Written Comment: Title IX Public Hearing - Regional Centers

Writing as a well known public interest law professor with extensive experience and involvement with this field, I most respectfully suggest and recommend that any new proposed regulations - and/or at least the accompanying text - include appropriate language reminding if not encouraging institutions of higher education (hereinafter "colleges") about the alternative of using regional centers (consortia), rather than their own personnel, to investigate and/or adjudicate complaints of sexual assaults (especially date rape), thereby virtually eliminating inherent conflicts of interest, and providing many additional advantages.

This alternative methodology is one which I have researched and extensively written about, and which has been featured in the Chronicle of Higher Education, U.S. News, Washington Examiner, National Public Radio, New York Times, Inside Higher Ed, and in other respected media outlets, and which I presented as an invited speaker at the 2017 ATIXA/SCOPE Joint National Conference.

Specifically, colleges should be reminded and know that, instead of performing
investigations and conducting hearings themselves - with all the inherent conflicts of interest, and problems of trying to employ and retain persons with sufficient training and experience [SEE BELOW] - they can join with other similar institutions in their immediate geographical vicinity to form regional centers charged with conducting the investigations and/or hearings impartially (with virtually no conflicts of interest), and with the ability to employ and retain personnel with sufficient expertise and experience to more than adequately perform these functions, thereby benefiting and protecting complainants, respondents, and the Agency.

FOR MORE BACKGROUND, SEE Law Professor John Banzhaf’s Novel Approach for Investigating and Adjudicating Allegations of Rapes and Other Sexual Assaults at Colleges

SEE ALSO: POLITICO - Could the Next Higher Education Act Include a ‘Third Way’ on Title IX?:

There could be a way to find some common ground around a totally new model for handling assault allegations: independent regional centers — in addition to colleges or police departments — that investigate complaints.

The model has broad support. Advocates for survivors of sexual assault like it. And so does Education Secretary Betsy DeVos, who touted it during a speech last year when she announced she was rescinding the Obama administration’s guidance on campus sexual assault — a move that put her at odds with advocates.

Margaret Spellings, the president of the University of North Carolina system and an Education secretary during the George W. Bush administration, told Morning Education she is trying to sell the idea, which she called “a third way,” to Sen. Lamar Alexander (R-Tenn.), the chairman of the Senate education committee rewriting the Higher Education Act.

“Regional centers could provide the forum for sensitive interviews by independent, forensically trained, and experienced investigators; fact-finding by independent, neutral, experienced adjudicators;

Under Spellings’ pitch to Alexander, the Higher Education Act could include grants for states willing to try it out. “I think we ought to try it,” Spellings said. “I do think it’s kind of coming to a head more than in the past,” she said about arguments over how campuses are handling allegations of assault. Anything encouraging regional centers would have to be in addition to other measures on campus safety. [emphasis added]"

The concept or strategy of colleges establishing regional centers or consortia to conduct investigations and hearings into complaints of date rape is also one which was proposed by two experienced sex crime investigators, Gina Maisto Smith and
Leslie M. Gomez. Both are former career prosecutors with the Philadelphia District
Attorney’s Office, where they specialized in investigating and prosecuting sexual
violence, child abuse, and domestic violence through an integrated Family Violence
Sexual Unit.

See their proposal in: ABA - The Regional Center for Investigation and
Adjudication - A Proposed Solution to the Challenges of Title IX Investigations
in Higher Education

Professor Banzhaf and attorneys Smith and Gomez strongly agree on the current
serious problems of having colleges perform their own investigations and conduct
their own hearings. In their words:

"For an educational institution, the fact-finding investigation of sexual and gender-
based harassment and interpersonal violence is one of the most sensitive and difficult
tasks in the institutional response.

Our experience has taught us that an effective investigation demands scrupulous
rigor in fact-gathering by individuals with appropriate training or experience, a
toolkit designed to access relevant and material information, and precise
reconciliation and documentation of available information to support reliable
decisions.

The investigation and evaluation of credibility also require special expertise to
identify relevant sources of information, including peripheral and corroborative
evidence; synthesize all available information and reasonable inferences; and
evaluate the unique and complex factors at play in each investigation.

For most educational institutions already strained by limited resources, this kind
of in-house rigor and expertise may be unattainable and unsustainable. [emphasis
added]

The primary difference between the two proposals - which both suggest that
investigations and adjudications of sexual assault claims would be better carried out
by regional centers rather than by individual colleges and universities - is that Smith
and Gomez would include law enforcement components within (and as a part of) the
regional centers, whereas, under the Banzhaf proposal, colleges would form
independent 501(c)(3) regional centers (as they now form a variety of inter-university
cooperating consortia) which would not necessarily contain a law enforcement
component.

Banzhaf respectfully suggests that his proposal would be simpler and more easily
established and operated, and avoid whatever complications might arise from a new
and novel organization which includes not only colleges, but also governmental units,
including those involved with law enforcement duties. However, it is not necessary for the Agency to seek to determine, now and in the abstract, which of these two possibilities (or some third hybrid model) might work better under certain circumstances.

Rather, by doing no more than suggesting the possibility of colleges using some kind of regional center to investigate and/or adjudicate claims from member/cooperating colleges, the Agency simply opens the door to a variety of possible approaches, all possible under both the former informal guidance and the current regulations, which it can examine and react to in the real world once the new entities are formally proposed or become operational. This is consistent with the philosophy expressed generally in many rules of not having the Agency dictate specific details and requirements any more than might be reasonably necessary.

To paraphrase Judge Benjamin N. Cardozo, different types of regional centers with different structures and operating procedures can be continually retested in those great laboratories of the law (actual practice and experience). Every new one is an experiment, and if the results are not acceptable, the arrangement is reconsidered.

**POSSIBLE LANGUAGE TO IMPLEMENT REGIONAL-CENTER PROPOSAL**

In my comment submitted in the earlier rulemaking proceeding - COMMENT - RIN 1870-AA14, Docket ID ED-2018-OCR-0064, re: REGIONAL CENTERS - I most respectfully suggested that the following language, shown in **boldface** below, could easily be added to the text of the comments accompanying regulations:

> Although a school could contract with a third-party to perform an investigation or otherwise satisfy its responsibilities under this section, including to gather evidence, the recipient will be held to the same standards under this section regardless of whether those responsibilities are performed by the recipient directly through its employees or through a third party such as a contractor. *For example, the recipient may choose to engage an outside law firm or similar entity to investigate and/or adjudicate complaints it receives regarding its own students. As an alternative, colleges and universities within a given geographical area might choose to establish and fund an independent 501(c)(3) regional center, similar to a multi-university consortium, which would then conduct such investigations and/or hearings as may be required. Likewise, although schools with often report misconduct...*

Apparently as a result of my comment, and the contributions of attorneys Smith and Gomez, the final Title IX rule included the following:
Under the final regulations, recipients and States remain free to consider alternate investigation and adjudication models, including regional centers that outsource the investigation and adjudication responsibilities of recipients to highly trained, interdisciplinary experts. Some regional center models proposed by commenters and by Title IX experts rely on recipients to form voluntary cooperative organizations to accomplish this purpose, while other, similar models involve independent, professional investigators and adjudicators who operate under the auspices of State governments. The Department will offer technical assistance to recipients with respect to pursuing a regional center model for meeting obligations to investigate and adjudicate sexual harassment allegations under Title IX. [emphasis added]

ADVANTAGES OF USING REGIONAL CENTERS TO INVESTIGATE AND/OR ADJUDICATE

Set forth very briefly below are some of the many advantages of colleges forming regional centers - advantages primarily for the colleges, but also for the Agency.

Totally Eliminate All Biases and/or Conflicts of Interest

Any time colleges investigate and/or adjudicate claims involving their own students, they have an inevitable and unavoidable conflict of interest - or, at the very least, a justified appearance of a conflict of interest. Regional centers avoid this.

Colleges are often accused - by activist organizations, political figures, and others - of not fully and effectively investigating date rape complaints because of a well-justified fear of damaging their reputation, discouraging parents from sending their children to study there, of becoming known as "RAPE U," etc. If an accused is found to not be responsible, the accusations further intensify, especially if the respondent is a star athlete, comes from a rich, well-connected, or otherwise influential family, etc.

On the other hand, different organizations, political figures, and others often accuse colleges of conducting investigations which are unfair if not biased against the respondent in order to avoid criticisms (including student demonstrations, etc.) from activist organizations, the filing of legal complaints, and even official investigations (which, of course, can be both very embarrassing and very expensive). If the accused respondent is found by the college to be responsible/guilty, such accusations of unfairness and bias can intensify, especially if the respondent is a minority, an athlete, or otherwise popular or well known.

Moreover, in an ever growing number of situations, judges have agreed with these
latter accusations, and have often ruled that the college acted illegally, and often unconstitutionally, in finding against the accused student. To the extent that these court rulings are based upon constitutional grounds (e.g., violations of Due Process), they will undoubtedly continue, regardless of any regulations or guidance the Agency might promulgate, since constitutional requirements always trump regulations or even state statutes (e.g., those requiring a "yes means yes" standard).

Fortunately, the regional center proposal would virtually eliminate such conflicts of interest, and help to insure that there are no more constitutional violations.

By transferring responsibility for investigations and/or adjudications to an outside entity [regional center] which is independent of any particular college and therefore impartial, the proposal would eliminate any actual, potential, or perceived biases and/or conflicts of interest - either one in favor of the accused (e.g., to avoid adverse publicity, protect popular athletes, etc.) or one in favor of the accuser (to avoid federal complaints and investigations, pressure from activist groups, etc.) - since both tasks would be carried out by the regional center's independent personnel under the overall supervision of an impartial board.

Such an arrangement would also make it much easier for the Agency to deal with complaints of real, apparent, or even potential conflicts of interest in the investigation and adjudication of claims regarding any specific college since the Agency's review of a regional center's policies and procedures would cover a dozen or more individual colleges.

**Fully Trained and Competent Impartial Investigators**

Many if not most universities, much less small colleges, cannot afford to hire, much less to fully employ, investigators with the advanced specialized training and extensive experience necessary to conduct - properly and in a manner which is beyond reproach and legal challenge - the investigation of alleged sex crimes. Such investigators must also have a unique skill set which requires a special sensitivity and understanding most police officers (campus or governmental) do not have and cannot easily acquire. That, for example, is why some police departments have established special units (e.g., SVU) to investigate such alleged crimes.

Thus, one cannot expect fair and effective investigations to be conducted by campus police officers, even with many hours of additional sex-crime training, much less by Title IX or other campus bureaucrats who generally will have even less experience and training, and might even see their positions dependent in part upon producing results which their college expects or at least hopes for.
Instead, one would hope and expect that such important and delicate investigations would be carried out by persons with extensive expertise and experience involving nothing but sex crimes; e.g. former police SVU detectives with several years of training and experience solely investigating sex crimes, perhaps prosecutors with extensive experience overseeing such investigations, etc.

These investigators must also, to avoid impairing an investigation, and/or creating potential legal liability for the university, know about and deal with a complex legal and regulatory framework including Title IX of the Education Amendments of 1972 (Title IX, and its binding legal rules and regulations), the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act, as amended by Section 304 of the Violence Against Women Reauthorization Act of 2013, the Family Educational Rights and Privacy Act of 1974, other federal, state, and local laws, and many implementing regulations, guidance, and advisory materials.

It would appear that few colleges could afford to hire and retain persons with that level of expertise and experience, given the salaries they could reasonably command. Moreover, it's doubtful that they could be kept completely busy, given the small number of complaints at any given college which would warrant investigation.

Another problem is that the number of rape complaints on any given campus can vary from year to year - so that a number of investigators deemed sufficient on the basis of an average number of complaints could be totally overwhelmed in some years, and left with little to do in others, because of a smaller-than-expected number of complaints.

There problems would be largely solved if a dozen or more colleges formed a regional center, and it was the center - and not the individual colleges - which hired and employed these highly-paid investigators. Their high salaries would be borne by a large number of colleges rather than by only one; there would be a sufficient number of complaints from the participating colleges to keep the investigators occupied; and the total number of investigations which had to be handled in any given year would be more stable and not subject to the variations which might occur on any one campus.

It is also important - to remove any possible suspicion of bias or favoritism - that all investigators be completely independent of the institution at which the complaint was filed. Using investigators with those rare qualifications, employed solely by an independent regional center rather than by any individual school, completely solves this otherwise intractable problem.
From the perspective of the Agency, the benefit is likely to be fewer complaints about investigations. Of the complaints which are nevertheless filed, it should be easier for the Agency to investigate and oversee the work of a single team of highly trained investigators (employed by a regional center) and developing its own rules and protocols, than for the Agency to have to investigate ad hoc investigatory practices by police on individual campuses, by various college bureaucrats, etc.

**Adjudications Which Are Fair and Appear Fair**

It is very difficult to conduct an adjudicatory proceeding [fact-finding hearing], even under the best of circumstances, in such a manner that the rights of all participants are fully protected and free from any substantial court challenges, and about which neither side can reasonably complain about unfairness. It is especially difficult when sexual activity is the subject of the proceeding, and it is conducted by persons without sufficient actual experience in holding such highly charged and sensitive hearings.

Even law professors - who, of course, are not readily available at many institutions which have no law school - cannot be counted on to conduct such a proceeding without significant real world experience. After all, conducting a hearing involving intimate sexual details and issues of sexual privacy, where emotions run high, and the harm to an accused can be incalculable, is very different and much more difficult than teaching a law school class, writing a learned article on a legal subject, or even participating in a typical hearing to adjudicate routine contract disputes, tort claims, etc.

Also, if the hearing is conducted, or a final determination is made, by people with any affiliation at all with the school, there will be actual or at least potential conflicts of interest, and reasonable concern about bias. These problems are completely solved if the hearings are conducted by retired judges, retired law professors, and/or retired trial attorneys, or those with similar qualifications, employed by a completely separate and impartial entity such as a regional center whose only allegiance is to the independent regional center.

Hearings conducted by a completely impartial body (rather than the college itself), and by those with expertise and experience in such proceedings (e.g., retired judges or lawyers, rather than campus bureaucrats, student-faculty panels, etc.) are likely to trigger far fewer complaints for the Agency to deal with, and make the resolution of any such complaints easier for the Agency.

**Fewer Complaints to the Agency**
Using such a process of regional centers, complaints to the Agency and possible resulting federal investigations - both of which are a major burden on any school financially and otherwise - are much less likely to occur because neither side can make a credible claim of bias or conflict of interest since the investigation and hearing were performed by persons with no connection to the school, and who have special extensive training, backed up by many years of actual experience, in how to conduct such investigations and hearings thoroughly and with the required sensitivity.

Likewise, the investigators will be following investigative protocols which has been adopted and refined by the investigators themselves, based upon their own extensive training and experience, and one used in investigations at all of the schools which are members of the regional center. Here it should be noted that many courts have reversed adverse findings against the accused, and admonished colleges and universities, for either having flawed ad hoc procedural policies - which, by the way, were often not even properly followed - or no established investigative policies at all.

**Less Involvement and Cost for Individual Colleges**

Rather than having to oversee and conduct a thorough, complete, and hopefully fair investigation of sexual assault complaints, and maintain the required administrative apparatus and policies for doing so, colleges would simply turn over all credible complaints to the regional center, and would then cease to have any continuing significant duties or involvement.

Similarly, if the investigation by the regional center suggests that a hearing is appropriate, the college would not have to conduct it by itself, often with insufficiently trained personnel both overseeing and participating in the hearing. Rather, any necessary hearings could be conducted by the regional center, which would use people who are both completely impartial and have sufficient experience and expertise (e.g., retired judges) to avoid the many problems courts are increasingly finding in the hearing phase of such college disciplinary proceedings.

If, despite all of the above, there is a complaint leading to a federal investigation, the federal investigation would focus almost entirely upon the regional center, and its procedures and personnel, with little if any involvement, disruption, expense, etc. for the individual college.

**Far Lower Costs**

There should also be considerable cost savings because individual colleges will no longer have to train and then sufficiently employ expensive sex-crime investigators
with the requisite amount of special training and on-the-job experience and expertise. Even larger universities, much less many smaller ones and colleges, can ill afford to pay the salaries of such highly qualified investigators, especially if there are not enough sex-related complaints to keep them occupied.

However, a regional center funded in some fair manner (e.g., with bigger schools paying proportionately higher dues) could easily afford to hire however many investigators are needed because the costs would be spread among all the schools. Also, while most schools may not have sufficient sex-related investigative work to keep such personnel occupied, a regional center formed and funded by many schools will have enough combined complaints to warrant the full-time employment of these special personnel.

In addition, as noted above, colleges will be spared the huge administrative costs, as well as the diversion of faculty time and resources now used to establish, maintain, refine as necessary, and operate the elaborate apparatus which is now used to investigate and adjudicate complaints of sex crimes.

**Ability to Justifiably Shift Blame**

Complaints about the handling of sex-related incidents are rampant on the campuses of many colleges. Some complainants argue that the university is indifferent to their needs, that it doesn't adequately investigate sex-related complaints, that the hearing process is unsatisfactory or unfair, etc. On the other side are similar complaints from the accused and their supporters, backed up by a growing number of cases in which the courts have sided with the accused.

By turning over virtually all of the work and responsibility to a completely independent and impartial entity (regional center), any complaints about the process can and should be shifted largely to the regional center, not to the individual college and its administrators and faculty. This, indeed, may be the major benefit of this proposal - getting colleges out of roles and tasks for which they are ill suited and have little expertise.

**HOW IT MIGHT OPERATE**

A large college or university might take the lead in inviting all colleges and universities in a given geographical area which meet certain minimum qualifications to join together in forming an independent tax-exempt 501(c)(3) regional center to serve to investigate - and where appropriate adjudicate - allegations of sexual misconduct involving students from any member school. Such regional centers could
be modeled upon consortia which colleges have experience in forming to handle inter-
library exchanges of books, students needing to take an occasional course not taught
at their own school, etc.

The new organization would be headed by a board composed of a sufficient number
of persons of stature with no connections with any member school, and having
relevant expertise and experience. Hopefully, it will be reasonably balanced along
gender lines.

The regional center would be funded by dues based under a fair system in which
larger institutions would pay proportionately more than the smaller ones (e.g., based
upon total enrollment, total income, gross or net tuition income, etc.). These dues
would be used to fund the regional center once it is established and operating (perhaps
with the initial assistance of a possible startup grant from the government or a private
foundation), and it would be prohibited from accepting funding from any other source
which might compromise its integrity and independence.

The board would hire an executive director who in turn would hire and employ a
sufficient number of skilled sex-crime investigators who would investigate all credible
complaints from member schools based upon written protocols the investigators
would develop in conjunction with the executive director (perhaps also subject to
board approval).

It is anticipated that the investigators would interact and cooperate with each other in
conducting their individual investigations, thereby helping to insure both the
effectiveness and fairness of the investigation.

If, after such an investigation, it is determined that there is sufficient evidence to
conduct a fact-finding proceeding, the regional center shall either conduct such a
proceeding itself by engaging trained hearing personnel such as retired law professors
or judges, or it would utilize existing arbitration or similar services already available
in the region.

The findings would then be turned over to the college which is involved. In other
words, it is anticipated that the regional center (and not the individual college) would
handle all investigations, and conduct hearings when required, but that the punishment
or other resolution of the proceeding could be made by the individual college involved
(unless an alternative is desired).

While it would obviously be preferable if all member schools utilized and followed
the same substantive rules (e.g., the definition of "consent") as well as procedural
rules for a hearing (e.g., regarding confrontation, cross examination, burden of proof, etc.), the board may decide to permit some individual variations in these criteria if desired.

The above is, of course, only a very broad, general, and tentative outline, and it may change in many ways as a result of suggestions, compromises, etc.

**SUMMARY AND CONCLUSION**

It is important that any proposed Title IX rules or guidelines not only provide sufficient flexibility so that colleges are not unnecessarily dictated to, but rather are left with some flexibility to experiment with various approaches. One way to do this is to be sure that colleges are made fully aware of the possibility of using regional centers as they consider how to respond to any new rules or guidelines.

The specific language suggested above is only one example of what might easily be done. It is quite possible that the Agency can adopt even better language. The important issue is not the precise language, but rather than colleges are made fully and clearly aware of this alternative so they can decide for themselves whether to take advantage of the possibility.

Respectfully submitted,

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