

From: Debra Bradley
Sent: Wed, 9 Jun 2021 12:01:23 -0400
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing
Attachments: Title IX letter.pdf

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Dear Sir or Madam:

Please find attached the Written Comment on Title IX submitted by the NJ Principals and Supervisors Association for the upcoming public hearing on June 11, 2021. Thank you for your consideration of the views of over 7,000 school leaders in New Jersey.

Sincerely,

Debra J. Bradley, Esq.

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(b)(6)



Acting Assistant Secretary Suzanne Goldberg
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20002

June 9, 2021

Re: Title IX Public Hearing

Dear Assistant Secretary Goldberg:

On behalf of over 7,000 New Jersey district leaders, school principals, assistant principals and supervisory leaders in our public schools, grades PreK through 12, the New Jersey Principals and Supervisors Association (NJPSA) submits the following comments for the virtual public hearing on strengthening enforcement of Title IX of the Education Amendments Act of 1972.

NJPSA is a statewide membership services organization dedicated to the promotion of educational excellence through the ongoing support of New Jersey's school leaders. Among our Guiding Beliefs for Learning Leaders is the core responsibility of each leader to create an environment that is conducive to learning by fostering a culture of trust, mutual respect, and ethical behavior among all stakeholders in the school and district community and by ensuring that all stakeholders are able to function in a safe and supportive school setting. Our members take this obligation very seriously and our organization devotes significant resources to professional learning opportunities for our members on creating strong supportive school environments and on learning the broad span of school laws impacting our students and staff.

New Jersey has an active State Legislature that has enacted a strong network of laws addressing school environments and culture, bullying, harassment, sexual harassment and laws against discrimination. The Anti-Bullying Bill of Rights, *N.J.S.A. 18A:37-13 et seq.*; the New Jersey Law Against Discrimination, *N.J.S.A. 10.5-1 et seq.* and our state regulations including our Controversies and Disputes code, *N.J.A.C. 6A:16-7.7*, and *6A:3*; all address different aspects of the investigation of claims of harassment, including sexual harassment claims. In fact, on June 10, 2021, the Senate Labor Committee is considering a potential new statute via S-3352 (Weinberg) which concerns mandatory workplace policies on unlawful harassment and discrimination including sexual harassment which will apply to schools including school employees,



their interactions with others, vendors, suppliers, customers, suppliers, clients, invitees and patrons. Arguably, this means students. This bill contains investigatory procedures and mandatory trainings for supervisory staff.

With this legal structure and the context of the pandemic in mind, NJPSA submits these points concerning the current Title IX rule on sexual harassment in K-12 schools.

1. NJPSA supports the provision that permits K-12 students to report a Title IX claim to **any** employee at their school. School leaders must respond whenever any employee has notice of sexual harassment or allegations of sexual harassment, so there is no need to distinguish among employees who have “authority to redress the harassment,” have the “duty to report” misconduct to appropriate school officials, or employees who “a student could reasonably believe” have that authority or duty.

We believe this change is student-focused and makes sense to simplify the reporting process for students who are the potential victims in these cases and face the most difficulty in coming forward. They should not have to know which staff member is the “right” one to report to. All staff members should be informed of their role and obligation to share this information promptly with the appropriate school officials within the investigatory structure in the school. This burden should not be the students. In New Jersey, such a process exists within the Anti-Bullying Bill of Rights which has required specific reporting, training and investigatory procedures. We would recommend that language that permits these procedures be aligned with any state level investigatory systems that already cover harassment cases.

2. Apparently under the rule, school leaders are required to ignore all reports of in-school sexual harassment where the student has not yet been “effectively denied” equal access to a school program or activity. In New Jersey, this would potentially violate our laws under the ABR, our criminal laws covering cyber-harassment for example, and potentially our Law Against Discrimination. This inconsistency with state laws must be addressed in order to avoid confusion, respect the intent of state lawmakers and provide clear rules and guidance to our members who must implement these conflicting laws.
3. School leaders may now investigate Title IX incidents that occur off-campus as long as “the school exercises substantial control over both the respondent and the context in which the sexual harassment occurs.” While it is possible for

school leaders to address sexual misconduct that occurs outside their education programs or activities, they are not required to do so, and in some circumstances would be prohibited from investigating these claims. There are also restrictions that would prohibit a district from investigating online sexual harassment.

In New Jersey, school leaders already may investigate allegations that occur off the school site if the behavior is connected to behavior at school. This includes incidents of cyber- harassment. Again, this new rule will create areas of inconsistency and confusion where an incident may cross over state and federal Title IX jurisdictions.

4. Under the rule, school leaders may not require the parties to participate in informal resolution and may not offer informal resolution unless a formal complaint is filed. At any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution and resume the grievance process with respect to the formal complaint.

In our state, the NJ Department of Education has actively discouraged districts from offering informal resolution in cases of alleged bullying, since that could lead to re-victimizing the student victim by allowing the aggressor to engage in insincere forms of apology. This is distinct from student conflict, where both parties are actively engaged in misconduct. In sexual harassment or other bullying or discrimination claims, there is an inherent imbalance in power which could lead informal resolution sessions to actually have a negative impact on the student(s) involved. For this reason, we recommend that informal resolution should not be an option until after the initial investigation of sexual harassment (or other forms of discrimination or bullying) has been completed and the district has concluded that no such sexual harassment has occurred. This would avoid any chance of re-victimization or negative impacts on involved student(s).

We do agree with the provision that school leaders must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student. The difference in status and clear imbalance in power render informal resolution processes inappropriate and could be perceived as biased toward the district by the community.

5. Over the past year and a half, school leaders have been stretched to the maximum trying to keep students and staff safe during the pandemic and continuing the learning process. As a result, changes to investigatory procedures, new rules from the federal government, especially confusing and conflicting rules, have not been the priority issues at the building level – particularly where the rules were in the process of being changed. Now that



the public health emergency is improving, our members' focus is on a safe return to school, appropriate health and safety guidance, student mental health and social emotional needs and addressing gaps in learning. In terms of the change in Title IX rules, we ask for clear guidance on the final rules to be adopted, a real world approach that recognizes students first but also balances the complex environments in many states that have already created legal structures to address these issues, and a fair implementation timeline to allow for the necessary professional learning that must take place. Guidance from the USDOE rather than prescriptive approaches in investigation, appeals and practice is clearly preferred. Our members have been working under a highly prescriptive statutory structure for many years under the ABR alone. Modifying our approach to investigations under that law, during this time of significant demands on school leaders will not help us prioritize what truly matters right now – the safe return of our students to school and the resumption of learning for all in our buildings.

Thank you for your consideration of the recommendations and views of the NJ Principals and Supervisors Association on this important topic.

Sincerely,

Debra J. Bradley, Esq.
NJPSA Director of Government Relations

6. With respect to other procedural requirements contained in the rules, there are a number of areas where the rules would potentially have a chilling effect on reporting incidents, lead to potential interference with investigations, potentially create a higher "clear and convincing" standard that is inconsistent with the standard for all other student misconduct investigations, and as previously noted, restrict the ability to investigate alleged sexual harassment if it occurred outside of school or online or did not effectively deny access to an educational program.

In New Jersey, this rule creates situations where school officials could reach one conclusion following state law under the New Jersey Law Against Discrimination and the Anti-bullying Bill of Rights and reach a different conclusion under Title IX for the same incident, with the Title IX rule making it more difficult to conclude that sexual harassment occurred. This would be confusing for all parties, potentially embolden student aggressors and create open legal questions about whether schools are risking Title IX funding by conducting their investigations consistent with higher state law requirements.

For example, a student is being cyberbullied online, including comments that constitute sexual harassment. The comments are made outside of school, and not during any school function, and there is no evidence that the comments were repeated in school or at a school function. Under this situation, the Title IX rules suggest that the district cannot find the student aggressor to have violated Title IX, even though the student aggressor could still be guilty of bullying and sexual harassment under the NJ Law Against Discrimination, or the ABR IF the hurtful comments caused substantial



disruption for the victim in school, which could be emotional harm, embarrassment or fear.

The rules should focus on the impact on the victim and whether that impact was reasonably foreseeable, and whether that impact causes a substantial disruption for the student victim, not where the conduct occurred. Our state laws and court cases have already resolved such issues. The Title IX rules should not put confusion and inconsistency into our school investigations of these complex, emotional and high stakes investigations.

Thank you for your consideration of our concerns.

Sincerely,

Debra J. Bradley, Esq.
NJPSA Director of Government Relations