

The NYCDOE also welcomes the opportunity to speak with the Department at greater length to discuss this topic, including the potential impact in the K-12 context of the sexual harassment definition and the procedural requirements as currently written, and the importance of codifying sexual orientation, gender identity, and gender expression protections in Title IX and related guidance.

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[60] *2001 Guidance* at 20 n. 102, and 22 ("Furthermore, the [FERPA] does not override federally protected due process rights of persons accused of sexual harassment.").

[61] *Id.* at vii.