

From: Valery NL Richardson
Sent: Fri, 11 Jun 2021 19:04:17 +0000
To: T9PublicHearing
Cc: Office of the Title IX Coordinator
Subject: Written Comment: Title IX Public Hearing (sexual harassment provisions applying to post-secondary educational institutions)
Attachments: 2021.06 - UW Title IX Public Hearing Comments.pdf, 2021.06 - UW Title IX Public Hearing Comments.docx

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Dear Assistant Secretary Goldberg:

Thank you for the opportunity to provide comments in response to the Title IX public hearing. Our comments are attached.

Best regards,

VALERY RICHARDSON (she/her)
Title IX Coordinator
Office of the Title IX Coordinator

Compliance Services
Roosevelt Commons East, Suite 340, Box 354996
4311 11th Avenue NE, Seattle, WA 98105
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 UNIVERSITY of WASHINGTON

To: The Honorable Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
U.S. Department of Education
Washington, D.C. 20202
T9PublicHearing@ed.gov

From: Valery Richardson, Title IX Coordinator
University of Washington
Seattle, WA 98105
titleix@uw.edu

Date: June 11, 2021

Re: Written Comment: Title IX Public Hearing (sexual harassment provisions applying to post-secondary educational institutions)

Dear Assistant Secretary Goldberg:

We thank you for the opportunity to provide comments in response to the Office for Civil Rights of the U.S. Department of Education's Public Hearing regarding Title IX of the Education Amendments of 1972. We, the Office of the Title IX Coordinator at the University of Washington, submit the following comments which are informed by our direct experience with the new 2020 regulations over the past ten months. Our perspectives are further grounded in our values of a) providing supportive measures, resources, and options to complainants and b) providing fair, equitable, and accessible processes for all involved parties when investigations and adjudications occur.

The University of Washington embraces the elements of the 2020 regulations which couple responses to sexual harassment with providing support and allowing options for those who experience harm. **We encourage the Department of Education (Department) to maintain the following elements of the regulations:**

- Provision of supportive measures. The requirement under 34 CFR §106.44 that schools offer supportive measures each time a complainant's name is provided in a report—whether or not an investigation is opened or a formal complaint is made—is a best-practice ensuring complainants learn of university and community resources as well as options for investigations and should remain a required response to reports of sexual harassment.
- Differentiation between “report” and “formal complaint.” Establishing a specific and clear definition of “formal complaint” in 34 CFR §106.30 as compared to “report” as used in 34 CFR §106.8 has allowed universities to provide a broader range of responses and prioritize a complainant's preferences in addressing the situation. Requiring that an investigation be undertaken only when requested by a complainant (or, in rare cases by the Title IX Coordinator) prioritizes the complainant's choice and agency while ensuring that complainants may still access supportive measures when a report is made by them or on their behalf.
- Submission of formal complaint. Likewise, requiring a complainant to affirmatively request an investigation of specific allegations through the filing of a formal complaint as defined in 34 CFR §106.30 prior to initiating an investigation or grievance process underscores the importance of

allowing for complainant/survivor choice. As stated above, we further endorse that only the Title IX Coordinator (outside of a complainant) may file a formal complaint.

- Elimination of overly inclusive “responsible employee” guidance. Defining “actual knowledge” in 34 CFR §106.30 such that schools may define the band of the officials who have “authority to institute corrective measures” has allowed for revised reporting expectations that better align with providing complainants greater choice regarding with whom their experience is shared. The prior requirement regarding responsible employees was unnecessarily expansive and encouraged institutions to adopt policies that did not provide for complainant agency and choice, as those trusted employees to whom a complainant disclosed their experience were often required to further disclose the information and potentially force institutional action.
- Opportunity to participate in informal resolution. The availability of informal resolution as an option has prompted many schools to consider non-investigatory, less time-intensive, and less emotionally difficult resolution options. *See, e.g.,* 34 CFR §106.45(b)(1)(v) and 34 CFR §106.45(b)(9). The requirement, however, that a formal complaint must be filed before negotiating a process that is less formal should be eliminated, as an initial notification arguably has the impact of framing the grievance process in a more adversarial or litigious manner that, alone, could stifle a respondent’s willingness to explore informal resolution options. 34 CFR §106.45(b)(2)(i)(A).

The University of Washington takes issue with the elements of the 2020 regulations that introduce prescriptive definitions and processes that do not account for laws, policies, codes, and agreements unique to specific institutions or that impose a more confusing and less reliable process for both parties. **We encourage the Department to eliminate the following elements of the regulations:**

- Narrowed definition of sexual harassment. The narrower definition of sexual harassment set forth in 34 CFR §106.30 together with the specific jurisdictional framework set forth in 34 CFR §106.44 exclude many categories of harm that can and do impact the educational and work environments. In response, many schools, including the University of Washington, established multiple sets of definitions of prohibited behavior and additional grievance processes that are used simultaneously and overlap in a confusing manner. Utilizing multiple definitions and processes is both cumbersome and confusing to all involved in a process and to the community as a whole. The definition of sexual harassment should be broadened, and schools should be provided with leeway to define sexual harassment and forms of sexual violence consistent with state law, Title VII, and/or existing university policies. We further advocate schools receive additional leeway in creating their own grievance process centered on due process and equitable procedures that account for the needs and culture of their own communities.
- Cumbersome and prescriptive process. The spirit of the regulations (due process and equitable procedures) is not being achieved via the overly prescriptive grievance procedures outlined in 34 CFR §106.45. These process steps have resulted in enormous work-load increases, lengthy and confusing forms and notifications, increased time frames, and no increase in due process or equitable treatment for either complainants or respondents. Rather than establishing and requiring all schools adhere to the same prescriptive process, irrespective of state laws, collective bargaining agreements, and institutional codes and policies that also inform the established grievance process, we recommend providing higher level guidance that allows

schools to develop processes—all grounded in the principles of due process—that better align with the needs of students, faculty, classified staff, and at-will employees.

- Application to employees. Applying the prescriptive grievance process codified in 34 CFR §106.45 to allegations about the behavior of employee respondents imposes undue regulatory burdens on higher education institutions that are not imposed on any other employer. Navigating and implementing the overlapping but different requirements and processes of Title IX, Title VII, numerous other state and local laws, negotiated faculty handbooks/codes, and multiple collective bargaining agreements has resulted in inconsistent compliance priorities. Moreover, limitations on the types of appropriate supportive measures (i.e. changing a respondent's work shift is considered "punitive" per the regulations and would be deemed inappropriate) and the prescriptive grievance process in 34 CFR §106.45 have prevented managers from addressing some behaviors before they worsen thereby undermining the institution's ability to prevent discrimination, harassment, and violence. We recommend schools be required to continue providing rights and role-appropriate complainant-requested supportive measures to employee complainants. We further recommend schools be provided significant leeway in establishing grievance processes that more cleanly coincide with the array of additional federal, state, and local laws to which they must adhere as well as the applicable faculty codes and collective bargaining agreements governing different types of employees within the same institution.
- Verbal cross-examination requirement. 34 CFR §106.45(b)(6)'s requirement that cross-examination occur directly, orally, in real-time, and through a party's advisor is neither necessary for due process nor for ascertaining facts of a case. Instituting advisors does not alleviate any potential negative impact on a party. For example, our students expressed great concern that a party's parent could be the individual asking questions of the other party. Requiring verbal cross-examination is particularly ill-advised in matters involving sexual violence, including stalking and relationship violence. Further, the practice of utilizing advisors adds time and expense on behalf of a school when a party does not select an advisor. We recommend schools be afforded leeway such that cross-examination occur through contemporaneously typed questions a decision-maker may review and then verbally ask a party when such questions are appropriate and aimed to yield relevant information. This approach eliminates the need for advisors since parties would not be speaking directly to one another and, to some extent, reduces the stress and anxiety of the parties.
- Inability to utilize evidentiary rules. The 2020 amendments to Title IX outline minimal evidentiary considerations in 34 CFR §106.45(b)(6), and the preamble to the rules explicitly prohibited a school from utilizing any existing evidentiary code. Both not adhering to and preventing universities from utilizing an evidentiary code results in unclear and confusing standards. Specific concerns include:
 - Hearsay excluded. Not following general hearsay exceptions prevents relevant evidence from being considered.
 - Cross-examination requirement for evidence to be considered. Requiring a party submit to cross-examination (and answer all questions asked of them) in order for relevant evidence provided during the investigation or earlier in the grievance process to be considered or admitted creates barriers to—rather than increases—due process.
 - Impact on decision. Moreover, a party who refuses to submit to cross-examination can ultimately prevent the decision-maker from reaching the factually correct decision when

refusal to submit to cross-examination effectively removes from consideration the most relevant (and/or potentially damning) evidence.

We ask that institutions be allowed to adhere to evidentiary codes and/or allow the absence or presence of testimony, including submitting to cross-examination, to impact the weight of evidence but not prevent its admission/consideration.

Finally, the University of Washington recommends the Department of Education include expectations regarding the training of all employees in academic settings, not only those employees who are involved in Title IX processes as set forth in 34 CFR §106.45(b)(1)(iii). Such training should focus on a) preventing the occurrence of discrimination, harassment, and violence, b) available resources, support, reporting options, and c) how to appropriately respond to disclosures of harassment and violence.

We appreciate this opportunity to submit written comments for consideration on these important issues that so often have long-term impacts to those experiencing impacts.

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