

**From:** Alison Groebner  
**Sent:** Fri, 11 Jun 2021 20:48:28 +0000  
**To:** T9PublicHearing  
**Subject:** Written Comment: Title IX Public Hearing  
**Attachments:** MPCC - Written Comment- Title IX Public Hearing 6-11-21.pdf

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Dear Office for Civil Rights, U.S. Department of Education:

Please see the attached letter signed by representatives of 16 higher education institutions in Minnesota.

The letter provides written comments for consideration as a part of the Department's Title IX Public Hearing.

Thank you for the opportunity to provide input. We appreciate your consideration.

Best,  
Alison Groebner

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June 11, 2021

*Sent via email to:*

[T9PublicHearing@ed.gov](mailto:T9PublicHearing@ed.gov)

Secretary Miguel Cardona  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

Dear Secretary Cardona,

On behalf of the undersigned private non-profit colleges and universities of the Minnesota Private College Council (MPCC), we write to provide comments in response to the U.S. Department of Education's (Department) public hearing to gather information for the purpose of improving enforcement of the Title IX of the Education Amendments of 1972 ("Title IX").

Our institutions are small, largely undergraduate, residential colleges and universities focused on the liberal arts. Established in 1948, MPCC's mission is to serve members' shared needs and advocate to meet the educational needs of students and enhance private non-profit higher education in Minnesota. The Title IX Coordinators at our member institutions meet, discuss and support each other through their work. Member institutions work diligently to prevent, stop and respond to all aspects of sexual assault and harassment on our college campuses. We have worked to meet all aspects of the current regulations and through our work have concerns about the significant changes imposed by the 2020 *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* regulations. It is in this vein that we submit these comments centering around the financial and staffing burden; the hearing process including cross examination; the role of the adviser; and, the chilling effect of this process on all parties involved.

The Title IX regulations enacted in August 2020 have placed undue financial and personnel burdens on our small non-profit colleges and universities. To keep college affordable for students and given that small institutions do not have high numbers of formal complaints, it is not always possible to have one person solely focused on Title IX. Many of our member Title IX Coordinators also have significant non-Title IX responsibilities, while other member campuses may have a one-person Title IX office. The process outlined in the 2020 regulations requires institutions to fill many different roles - investigators, hearing board members and chairs, mediators, and advisers. These varied roles require significant training of staff and time away from their other responsibilities at their college or university.

In order to fulfill all of the required Title IX responsibilities, many campuses must outsource the work to investigate complaints, provide advisers and hearing board members or chairs. An institution's most trained staff, their Title IX Coordinators, are barred from much of the complaint resolution process and must rely upon others within the institution or outsource this work at a significant financial burden.

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For institutions that have the personnel to investigate and adjudicate Title IX cases, significant time is spent in pre-hearing meetings with the hearing chair and parties to effectively execute live hearings; recruit and train college-appointed advisors; coordinate additional college employees to manage technology, schedules, and adjudication. Institutions must identify the following potential roles for just one complaint: two advisors, one or two investigators, two or more hearing officers, potentially a hearing chair with additional training in making relevance and procedural decisions mid-hearing, and one or more appellate officers. At a minimum, these eight individuals cannot have a conflict of interest with either party or the process. Colleges and universities may also have more than one process running concurrently placing an additional stress on small institutions. The burdensome nature of the 2020 regulations has impacted the quality of process that can be offered to parties, by requiring more people who may have less frequent experience in the process. The number of individuals required to complete the process, and arduous hearing requirements have all created layers of cost and skill that are difficult to attain. In addition, the time required of the Title IX Coordinator to oversee and coordinate the investigations and adjudications of Title IX cases takes precious time away from their ability to offer programs and activities designed to prevent sexual assault and harassment.

Title IX is fundamentally a law about access. Unfortunately, the current regulations create significant barriers for some community members to access the process, and ultimately a less equitable education. Our institutions identified the following barriers to access: the length and complexity of the Title IX policy, the requirements related to formal complaints including language about dismissing complaints, and requirements related to the live hearing process. These issues result in complaints often not being pursued, or being dropped in the middle of the process, with the result that neither complainant or respondent receive an equitable outcome.

The complexity added by the 2020 regulations added significant length to institutional policies. Our institutions have policies in excess of 70 pages. An individual who has experienced a traumatic event or been accused of causing harm cannot readily and independently access information in a policy of this length. Foundational principles of equity and access suggest that institutional policies should be transparent and easily understood. Our community members have told us that policies are too long, too hard to understand, and too challenging to attempt to read without the help of college staff. Additionally, Title IX staff are spending significantly more time educating and walking parties through the new process than in the past, conveying a message to parties that the process is challenging. Our institutions report frequently having students begin the process only to drop out due to the daunting nature of the requirements.

There are also barriers related to the process requirements to access different aspects of the policy. Currently, a complainant must file a formal complaint to access the informal resolution process. Our institutions have identified the option of informal resolution as a positive outcome of the 2020 regulations, but the requirement to file a formal complaint to access informal resolution is a barrier. Complainants wishing to engage solely in informal resolution have expressed concern about writing and submitting a formal complaint to begin this process. This also deprives some respondents of the option for informal resolution since it seems inaccessible.

The language about “dismissing” complaints is confusing to parties and can be a barrier to access. Most of our institutions maintain parallel policies prohibiting forms of sexual misconduct no longer covered under Title IX, and even though those provisions may exist in the same policy, or use the same process, due to the regulations institutions must “dismiss” a complaint officially, only to continue down the parallel process. This provision in the regulation adds complexity and confusion to the process for both parties, leading to participants choosing not to pursue the process because of the appearance of unattainability.

Barriers to accessing the Title IX process can also impede reporting, access to support, and ultimately accessing an education. The 2020 regulations were a major sea change for small private institutions and their students, Colleges and universities were navigating the challenges of a global pandemic while also standing up new processes and procedures that were not well understood by community members and that amplified barriers to access. Most students and employees were trying to navigate completely new ways of learning and working, while away from campus resources, and trying to learn a new, more cumbersome Title IX process in the midst of these changes was not realistic. Any changes to Title IX regulations should be implemented with the appropriate lead time and resources to support our campus communities to do this work well and with intentionality. If the intention is to serve students and reduce barriers to education, then the Department should ensure that higher education institutions are able to implement regulations that serve all parties.

The adversarial nature of the hearing process limits access and impacts the educational nature of the Title IX process. Many complainants want the respondent to hear their concerns, understand that pain was caused, or apologize. Creating a process that requires opposition is antithetical to these goals and discourages complainants to come forward to seek resolution. Additionally, while the live cross-examination appears to mimic elements of the criminal justice system, it does so without many of the rules and procedural protections. Participants must answer all questions or have their entire testimony stricken. There is no safeguard for a participant to exercise their 5th amendment rights while still participating in the process. This process occurs in the context of limited and opaque rules about relevancy, and real time relevance decisions made by adjudicators with varying levels of experience and training. There is also fear that Title IX cases adjudicated on college campuses could be a trial run for a criminal case in the judicial system which goes against the educational nature of Title IX.

The requirements related to the hearing itself have created additional administrative burden and impacted the quality of the process. The language around relevance in the 2020 regulations is vague and staff without legal training feel intimidated by the prospect of making quick, real time decisions that will have profound impacts on participants in the process. Some of our institutions have opted to hire outside experts to serve as hearing board chairs in order to facilitate this process which adds increased costs to students and further separates the process from the educational community. The financial burden for small private non-profit campuses ranges from \$15,000-\$20,000 per case from the initial investigation and adjudication through the hearing process.

There are other aspects of the required live hearings that our community members say create additional barriers. Complainants learning that they must commit, weeks or months in advance of a hearing, to be present and answer all questions have shared with Title IX Coordinators that this is a barrier to access. Complainants often do not want to be present concurrently with the respondent and when parties learn they must, it often leads the complainant to drop the complaint. Respondents also express a desire for more privacy than the new regulations allow for given the number of people who must be involved in a single complaint.

Related to this, the requirement for advisors to ask questions and for advisors to be appointed by schools if parties do not select an advisor, has impacted the quality of process schools can provide. Parties who do not have the resources to fund private attorneys express fear and concern about moving forward with a hearing process that includes live cross-examination. In this way the 2020 regulations mirror the inequities that exemplify the U.S. criminal justice system. If one party chooses to bring an attorney, the institution is obligated to provide an advisor to the other party. Often a college staff person at the institution does not possess the training or skills to advise the party in the same way an attorney would, creating both the appearance and reality of inequity. Some parties and institutions have interpreted the

2020 regulations to necessitate an institution to hire an attorney for a student if the other student involved has an attorney.

Under the 2020 regulations, institutions needed to develop new standards for behavior and decorum within the hearing because of the inherently adversarial process. Outside advisors serving as quasi-counsel, often results in antagonism, animosity, and attempted intimidation in order to elicit desired responses to questions. There are numerous examples of schools using hearings prior to the 2020 regulations and allowing parties to ask their questions through the hearing panel. This system gave the panel time to process the questions and determine relevance accurately and also ensured questions were asked in a neutral, not antagonistic manner. Our institutions are also concerned about the existing regulations resulting in new avenues for litigation mirroring ineffective assistance of counsel claims if parties have a school appointed advisor and do not get their desired outcome. When schools could rely on their own panel members to ask the questions they could be assured of both appropriate training and behavior in the process. No matter what route schools take under the 2020 regulations they are being asked to develop semi-courtroom processes without the resources or expertise needed for such processes.

The 2020 regulations reflect a continued singling out of sexual harassment and misconduct for disparate treatment from other forms of conduct (e.g. physical assault, alcohol and drugs, etc.). Schools have a long history, going back to *Dixon v. Alabama* (1961), of enforcing codes of conduct that reflect community standards centered on fair process, notice, and hearing. Instead of improving long standing educational, community processes, the 2020 regulations create an entirely new system and process that is neither criminal, civil, nor educational. Schools are left to build something new, with limited time and resources, and no support from the Department. Our members' commitment to doing their best work is not being supported by adding complexity and confusion to already traumatic events.

We strongly support moving back to regulations that allow schools to pick the resolution process most suited to their communities. Full hearings may be appropriate at large public institutions, while adjudication processes using review of paper files that parties have reviewed and commented on may be more appropriate for other institutions. Some small institutions may even benefit from processes that utilize restorative justice practices. The one-size fits all approach to formal complaints denies the reality of very different educational institutions and disallows schools to use the educational approaches they are experts in.

While it is our strong preference the Department will provide higher education institutions with more flexibility, if live hearings remain, our institutions strongly favor allowing questions to be asked through the panel and removing the requirement for schools to provide advisors who cross examine the other party. These two changes when made together would reduce cost and personnel burden while allowing institutions to provide better training and experience for panel members. We recommend allowing Title IX Coordinators to use their expertise in a more direct role in the hearing process. The coordinator could serve in an administrative role to make relevance decisions, enforce decorum standards, and provide institutional history that would add fairness to the process. Allowing the Title IX coordinator to serve as the umpire, calling balls and strikes during the live hearing would enable schools to provide better process for all involved.

Additionally, we believe the Department must remove the requirement that parties and witnesses answer all questions or have their statements excluded from the decision-making process. This scheme is harmful to both respondents and complainants, as well as witnesses. It creates a barrier to reporting, a barrier to choosing a formal process, and heightens concerns about retaliation based on what someone might say

in response to a question. There is no such comparable requirement in either criminal or civil law and it does nothing to better the process for all involved.

The final item we wish to share at this time is the conflict of laws between the definition of sexual harassment under Title IX and Title VII. Many of our institutions have professionals serving in roles overseeing institutional response to both laws. This conflict in definitions requires coordinators to examine one issue through multiple lenses for possible different, even conflicting institutional responses. It also suggests that students must endure more significant sexual harassment for it to fall under Title IX, than employees must to seek relief under Title VII. Our institutions believe it sends the wrong message about access to education to suggest students must be subject to severe, pervasive, and objectively offensive behavior before they can seek relief or recourse.

We appreciate the opportunity to submit comments as a part of the Department’s public hearing process. Our colleges and universities remain committed to addressing sexual harassment and sexual assault on their campuses and complying with all federal and state laws, including Title IX.

Sincerely,

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