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Attachments: OSDE Public Comment - Title IX proposed regulations.pdf

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Hello,

Attached is the Oklahoma State Department of Education's comment.

Sincerely,

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OKLAHOMA
Education



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STATE SUPERINTENDENT *of* PUBLIC INSTRUCTION
OKLAHOMA STATE DEPARTMENT *of* EDUCATION

Oklahoma State Department of Education
Public Comment on Proposed Title IX Regulations

The Oklahoma State Department of Education (OSDE) is the state education agency responsible for oversight of public common education (Pre-Kindergarten through grade 12) in Oklahoma. While the OSDE commends the U.S. Department of Education for pursuing its proposed changes to Title IX through the public rulemaking process, the substance of the proposed changes raise concerns for our agency in the following areas.

Definitions

"Sexual harassment"

The proposed definition of "Sexual harassment" would define the conduct proscribed by Title IX so narrowly as to deny students who are subjected to unwelcome sexual conduct the protection of the law until they have already suffered negative—and often lasting—consequences on their education, and potentially on their lives.

The proposed definition provides that, in addition to including sexual assault as defined in 34 CFR 668.46(a), "Sexual harassment" is intended to be defined as:

"Unwelcome conduct **on the basis of sex** that is **so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity**" (§ 106.44(e)(1)(ii), NPRM p. 133, emphasis added).

The language "so severe, pervasive, and objectively offensive that it [can be said to deprive the victims of] access" to educational opportunities appears to be drawn directly from *Davis v. Monroe County Board of Education* (526 U.S. 629), the U.S. Supreme Court case which held that an educational institution may be liable to a student for private civil damages under Title IX if it acts with deliberate indifference to the student's complaints. However, adopting the standard for **conduct that is so extreme that failing to address it appropriately can result in a school owing monetary damages to a student** as the definition for sexual harassment itself is an inappropriate limitation of Title IX.

Requiring unwelcome sexual conduct to be "**so severe, pervasive, and objectively offensive**"¹ that a student is already understood to be denied appropriate access to an educational opportunity before such conduct is proscribed by Title IX will, by definition, result in greater educational losses for students who experience sexual harassment. Such a shift is at best dismissive of the consequences of sexual harassment for students who experience it, and could be interpreted as an intentional prioritizing of the rights and educational experiences of those who are accused of harassment over the rights and experiences of those who are harassed. Constricting the definition of sexual harassment in this manner would result—again, *by definition*—in greater harm suffered by students who are victims of unwelcome sexual conduct before their schools investigate their claims under Title IX.

The OSDE recognizes the importance of due process protections for individuals accused of sexual harassment, but constricting the definition of "sexual harassment" itself to the point where a student must demonstrate harm has already occurred before their school assists them has no effect on due process, while denying the protection of the law to students who are subjected to unwelcome sexual conduct until they suffer the negative effects that Title IX is intended to prevent.

In addition to the heightened burden the proposed definition would place on students who seek assistance from their schools in addressing unwelcome sexual conduct, the specific phrasing "[u]nwelcome conduct **on the basis of sex**" would appear to remove conduct from the purview of Title IX that would otherwise be covered, depending on the sex of the individuals involved. The difficulty of determining motivation notwithstanding, if a student who is sexually harassed is the same sex as the student(s) exhibiting the unwelcome sexual conduct, it is questionable whether the harassment would be considered "on the basis of sex" under the proposed regulations. As the agency responsible for our state's public common education system, the OSDE is particularly concerned about the effect this wording change would have on a school district's authority to apply Title IX to clearly harmful conduct such as sexualized "hazing" among members of a sports team who are all the same sex. **Unwelcome sexual conduct should be proscribed by Title IX regardless of an individual's motivation for such conduct.**

It is also unclear from the proposed definition of "sexual harassment" what "sex" is intended to mean in the context of the proposed regulations. While much of the jurisprudence on Title IX and its legal parallel, Title VII, has established that gender is included in federal protections based on "sex"², we note with concern that language used

¹ The term "objectively offensive" implies a universally applicable standard, which the proposed regulations do not provide. If there is indeed meant to be an "objective" standard for "offensive[ness]" as the rule states, students and schools must be given notice of what that standard is, as the purpose of regulatory material is to provide clarification and guidance on the relevant law.

² See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1980); *Smith v. City of Salem, Ohio* (6th Cir. 2004); *Barnes v. City of Cincinnati* (6th Cir. 2005); *Glenn v. Brumby* (11th Cir. 2011); *Whitaker v. Kenosha Unified School District* (7th Cir. 2017).

by USDE in the withdrawal of previous guidance on Title IX appears to reject that substantial history and acknowledge only contrary rulings.³ The problems inherent to including "on the basis of sex" in the definition of "sexual harassment" notwithstanding, the OSDE objects to any explicit or implicit definition for "sex" which purports to be based on a binary biological construction, which is itself scientifically inaccurate as applied to intersex individuals.⁴ As a state education agency, we acknowledge an obligation to help protect *all* students from sexual harassment.

"Actual knowledge"

Similar to the proposed definition of "Sexual harassment," the proposed definition of "Actual knowledge" is so narrow that a negative impact on students who experience sexual harassment is a predictable outcome.

Under the proposed definition:

"Actual knowledge means notice of sexual harassment or allegations of sexual harassment **to a recipient's Title IX Coordinator or any official of the [school] who has authority to institute corrective measures on behalf of the [school]**, or to a teacher in the elementary and secondary context **with regard to student-on-student harassment**. Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the [school] with actual knowledge is also the respondent. The mere ability or **obligation to report sexual harassment does not qualify an employee, even if that employee is an official**, as one who has authority to institute corrective measures on behalf of the [school]" (§ 106.44(e)(6), NPRM p. 134, emphasis added).

The OSDE has general concerns about the chilling effect on reporting that is likely due to narrowly defining the class of school officials to whom disclosure of sexual harassment may give rise to "actual knowledge." Even at the higher education level, students may not be aware of who at their institution falls under the proposed definition of "Title IX Coordinator or any official...who has authority to institute corrective measures," and the proposed definition places the burden on a student who is sexually harassed—and often experiencing related trauma—to seek out that administrative information before seeking help from their school. A higher education student who wants their school's assistance in addressing sexual harassment should not be required to locate an organizational chart in order to ask for help.

In addition to the general concerns raised by the proposed definition, the OSDE calls attention to the definition's potential effect in the common education (Pre-K – 12th Grade)

³ See February 22, 2017 "Dear Colleague Letter" at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁴ See, e.g., Blackless et al., "How Sexually Dimorphic Are We? Review and Synthesis", *American Journal of Human Biology*, 12:151-166 (2000).

context. It is appropriate for an elementary or secondary student's disclosure of student-on-student sexual harassment to a teacher to give rise to the school's "actual knowledge," and the OSDE endorses the spirit of that element of the proposed definition. However, restricting the school personnel to whom a student may disclose student-on-student sexual harassment to *only* "teacher[s]" defines the class too narrowly. Additional categories of elementary and secondary school personnel should be added to ensure common education students are appropriately protected by Title IX, to include other personnel who work closely with students such as paraprofessionals, school counselors, and school nurses. A disclosure of student-on-student sexual harassment to any school administrator at an elementary or secondary school should also give rise to actual knowledge, as the burden should not be placed on young students to determine which of their school administrators have "authority to institute corrective measures."

Concerningly, the proposed definition for "actual knowledge" addresses *only student-on-student* sexual harassment in the elementary and secondary context. The proposed regulations are silent on how an elementary or secondary school acquires actual knowledge of *staff-on-student* sexual harassment, but the language of the definition implies that the same limitations that apply to higher education would apply to a Pre-K – 12th grade student's disclosure of staff-on-student sexual harassment. **If this is indeed the intent of the proposed definition, it would require a child as young as 4—the minimum age for entry into Oklahoma's public education system—to report staff-on-student sexual harassment to the school's Title IX Coordinator, or an administrator with the authority to institute corrective measures, in order for the school to investigate in a Title IX context.** If this is the intent of the proposed definition, such an expectation is 'objectively offensive'.

If the proposed regulations' silence on who an elementary or secondary student must report staff-on-student sexual harassment to in order to give rise to "actual knowledge" is due to an assumption that all such conduct is prohibited by criminal law, it would still be inappropriate for the definition not to address such conduct. However, it is not accurate that all staff-on-student conduct which would meet even the new proposed definition of "sexual harassment" would automatically violate every state's criminal laws. Students appear insufficiently protected from staff-on-student sexual harassment under the proposed definition, since they would apparently: (1) be required to know what limited pool of school officials they may report to in order to trigger an investigation, and (2) be required to disclose sexual harassment by a staff member directly to one of those specific officials.

The OSDE recommends that in the elementary and secondary education context, "actual knowledge" of both student-on-student sexual harassment and staff-on-student sexual harassment should be triggered by a student's disclosure to any teacher, administrator, school counselor, school nurse, or paraprofessional other than the individual(s) accused of the proscribed conduct.

We would also recommend a broader class of institutional personnel to whom a disclosure can be made at the higher education level to give rise to actual knowledge.

Effect on Special Education Students

The OSDE recognizes that the proposed regulations refer appropriately to the fact that rights provided to eligible students under the *Individuals with Disabilities Education Act* (IDEA) have a potential impact in the context of "Emergency removal" (§ 106.44(c), NPRM p. 132). However, consideration only appears to be given to the rights and needs of special education students who are accused of sexual harassment, while students with disabilities who are sexually harassed also face unique challenges that would be intensified if the proposed regulations were implemented. **The OSDE Office of Special Education Services calls attention to the likely chilling effect the proposed definitions for "sexual harassment" and "actual knowledge" would have on students with disabilities seeking assistance from their schools when they experience sexual harassment.**

As noted above (*see* "Definitions"), the narrow definitions for both "sexual harassment" and "actual knowledge" would place a higher burden on a student seeking assistance from their school when they experience unwelcome sexual conduct. For any student, but for special education students and other vulnerable students in particular, sexual harassment may result in disruption of educational opportunities whether or not it rises to the new definition's standard of being "so severe, pervasive, and objectively offensive" that it denies equal access.

Moreover, the proposed regulations' lack of clarity regarding how a school acquires "actual knowledge" of *staff-on-student* sexual harassment imposes a burden on students with disabilities and other vulnerable students that is potentially even greater than the apparent reporting barrier for a regular-education student when it comes to reporting staff-on-student harassment. The Office of Special Education Services highlights the communicative challenges many students with disabilities face—difficulties which may be physiological, cognitive, and/or social in nature. A special education student may only be comfortable communicating sensitive issues to their own teacher(s), and in some cases may only be *able* to communicate with appropriately trained special education staff. For all common education (Pre-K – 12th grade) students, disclosure of staff-on-student sexual harassment to a teacher, administrator, school counselor, school nurse, or paraprofessional⁵ should give rise to "actual knowledge," and the necessity for this construction is all the more important for students with disabilities who may face special challenges in communicating their needs and concerns.

⁵ Paraprofessionals play a large role in the provision of special education services to students in public schools, making their inclusion among the personnel students may disclose sexual harassment to particularly important for students with disabilities. A student may not differentiate between which of their instructors is a "teacher" and which is a "paraprofessional".

Effect of the Proposed Changes on Oklahoma School Districts

The proposed regulations would appear to undercut some of the significant work that many Oklahoma school districts have undertaken in recent years in ensuring equitable program access and a safe, supportive environment for all students.

As one example of this progress, Norman Public Schools is an Oklahoma school district that received national media attention in 2014 in relation to a broad movement by students and community members protesting the alleged mistreatment of rape victims within the district. The "Yes All Daughters" advocacy movement and student walkout resulted in a number of concrete policy changes adopted by the district, including the hiring of a school counselor specifically dedicated to sexual assault and Title IX issues at each of the district's high school campuses.

Similar incidents and outcomes in Oklahoma school districts in recent years have involved alleged sports team "hazing" rituals of a nonconsensual sexual nature, with resulting policy changes and school district responsiveness creating a safer and more welcoming atmosphere for students.

On a statewide scale, in partnership with other government and nonprofit entities, the OSDE has launched an initiative over the past year focused on trauma-informed instruction. Among all states, Oklahoma has the highest percentage of children and youth who have endured Adverse Childhood Experiences (ACEs), which are known to have negative impacts on education and development. The intensive effort that the OSDE and its partners have begun in order to mitigate the effects of trauma on our students recognizes that sexual assault and harassment are among the most severe of Adverse Childhood Experiences, with far-reaching effects on children and youth in their educations and their lives in general. It is a matter of urgency for our students that Title IX remains an effective mechanism for addressing and alleviating sexual harassment in the school context.

The OSDE applauds the progress that Oklahoma school districts have made in addressing how sexual harassment negatively impacts students, and we trust that Oklahoma schools will continue this work.

We would note with concern, however, that many of the incidents which have resulted in positive changes to policy and practice that are benefitting our students today would no longer appear to fall under the purview of Title IX if the proposed regulations are implemented.