

From: Kincaid, Jennifer U
Sent: Fri, 11 Jun 2021 19:38:45 +0000
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing
Attachments: Written Comment: Title IX Public Hearing

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Attachments: IU Written Comment- Title IX Public Hearing (6-11-21).pdf, smime.p7s

Greetings-

Attached please find written comments submitted on behalf of Indiana University.

Thank you,
Jennifer Kincaid

Jennifer U. Kincaid

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INDIANA UNIVERSITY

OFFICE OF INSTITUTIONAL EQUITY

TO: Office for Civil Rights, U.S. Department of Education
FROM: Indiana University Office of Institutional Equity
DATE: June 11, 2021
RE: Written Comment: Title IX Public Hearing

Indiana University appreciates the opportunity to submit comments to the Office for Civil Rights (OCR) as part of the Title IX Public Hearing process.

First, Indiana University welcomes increased focus by OCR on discrimination based on sexual orientation and gender identity in educational environments. IU is frequently listed among the top LGBTQ-friendly universities in the country and is proud of its efforts to provide a welcoming environment to all students. Our Non-Discrimination policy includes sexual orientation, gender identity and gender expression; and our Code of Student Rights, Responsibilities and Conduct and our university Discrimination, Harassment and Sexual Misconduct policy also prohibit harassment on those bases and provide procedures for addressing complaints.

Second, Indiana University would like to submit comments related to the 2020 Final Rule revising the regulations implementing Title IX of the Education Amendments of 1972 (hereinafter "Regulations"). Following the release of the Regulations in May 2020, staff and faculty worked extensively to revise the university's sexual misconduct policy and procedures to be in compliance prior to the August deadline. The responsible university offices spent an extraordinary amount of time to align our processes with the Regulations. The university also incurred large financial costs to engage consultants to provide required trainings for everyone involved in Title IX cases across all campuses. Certain aspects of the Regulations are unwieldy and unnecessarily burdensome and some have an even greater negative effect on the ability and willingness of students to participate in resolution processes. We wish to note some of those areas for OCR's consideration and hopefully future revisions:

- The changes in jurisdiction for what is covered by Title IX in the Regulations left us with two sets of procedures each for students and faculty/staff cases. The majority of our student sexual misconduct cases and all of our employee cases this past year ended up not being within the jurisdiction of the Regulations either because of the off-campus location of incident or because the behavior did not meet the changed standard for sexual harassment. This bifurcation results in confusion for parties interested in reporting, which may discourage them from seeking supportive measures.
- The Regulations' definition of sexual harassment is narrower than our university standard and other standards such as Title VII of the Civil Rights Act of 1964, requiring that the unwelcome conduct of a sexual nature be severe, pervasive and objectively offensive, rather than severe, persistent or pervasive. The university's existing definition remains for cases that do not fall within Title IX's scope as it represents behaviors that the university wishes to address. As a result of the Regulations changing, we also have two definitions (Title IX and university versions) for dating violence, domestic

violence, sexual assault, and stalking. Alignment of Title IX definitions with other federal laws and standards would be welcome.

- The active participation of attorneys in the university Title IX hearing process for purposes of cross-examination is one of the most significant changes with potentially the greatest effect on student complainants and respondents. In our non-Title IX hearings, attorneys may be present, but the questions are submitted to the hearing panel who relays them to the parties. Prior to the new Regulations, this served to allow a form of direct questioning without creating an overly stressful or confrontational environment for either party. The few Title IX hearings this year that included attorney cross-examination were extensively long and student affairs officials perceived negative effects on the students being cross-examined. This change will undoubtedly have a chilling effect on students' willingness to participate in the process. The continuous review of cross-examination questions for relevancy by the hearing official has also greatly added to the length of those Title IX hearings.
- If a party or witness does not submit to cross-examination at the hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility. This provision potentially allows respondents to alter or evade outcomes by not appearing, or when a complainant or witness does not appear. Even when there are prior statements to police or investigators by a party or witness, those are not permitted to be used without live cross-examination, which is a significant change from our university complaint process. Additionally, respondents may wish to not answer questions relevant to, or in light of, ongoing criminal investigations, and this requirement affects their ability to fairly participate in the university process.
- Although we value providing information to parties and transparency during the investigation and adjudication process, providing the parties access to all materials gathered or submitted, even those that are not relevant, dilutes the information and evidence germane to the case and extends the timeline for resolution as it requires significant staff time to make appropriate redactions.
- Provisions in the Regulations regarding interim measures that are considered punitive have left universities unable to place holds on degrees and potentially unable to take action against students that are soon to graduate.
- Requiring hearings for Title IX cases where an employee is the respondent is a significant and intrusive change from our normal employment procedures. For faculty and staff, we had established sexual misconduct procedures that included significant due process and a right to appeal, with an added board of review step for faculty members. In addition, the university is already subject to other federal agencies in this area.

There are also portions of the Regulations for which we would like to indicate support:

- We have continued to use the preponderance of the evidence standard and believe that it is the most appropriate standard for our processes, and aligns with other university policies and civil standards.
- We have continued to use the Responsible Employee structure to maintain the obligation to promptly report sexual misconduct even though the Regulations narrowed the obligation to an employee with the authority to institute corrective measures. Our definition of Responsible Employee includes: those with any teaching responsibility; advisors; coaches and athletic staff who interact directly with students; student affairs administrators; residential hall staff; employees who work in offices that interface with students; and all supervisors and university officials. We do not want to retreat from promoting an environment in which sexual misconduct is taken seriously and individuals receive outreach and support from designated and appropriately trained officials on each campus. After receiving reports, our Confidential Victim Advocates program has become an

effective way to conduct initial outreach in many cases and offers students a way to be connected with resources, understand options, and have a guide throughout the complaint resolution process.

- Prior to the change in the Regulations, we already used hearings for student sexual misconduct cases and believe that appointing a hearing advisor for any student that does not have one is a positive change, whether they are a complainant or respondent.
- We have found that the opportunity for alternative (informal) resolution processes is a valuable alternative to a hearing in certain cases and that such options may encourage some students to engage with the sexual misconduct process when they would not otherwise.
- Remote participation that was necessary during the pandemic has become a valuable option for parties who have concerns with being in the same location or being in-person during cross examination.

Again, thank you for the opportunity to submit comments and we look forward to participating in any upcoming rule-making process.