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Sent: Fri, 11 Jun 2021 20:00:16 +0000
To: T9PublicHearing
Cc: Thachik, Stefani (OSHE)
Subject: Written Comment: Title IX Public Hearing New Jersey Office of the Secretary of Higher Education
Attachments: NJ OSHE Title IX Written Comment.pdf

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Dear Acting Assistant Secretary Goldberg,

Please find the attached document being submitted for your consideration on behalf of the New Jersey Office of the Secretary of Higher Education. We ask that you consider this written comment as part of the U.S. Department of Education's Office for Civil Rights Title IX Public Hearing.

Our office stands firm that amendments to address the Rule's problems are necessary to uphold the Department's commitment to making students, regardless of education setting, feel safe and supported and to carry out Title IX's mandate.

We thank you for providing the opportunity for students, faculty, staff, community members, and stakeholders to directly engage with your office.

Additional questions related to our written comment can be directed to Jessica.Steiger@oshe.nj.gov.

Best,
Jessie



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June 11, 2021

Suzanne Goldberg
Acting Assistant Secretary for Civil Rights
Office for Civil Rights
U.S. Department of Education
Lyndon Baines Johnson Department of Education Bldg.
400 Maryland Avenue, SW
Washington, DC 20202-1100

Re: Written Comment: Title IX Public Hearing

Dear Acting Assistant Secretary Goldberg,

INTRODUCTION AND CONTEXT

On behalf of the Office of the Secretary of Higher Education of the State of New Jersey, the state's authorizing, policy, and coordinating entity for higher education, I first want to thank you for providing the opportunity to students, faculty, staff, community members, and stakeholders to engage directly with the U.S. Department of Education's Office for Civil Rights to ensure improvements are made to the enforcement of Title IX of the Education Amendments of 1972. I also write to express continued objection to the Rule that went into effect on August 14, 2020. Our office stands firm that amendments to address the Final Rule's problems are necessary to uphold the Department's commitment to making students, regardless of education setting, feel safe and supported and to carry out Title IX's mandate.

The Rule hinders the progress and nullifies the critical work institutions in the State of New Jersey and across the nation have done to establish protections for survivors of sexual violence. Over the past several years, many of our colleges and universities rose to the challenge of establishing policies that reflect best practices, and that work well for their unique circumstances, consistent with previous guidance from the U.S. Department of Education. By rescinding the previous guidance and enacting the Rule, critical efforts and progress to safeguard the protections of students around the nation are threatened. New or amended regulations must preserve Title IX as a vital civil rights law that protects students from discrimination based on sex or gender identity at educational institutions that receive Federal financial assistance.

In January 2019, our office submitted a [public comment](#) suggesting changes to the proposed rule. Our comments still stand from 2019 and we think the Rule did not address them and the Department should do so now that we've seen the effects of the rule and that these issues continue to arise. The comment letter specifically explained the problems with imposing certain procedural requirements in cases of sexual harassment, requiring schools to dismiss certain complaints of sex-based misconduct, and discouraging students from coming forward to report when they experience harassment. However, the Rule was adopted in May of 2020, and implemented on campuses in August 2020, without modifications to sufficiently address our concerns. Among other things, the Rule abandons the recommendations of the [First Report of the White House Task Force to Protect Students from Sexual Assault, issued April 2014](#), which encouraged colleges and universities to provide students with appropriate remedies in cases where they may experience discrimination based on sex or gender identity, including sexual assault and sexual harassment that disrupts their education. Our office and the State are committed to protecting our students and their rights.

AREAS OF CONCERN

We have highlighted below several of the concerns which require, in our analysis, the most immediate review and consideration, along with recommendations for proposed regulatory amendments from our office. Our office is raising the following concerns based on feedback from New Jersey colleges and universities and/or students at these institutions:

1. The **change in the [Rule](#) to the definition of sexual harassment** only allows certain cases to fall within the narrow scope of the new regulation. The definition now requires **mandatory dismissals** for cases of sexual misconduct, whenever they do not meet the six specific criteria elevating a case to the Final Rule's definition of sexual harassment. However, as a result of these mandatory dismissals, some institutions have amended their own codes of conduct and implemented policies to protect students from the types of severe or pervasive sexual misconduct that have long been recognized to interfere with a student's education in violation of Title IX, but no longer fall within the scope of Title IX under the rule.

We do not support the current definition and the limitation it creates to the scope of the regulation and request that the definition of sexual harassment be modified to reflect trauma-informed language by acknowledging all levels of sexual harassment, including sexual misconduct, can cause harm and compromise a student's education environment deterring their learning. We recommend the definition of sexual harassment be broadened to "unwelcome conduct of sexual nature," which has been the Department's long-standing policy, including the policy guidance issued by the Department in 2001 and later rescinded by previous Secretary DeVos in 2019. It is also consistent with the way harassment is defined under other civil rights laws.

2. The **change in the [Rule](#) to the definition of an education program or activity** restricts the situations in which colleges and universities are permitted under Title IX to respond

to reports of sexual harassment occurring off-campus and/or during American educational programming abroad. New Jersey institutions have expressed frustration that this narrow definition limits their ability to respond to students who may experience sexual harassment in a space physically separate from, but otherwise associated with, the college or university or continues to affect the student during their educational experience. As was highlighted this past year by the COVID pandemic, the college and university setting is not always a confined or fixed location. Sexual harassment can occur anywhere, even virtually (i.e. cyberbullying). We encourage your office to adopt an informed approach to understanding the impact trauma has on a student's physical, emotion, and mental wellbeing and the impact it has on their ability to access their educational program and activity, even when issues of conduct occur outside of confined location, notably in the digital age. We recommend amending the Final Rule to more clearly cover conduct occurring off-campus and/or in the context of American educational programming abroad.

3. The **Rule fails to appropriately reflect the context and setting of the grievance process on college campuses**, and more closely resembles that of a criminal proceeding. All institutions of higher education are now **required to conduct live hearings** for cases of sexual assault and harassment where the parties' advisors, who can be attorneys or even family or friends, must be allowed to conduct a cross-examination of the other party and their witnesses. This means student survivors of sexual assault and harassment would have to go through a prosecutorial process resembling a court of law if they file a formal complaint for remedies. Such a process places student complainants at risk of re-traumatization, particularly if encountering the accused or are subjected to an antagonistic line of questioning by the respondent's advisor in front of others.

This rule also **mandates cross-examinations in all cases**, and allows for students' attorney-advisors to conduct cross-examination, whereas schools previously could choose to have any questioning carried out by a neutral third party not representing either the accused or the accuser. Requiring such an adversarial process is not only burdensome and costly for colleges and universities, but also intimidating for non-lawyer advisors and university staff (such as student conduct officers, deans, and college administrators) who typically oversee these kinds of hearings.

This rule impairs proceedings' truth-finding function by inappropriately **requiring the exclusion of evidence**. If a party or witness does not appear at a live hearing, or chooses not to answer cross examination questions, the party's (witness's) statement cannot be considered. This exclusion creates a loophole to manipulate the system. As a result, respondents may strategically not show up for their cross examination and/or public hearing in an effort to exclude their own prior admissions. This is a clear manipulation of the intended process outlined by the current regulation.

These are some of the administrative concerns and confusion engendered by these regulations. Currently, the rigid grievance process limits Title IX administrators in their

ability to best achieve the goals of their institution and align them with the expectations of the Final Rule. We encourage your office to consider more clearly identifying action steps and objectives to be implemented and achieved through the grievance process in order to ensure institutions have appropriate flexibility in determining how to best meet these objectives, while fulfilling Title IX's mandate to protect students from sexual harassment and discrimination.

SUMMARY

Title IX has played an integral role in student safety on our nation's college campuses. The law has provided students with an important tool to receive an equal opportunity to access education, receive the necessary supports to feel safe in their campus environment, and experience an equitable process that values their wellbeing if they are ever exposed to sex-based discrimination. Here in New Jersey, we are committed to protecting our students and fostering safe and inclusive learning environments. This commitment means ensuring that students in our state are able to receive an education that is free of discrimination, harassment, assault, and all forms of sexual violence. We are concerned the Final Rule has and will continue to harm students and jeopardize the progress our state has made to holistically and collaboratively address the effects of sexual assault and other sexual misconduct on access to education. We ask that your office consider our recommendations while gathering information to improve the enforcement of Title IX in higher education.

Sincerely,

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Brian K. Bridges, Ph.D.

Secretary of Higher Education
State of New Jersey