

From: Cortez, Ann Marie
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To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing - Enforcement of Title IX in K-12 Schools
Attachments: SFUSD Public Comments - OCR Hearing (June 2021).pdf

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Hello,
San Francisco Unified School District submits the attached public comment regarding the enforcement of Title IX in K-12 schools. We appreciate your consideration of our comment.
Thank you,
Ann Marie Cortez

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Please be advised, as of January 1, 2021, the Office of Equity fax number will no longer be in service. If you need to send a document to the Office of Equity, please scan and send the document to equity@sfusd.edu.

In light of the COVID-19 outbreak, all attorneys and staff in the Legal Division are working remotely. There is also limited access to the District Office. Therefore, we are not able to receive mail in a timely manner. Please send all correspondence, pleadings, discovery or other documents via email or voluminous materials through a document sharing app. To schedule service of process, please email legalfilings@sfusd.edu. Thank you for your understanding and professional courtesy.



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June 11, 2021

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Via Email

RE: Comments in Response to Department of Education's Office for Civil Rights Public Hearing to Gather Information for the Purpose of Improving Enforcement of Title IX

As the Superintendent of San Francisco Unified School District, as well as the designees responsible for ensuring compliance with Title IX of the Education Amendments of 1972 (Title IX), on behalf of the students we serve, we submit this public comment regarding the implementation of Title IX and our concerns with the current Title IX regulations. The implementation of these regulations has created significant burdens in the K-12 educational sphere and its implementation will yield long-term harmful effects to all our students. This will, in turn, have a major impact on the overall school climate and potential safety of our students.

SFUSD serves more than 57,000 students and is the sixth largest school District in California. We consist of over 130 school sites and employ approximately 10,000 employees. Although the Department of Education oversees the K-12 setting, its current regulations do not contemplate the unique challenges that they pose to K-12 schools. Specifically, the regulations' prescriptive grievance procedure appears to be tailored to higher education, to the detriment of K-12 students. Although the current regulations do acknowledge the few differences for K-12 schools, the formal grievance procedure outlined in the regulations are nevertheless infeasible for K-12 schools and may be harmful to participating students.

Below, we describe the challenges and concerns SFUSD has identified and faced while implementing the current regulations over the last year.

Definition of Sexual Harassment (§ 106.30(a)(2))

The Department of Education's decision to narrow the definition of sexual harassment to unwelcome sexual conduct that is "severe, pervasive, and objectively offensive" creates a

discrepancy between grievance procedures required under federal law, grievance and disciplinary procedures required under state law, and local Board Policy for sexual harassment; as well as those available for other forms of discrimination and harassment under federal and state law, and local policy. Under the prior Title IX regulations and enforcement by the Office for Civil Rights, Title IX provided an umbrella standard within which all forms of sexual, sex and gender-based discrimination and harassment could be addressed that allowed local education institutions leeway to meet federal, state, and local standards for providing a prompt and equitable process to address complaints. With a separate, different and narrower definition of sexual harassment under Title IX and the accompanying grievance process, the school community – none of whom are lawyers – are unreasonably expected to understand the nuances within the new definition to identify and parse out incidents and allegations that fall under the new regulation as opposed to those that require redress under the state or local definitions of sexual harassment *after* having been extensively trained under the prior Title IX standards, particularly in the eight plus years immediately prior to the new regulations.

The new regulations will negatively impact students in the K-12 setting long-term by causing confusion in the field around how to categorize and address sexual harassment by limiting the behaviors schools may address under Title IX. When incidents of any form of sexual harassment occur in the K-12 setting, they are always alarming considering the age of the students involved. Parents inevitably express concern that, regardless of how “severe” a situation is, their child has experienced some distress, trauma, or impact, and accordingly rely upon the school to address the conduct.

These regulations, as written, have made addressing most incidents in the K-12 setting difficult and burdensome with respect to categorizing conduct as redressable under Title IX. If less severe incidents are not addressed because they do not rise to the high bar set by this definition, the situation will inevitably increase in severity and the conduct will likely be repeated (or “pervasive”) due to our inability to address and correct the behaviors in the first instance. In addition, conditioning the definition on conduct that is “objectively offensive” is problematic as school site staff are unlikely to understand this legal term. This may result in inconsistent application across school sites and potentially increased failure to investigate reports.

School sites are also responsible for teaching and educating students about healthy relationships and appropriate boundaries/behaviors. Waiting until an incident becomes “severe” and “pervasive” interferes with our obligation to proactively educate students. This impact will undoubtedly lead to students feeling unsafe because of the school site’s inability to address the conduct. Similarly, the students who are engaging in the inappropriate conduct will not understand the impact of their actions if the school is unable to respond due to this limiting definition. For students, this will lead to a potentially permanent impact on their educational experience, which could include students missing class to avoid the accused student, self-harm, or further assault and/or retaliation.

In order to fill the void created by the current regulations and comply with state, federal, and local standard that require redress for harassment that might not meet Title IX’s definition, schools are then forced to rely on multiple grievance procedures to address conduct that is sexual

in nature but does not rise to the high bar set by this definition. This multiple-process system runs the risk of causing confusion among students and staff regarding what process should be used to address incidents that arise. In practical application, this inherently shifts the immediate concern to whether staff are following the appropriate process, rather than the true priority of ensuring student safety. This unintended consequence of the regulations will likely result in inefficient and ineffective interventions on behalf of students when compared to compliance with previous Title IX guidance.

Off-Campus Conduct “Within Its Education Program or Activity” (§ 106.44(a))

The regulation states that Title IX applies only to conduct “within its educational program or activity.” As a preliminary concern, this limited jurisdiction squarely contravenes the California Education Code, which extends District jurisdiction to incidents that occur “while going to or coming from school.” (California Education Code § 48900(s)(2)). Further, those who work in the K-12 setting know that this limited jurisdiction is impractical, as conduct that occurs outside of the school setting often spills over into school. Specifically, the use of social media and other electronic applications have made it very difficult for schools to keep “off-campus conduct” from affecting students’ learning environment at school. This has never been more apparent than during the COVID-19 pandemic, where K-12 schools across the nation moved to a virtual setting. Although schools are progressively returning to normal operations, the role of social media and other electronic applications will continue to be present in the school setting. When off-campus conduct spills into our K-12 schools, we must take steps to address it as required by California Law.

The current regulations do not reflect the reality that off-campus conduct will likely have a negative impact on the educational environment in most cases. By not addressing social media reports immediately, these incidents have the potential to become even more serious and have an even greater impact on the students. SFUSD believes that the Department of Education should craft language that includes potential responses for those incidents that spill over into the K-12 school setting as well.

Finally, these current regulations are inconsistent with California’s mandatory reporting requirements with respect to reporting child abuse and notifying authorities about child pornography. If a K-12 staff member knows that another student is cyber-harassing someone and/or sharing naked pictures/videos of a minor student off or on campus, the staff member must report this to California’s Child Protective Services and/or the local police as suspected child abuse. Under the regulations, however, school site staff are placed in an untenable position of having knowledge of potential abuse but no jurisdiction or authority to address the harm at the school site itself.

Designation of Multiple Roles (§ 106.45)

The regulations prohibit schools from using a single-investigator model during the course of Title IX investigations. Instead, schools must designate both an Investigator and a Decision Maker for each case, the latter of which cannot be the Title IX Coordinator. There is no clarity under the new regulations on the Title IX Coordinator function with respect to its potentially

conflicting duties serving as an advisory role to staff and students, and its role in the new grievance procedures. The question of participation in the grievance procedure puts the Title IX Coordinator in the tenuous position of deciding to avoid a conflict of interest during the grievance procedure by withholding advice and counsel to staff or students in the immediate moment that a potential Title IX matter arises versus assuming the conflict of interest by advising in the moment and subsequently assuming a role in the grievance procedure once the incident is confirmed to fall under Title IX.

The multiple roles involved in the investigation procedure has created an almost insurmountable barrier to implementation for K-12 schools. The elementary and secondary schools, and central office departments, are simply not staffed to include this many different individuals in a grievance process. Prior to the current regulations, SFUSD designated and trained specific Title IX Site Officers to investigate and resolve complaints. This system, adopted by many larger school districts across the nation, allowed for effective investigations into reported harassment at the school site level. As things were prior to the new regulations, recipients were already asking staff, who are primarily educators by trade, to assume additional responsibilities in order to implement Title IX. The current regulations' dual-role model is extremely difficult to implement at a school site level, as it is possible that an individual school may only have one administrator and/or one person who has been specifically trained as a Title IX specialist. Implementing this system at the school site level would require some schools to have someone not trained or familiar with Title IX investigations step in as either the investigator or the decision maker. This dual-role system is not feasible in the K-12 school setting.

SFUSD spends considerable time training and working with administrators and other school site staff on how to identify, investigate and resolve complaints of sexual harassment. K-12 administrators are also responsible for administering student discipline. Deferring one of those responsibilities to someone else who is not trained nor experienced in either investigations or discipline would lead to confusing and inequitable results.

In light of the new regulations, SFUSD made the difficult decision to vest authority for all Title IX investigations at the district level as opposed to school sites themselves, notwithstanding that school sites administrators are uniquely qualified to handle incidents occurring within their own school community.

Presumption of Non-Responsibility (§ 106.45(b)(1))

SFUSD is in full agreement that all parties to a Title IX Complaint, or in any other complaint and investigation, should be treated fairly. However, SFUSD takes issue with the regulations' "presumption that the respondent is not responsible for the alleged conduct." Title IX Investigators must remain objective and neutral. In contrast, the "presumption" of non-responsibility essentially requires an investigator to begin the investigation by presuming the reporting party is not truthful. While the changes state that the "requirement is added to ensure impartiality by the recipient until a determination is made," it ensures the opposite.

Investigators should be completely impartial and should review all the facts as presented to them before they make a determination in a Title IX investigation. Requiring the investigator to presume the accused student is not responsible for the alleged conduct confuses the burden of proof and invites investigators to use the impermeability high standard of “beyond a reasonable doubt.” Title IX investigations in the K-12 setting are not criminal investigations. Investigators should not presume either party is more truthful than the other but must instead approach investigation in a fair and impartial manner. By emphasizing this presumption of non-responsibility, these regulations place yet another burden on reporting students.

Notice of Allegations (§ 106.45(b)(2)(i)(B))

The regulations state that a “recipient must provide written notice to the parties of the recipient's grievance procedures and of the allegations,” including:

- identities of the parties involved in the incident, if known;
- the conduct allegedly constituting sexual harassment under this part and under the recipient’s code of conduct;
- the date and location of the alleged incident, if known;
- provide sufficient time to prepare a response before any initial interview;
- include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process; and
- inform the parties that they may request to inspect and review evidence under § 106.45(b)(5)(vi).

SFUSD agrees that the accused student must be afforded due process, including notice of the allegations and an opportunity to respond. However, is it neither necessary nor reasonable for a K-12 school site administrator to provide this extreme level of detail in a written notice for all sexual harassment cases. Requiring schools to permit “parties” to “inspect and review evidence” and disclose the identity of all parties is also extremely worrisome. This puts school districts in the untenable position of disclosing information that may well violate FERPA and other state privacy laws.

Investigations of a Formal Complaint (§ 106.45)

The formal grievance procedure required under the current regulations is inappropriate for the K-12 setting. Although the regulations try to account for K-12 schools by allowing for an exception to the hearing requirement, the length and detail of the formal process risks retraumatizing participating students by subjecting them to an arduous and combative process. This is especially inappropriate for elementary or middle school students. At the school site level, investigations must move quickly due to the sensitive nature of the allegations and the age of the students enrolled in K-12 schools. Unlike postsecondary students, elementary and secondary school students attend full time school, five days a week and often attend before and after school programs – usually at the same campus as the respondents who are in the same classes and programs. Reasonable timeliness of due process must therefore be on a more abbreviated

timeline to expediently address and prevent harassment in order to minimize learning loss of all students.

As discussed above, prior to the new regulations, both the District Title IX Coordinators and Site Coordinators in SFUSD were trained on investigating sexual harassment claims, including weighing evidence and making determinations. Often, the investigator could quickly corroborate the allegations through written statements, video footage or other evidence. Requiring an administrator to allow for review of evidence and permitting "each party the opportunity to submit written questions" in all cases is therefore unnecessary and will very likely cause unreasonable delay. This also assumes that a minor has the time, ability, focus, and critical thinking skills to review and question the evidence presented.

We anticipate that the intimidating and complex nature of the prescribed grievance procedure will likely chill reports of sexual harassment by victims who do not want to participate in a long, drawn out investigation process that disallows removal of the respondent until the process is complete, with the limited exception of emergency removals. Similarly, we anticipate the current evidence review requirements will chill witness participation. This expected chill in reports will handicap a district's ability to become aware of and investigate allegations of sexual harassment and will ultimately undermine the ability for K-12 schools to address incidents in a manner that is both age appropriate and prevents future incidents.

Title IX and Employees

The unsuitable nature of the grievance procedure is even more apparent when applied to reports made by students against employees. Not only do the regulations ignore many well-established workplace investigations best practices (such as respecting the privacy of the involved parties, including witnesses), but they also provide numerous process protections to responding employees that go far beyond what is necessary to provide appropriate due process. These protections completely ignore the power imbalance between young students who report sexual harassment and district employees. Further, as K-12 schools serve minor students, complaints against employee respondents regarding conduct that is severe, pervasive, and objectively offensive may also include allegations of suspected sexual abuse. In light of this fact, the increased process rights, such as the right to have questions asked of any witnesses or party during the decision-making process, are extremely inappropriate and prioritize the rights of a potential abuser over their victim.

With respect to the application of Title IX to employees, the regulations nor the Department provide guidance on the intersectionality between Title IX and Title VII and other employment laws, and which takes precedence over the other. As it applies to employees, it is unclear to recipients whether employees are considered to be participating or attempting to participate in an educational program or activity. Further, recipients wonder whether the employee receives similar notice, investigation, and hearing opportunities prior to termination under Title IX. In light of the very real concerns asserted above, SFUSD requests that the Department reconsider the appropriateness of these formal grievance procedure in the K-12 context, for both student-on-student and student-on-employee harassment.

Conclusion

SFUSD is at the forefront of K-12 Title IX Compliance in California. We have been and remain committed to creating clear policies and procedures for all students so they are aware of the process and their rights. SFUSD has also worked hard to create clear systems and guidance for our school site staff to ensure that schools are effectively responding to complaints in a manner that is focused on the students’ needs and success. With the goal of keeping all students safe and creating an equitable educational environment for all students to thrive in the twenty-first century, SFUSD’s Title IX policies and procedures have been strengthened and implemented in a manner consistent with the current regulations and previous Department of Education guidance. The current regulations, however, have already negatively impacted SFUSD students and all K-12 students by creating a convoluted and complex grievance procedure process that is completely unsuitable in the K-12 context. Due to the nature of the COVID-19 pandemic, we have yet to see the full impact of the new regulations as applied to a traditional school year, but we anticipate that these regulations in their current state will have a lasting negative impact on students, including SFUSD’s most vulnerable students, whom SFUSD fights so hard to protect.

Based on the reasons above, SFUSD strongly requests that the Department of Education reconsider the current regulations and, instead, provide further guidance that is more friendly from the K-12 school setting.

Sincerely,

(b)(6)

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Superintendent

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Danielle Houck
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