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To: T9PublicHearing
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Subject: Written Comment: Title IX Public Hearing (2020 Amendments to Title IX Regulations)

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Written Comment: Title IX Public Hearing (2020 Amendments to Title IX Regulations)

This written comment is submitted by Jean Phan Buchanan, Deputy General Counsel, Office of General Counsel for the Los Angeles County Office of Education in Downey, California, on June 11, 2021. The e-mail address is Buchanan_Jean@lacoed.edu.

The written comment is as follows:

34 CFR § 106.30 – The definition of hostile environment sexual harassment is “unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school]’s education program or activity.”

The “severe, pervasive, and objectively offensive” language should be deleted and the original standard of “severe or pervasive” should be reinstated. The requirement that the harassment be “severe, pervasive, and objectively offensive” is too stringent and would not encompass severe incidents occurring only once, or relatively minor incidents even if such incidents continue for an extended period of time.

34 CFR § 106.30 – The definition of quid pro quo sexual harassment is “an employee of the [school] conditioning the provision of an aid, benefit, or service of the school on an individual’s participation in unwelcome sexual conduct.”

The definition should be changed so that the perpetrator can be an employee, student, or anyone else under the school’s control. Quid pro quo sexual harassment is based on an uneven power differential, which is not related only to relationships with a school’s employees.

34 CFR § 106.30 – An individual who is “alleged to be the victim of conduct that could constitute sexual harassment” is called a “complainant.” This should be changed so that it is not implied that these individuals are “complaining.”

The educational institution who receives Title IX funds is called “recipient.” This should be changed so that it is not implied that these institutions are required to follow these regulations based purely on funding.

34 CFR § 106.44 – This section provides: “A [school] with actual knowledge of sexual harassment in an education program or activity of the [school] against a person in the United States, must respond promptly in a manner that is not deliberately indifferent (i.e., clearly unreasonable in light of the known circumstances).”

The “actual knowledge” requirement should include when a school knew or should have known of sexual harassment to encourage schools to implement policies and practices to effectively detect and uncover sexual harassment.

The “United States” requirement should be deleted; the inclusion of this requirement ignores the potential for sexual harassment while overseas on a school related excursion.

The deliberately indifferent/clearly unreasonable standard should be deleted and a higher standard should be implemented in order to motivate schools to take all actions necessary to address sexual harassment effectively.

Clarify the “respond promptly” standard to reinstitute a definitive timeline to complete an investigation within 60 days. An across-the-board timeframe is needed to ensure a prompt response.

The regulations provide that “education program or activity” includes locations, events, or circumstances over which the [school] exercised substantial control over both the respondent and the context in which the sexual harassment occurs. The requirement of substantial control over the respondent should be deleted. In addition, the language should encompass online behavior, including during virtual learning. This definition should also include behavior that causes effects on the school’s education program or activity.

34 CFR § 106.44(c) – This section provides that in situations where a respondent poses an immediate threat to the physical health and safety of any individual before an investigation into sexual harassment allegations concludes (or where no grievance process is pending), a school may remove the respondent from the school’s education programs or activities.

This emergency removal process should be deleted in its entirety. Schools should be allowed to suspend a student and provide supportive measures without having to go through this emergency removal process. The requirement that supportive measures must be nondisciplinary, nonpunitive, and must not unreasonably burden the other party should also be removed as it unnecessarily restricts a school’s ability to effectively and efficiently address sexual harassment.

34 CFR § 106.45 – This section provides that the Title IX Coordinator may dismiss a formal complaint if the Respondent is no longer enrolled or employed by the school or when sufficient circumstances prevent the school from gathering evidence sufficient to reach a determination with regard to the complaint. This should be deleted as it encourages a perpetrator to simply leave the school to avoid a Title IX investigation.

34 CFR § 160.30 – This section allows the use of the preponderance of the evidence standard or the clear and convincing evidence standard. The option to use the clear and convincing standard should be removed for K-12 schools. K-12 school districts are familiar with the preponderance of the evidence standard and have been using that standard for years. There is no compelling reason to now implement the clear and convincing evidence standard, at least in the K-12 context.

34 CFR § 160.45 – Cross examinations should not be allowed in the K-12 context, whether oral or written. It is unnecessary, causes additional trauma to victims, and does not lead to the discovery of additional evidence. To the contrary, cross examinations in the K-12 context would discourage underage victims from speaking up and could possibly deter them from filing a Title IX complaint in the first place.

34 CFR § 160.45 – This section precludes the school from prohibiting parties from discussing the allegations during the investigation. This prohibition should be deleted as the school needs to have the ability to prevent tampering with evidence or witnesses and to prevent further trauma to the victim by way of widespread rumors and gossip.

GENERAL RECOMMENDATIONS –

The regulations require a Title IX Coordinator, Investigator, Decision Maker, Appeals Officer, and Informal Resolution Process Facilitator, and requires that there be different people to fulfill each of these roles. This does not work in the K-12 context, particularly for smaller schools. This requirement should be removed and schools should be allowed to have individuals perform more than one role should this be necessitated by the school's size. In addition, schools should be permitted more flexibility in how to carry out Title IX complaints, i.e. the first point of contact with the complainant should be the school's principal and assistant principal as they are familiar with the school and the students, would be able to obtain pertinent information relating to the complaint in a timely manner, and can more easily establish a rapport built on trust with the complainant and complainant's family.

Thank you for your consideration of our written comment. Should you have any questions or need additional information, please do not hesitate to contact our office.

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