

From: Cindy Hunt
Sent: Fri, 11 Jun 2021 18:42:52 +0000
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing from Nevada System of Higher Education
Attachments: 0781_001.pdf

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Good morning,

On behalf of the Nevada System of Higher Education (NSHE) please find attached our comment letter from Melody Rose, Ph.D., Chancellor.

Kind regards,

Cindy

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Cynthia Hunt
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Nevada System of Higher Education

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June 11, 2021

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
U.S. Department of Education, Office for Civil Rights
400 Maryland Ave. S.W.
Washington, DC 20202-1100
T9PublicHearing@ed.gov

Re: Nevada System of Higher Education Comments
Public Hearing on Review of Title IX Regulations

Dear Acting Assistant Secretary Goldberg:

I am writing on behalf of the Nevada System of Higher Education (NSHE) to provide comments, as solicited by the U.S. Department of Education, Office for Civil Rights, regarding enforcement of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. (Title IX) and, specifically, the new Title IX regulations set forth in the “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” 85 Fed. Reg. 30026 (May 19, 2020), and codified in 34 C.F.R. § 106, which became effective on August 14, 2020.

NSHE and its eight institutions strive to ensure that members of our campus communities thrive and are protected from discrimination in their workplaces, communities, and schools. To this end, our system diligently works to maintain campus communities free from unlawful discrimination, harassment, and related sexual misconduct. Sexual harassment and sexual misconduct have no place in higher education. NSHE recognizes the significance of Title IX, and we strongly support Title IX's objectives, including its application to all forms of sexual harassment and sex-based discrimination. NSHE will continue to strive to end all sexual harassment and sex-based discrimination within our campus communities, and to ensure that all allegations of such misconduct are promptly investigated and responsible individuals are held accountable for their actions through a fair process.

However, the new Title IX regulations enacted by the U.S. Department of Education in 2020 are deficient and diminish NSHE's ability to rely upon federal guidance to fully protect our students, employees, and campus communities from sexual harassment and misconduct. The Department's decision to implement the new Title IX regulations with little advance notice, and during the midst of the COVID-19 global pandemic, further contributed to an environment of confusion, uncertainty, and anxiety among students and employees throughout our campus communities.

The Nevada Board of Regents of NSHE voted in August 2020 to endorse the Nevada Attorney General in joining a multi-state coalition of states challenging the new Title IX regulations. Today, Nevada remains a party in the case *Commonwealth of Pennsylvania, et al. v. U.S. Department of Education* that was filed on September 18, 2020, in the United States District Court, District of Columbia (case no. 1:20-cv-01468-CJN), which seeks to permanently enjoin the U.S. Department of Education from enforcing the new Title IX regulations, and to repeal them in their entirety.

NSHE welcomes the decision by the U.S. Department of Education to revisit the newly enacted Title IX regulations and remains optimistic that the Department will amend and/or wholly repeal the regulations and start anew in the rulemaking process. Below are comments on troubling provisions within the new Title IX regulations that specifically warrant reconsideration.

Section 106.30(a)(2) of the new Title IX regulations defines sexual harassment to mean “[u]nwelcome conduct . . . on the basis of sex” that is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access” to an education. This definition is too narrow. Use of the conjunction “and” suggests that all three elements, *i.e.*, severe, pervasive, objectively offensive, must be established before actionable misconduct occurs, which makes it more difficult for a victim to establish a Title IX violation. This puts the definition at odds with “sexual harassment” as defined in Title VII and other federal and state statutes, and makes it more difficult to establish a Title IX violation.

Additionally, requiring that the harassment actually “den[y]” equal access to education to be actionable under Title IX is an unreasonable burden and too high a bar—all sexual harassment involving higher education should be actionable. Similarly, limiting the scope of the new Title IX regulations to “unwelcome conduct on the basis of sex,” without further clarification or guidance, leaves uncertainty about its application to matters involving sexual orientation or gender identity.

Section 106.44(a) of the new Title IX regulations improperly limits its application to only those students or employees physically present “in the United States” at the time the sexual harassment or misconduct occurs. This limitation removes Title IX protections for students and employees who may be studying or working abroad. Section 106.44(a) also improperly limits its application to an “education program or activity” where the higher education institution “exercised substantial control over both the respondent and the context in which the sexual harassment occurs.” This narrow definition will limit the ability of higher education institutions to investigate sexual harassment or misconduct that occurs in many off-campus settings pursuant to Title IX,¹ and instead require those investigations to be conducted in accordance with other policies or laws.

¹ It is of further concern that Section 106.45 (b)(3) of the new Title IX regulations provide that in instances where the alleged conduct took place outside of the institution's program or activity that the institution “must dismiss that complaint.” This provision may be used to deny a remedy in these situations, notwithstanding the fact that otherwise actionable conduct that might even be defined in other governing laws, such as dating violence under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act has occurred.

Section 106.45(b)(6) of the new Title IX regulations improperly transforms fact-finding disciplinary processes into more formalized and full adversarial legal proceedings that may subject already traumatized students to further traumatization through live and in-person cross-examination by an attorney. Cross-examination can unfortunately be used to embarrass, harass, and intimidate individuals, especially when the cross-examination occurs without the protections of evidentiary standards found within the formal judicial process. NSHE campuses and resources are not designed to facilitate a formal judicial process, and this level of adversarial confrontation is not appropriate in an academic setting and may deter some individuals from reporting sexual harassment or misconduct. Language within this section also contemplates that higher education institutions may be required to provide parties with legal counsel in certain circumstances, which may not only create additional costs, but may further elevate the adversarial and legal nature of what should be an academic administrative process.

The above comments are not offered by NSHE as an exhaustive summary of inadequacies in the new Title IX regulations. Nor are they intended to be an all-inclusive description of how the new Title IX regulations negatively impact NSHE students, employees, and campus communities. I have focused my comments on only a few troubling areas. Notably, deficiencies in the new Title IX regulations have warranted prompt action by the Board of Regents of NSHE and the Nevada Legislature to enact new policies and laws to ensure our students, employees, and campus communities remain protected and have recourse against sexual misconduct.

I respectfully urge the U.S. Department of Education to reconsider the new Title IX regulations and to revisit the rulemaking process. On behalf of NSHE, I would also like to thank the Department for the opportunity to provide written comments and for its attention to this extraordinarily important issue. Please contact me at mrose@nshe.nevada.edu or Chief General Counsel Joe Reynolds at jreynolds@nshe.nevada.edu if we can be of any further assistance.

Best regards,

(b)(6)

MELODY ROSE, Ph.D., Chancellor
Nevada System of Higher Education

Cc: Mark Doubrava, Chair, Nevada Board of Regents
Carol Del Carlo, Vice Chair, Nevada Board of Regents
Aaron Ford, Nevada Attorney General
Joe Reynolds, NSHE Chief General Counsel