

From: Courtney Bullard
Sent: Fri, 11 Jun 2021 10:31:56 -0400
To: T9PublicHearing; Susan Eastman
Subject: Written Comment: Title IX Public Hearing (K12)
Attachments: ICS DOE Submission Final.pdf

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Please see the attached comments submitted by ICS, in part on behalf of its clients and partners. Our comments mainly focus on the impact of the regulations on K12 and suggested changes/feedback.

Thank you for the opportunity to present live and to provide these comments in writing.

Sincerely,

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Courtney Bullard, Esq.

Owner at ICS

A 711 Signal Mountain Rd., #108 Chattanooga, TN 37405

P Main Line: 423-667-1838 **E** chb@icslawyer.com

W www.icslawyer.com





To whom it may concern,

Institutional Compliance Solutions is pleased to provide its comments to the new Title IX regulations for consideration for the Department of Education.

Introduction and Background

ICS is a woman-owned, women run, legal and consulting company that focuses on assisting school districts and universities with compliance with Title IX and related laws and regulations. ICS has been in existence for five years and has had the privilege of partnering with hundreds of Title IX professionals in policy drafting and review, training, conducting external investigations and decision-making services, audits of Title IX programs and remediation assistance after a crisis. ICS is distinctive in that everyone who works on matters with clients is both a practicing lawyer and former practitioner. Backgrounds include a former sex crime and DV prosecutor, Title IX investigator, Deputy Title IX Coordinator at a large State system, and former campus counsel for a large State system. One of our team members is also married to a K-12 administrator with Title IX duties. Our signature service is providing real-time on the ground assistance to Title IX professionals and training that is practical to assist with not only learning content but effective implementation.

Since the release of the Title IX regulations in May of 2020, ICS has trained thousands of K-12 Title IX professionals on what is mandated under the regulations as well as provided practical advice for effective implementation. This training has involved administrators from school districts across thirty-eight that vary in size from some of the largest, to some of the smallest. In addition, we have provided day-to-day assistance to school districts in attempting to implement the regulations- at times fielding four to five inquiries for help a day from K12 Title IX Coordinators. We are certain that no other similar organization has touched the number of school districts that we have in this last year.

Importantly, we have also reviewed, revised and drafted hundreds of policies attempting to incorporate the requirements of the new regulations.

Not only have we learned from our clients and Community Partners, but we ourselves have served as external investigators and decision-makers under the new regulations.

Observations and Recommendations

ICS' observations and recommendations encompass feedback from our clients, who represent school districts of all sizes in locations in 38 different states. We were honored to seek their feedback so that we could communicate it to the Department on their behalf. This is important because it is our observation that the regulations were put into effect without the appropriate input from those on the ground doing the work each and every day. We respect and value the voices of the survivor community, as well as those accused; however, to ensure any revisions to the regulations are truly effective - which will ultimately ensure a process that leads with care and support for all parties involved while effectuating accountability where necessary – it is vital that the Department seek input from Title IX administrators. In short, if the regulations do not work in practice, there will be barriers to reporting and ultimately an inability to effectively respond to and address sexual harassment.

K12 Comments and Feedback

Overall, the new regulations have had the most impact and created the most change for school districts. Simply put, K12 does not have the infrastructure and support to absorb the prescriptive procedural requirements of the regulations. They are not staffed and resourced to do the work in the manner prescribed - where it takes at least 3 people working on every case - while those same administrators are being pulled away from endless other responsibilities. We are working with administrators who absolutely want to do the right thing and are putting their best efforts forward but are facing significant difficulty in complying with these mandates.

K12 and higher ed are very different spaces and should be treated as such in revisiting the regulations. All of these general observations frame our comments and feedback.

1. *Definition of Sexual Harassment.* The second definition of sexual harassment is the biggest pain point for Title IX Coordinator (K12 and Higher Ed). It is recommended that this definition be broadened to severe, pervasive, or objectively offensive to encompass more conduct.

2. *The Formal Title IX Grievance Process.* In general, the formal Title IX grievance process prescribed in the regulations simply runs counter to how districts work in real-time in addressing student-on-student misconduct. The biggest issue is that it takes too much time. The notice requirements and lengthy investigative process with its review periods restrict K12 administrators from being able to act swiftly to address safety concerns or to resolve a matter in student-on-student cases. Allowing some type of review, albeit a shorter one, would still provide the necessary procedural safeguards while shortening the investigation process. The Q&A is similarly ill-suited for the K-12 environment and unwieldy in practice. It is overly complicated and unnecessarily time consuming for administrators who are already adhering to safeguards in manifestation and expulsion hearings. Moreover, the regulations do not adequately address overlapping or contradictory federal and state laws.

3. *Informal Resolution.* Our clients and partners would like to see the option of informal resolution remain. K12 is very adept at informally resolving matters and this option has been highly effective.

4. *Mandated Training.* We suggest that the any revisions keep the mandated training for the Title IX team. It is no secret that historically K12 is behind higher ed in its Title IX compliance efforts. The mandated training has provided the much-needed attention and funding (although more is certainly needed) by leadership to ensure districts are not only meeting their obligations but also fully supporting those who are asked to do this important work. Federal funding is also necessary to support this mandate. There is still significant work to be done on professional development, but mandated training has been a strong first step.

5. *Separate Investigators and Decision-Makers.* ICS values the procedural guardrails that have been put in place because of requiring separate investigators and decision-makers and believe this is an appropriate approach for institutions. For districts, however, this can be exceedingly difficult. Especially small, rural districts. We recommend that the Department consider allowing

districts the discretion of utilizing a single-investigator model that incorporates a review period and/or other procedural safeguards.

Higher Ed

The following are an overview of feedback regarding comments to the regulations for colleges and universities.

1. Definition of Sexual Harassment. Similar to K12, the second prong of the definition of sexual harassment has been difficult for Title IX Coordinator's in receiving and reviewing Formal Complaints.

2. "Cross-Examination". Our clients and partners would like to have the requirement that an institution provide an advisor at a hearing, and that the advisor engage in cross-examination, removed from the regulation's mandates. There are other ways to provide for procedural safeguards outside of this process, such as allowing the parties to provide written questions to the decision maker that will be asked of the other party or witnesses.

Finally, the regulations are silent on expectations for training, prevention and education for students and the community at large at a school. It would be helpful if guidance was included in the regulations.

In closing, our emphasis is that the voices of administrators need to be included in this process - both for K12 and higher ed - and it is apparent that they were not included, especially for K12, in the drafting of the regulations. We are attaching a summary of written submissions from our clients and partners of their comments on the regulations for your review as well.

3. Informal Resolution. Similar to K12, the informal resolution process has been extremely helpful for higher ed. Schools have been able to implement restorative justice practices to resolve matters and both parties feel heard through this practice. This allows for more efficient and effective resolution of sexual harassment cases.

4. Review of evidence "directly related to". This review requirement has created a lot of confusion in practice, significantly slows down the process, and provides little, if any, benefit because the parties will receive most if not all of the information with the report, with an opportunity for review and response at that time.

In closing, our emphasis is that the voices of administrators need to be included in this process - both for K12 and higher ed - and it is apparent that they were not included, especially for K12, in the drafting of the regulations. We would welcome the opportunity to participate in any additional comments as the regulations are reviewed.

Sincerely,

Courtney H. Bullard

Courtney H. Bullard, Owner

K12

Thank you for requesting feedback. Below are my comments.

- The investigative process timeline is too long for K-12 public education. It's unreasonable to intentionally provide 10 days for each mandated 10-day period for review. While I understand the gravity of the allegations for a Title IX complaint, there has to be an allowance to reduce the timeline so these investigations and decisions may be expedited.
- Increased guidance from the Office of Civil Rights on the roles and processes.

I would like for you all to express that Title IX is not working for our school district when it comes to K-12 students. I can see how it may be helpful in a college setting, but not for students in a K-12 setting. There are no additional or varied disciplinary actions for Title IX. Thus, we may be dispensing the same disciplinary action, if the respondent is deemed responsible, as if we would discipline him/her according to our disciplinary process and procedures.

We are currently in the middle of a Title IX investigation. The information will not reach the Decision Maker before the end of school year for students (June 11th) due to the number of days allocated for the review of evidence. So, consequences may need to be given at the beginning of the student's 9th grade year versus when the incident occurred in May?

We hope this is under serious review. Thank you so much for requesting and accepting the feedback.

Thanks for taking on this task. For K12, the process is too long. The two 10day review periods are difficult to manage especially with the day-to-day operations of schools and the need to embrace "teachable moments". These 20 days delay the opportunity to give real time feedback and address the problems that arise with a delayed response.

Because we are a smaller district, each person on our administrative staff fills multiple roles. In addition to being the district Title IX coordinator, I am responsible for screening applicants, conducting hiring interviews, validating proper certification of our educators, managing staff evaluations, organizing and facilitating professional development, overseeing our induction and mentoring program, and coordinating placement of student interns. To properly meet the requirements following a Title IX notification in a timely manner, all of these other responsibilities must come to a complete halt. In order to get myself, our Title IX team, and our employees trained in the new regulations, I have had to set aside many other tasks that held great importance to our teachers and students. While I sincerely value the intent of Title IX, I find the new requirements to be very overwhelming to implement.

Here are a couple changes I would love to see...

- 1) Allow for some confidentiality for the complainant but continue the repercussions for the complainant for lies or false accusations.
- 2) Allow/encourage dismissals throughout the process if needed. It feels implied but I am not sure that everyone goes to dismissal.
- 3) Eliminate a little of the notices and paperwork.
- 4) Provide some level of support for this unfunded mandate.

These are the items I would suggest continuing in the current Title IX regulations:

- Not imposing monetary damages for determinations by administrative enforcement of actions
- Posters on how to report for High Schools (It would be great to expand to have age-appropriate posters in all classrooms.)
- Posting of contact information at sites and district.
- Offenses off-campus and school sponsored activities are out of jurisdiction for investigation. Should say that if it carries over to campus then it is in jurisdiction.

These are the items I suggest change in the current Title IX regulations:

- **Rescind the entire formal grievance process**-coordinator, investigator, decision maker, appeals. It is not appropriate for small children (high school maybe).
 - The entire procedure is overkill. We are making our k-12 school districts act as judicial entities.
 - Remedial action and student discipline can be put on hold for a very long time with these grievance procedures. Is it reasonable to discipline a student 60 or 90 days after something has been reported to the school?
 - It is cost prohibitive for most school districts. No extra funds have been provided to expand the grievance process.
- If they are going to keep the formal SH grievance procedure. Parent/Guardian should determine whether to file complaint. This should be taken out of T9 coordinator ability entirely.
- A statute of limitations for filing formal complaints (if they keep the grievance procedure) should be specified. It is unreasonable to pretend that student issues can be investigated even a year later. CA already has the Uniform Complaint Procedure (UCP) in discrimination, harassment, intimidation, and bullying based on a protected category (sex-based being one of them). The statute of limitations for discrimination, harassment, intimidation, and bullying under the CA UCP is six months.
- Allow site administrators or designees to do investigations for student sexual harassment allegations that occur on campus or at school-sponsored activity. Site admin needs to handle what happens on their campuses. Allow two weeks for the investigation (enough time for law enforcement to proceed first if necessary.)

- Go back to preponderance of the evidence standard, do not give an option of clear and convincing. Clear and convincing allows responding parties too much wiggle room to get away with offenses. Site admin and school staff should be able to make the call based on the credibility of each party and witnesses. They know their students.
- Go back to constructive notice (rescind actual knowledge)– constructive notice protects students more than actual knowledge. Suspected sexual harassment should ALWAYS be reported in order to make sure it isn't happening or if it is, it stops. Employee-to-student issues should require formal investigation by districts.
- The Definition: Keep #1 the quid pro quo and #3, the sexual assault/battery and dating violence as part of definition but go back to objectively offensive and repeated/pervasive, or severe. It protects our kids better.
- Complainant's parent/guardian only should be the party who files a formal complaint/grievance. They should only be able to do so after the site admin or designee makes determination (based on preponderance) of culpability. Maybe this grievance process could be thought of as an appeals process for the site's investigation and determination. Prior to the new regulations we used our UCP as our appeals process for the site's determinations. Filing a formal grievance should not be in the Title IX Coordinators purview AT ALL.
- Supportive measures should be coordinated effort between school and Title IX coordinator and tracked by school. Large school districts have too many schools to expect the central office to track and implement.
- Acknowledge or designate the different needs in K-12 environment: Perhaps provide separate guidance/protocols for each of: Pre-K through 3 (we can't suspend for in CA for sexual harassment at these grades), 4-8, and High School (affirmative consent is important here), and postsecondary.
- Rescind emergency removal (expulsion takes care of this). Sexual assault (battery) requires mandatory expulsion in CA for sexual assault (and battery).

Higher Ed

One major issue I've run into is the inability to ask parties to not talk about the matter, i.e. no gag orders. This is how I'm seeing this played out, particularly at small, liberal arts institutions. Complainant wants her side of the story known to everyone, so she tells the majority of Respondent's Department. Respondent alleges Complainant told so many others in a "retaliatory" manner and is now having difficulty working because Complainant created a hostile work environment.

Also, because of a lack of gag orders, I'm seeing parties and their advisors conducting mini-investigations, including witness interviews, before even meeting with me, the investigator. They are being instructed by their privately retained advisors to put off the initial investigative interview, until they evaluate the evidence on their own. This is obviously problematic for a number of reasons, but it also goes back to our inability to issue gag orders while the investigation is pending.

We need to be able to better control these investigations by instructing the parties to not talk about the matter with anyone other than their support people.

This is one of many issues I have, but it has created the most trouble for me, thus far, on the ground.

1. Do NOT add back in rigid 60-day time frame (or other timelines). Review periods are fine.
2. Clearly allow for the Title IX Coordinator to designate someone to implement supportive measures.
3. Keep the limited jurisdiction.
4. Clarity on when an individual is an employee under the regs.
5. Have prong 2 match Title VII (severe pervasive OR objectively offensive).