

From: Anderson, Krista
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To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (The University of Texas System's Comments and Suggestions to Strengthen Title IX)
Attachments: UTSYS Comments to Title IX Regulations.FINAL_06.11.21.pdf

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Dear Honorable Secretary,

Please find attached The University of Texas System's written comments and suggestions to strengthen Title IX.

Sincerely,

KRISTA ANDERSON

Systemwide Title IX Coordinator

Office of Systemwide Compliance

The University of Texas System

210 West 7th Street

Austin, TX 78701

Office 512.664.9050

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June 11, 2021

Dr. Miguel A. Cardona
United States Secretary of Education
400 Maryland Avenue, SW
Washington, D.C. 20202-0596

**RE: Written Comment: Title IX Public Hearing (The University of Texas System's
Comments and Suggestions to Strengthen Title IX)**

Dear Honorable Secretary:

Thank you for inviting institutions of higher education and other concerned individuals and entities to comment on the Department's efforts to strengthen Title IX.

The University of Texas System is one of the nation's largest systems of higher education. Our thirteen institutions educate over 235,000 students systemwide per year. The following comments are submitted by UT System on behalf of the following institutions:

The University of Texas at Arlington;
The University of Texas at Austin;
The University of Texas at Dallas;
The University of Texas at El Paso;
The University of Texas M.D. Anderson Cancer Center;
The University of Texas Medical Branch at Galveston;
The University of Texas Health Science Center at Houston;
The University of Texas Permian Basin;
The University of Texas Rio Grande Valley;
The University of Texas Health Science Center at San Antonio;
The University of Texas at San Antonio;
The University of Texas Southwestern Medical Center; and
The University of Texas at Tyler.

UT System's Comments and Suggestions

UT System applauds how the current regulations make a distinction between—on the one hand—a *report* to the Title IX Coordinator to which the institution can respond with supportive measures and—on the other hand—the *formal complaint* Grievance Process. UT System encourages the Department to maintain this distinction so that complainants who do not want to participate in the Grievance Process but do want access to supportive measures will have the option to file a report without necessarily activating the institution's Grievance Process. UT System also applauds the Department's efforts to ensure that those accused of sexual harassment are treated fairly and that institutions comport with due process.

In general, however, UT System believes the Title IX regulations can be strengthened to better protect campus communities from sex discrimination and sexual harassment while protecting the rights of both parties. UT System finds the current Title IX regulations to be too prescriptive with respect to *how* institutions must respond to allegations of sexual harassment. UT System encourages the Department to consider giving institutions more discretion in ensuring Title IX's goal of eliminating sex discrimination on campus. Some specific areas of concern to UT System include the following:

1. Definition of Sexual Harassment

Section 106.30(a) defines Sexual Harassment as including, "Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."

Additionally, it limits quid pro quo sexual harassment to only employees, stating, "An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct."

A. The Department should Amend the "Severe, Pervasive, and Objectively Offensive" and "effectively denies a person equal access" language because the phrases are too restrictive.

UT System encourages the Department to change the definition of sexual harassment to be consistent with Title VII. At many UT System institutions, compliance offices are responsible for investigating complaints of sexual harassment under both Title IX and Title VII. UT System submits that the definition of a sexually objectionable environment for Title IX purposes should be consistent with that under Title VII case law, which is broader in scope and requires a showing of conduct that is: (a) severe *or* pervasive

(not severe **and** pervasive)¹; and (b) both objectively and subjectively offensive.² Consistency in these federally mandated definitions would benefit not only institutions but also faculty, staff, and students by providing administrators with a clear, uniform, transparent standard that parallels legal precedent.

Further, UT System encourages the Department to adopt prior language in the Department's guidance with respect to the required effect of the harassment. The current regulation uses the term "effectively denies." This standard may require institutions to investigate only those complaints that completely deny a complainant's access to an educational activity or program. This narrowed definition may not only discourage complainants from coming forward with complaints of sexual harassment but may prevent them from getting the resources needed to succeed in the educational environment.

For the reasons set forth above, UT System recommends that the Department adopt:

- A definition of "sexual harassment" that is consistent with Title VII case law, *i.e.*, (a) severe **or** pervasive; and (b) both objectively and subjectively offensive.
- Prior guidance stated that harassing conduct creates a hostile environment "if 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." (Emphasis added). This definition appropriately recognizes that institutions should not permit violence and harassment to interfere with a complainant's educational program or activity.

Last, UT System encourages the Department to provide more guidance as to what constitutes "severe" and "pervasive" in this context. Courts across the country differ in what these terms mean in the context of Title VII litigation. Does the Department use the words "severe" and "pervasive" to mean the same as how courts have defined these terms in Title VII litigation? Many of the student conduct professionals and Title IX Coordinators across the country are not lawyers. Therefore, these terms may have meanings to those individuals different from how judges in Title VII cases define these terms. More guidance would be helpful.

¹ That is, that the unwelcome conduct complained of was either severe (*e.g.* sexual assault) **or** pervasive (*i.e.*, repetitive conduct over a period of time).

² When determining whether unwelcome conduct is sufficiently "severe or pervasive" to create a hostile work environment, courts view the alleged behavior both objectively and subjectively. That is, the unwelcome conduct must be **both** behavior that a reasonable person would find hostile **and** behavior that the employee actually finds to be hostile.

B. The Department should Amend the Definition of Quid Pro Quo Sexual Harassment

UT System encourages the Department to expand the definition of quid pro quo sexual harassment. Limiting quid pro quo harassment to only employees ignores the reality that students in leadership roles or positions of authority (such as graduate students, leaders of student organizations, etc.) may seek to assert this power to exploit others. To ensure the provisions of Title IX protect against quid pro quo sexual harassment, UT System encourages the Department to amend this provision to include students.

2. Greater Flexibility with Respect to Employees

UT System respectfully asks the Department to consider revising the Title IX regulations to allow greater flexibility for how to investigate and adjudicate sexual harassment in instances where the respondent is an employee. Under the current regulatory scheme, an employee may be found not responsible for sexual harassment due to a variety of technical factors (including, for example, because a complainant does not attend the hearing to testify, or harassment is severe but not pervasive, etc.). But Title VII may still require the institution to act where it believes sexual harassment has occurred. The institution then risks potentially violating one law to satisfy the other. Moreover, due process rights that may apply when a student is a respondent do not always apply where the respondent is an employee. Hearings, for example, are often not required—other than to satisfy the 2020 Title IX regulations. UT System, therefore, asks that the Department consider allowing institutions more flexibility when respondents are employees.

3. Administrative Dispositions Should be Permitted

Section 106.45(b)(6) states that the grievance process “must provide for a live hearing.”

UT System encourages the Department to amend the Title IX regulations to allow institutions more discretion to adjudicate Title IX complaints without a hearing, specifically with administrative dispositions. An administrative disposition is an opportunity for the respondent to accept responsibility for violating the policy and waive the option for a hearing. Prior to the 2020 Title IX regulations, UT System institutions utilized administrative dispositions, which were well-received by both complainants and respondents.

Before the administrative disposition, at the conclusion of the investigation, both the complainant and respondent had an opportunity to inspect, respond, and comment on the investigation report. The university then made a preliminary finding regarding the respondent’s responsibility based on the evidence as detailed in the investigation report and any responses to that report.

If the respondent was found *not* responsible, both parties had the opportunity to comment on that proposed finding, and if the university concluded that the evidence standard had not been met, the matter would end. If the respondent was preliminarily found responsible, however, then both parties would be provided with a proposed finding of responsibility and proposed sanctions. The parties then each had an opportunity to elect one of the following options:

- (1) Agree to the proposed finding of responsibility and proposed sanctions and waive the option of a hearing. If the parties agreed, the matter was resolved;
- (2) Agree to the proposed finding of responsibility but appeal the proposed sanctions to an independent appellate officer. This would also waive the option of a hearing; or
- (3) Reject the proposed administrative disposition entirely (both the proposed finding of responsibility and proposed sanctions). This matter would then proceed to a hearing with an independent hearing officer.

The administrative disposition process was an equitable and expedient option for both complainants and respondents. Both had an opportunity to be heard without automatically requiring a hearing, unless one or both parties explicitly optioned to do so.

The Title IX regulations do not allow for administrative dispositions because institutions may not make a preliminary finding of responsibility before a hearing. The result is that the Department's regulations are currently forcing complainants and respondents to participate in a hearing—even when neither party wants one. As the Department is aware, hearings can be traumatic and onerous for *both* complainants and respondents. Additionally, many complainants and respondents hire attorneys to assist them in the hearing process, spending thousands of dollars. Allowing for administrative dispositions—where both the complainant and respondent agree to a responsibility finding and sanction proposed by the institution—would be a welcome benefit to all involved. For this reason, UT System encourages the Department to reevaluate the prohibition on administrative dispositions.

4. Mandatory Dismissals and Title IX Jurisdiction

Under Section 106.45(b)(3)(i), the Title IX regulations state that “if the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to the conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.”

Under Section 106.45(b)(3)(iii), the Title IX regulations state that “upon a dismissal required or permitted” under the Title IX regulations, “the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.”

UT System encourages the Department to consider amendments to these sections. UT System is committed to fostering an environment that is free of sexual harassment by members of the university community, even when that harassment does not occur within the context of our educational program or activity, *e.g.*, when a member of the university community sexually assaults another member of the university community off-campus in private housing. In the spirit of maintaining a safe campus environment for all students, faculty, staff and visitors, UT System not only has a moral duty but must have the authority to investigate all complaints of sexual harassment or misconduct—even if the alleged conduct falls outside the scope of Title IX as defined by the regulations.

Under the above regulations, if alleged misconduct occurs outside of an institution’s “education programs and activities” then the alleged conduct falls outside the scope of Title IX and must be dismissed. But limiting the scope of the applicability of Title IX to on-campus education programs and activities, however, dismisses not only the realities of college campuses (such as commuter campuses where students live and engage in activities off campus) but also the relationship of off-campus activities to the educational environment. Sexual harassment incidents can—and often do—have a substantial connection to the interests of a university regardless of the location where the alleged incident occurs, due to the severity, pervasiveness, and/or possible risks and safety concerns of the conduct within the university community. This same concern exists with respect to the “occur against a person in the United States” language in the regulations. Like universities across the country, our institutions have countless study abroad opportunities. Institutions must continue to have the right—and indeed have a moral duty to maintain campus safety—to investigate these matters, as they deem appropriate, even if the alleged conduct falls outside the scope of Title IX because it did not occur in the context of an “education program or activity” or in the United States.

Because of this duty and desire to continue to prohibit inappropriate conduct beyond the limited definition in the regulations, many institutions—including all at UT System—prohibit sexual harassment even if it occurs outside the context of an “education program or activity,” including off-campus or outside the United States. Because UT institutions continue to prohibit sexual harassment even if occurs beyond the “jurisdictional elements” in §106.45(b)(3), our institutions are required by the Title IX regulations to send written notification in such cases that, on one hand, the case is “dismissed” but—on the other hand—will continue to be investigated pursuant to the institution’s policies. Understandably, this notification causes confusion and anxiety—*both* for the complainant and the respondent. The notification is unnecessary and is sent solely because of the regulations. UT System encourages the Department to eliminate required dismissals.

5. Greater Flexibility with Discretionary Dismissals

Section 106.45(b)(3)(ii) states that “The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

If the Department determines that the dismissal provisions in the regulations are necessary, UT System encourages the Department to consider adding a fourth basis for dismissal. Specifically, UT System respectfully asks that the Department allow the institution to dismiss a formal complaint if an independent arbiter separate from the investigator determines that there is insufficient evidence to prove that the respondent’s alleged conduct constitutes sexual harassment. This addition would decrease needless and expensive hearings that are often traumatic for *both* the complainant and respondent. Further, this would save scarce resources for institutions of higher education. The independent arbiter could be affiliated with the institution, such as a Dean of Students or that dean’s designee.

6. Emergency Removals

Section 106.44(c) states that “Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the

respondent with notice and an opportunity to challenge the decision immediately following the removal.”

UT System submits that the foregoing language limiting the conditions under which an institution can remove a student respondent unreasonably limits an institution’s ability to protect the campus community. UT System believes that an institution should have the discretion to invoke an emergency removal under circumstances beyond those involving an “immediate threat to physical health or safety...arising from the allegations of sexual harassment.” For example, circumstances may exist under which the continued presence of a student poses a **likely** danger to persons or property but it is not clear whether such a threat is “immediate.” Further, the potential threat may not “aris[e] from the allegations of sexual harassment” but may be independent of that sexual harassment.

UT System understands and agrees that respondents are not responsible for alleged conduct until a determination is made under institutional rules. Nevertheless, an institution has a responsibility to ensure the safety of its educational environment for all participants—not just for a respondent or a complainant. UT System encourages the Department to remove this language. Alternatively, UT System recommends that the regulation be amended to allow the appropriate administrator (such as a dean of students), in consultation with the Title IX Coordinator, the discretion to determine the appropriateness and scope of an emergency removal based on a standard that is in the best interest of the university community and allows for notice to the respondent with an opportunity to challenge it and explain why the respondent is not a threat.

7. Definition of “Education program or activity”

Under Section 106.44(a), an “education program or activity” includes “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.” In addition, under Section 106.2(h), an education program or activity also includes “all of the operations of” a postsecondary institution. Section 106.45 describes in detail how institutions are to proceed with investigating and adjudicating formal complaints of sexual harassment filed by complainants participating or attempting to participate in an educational activity.

The scope of cases to which the Grievance Process currently applies is broader than what is practicable or desirable for certain populations. The case of medical patients within UT System’s institutions providing academic medical training and clinical services illustrates the point. For example, dementia patients and patients at psychological facilities sometimes suffer from delusional episodes and assert that they have been sexually assaulted by medical staff. Similarly, delusional episodes can also occur when hospital patients are on certain medications. These patients deserve to be heard, deserve empathy,

and deserve a prompt investigation—both morally and legally, including under Title VII obligations and health care accreditation standards.³ Our medical institutions have a long history of investigating such complaints—even if on their face the complaints appear to result from a medical condition or medication.

While UT System has always investigated these instances and will continue to do so, UT System suggests that the Title IX Grievance Process is not the best *method* to investigate and adjudicate such allegations. The Grievance Process can be time-consuming, inefficient, and require too much of these patients. Some would argue, however, that the current regulations require institutions to apply the Title IX Grievance Process to these complaints because the scope of “educational program or activity” is so broad that it encompasses “all...operations.” If these instances did fall within the scope of an “educational program or activity,” the result is that the institution would have to engage in the prescriptive steps outlined in the Grievance Process, including the requirements to provide a formal notice document to both the patient and the physician before an investigator may take any other steps to understand the situation or ask questions of any party in the matter. Further, the regulations may not allow for dismissals when practically appropriate. And ultimately the institution would be required to hold a hearing with perhaps an appointed advisor for the patient. All of this could—understandably—frustrate the patient.

The prescriptive requirements in the Grievance Process are simply not practical in these instances. Again—our institutions investigate all such accusations and take them seriously. And medical patients deserve to be free from sex discrimination and sexual harassment. UT System encourages the Department to provide more discretion for institutions to determine *how* it responds to any such allegations, especially when dealing with complainants who are not students.⁴

³ For example, the Joint Commission—an accreditation body for health care entities—has a standard (RI 01.06.03) that “The patient has the right to be free from neglect; exploitation; and verbal, mental, physical, and sexual abuse.” Additionally, 42 CFR § 482.13(a)(2) states that “The hospital must establish a process for prompt resolution of patient grievances and must inform each patient whom to contact to file a grievance...”

⁴ These same concerns expressed with respect to medical patients also exist with respect to other categories of non-students or employees such as partners of faculty who live in campus housing, inmates in correctional managed care provided by a medical institution, contractors, boosters for athletic teams, employees of companies recruiting students for internships and jobs, and other visitors who do not fall with the scope of “students” or “employees.” These third-parties or visitors may have a single, fleeting experience with the institution and, because of that, applying the Grievance Process to resolve formal complaints may not be the most practical or desirable way—for either party or for the institution—to investigate and adjudicate any such complaint.

8. Flexibility with Respect to Advisors and Who can Conduct Cross-Examination

UT System encourages the Department to reconsider the Title IX regulations' requirement that advisors must be provided by the institution and *must* be the individuals who ask questions—including cross-examination questions—at the hearing.

Under the student disciplinary process employed at UT System institutions prior to the 2020 Title IX regulations, both a complainant and a respondent were entitled to have an advisor of their choice present at the hearing, though they were not compelled to do so. The advisor was able to confer with the complainant or the respondent but was not permitted to directly question witnesses, introduce evidence, make objections, or present arguments. This was the case in all student disciplinary matters that went to a hearing, even those that involve serious charges and sanctions, such as suspension or expulsion. The complainants and respondents themselves asked questions—sometimes assisted by advisors who wrote questions or provided advice about what to ask—but the questions were asked by the parties themselves.

The only exception was when the parties cross-examined each other. In those instances, the parties would submit their written questions to the hearing officer and the hearing officer would read them. Two courts in Texas recently concluded that this process is consistent with due process. See *Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. September 15, 2020) (holding that indirect cross-examination through a hearing panel comports with due process and stating that direct cross-examination is not required); *Texas A&M Univ. v. Doe*, 2020 WL 7866878, at *6 (Tex. App.—Waco December 30, 2020, no pet. h.) (holding that Texas constitutional due process did not require attorney cross-examination and that cross-examination through a neutral hearing panel comported with Texas constitutional due process).

UT System submits that its institutions should not be required to provide advisors and should not be required to permit advisors to ask questions at the hearing. Allegations of sexual harassment are indeed serious charges, but the internal processes and procedures applied by institutions are not criminal proceedings. The 2020 Title IX regulations had the effect of unreasonably altering the nature of these administrative student disciplinary proceedings—which are intended to be less formal, more engaging, and more individually tailored—to that akin to a court proceeding. To subject either party in these cases to direct cross-examination by advisors (who are often attorneys) is traumatizing, adds little to nothing to the fact finding, and has likely discouraged participation in the process.

UT System recommends that the Department allow institutions to adopt the well-established academic practice of allowing both parties to submit questions to an objective third party (such as a hearing officer), who can then solicit responses from the other party. This practice removes the potential for re-victimization and intimidation of both parties.

9. The “Hearsay” Exclusionary Rule

Under Section 106.45(b)(6)(i), the Title IX regulations state that “if a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.”

This exclusionary rule is too broad in its reach because it excludes reliable, relevant evidence from consideration that the institution could otherwise use to reach a correct finding. A key reason why “hearsay” is often excluded in court proceedings is because hearsay can sometimes be unreliable evidence. However, the rules of evidence that apply in judicial proceedings contemplate numerous exceptions and define hearsay to only a subset of “statements.” The most obvious example of this rule’s perverse consequences is a “statement against interest” where the respondent admits to the conduct at issue. In legal proceedings, such a statement is considered reliable and is, therefore, not excluded. Under this rule, however, the decision-maker cannot consider even statements against interest if the respondent does not submit to full cross-examination. That means that even if the respondent admits to certain conduct during the investigation, those admissions would be excluded at the hearing if that respondent does not testify. UT System encourages the Department to eliminate this rule.

10. Requiring a Relevance Ruling on Every Question

Section 106.45(b)(6)(i) also states “Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”

UT System respectfully encourages the Department to eliminate the requirement that the decision-maker rule on relevance **with each question** asked. UT System encourages the Department to continue to allow the hearing officer the ability to exclude irrelevant questions as they arise.

Requiring a hearing officer to rule on the relevance of every question is unnecessary and leads to a chaotic hearing because the hearing officer must constantly remind witnesses to wait until the hearing officer rules on the relevance of the question before the witness answers. Witnesses inevitably forget to wait, and they answer the question at the same time that the hearing officer rules that the question is relevant. When the witness and hearing officer are speaking over each other, it becomes difficult to hear either person. Often, this cacophony is then followed by one or both people apologizing. In a typical hearing, this exchange occurs numerous times with each witness.

Hearings are often traumatic for *both* the complainants and respondents. The current unnecessary procedure creates further distress and frustration to all parties (including the hearing officer) and provides little benefit. At the same time, however, parties should be protected from harassing, irrelevant questions. UT System, therefore, respectfully requests that the Department eliminate the requirement for the hearing officer to rule on the relevance of every question while maintaining the hearing officer's ability to exclude irrelevant questions as they arise.

11. Removal of the Formal Complaint Requirement to Participate in Informal Resolution

Section 106.45(b)(9) states "...[A] recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed."

Complainants and respondents sometimes benefit from the informal resolution process. Indeed, sometimes they specifically ask for an informal process as opposed to the mandated Grievance Process. The requirement of a formal complaint to complete an informal resolution process, however, is an obstacle to allowing the parties to find a mutually beneficial resolution. On many occasions, complainants have reported that they are hesitant to file a formal complaint because they do not want to participate in an administrative hearing. Yet they still want the institution's assistance in resolving the issue. Therefore, to allow for more informal resolutions, the Department should amend the regulations to remove the requirement that a complainant must first file a formal complaint before the institution may provide an informal resolution. Additionally, to ensure against either party exploiting an unequal power dynamic, the regulations should allow institutions an ability to reject the parties' request for informal resolution.

12. Effective Date for Any New Regulations

UT System respectfully requests that the Department provide institutions an adequate time to revise and implement any new policy changes arising from any new Title IX regulations. The process of revising policies often involves hearing from multiple concerned constituencies, including faculty, staff, and students. These distinct groups each offer a unique voice that should be heard. Additionally, Texas state law requires that the UT Board of Regents approve any revisions to our sexual misconduct policies. To allow adequate time to make these revisions, UT System requests that any new Title IX regulations have an effective date of 12 months following the publication of the final rule.

Again, thank you for soliciting our input as you consider how best to strengthen Title IX and ensure all educational institutions are free from sex discrimination and sexual harassment.

Sincerely,

(b)(6)

Krista Anderson
Systemwide Title IX Coordinator
The University of Texas System
Email: kranderson@utsystem.edu