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**Sent:** Fri, 11 Jun 2021 14:00:27 -0700  
**To:** T9PublicHearing  
**Subject:** Written Comment: Title IX Public Hearing Process and Definitions

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My name is Kristen and I have worked with Title IX for about a decade, specifically acting within dedicated Title IX roles since 2015 in at small, mid-size, and large four-year institutions. My statements included here are my own and do not represent my current or former employers. I feel compelled to write today as part of the public hearing on the current Title IX regulations as someone who has first-hand experience conducting intake, investigations, informal resolutions, hearings, and coordination of resolution processes, policy development, policy implementation, and comprehensive training for Title IX teams and campus communities.

When the 2020 regulations were released in May 2020, I immediately began spending 10 hours a day reading the 2000+ pages of regulations and commentary to develop a plan for their implementation. To this day, I have not met another Title IX administrator in my immediate circle who was able to read all 2000+ pages as I did. We had three months to implement and I was a team of one at the time, and so I knew it needed to get done. However, my colleagues relied on the cottage industry that has built up since 2011 comprised of consultants, firms, and organizations churning out trainings, statements, and templates. While I have immense respect for a few of these organizations and firms, this cottage industry is evidence of the complexity of the regulations and clear apprehension educators have about the task at hand. This current model is unsustainable. When administrators and perhaps their general counsel cannot read, interpret and implement federal regulations on their own, then the regulations are too prescriptive, cumbersome, and costly.

The preamble to the 2020 Title IX regulations stated that the Department's goals for the regulations were to establish a grievance process rooted in due process principles, improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably, avoid sex-based biases and stereotypes, and promote accurate, reliable outcomes. In my experience, the 2020 regulations fail to deliver on most of these goals. I have organized my thoughts on the current regulations and the state of Title IX implementation below under thematic umbrellas.

**Move Toward Process for All Civil Rights Concerns** – The preamble of the 2020 Title IX regulations states that “different types of discrimination may require a different process, and a recipient is not required to address discrimination on the basis of race (for instance, under Title VI) in the same manner as sexual harassment under these final regulations implementing Title IX” (pg. 1752). I do not understand why different types of discrimination require vastly different processes, and I reject that this was stated as a fact without further exploration. Unfortunately, in the current scenario, many schools in California alone currently have four or more processes for different types of person-to-person misconduct: “Title IX” sexual harassment with a § 106.45-compliant process, a non-“Title IX” process for sexual misconduct cases that could result in severe sanctions that also include a hearing that falls shy of

the prescriptions of § 106.45, a more opaque complaint resolution process for civil rights concerns, and a student conduct process for any other type of interpersonal misconduct.

The current regulations have encouraged many schools and colleges to create these multiple “lanes” for resolution because the § 106.45-compliant process is so burdensome for both parties and institutions that it only makes sense to utilize it for cases that require it. When I worked at a smaller institution, we tried to implement a § 106.45-compliant process for all sexual misconduct cases (whether they fell under the more narrow scope of Title IX or not), but that still chilled reporting and created a bifurcated system where cases on the basis of sex received so much more process and diligence than cases regarding other civil rights concerns. Institutions in states that do not already follow case law in their circuit that requires some type of hearing have also created confusing dual-track systems for complaint resolution for sexual misconduct cases, which again harms both the integrity of both processes in the eyes of campus communities and means that some individuals receive a completely different experience than others because of the type of misconduct or location of the alleged incident. With the new regulations from the Biden administration, I sincerely hope to see the Department of Education require that all forms of sexual misconduct, as well as other all forms of discrimination and harassment based on other protected statuses, follow simplified single process that protects the rights of all parties involved and does not provide different rights to parties based on the nature or location of the alleged incident.

While there were several aspects of the 2020 regulations that I strongly disagreed with, I did appreciate that the preamble to the 2020 regulations stated that, “a transparent grievance process benefits all parties because they are more likely to trust in, engage with, and rely upon the process as legitimate” (page 932). This is absolutely true, and I think allowing for a transparent grievance process for all civil rights concerns is the best way to provide clarity and predictability for students, such that they understand how to report and what to expect no matter if they are discriminated against or harassed on the basis of sex, gender, sexual orientation or any other identity they hold.

**Allow for More Institutional Discretion** – You will see elsewhere in my statement that I strongly believe in some set of standards and clear top-down expectations to streamline processes and make a student’s experience more predictable from one campus to another. While this is important, there are still areas in the current regulations that are far too prescriptive and do not allow for administrators to do the work that needs to be done in their specific campus or circumstance. For example, the prescriptive regulations do not allow for K-12 schools and districts to investigate and resolve formal complaints in a manner that is suitable to the K-12 reality that most students are all in the same building every day, since the current regulations require two 10-day periods of review and do not allow for the removal of a respondent from a program or activity unless a very high bar is met. Therefore, I believe that more administrative discretion is necessary to be built into the manner in which schools and colleges can proceed with reports, formal complaints, and formal and informal resolution processes.

Further, there are several areas where the federal regulations and varying state laws are in direct contrast with one another, and the states would otherwise provide better protection for the parties if only the schools in those states were able to follow state law without violating prescriptive Title IX regulations at the federal level. One specific area where state law or case law is in direct contrast with the regulations is the prescriptive process of the live hearing with cross-examination. While I understand that in my circuit, my work on campuses in my geographic area will always include some sort of hearing, I believe that the formal approach required by the courts for some schools is often more flexible than

the process outlined in the 2020 regulations. I urge the Department to adopt new regulations that provide for necessary flexibility to schools that allow the schools to comply with standards in their circuit or state when as needed while also being able to adopt tailored approaches that ensure a fair and equitable process when their local laws permit doing so.

**Maintain Autonomy for Complainants** – I appreciate how the 2020 regulations focused on the autonomy of the complainant, allowing the complainant to retain as much control as possible over the next steps following a disclosure of potential sexual harassment. However, I believe this autonomy can be maintained by simply retaining the requirement that schools provide the complainant with available and appropriate supportive measures as well as options to pursue a resolution process. As stated above, requiring a formal complaint to be signed is above and beyond what should be necessary for complainants to request that the school or college take action. Additionally, as noted above, the requirements for a formal complaint and then a mandatory dismissal with notice and an opportunity to appeal is lengthy, cumbersome, and oftentimes confusing for both parties.

**Geography Requirements for Title IX Complaints** – The reasoning provided by the Department of Education in the preamble to the 2020 regulations as to why it asserts that Title IX does not extend to study abroad programs is narrow-minded. For example, to argue that the original statute's language of "no person in the United States" emphasizes that Title IX does not extend to individuals physically located outside of the United States at the time of misconduct completely side-steps the fact that students' experiences in study abroad programs are often within institutional programs or activities and that experiences within abroad programs directly impact students' sense of safety, well-being, equity, and belonging within their institution. While the Clery Act and Title IX do in fact have different goals of crime reporting and equal access to education respectively, I fail to see how these goals differ so immensely that institutions would list reported crimes abroad in certain situations for prospective students under Clery, but fail to stop and promptly address misconduct that occurs between current members of the institution's community under Title IX.

**Actual Knowledge vs. Responsible Employees** – The Department of Education states in its discussion of the 2020 regulations that using the actual knowledge framework is a way of "respecting the autonomy of students at postsecondary institutions to decide whether or when to report sexual harassment" (pg. 33) and that the Department decided that the former framework of responsible employees "unintentionally discouraged disclosures or reports of sexual harassment by leaving complainants with too few options for disclosing sexual harassment to an employee without automatically triggering a recipient's response" (page 57). Again, I wholeheartedly agree with allowing for complainants to have some level of autonomy when deciding what to request of an institution upon disclosure or reporting potential sexual misconduct, but allowing for schools to significantly narrow the list of employees required to take action does nothing to support complainants in this way. Instead, it makes it even more difficult for complainants to obtain access to supportive measures and an opportunity to discuss possible next steps under Title IX, as their disclosure to the faculty member they trust or staff member they see most often may in fact no longer directly connect the complainant with someone who can assist them most directly.

**Widen the Current Sexual Harassment Definition** – The current definition of sexual harassment "under Title IX" is incredibly narrow and sets such a high bar for behavior that would fall within it that only a fraction of cases reported daily to the average Title IX office at a higher education institution would

proceed under the 2020 regulations. I strongly believe that the Department needs to broaden the standard for sexual harassment standard to set a reasonable bar for how and when institutions are required to step in and at least provide available and appropriate supportive measures and remedies to the parties. I have worked with a hostile environment standard in the past, which could be an appropriate replacement that also allows for protection of free speech under the First Amendment and state laws. The hostile environment standard is covered under many laws, and colleges much comply with these other laws, including Title VI and Title VII, in addition to Title IX. Streamlining definitions makes sense and allows more seamlessly for one approach to all civil rights concerns. Restoring the previous “severe, persistent, or pervasive” standard would be workable for campus investigators and administrators and would be less restrictive than the definition adopted by the 2020 regulations.

**Redefine Quid Pro Quo Harassment** – The current definition from the 2020 regulations about “quid pro quo” harassment seems to have been written by someone who has never seen the intricate social networks on college and university campuses. Quid pro quo harassment is often alleged among members of student organizations and fraternities, team athletics, and academic departments, in addition to simply being between individuals in the same social circle. While power differentials are clearly a central component of “quid pro quo” harassment, a power differential can occur between two students and does not require the respondent to be an employee of an institution. Due to the fact that “quid pro quo” harassment can occur between students, the definition should be amended to allow for the leveraging or conditioning to be between any two parties. Further, the conditioning can be explicit or implicit, and even a threatened detriment should be within the scope of any updated “quid pro quo” harassment definition.

**Define Required Timelines and “Deliberate Indifference”** – The current regulations stated that an institution must respond “promptly” in a manner that is not deliberately indifferent to actual knowledge of sexual harassment within the narrow scope of “Title IX” harassment as discussed above. This brings up several concerns, one of which is the missing definition of the word “promptly.” While the 60-day timeline that was previously in subregulatory guidance was often unmanageable for a variety of reasons, the Department of Education should provide at least some clearer expectation for a prompt response. This means defining what “prompt” means in the requirement for the Title IX coordinator to “promptly” contact the complainant and what “prompt” means in the context of full completion of a regulations-compliant formal complaint resolution process. Further, the previous administration set an incredibly low bar with the “deliberately indifferent” standard here, and I believe that the Department should consider revising this either to further expand on what it means by this or to consider a clearly defined and articulated “reasonable response” standard rather than deliberate indifference.

**Set a Standard of Evidence** – I do not agree that schools and colleges should be able to choose whether to utilize a preponderance of the evidence standard or clear or convincing. With training requirements and previous subregulatory guidance in mind, and having worked as, trained, and supervised investigators, I strongly believe that the Department should outline the preponderance of the evidence standard as the required standard of proof in all Title IX resolution procedures across the nation. This has often been described as the one truly equitable standard.

**Revert Back to Allow Schools to Engage in Interim Safety Steps** – I strongly urge the Department to reconsider its position on emergency removals and allow for more space for schools and colleges to engage in interim safety measures such as interim suspensions. Under the current regulations, the

Department essentially stated that “emergency removal” means that schools can only remove a respondent from a particular activity or portion of their educational program when the individualized assessment identifies there is a threat that would justify removing the respondent from every part of the college’s education programs and activities. The Department goes on to say that anything less than that is a supportive measure, which cannot place an unreasonable burden on the respondent.

I believe that the current regulations make it almost impossible to suspend a student on an interim basis or restrict their campus/school activities for safety reasons. With the allowance for a post-deprivation challenge, this draws out the process that schools may be utilizing for an immediate relief for not only the complainant but the full school community. I understand the need for some sort of opportunity to discuss an interim suspension, and to regularly assess its necessity, but the high bar for emergency removals is unworkable.

In addition, this requirement means that schools now have no viable mechanism to prevent respondents who are under investigation from graduating or withdrawing, which means respondents can easily move to another institution without completing their process.

In effect, the regulations keep administrators from suspending an athlete temporarily for an allegation of serious sexual misconduct, even though schools still can suspend a student-athlete from practice or play for not attending class or a meeting, failing a drug test, being accused of academic dishonesty, or other types of alleged violations. This is unreasonable.

**Maintain Focus on Supportive Measures** – I believe that the Department did a fairly good job when writing the definition and full explanation of supportive measures and their important role in the process. I understand why the Department appeared to ridicule the use of the term “interim,” that many schools had used prior to 2020 because supportive measures are not only for something that is pending and instead can be put into place regardless of whether an investigation is pending or ever occurs. I think that the new regulations should continue to emphasize supportive measures.

**Remove “Direct” Cross-Examination and Diminish Role of Advisors in the Hearing** – According to the 2020 regulations, there must be an opportunity for what the Department considers “direct” cross-examination during the live hearing. In this new process required for all institutions of higher education, the hearing chair/decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. The 2020 regulations require that this cross-examination is conducted directly, orally, and in real time by the party’s advisor of choice. However, from all of the discussions I have had with colleagues and from what I have heard from professional organizations I am a member of, the opportunity for the parties’ advisors to cross-examine the other party or witnesses has not in any way shown to improve the process or provide clearer responses to posed questions. Therefore, the requirement for the questions to be posed by an advisor of choice does not improve the process, but instead can immensely detract from the process by chilling reporting and creating a more adversarial environment at a hearing if a party chooses a mutual friend of both parties or someone else with a conflict of interest to be their advisor of choice. Many schools and parties have opted to hire attorneys to act as advisors, and many others have trained up other school personnel to stand in and ask the questions for the parties. Either way, this can cause undue tension and apprehension for one or both parties, or damage trust in the institution that provides an institution employee as an advisor in a hearing. I discourage any sort of active participation by advisors of choice during the hearing, as it opens up so many opportunities for abuse of their speaking

time or inappropriate or even abusive statements or questions to be said out loud, which can never be unheard or removed from the record.

I would also argue that the current “direct” cross-examination is not direct at all. In fact, the current ask-pause-allow-and-answer rhythm whereby the decision-maker must first determine relevance prior to a party or witness answering a cross-examination question means that cross-examination is actually indirect through the hearing officer or decision-maker. In the state of California, due to changes in case law and statewide expectations, we have been conducting live hearings either in person or through teleconferencing technology for several years now, and indirect cross-examination is a key component of such hearings. The hearings run smoothly with all questions provided from the parties to the decision-maker, who then poses the questions out loud in real time for the opposing party or whichever witness to answer. In this indirect method, there is not uncomfortable pause and no unallowed, harmful, or combative questions are ever said out loud for the other party to hear. The decision-maker can ask a party to clarify or reword their question before it is ever posed. The decision-maker can then retain a record of what was posed by the parties and what was ultimately asked and answered. I strongly urge the Department of Education to include this sort of indirect cross-examination through the decision-maker to be included in any live hearing requirement that may be included in the next set of federal regulations.

**Diminish Role of Advisors Outside of the Hearing** – Prior to the 2020 regulations, advisors were generally a person of a party’s choice who was there as a support person for the complainant or respondent in a process, and institutions could set their own standards for if and when an advisor was permitted to speak during an investigative meeting or hearing. However, outside of the cross-examination discussed above, the new regulations also require that schools now actively involve an advisor in the review of evidence. Specifically, the regulations state that prior to completion of the investigative report, the institution must send to each party and the party’s advisor, if any, the evidence subject to inspection and review so they may submit a written response. This is unduly burdensome and unrealistic for the role of advisors outside of a hearing. Again, often these individuals – whether family members, friends, or hired attorneys – are there to help support the party and accompany them quietly during the investigation. Sending the full draft investigation report to two or more advisors per case means that we are doubling the number of individuals receiving incredibly sensitive information. I have worked with countless advisors in the last decade, and many of them who want to review the report can do so by having their advisee share the information with them. Others who are acting in a much more casual working relationship with their advisee have zero interest or perhaps active disinterest in being in possession of any confidential or sensitive material, and therefore would be very uncomfortable to receive a copy or an investigative report in their email inbox. I urge the Department to remove this requirement and allow schools and colleges more flexibility on if and how advisors are directly communicated with during any portion of an investigation.

**Remove All-or-Nothing Cross-Examination Requirement for Statement Inclusion** – According to the 2020 regulations, if a party or witness does not submit to full cross-examination at the live hearing answering all relevant questions, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility. This has widely been called the “all-or-nothing” rule or the “suppression clause” by Title IX administrators, and it has absolutely no precedence in any other any criminal or civil court in the United States or any other administrative or legal process. I cannot recommend strongly enough that this all-or-nothing rule be completely removed from the new

regulations. If the Department is willing to trust institutions to train their decision-makers to run hearings and render a prompt, fair, and equitable decision, then I would hope that the Department could trust institution decision-makers to effectively and appropriately weigh evidence, whether or not someone spoke during a hearing to affirm their statement shared earlier in an investigation. This rule also comes with it several complications of how to possibly properly implement it, as both the parties and the decision-makers cannot “unhear” or “unread” a statement that they have been poring over for two 10-day periods of review and have been discussing during the hearing up until the moment the one party or witness failed to attend or answer a question. This also is a complicated area to enact with witnesses who often are in different stages of their academic career and feel that they have fully fulfilled their sense of duty to the parties when they participated in the original investigation prior to the hearing. Without being able to compel witnesses to participate (which I agree should remain in the final regulations), schools and colleges would have a difficult time ever being able to rely upon witness statements when the witnesses choose not to return to a hearing months after their initial interview.