

From: Daniella Wassel Dwornik
Sent: Fri, 11 Jun 2021 18:57:52 +0000
To: T9PublicHearing
Cc: Amy Jones;Sonya Parker Goode;Sean Woods;Daniella Wassel Dwornik
Subject: Written Comment: Title IX Public Hearing (The 2020 amendments to the Title IX regulations in the postsecondary educational environment)
Attachments: Title IX Comments Combined Draft.docx

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To Whom It May Concern,

We, the staff of the Dallas Area Rape Crisis Center (Dallas, Texas), respectfully submit the attached comments in response to President Biden's "Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity" of March 8, 2021. We do so in support of our clients, our community, and the Title IX faculty whom we are proud to call our colleagues in the work for a discrimination-free future.

If this attachment is not available or is not readable, please refer to the full text of our comments, which can be found below the agency email signature.

Thank you for your time, consideration, and care for the safety and wellbeing of our students.

Submitted by Daniella Wassel Dwornik, Education and Training Coordinator, on behalf of

Amy Jones | CEO
(she/her/hers)



ajones@dallasrapecrisis.org

Direct Line: 214-712-4916

24/7 Crisis Hotline: 972-641-7273



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Regarding President's Biden's "Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity" of March 8, 2021

Written Comment submitted by the Staff of the Dallas Area Rape Crisis Center (Dallas, Texas)
On behalf of our clients, local students, and Title IX Coalition

To Whom It May Concern:

Since 2009, the Dallas Area Rape Crisis Center (locally known as “DARCC”) has provided compassionate care to survivors of sexual violence as well as community and professional education across our North Texas region. As the only stand-alone sexual assault survivors’ advocacy group in the ninth-largest city in the United States, DARCC’s work includes collaboration with dozens of local college, university, and high school campuses; and among our accomplishments we count the founding and administration of our quarterly Title IX Coalition meeting. At this meeting, we provide Title IX professionals, some traveling as far as 65 miles to participate, with training as well as opportunities to discuss their programming successes and challenges. With this experience, we submit the following response to the President’s call for public comment on the federal regulations related to the enforcement of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. We welcome this opportunity and thank the President, the Department of Education, and the Department of Justice, as they review agency actions to ensure that all students are guaranteed educational environments free from discrimination on the basis of sex, sexual orientation, and gender identity. We emphasize that the following comments are informed not just by our survivor-centered, trauma-informed expertise but also, just as importantly, by our regular community organization supporting our neighbor Title IX departments.

Determining ‘actual knowledge,’ according to §106.30(a) as currently written, investigates whether post-secondary student complainants have correctly reported their complaints to their authority figures with power to “institute corrective measures on behalf of” their recipient institutions. This narrow path for incident reporting creates an opportunity to chill current or future complaints: smaller recipient institutions may employ or designate only a single figure to receive and process such complaints. In cases where such a figure may be the respondent in a Title IX complaint, this creates a significant burden to the complainant before even submitting that formal complaint in the first place. Creating a class or designation of employees or volunteers—such as counselors, peer support individuals, professors, or additional administrative staff—would increase the likelihood that student complainants will come forward with relevant complaints, increasing campus safety and decreasing the likelihood of discrimination on the basis of sex.

Additionally, the present definition of ‘formal complaint’ further restricts the ability of Title IX faculty to fulfill their obligations to foster discrimination-free educational environments. Under the

current language, repeat harassers, abusers, and assaulters—those who make up the majority of violent perpetrators and perpetrations—to maintain the exact hostile and discriminatory environment intended to be mitigated by Title IX. If the respondent in these informal complaints is an employee of the recipient, complainants are less likely to seek out formal paths to sanction or remedy for fear of individual safety, retaliation, and loss of privileges or social status. These fears have been deemed serious enough for consideration in employment discrimination cases, making it an appropriate and necessary consideration for the rights of less powerful students on school campuses. Preserving this ‘formal complaint’ requirement will offer shelter to repeated assaulters and harassers while discouraging future complainants from sharing their experiences. We ask that the Departments remove the responsibility of Title IX faculty to cajole potential complainants into sharing their stories through formal complaint and remove the implicit discretion of Title IX faculty of unconsciously choosing which complainants they select for such encouragement. Failure to remove this loophole will fail those students whose stories didn’t garner enough attention or appear to be sufficiently harmful or traumatic.

Finally, many post-secondary students are unlikely to have ready knowledge of their institution’s Title IX Coordinator’s name, office, location, or duties. This lack of common knowledge may, at best, cause delays to reporting or, at worst, overtax complainants’ tolerance for burdens to reporting while leading to abandonment of their complainants. If even a single complainant finds it difficult or impossible to submit a report in the prescribed manner, positive associations between previous disclosures of some complainants and subsequent disclosures of other complainants are jeopardized and all but erased. Achieving the goal of successful adjudication of sexual harassment and sexual assault complaints is heavily reliant on individual complainants’ beliefs that they have not experienced and will not experience re-traumatization or increased traumatization through the grievance and hearing process.

The current regulations, in §106.30(a)(2), ask a reasonable person to determine if sexual harassment is “severe, pervasive, and objectively offensive” enough to warrant a course of action under Title IX. Including such limiting language allows for only the most grotesque and blatant sexual harassment cases to move forward, excluding a great deal of cases that miss the mark of being “severe, pervasive, *and* objectively offensive [emphasis added]” and all but ensuring that these will never come to light or actual knowledge of the recipient. Preserving this language similarly preserves the hostile environments which necessitated the enactment of Title IX in the first place. Title IX faculty work to eliminate discriminatory conditions at their institutions, and the current language creates significant barriers to these professionals as they cultivate environments to encourage complainants to come forward with their trauma experiences. Maintaining this will continue to silence survivors of such discrimination, harassment, and assault. We acknowledge that sexual harassment, like all types of sexual violence,

includes a spectrum of behavior that *can* be “severe, pervasive, and objectively offensive [;]” but only rarely will cases go forward that meet this insurmountable, subjective, and vague definition. Countless cases and incidents will go, and will continue to go, unheard with this unreasonably high bar for reporting. Making it harder to report complaints will not make these crimes disappear.

The language found in §106.44(a), governing the recipient’s response to sexual harassment, is frankly offensive and insensitive to the experiences of victims of sex discrimination, including sexual violence and sex-based offenses. That recipients must respond “in a manner that is not deliberately indifferent” is vague, with subsequent text failing to provide any more meaningful direction. Here, deliberate indifference exists only when a recipient’s “response to sexual harassment is clearly unreasonable in light of the known circumstances[.]” and recipients are given no experience through which to frame reasonableness. Are they to measure against the judgment of reasonable Title IX Coordinators? Reasonable post-secondary administrators? Reasonable complainants? Reasonable students or, more generally, simply reasonable persons? This provision requires additional language to ensure that Title IX staff at recipient agencies may more clearly understand their duties to complainant, respondent, and the law. We ask that the Departments reject the deliberate indifference standard altogether, instead calling upon recipients to create clear policies and procedures for response to Title IX complaints, including descriptions of adequate response to complaints, anticipated time frames for investigation and hearing, and dispute processes in place for failure to meet the described expectations.

With this in mind, an examination of the grievance process regulations for formal complaints of sexual harassment, as described in §106.45(b)(1), gives rise to new concerns.

“Reasonably prompt” (§106.45(b)(1)(v)) time frames are expected for the conclusion of the grievance process and appeals process or for necessary delays or extensions; however, no such time frame is required for the recipient’s response to the initial complaint. It is clear that the Title IX grievance process is intended to provide basic due process concepts for both complainant and respondent; and so we ask the Departments to carry a related commitment to speedy proceedings into the responsibilities of Title IX recipients. Under the current regulations, a first year post-secondary student may file a Title IX complaint and may not receive a hearing or determination of responsibility until their final year. In the event that the respondent leaves the recipient institution, the recipient may legally dismiss this early complaint without consequence (see further comment on §106.45(b)(3)(ii) below). This particular type of case has been the subject of discussion in our Title IX Coalition, with Title IX faculty expressing frustration at their inability to support complainant students. We ask the Departments to eliminate sluggish Title IX proceedings by implementing a standard for timely hearing and determinations of responsibility. Current regulatory language invites traumatic delay for complainant students’ pursuits of

remedy while simultaneously creating inconvenience and, in some cases, exemption from consequences for respondent students and employees (see further comment on §106.45(b)(3)(ii)). Lack of trauma-informed policies does not make campus more equal for complainant or respondent, but it does silence the voices of those seeking objective evaluation of evidence relevant to violence on campus.

Recipient discretion on the standard of evidence required to substantiate sexual harassment complaints, described in §106.45(b)(1)(vii), creates unpredictable outcomes for complainant students across states and institutions. In fact, a student attending the University of Dallas, using a preponderance of the evidence standard, and a peer attending Dallas Baptist University, using a clear and convincing evidence standard, may experience significantly disparate outcomes in their grievance processes under Title IX, despite their campuses' locations less than 13 miles away from one another. Federal regulation can create uniformity and predictable outcomes for complainants and respondents alike by adopting and enforcing a single preponderance of the evidence standard. Because the ultimate goal of the Title IX grievance process is to determine whether the respondent failed to uphold the conduct requirements of their recipient institution, this preponderance standard is more appropriate than the clear and convincing standard typically used in proceedings related to an individual's civil rights and civil liberties. No remedies available to educational institutions infringe on the civil rights or liberties of respondents. We ask the Departments to return to the previously-held preponderance standard for Title IX hearings.

Currently, regulation describing the process for the dismissal of formal complaints appears to abandon the adjudicatory obligations of recipient institutions. According to §106.45(b)(3)(ii), recipients may dismiss complaints when complainants withdraw their complaints in writing, when respondents are no longer enrolled or employed by the recipient, or when specific circumstances (undescribed in the text of the regulation) "prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein."

In the criminal justice system, when charges result from allegations of sexual harassment and sexual assault, prosecutors and the justice system are tasked with representing the state in a court of law and subsequently must satisfy the highest standard of proof. Such charges may move forward even without the participation of material witnesses, such as the victim of said crime, when sufficient evidence is present. Under Title IX, recipient institutions are similarly tasked with adjudicating relevant complaints in the interest of fairness to both complainant and respondent but also in order to ensure that misconduct is appropriately addressed. The current dismissal process under Title IX allows recipients, identified §106.30(a) as "authorit[ies] to institute corrective measures on" their own behalf, to shirk this authority without respect for either of these responsibilities when allowing complainants to be pressured, coerced,

or intimidated into withdrawing Title IX complaints. When recipients assume responsibility for investigation and adjudication, they take on the responsibility initially borne by complainants to maintain energy, motivation, and tolerance for the demands of the hearing process.

Similarly, allowing dismissal of Title IX complainants in the event that the respondent discontinues their enrollment or employment at the recipient institution creates opportunities for responsible parties to escape consequences and discipline at one institution and to risk harm to others at a new institution. Title IX regulations would be greatly improved with required reporting of positive responsibility determinations to a national clearinghouse or similar body, searchable by request from any Title IX recipient, in order to ensure the integrity of their campus safety measures.

Finally, with the inclusion of vague “specific circumstances” language allowing for recipients to dismiss otherwise legitimate Title IX complaints, the regulations provide bad faith actors the ability to overreach and apply such specific circumstances as they see fit. In order to maintain uniform, predictable outcomes for all Title IX complaints, we ask the Departments to clearly describe such circumstances warranting the dismissal of complaints in the event that the recipient is unable to gather evidence sufficient to determine the respondent’s responsibility. If the Departments determine that such circumstances are too numerous for a finite regulation, an additional, more detailed explanation of the nature of acceptable “specific circumstances” would provide clear guidance to recipients on appropriate grounds for complaint dismissal.

Again, we thank you for the opportunity to share our experience, expertise, and knowledge of serving survivors of sexual violence. We look forward to receiving updated Title IX directives better suited for fostering discrimination-free educational environments for all American and North Texas students.

Sincerely,

Amy Jones, MA, LPC-S
CEO/ Dallas Area Rape Crisis Center
2801 Swiss Avenue
Dallas, Texas 75204

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the first place. Creating a class or designation of employees or volunteers—such as counselors, peer support individuals, professors, or additional administrative staff—would increase the likelihood that student complainants will come forward with relevant complaints, increasing campus safety and decreasing the likelihood of discrimination on the basis of sex.

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Finally, with the inclusion on unenumerated “specific circumstances” allowing for recipients to dismiss otherwise legitimate Title IX complaints, the regulations provide bad faith actors to cite such specific circumstances as they see fit. In order to maintain uniform, predictable outcomes for all Title IX complaints, we ask the Departments to clearly describe such circumstances warranting the dismissal of complaints in the event that the recipient is unable to gather evidence sufficient to determine the respondent’s responsibility. If the Departments determine that such circumstances are too numerous for a finite regulation, an additional, more detailed explanation of the nature of acceptable “specific circumstances” would provide clear guidance to recipients on appropriate grounds for dismissal.

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Sincerely,

Amy Jones, LPC

CEO

Dallas Ares Rape Crisis Center

2801 Swiss Avenue

Dallas, Texas 75204