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The 2020 Title IX Rule (85 FR 30026), hereinafter “2020 Rule”, enacted burdens that are contrary to the Title IX statute’s requirement, at 20 USC § 1681(a), that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”. This discrimination covers sexual harassment including gender-based violence, the latter of which is the primary focus of the SAFE Campuses, LLC comments offered herein.

Title IX Guidance Should Afford Flexibility

As the U.S. Department of Education, hereinafter “Department”, reviews the 2020 Title IX Rule we believe that the goal ought to be developing agency actions, including regulations, that are sustainable and stand the test of time. In order to accomplish this, they need to afford regulated parties with the flexibility to employ evolving best practices and adapt to changing legal precedents, and carefully balance the needs of all parties involved including through the provision of “due process”, “fair process”, and “procedural safeguards” guaranteed by the Constitution, other laws, and institutional policy.

Title IX Guidance Should Not Be Overly Prescriptive

Beyond any specific policy issues associated with the 2020 Rule the extensive scope of the prescriptiveness of the requirements has made it profoundly difficult for federally funded educational programs including institutions of higher education, hereinafter “institutions”, to comply with. No similar law, including Titles VI and VII of the Civil Rights Act of 1964 or the Jeanne Clery Act, requires anything of this magnitude. This has the effect of discriminating against women and girls who are the principal beneficiaries of Title IX of the Education Amendments of 1972, hereinafter “Title IX”.

Perhaps the single most significant example of prescriptiveness is the evidentiary rule that the “statements” of parties are inadmissible in disciplinary proceedings unless they submit to cross-examination by advisors for both the complainant and respondent. This moves proceedings far closer to a “full-dress judicial hearing” than ever before and creates logistical challenges that aren’t necessary. In most jurisdictions relaying questions through a hearing officer or other neutral party in real-time will provide the information needed for a credibility-assessment.

Title IX Guidance Should Address Prevention & Accommodations

We also encourage the Department to carefully consider the impact that the focus on disciplinary proceedings is having to the exclusion of prevention and response work under Title IX. Eliminating

hostile environment sexual harassment is not the sole province of disciplinary action. Programming geared towards preventing it, and accommodations provided when it is reported are equally essential.

Title IX Administrative Enforcement v. Money Damages

The U.S. Supreme Court set a high bar for money damages in Title IX “sexual harassment” cases that was carefully differentiated from administrative enforcement standards. By aligning the 2020 Rule with standards for money damages it made it more difficult than necessary to accomplish the goal of Title IX to prohibit sex-discrimination undermining the purpose of the law.

We recommend restoring the longstanding administrative definition stating that “Sexual harassment is unwelcome conduct of a sexual nature...Sexual violence is a form of sexual harassment prohibited by Title IX.” This includes sexual assault, dating violence, domestic violence, and stalking, although it should be noted that the appropriate burden in civil-rights matters is “unwelcome” not a criminal consent standard. Further, we recommend requiring an institution to take reasonable steps to end the harassment when “the conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.”

The Nexus Of Title IX Harassment On & Off Campus

While Title IX does not apply to all acts of sexual misconduct that a member of an educational community may engage in, including conduct outside the United States, the 2020 Rule improperly narrows the scope of jurisdiction to solely underlying “conduct within its education program or activity” or harassment that continues within it. Where off-campus harassment causes a hostile environment in the educational setting, it creates a nexus between off-campus misconduct and the educational program. (See *Crandell v. New York College, Osteopathic Medicine*, 87 F. Supp. 2d 304, 315-316 (S.D.N.Y. 2000).)

With respect to the most serious sex-based harms, such as rape, Courts have consistently held in after-the-fact claims that educational programs may be liable for damages for the hostile education environment that may exist within the program in which both the victim and their assailant participate. Accordingly, we recommend that the Department apply Title IX in instances where there is a nexus of activity, especially in the most serious of matters.

Constructive v. Actual Knowledge

We recommend restoring the “constructive knowledge” standard in use by the Department between 1997 and 2020. As explained in both 1997 and 2001 this means “A school has notice if a responsible employee ‘knew, or in the exercise of reasonable care should have known,’ about the harassment.”

The “Formal Complaint” requirement of the 2020 Rule is particularly onerous on both institutions and complainants. It is unnecessary and should be eliminated. Institutions, however, should still assess whether or not a complainant wishes to move forward with any formal action, with the goal of honoring their wishes when possible, and whether or not there may be a threat to other parties warranting action.

Title IX Is A Contractual Obligation

It is important that any agency actions remind institutions that complying with Title IX is a contractual obligation with the federal government. It is not a blanket source of authority, rather it obligates institutions to prevent and remedy sex-discrimination. This obligation cannot and does not in any way conflict with obligations to provide due process, fair process, and or procedural safeguards.

Resources & Training Are Essential

While it will differ from institution-to-institution, the provision of adequate resources to fairly implement Title IX's requirements is essential. It is our observation that many of the gaps we continue to see in both eliminating hostile environments and affording adequate process are due to a lack of resources, communication, and training. We recommend that any guidance address the need to provide adequate resources. We also recommend that the Department consider establishing national standards for training, that among other things include training specific to each institution's policies and procedures.

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Safety Advisors for Educational Campuses, LLC (SAFE Campuses, LLC) is an independent social enterprise devoted to helping diverse communities establish safe learning environments. SAFE Campuses, LLC is comprised of multidisciplinary experts from the fields of campus public safety, student affairs, gender-based violence, alcohol and other drug abuse, and compliance with government campus safety related regulations including the Jeanne Clery Act and Title IX.

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