ZALKIND DUNCAN + BERNSTEIN

U.S. Department of Education
Office for Civil Rights
Via e-mail: T9PublicHearing@ed.gov

June 11, 2021

RE: Title IX Public Hearing – Sexual Misconduct Proceedings in Higher Education

Dear OCR:

I am a Title IX attorney at Zalkind Duncan & Bernstein LLP, a boutique law firm in Boston that has been representing students in civil rights matters for fifty years.[1] In the last ten years our firm has represented hundreds of students, staff, and faculty—both as complainants and respondents—in sexual misconduct proceedings at colleges and universities around the country, and in litigation against their institutions. We have also written extensively about Title IX, sexual misconduct proceedings in higher education, and legal challenges to those proceedings.[2] I write today to offer my thoughts on the Title IX regulations that went into effect on August 14, 2020, and how those regulations have worked in practice in sexual misconduct proceedings at colleges and universities over the last ten months.

Trends in Title IX representation under the new regulations

Since the current regulations went into effect in August 2020, our firm has witnessed a significant increase in complainants seeking legal representation for these proceedings. While previously, our experience had been that respondents often sought representation and complainants often did not, now that students are required to undergo both months-long investigations into the allegations and then one or more days of hearings with cross-examination by lawyers, we have seen many more students seeking legal assistance.

In addition, these processes now require a more significant time investment for students and their advisors than the already-lengthy processes that were in place before the new regulations. For the five years before the new regulations took effect, most of the schools in which we represented students used a single investigator model to address complaints of sexual misconduct. Under the single investigator

[1] The opinions expressed in this testimony are those of the undersigned attorney, not the firm as a whole.
[2] Many of our attorneys' thoughts on campus sexual misconduct proceedings can be found on our blog: https://www.bostonlawyerblog.com/category/student-rights-title-ix/.

model, an investigator—either a school employee or an outside lawyer hired by the school—would conduct interviews with the parties and witnesses, obtain and review evidence, and then write a report for the parties to review. In my experience these draft reports could be up to 600 pages long, including interview transcripts and documentary evidence. After this review parties generally had an opportunity to submit written responses to the reports, and then a final report would be drafted from which a decision maker would decide whether the school's policies were violated, and if they were, what sanction to impose. Both parties then had the opportunity to file an appeal. In my past cases, the entire single investigator process would take between 4-12 months to complete. I have never had a case under the single investigator model that was completed within the 60-day time frame previously recommended by OCR.

Under the new regulations, the schools at which I have represented students this year have maintained the same single investigator model they previously used to adjudicate the entire case, but once the investigator has written a final report, that report is provided to a hearing body which holds a live hearing. At that hearing, pursuant to the regulations, the hearing panel and each of the parties' advisors has the opportunity to ask questions of the witnesses and the other party. Thus far, in the one hearing I have attended under the new rules, even with only the two parties and a single witness appearing, the hearing took nearly eight hours. In upcoming cases I have scheduled with more than one witness, I am being asked to reserve multiple days for the hearing.

OCR should understand, in considering any changes to its regulations, the immense emotional, psychological, and financial toll these proceedings take on the students involved, a toll that has only been increased by schools' decisions to maintain the old single investigator model while also providing the hearing the new regulations require. Both complainants and respondents spend months, if not a year, with their futures in limbo. They are asked to re-live the events at issue in multiple lengthy interviews with an investigator, and then in a live hearing where they are cross-examined. While, as discussed below, a live hearing is critical for the decision-makers to be able to assess the parties' credibility and hear their experiences directly from them, the combination of many months of investigation and then re-visiting much of the factfinding the investigator has already completed during a live hearing is incredibly difficult for students.

Because few schools provide attorneys to students involved in Title IX cases, students who want experienced representation must hire private counsel for these processes. Those students who can afford counsel familiar with Title IX proceedings and the relevant state and federal laws that provide students with rights within those processes are at a significant advantage compared to those students who cannot afford representation. Now that schools are required to hold hearings with cross-examination by advisors, having experienced counsel is even more important

for students. These processes therefore likely exacerbate existing inequities among students, disadvantaging students from lower socio-economic backgrounds and those who cannot rely on their families for financial assistance.

Most of the procedural changes made by the current regulations provide important safeguards to students

The current regulations impose critical procedural safeguards that protect the rights of both complainants and respondents in these processes. The provision requiring notice of the charges (34 CFR § 106.45(b)(2)), including the facts alleged and the policies allegedly violated, allows both parties to know the scope of the case and adequately prepare relevant evidence and testimony. The provision requiring institutions to provide all evidence collected to both parties, (34 CFR § 106.45(b)(5)(vi)), similarly allows the parties the opportunity to understand the universe of evidence at issue in a case, and to have the opportunity to argue as to which evidence is relevant and why.

The most significant change the passage of the new regulations has brought about is the requirement that schools hold a live hearing in these cases, (34 CFR § 106.45(b)(6)). Under the single investigator model, at some schools an investigator would interview the parties and witnesses, and review evidence, and then draft a report setting out only the testimony and evidence. The investigator would not be allowed to make credibility determinations or recommendations of whether a policy was violated. The investigator's report would then be passed along to a school administrator or a panel, who would decide whether the evidence supported a finding that the school policy was violated, all without ever seeing or speaking with the parties and witnesses. Now, instead of a school administrator who has never seen or spoken to the parties making a decision in the case, the person making the decision has the benefit of hearing live testimony and asking questions of the parties. There is no substitute for a decisionmaker being able to judge a party's credibility via a live hearing and being able to ask questions of the party to clarify any areas of confusion.

The current regulations also give the parties more control over the process. Under the previous Title IX framework, guided by the 2011 OCR Dear Colleague Letter and OCR's 2014 Questions and Answers on Title IX and Sexual Violence, once an institution learned of a complaint it would usually proceed through a full investigation, even if the alleged victim (who sometimes was not even the complainant) did not want a formal investigation. As someone who represents both complainants and respondents, wIe have seen how traumatic and stressful these proceedings can be for students involved. A formal, disciplinary response is also not always what a complainant wants when looking for help addressing an incident. The relationships between students involved in these cases are often complex, and not reducible to simple roles as perpetrator and victim. In my experience many of

these cases come out of long-term relationships in which each party has engaged in some conduct that has harmed the other. A one-size-fits-all approach to resolving these complaints simply did not work.

The current regulations allow complainants to withdraw complaints if they no longer want to proceed with a process (34 CFR § 106.45(b)(3)). There are various circumstances in which this might make sense. For example, in some cases after a complaint is brought, one or both students withdraw from the institution. Under the previous regulations, institutions would generally continue the investigation even if one party was no longer affiliated with the school; requiring the other party to continue through this difficult process even where the institution could no longer address an alleged deprivation of access to education or impose a disciplinary sanction. In other cases, I have seen parties come to agreements outside of the institutional process, but the institution would not recognize the students' resolution of the situation and continued the adjudication, against the will of both parties. A complainant may simply realize after filing a complaint that going through the investigation and adjudication process is not helping them heal from the situation.

Even more importantly, the current regulations allow the parties to enter into informal resolutions to resolve the situation without the need for a formal investigation and hearing process (34 CFR § 106.45(b)(9)). Some complainants who are not interested in a formal process might still be interested in having the option to engage with the respondent in an informal process that would lead to an agreed outcome that the institution would enforce. Some complainants might be less interested in a disciplinary outcome and more interested in restorative outcomes that might remedy the harm caused, which can only be achieved through a process that the respondent engages in voluntarily. In cases where both parties have made allegations against each other, an informal resolution holds the promise of reaching a genuinely fair solution.

One concern I have about the new procedural regulations is relates to the requirement that cross-examination be done by the parties' advisors. Those students who cannot hire legal counsel to serve as their advisors must use advisors provided by the institution. These advisors will usually be administrators or other employees. In order to adequately prepare the advisors to conduct meaningful cross-examination, students must communicate in detail with the advisor about the facts of the case. Students' relationships with these advisors, unlike students' relationships with lawyers, are not privileged, or even necessarily confidential. This creates a significant risk for students—both complainants and respondents—who might face criminal investigation for the events leading to the allegations, or other events disclosed in the course of the Title IX investigation and hearing. In my experience, many of these cases involve underage drinking, illegal drug purchase, distribution, and use, and not infrequently, cross-complaints of sexual harassment,

dating violence, or assault by both parties. Students who are not counseled by attorneys with whom they have a privileged relationship risk exposing themselves to criminal prosecution when they are required to disclose information to lay advisors.

The narrowed definition of "sexual harassment" used in the current regulations is unworkable and out of sync with the legal definition of such harassment

The current regulations depart from the legal definition of hostile environment sexual harassment under federal civil rights laws, and past definitions used by OCR. The current OCR formulation of sexual harassment covered by Title IX is both out of sync with relevant legal standards and has created a two-track system of campus justice that deprives many students of fair procedures.

The current regulations identify three distinct types of sexual harassment: (1) quid pro quo harassment; (2) hostile environment harassment; and (3) criminal behavior as outlined in the Clery Act. While the current regulations' definition of quid pro quo harassment is consistent with Title VII and Title IX case law, and it makes sense to rely on the Clery definitions for serious sex-based crimes, the new definition of hostile environment harassment is not consistent with existing law.

As my colleague has explained elsewhere, in 1997 OCR defined hostile environment sexual harassment as "conduct of a sexual nature [that] is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment." In deciding whether conduct met this standard, both a subjective and an objective "reasonable person" standard were used. This definition tracked the legal definition of hostile environment sexual harassment under Title VII, and racial harassment under Title VI. Even after the Supreme Court held that in lawsuits based on peer harassment plaintiffs would have to show a heightened level of harassment to recover money damages (not injunctive relief) under Title IX, OCR continued to use the "severe, persistent, or pervasive" standard to determine when an institution was in compliance with Title IX, and for its own enforcement actions. This standard, which is consistent with the hostile environment standard under Title VII and Title VI, is the appropriate standard for OCR to use to determine if a higher education institution is in compliance with its obligations under Title IX. This is particularly true because Title IX applies not only to students, but to employees of education institutions. Consistent Title IX and Title VII standards ensured parity in investigation and enforcement mechanisms for faculty and staff-related sexual harassment matters. By raising the standard for sexual harassment under Title IX, employees may now have to litigate their sexual harassment claims in court under Title VII and related state laws, which previously could have been addressed internally through a Title IX process.

In addition to creating a heightened burden for complainants alleging sexual harassment, the current regulations dramatically narrowed institutions' obligations to respond to such harassment. Under the current regulations, institutions must only address claims of sexual harassment made by people participating in the institution's education programs (34 CFR § 106.30). Institutions are only required to investigate complaints of sexual harassment that occurs on campus or in locations where the school exercises substantial control over both the complainant and respondent (34 CFR § 106.44(a)). Pursuant to the regulations, sexual assaults that occur off campus, even between students who attend classes together or live in the same dormitory, do not have to be investigated under an institution's Title IX procedures.

In response to the significant narrowing of institutions' obligation under Title IX to address sexual harassment that affects their students, most of the schools where I have represented clients this year have come up with two different policies and procedures: one to address harassment that falls under the Title IX definition, and one to address harassment as it used to be understood before August 14, 2020. In my experience, where they are not required to provide the procedural protections set forth in the Title IX regulations, schools have chosen not to do so. So, for example, a student who is sexually assaulted by a classmate in a school-owned fraternity house would be provided the procedures set forth in the Title IX regulations; a student at the same school who is assaulted by a classmate in an off-campus apartment a block from the school would not receive those procedural protections. This seemingly arbitrary distinction, based not on the students' conduct but where that conduct happens to occur, is deeply confusing to students. Students who want to know what will happen if they report misconduct may not be able to determine how the school will handle it. Students accused of misconduct will have their rights determined by the location in which the incident took place.

I strongly urge OCR to bring its definition of hostile environment sexual harassment in line with the legal definition applicable under Title IX's cognate civil rights laws, and to require schools to create a single, uniform procedure to apply to all sexual misconduct cases.

The ban on considering statements by non-testifying parties and witnesses needs clarification

The current regulations state: "*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; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or*

other questions" (34 CFR § 106.45(b)(6)(i)). As I have previously written, this provision is unclear, and can lead to nonsensical outcomes. For example, under this provision it appears that a party can admit to relevant conduct to friends, or even the investigator in the case, but then decide not to submit to cross-examination, preventing those admissions from being considered. Even where the conduct itself constitutes the harassment—for example, a professor e-mailing a student that she will give the student an A if the student has sex with her—it appears the professor could prevent that e-mail from being considered by refusing to submit to cross-examination.

This provision also requires the institution to call as a witness every single person who has been interviewed by the investigator, even where the parties have no questions for the witness, in order to have their testimony to the investigator considered. In my experience, I have had to work out with schools what it means to "submit" to cross-examination when the parties' representatives have no questions for the witness. Must the witness appear at the hearing and have a party's representative ask *something* in order for the prior testimony to be considered, even if the parties have no relevant questions for the witness? Can the hearing officer simply ask the witness if they are willing to undergo cross-examination, and then accept the prior testimony if the witness says they are? Can the parties stipulate that the decision maker can consider prior testimony of certain witnesses so that the witness does not have to appear at the hearing at all?

This is the provision of the regulations that seems to be creating the most confusion for institutions and parties. It has the potential to prevent relevant, credible evidence from being considered, and to needlessly lengthen an already extremely time-consuming process by requiring unnecessary witnesses to appear at hearings to ensure their prior testimony is considered. It would be extremely helpful to institutions and practitioners for OCR to clarify this provision to allow parties to stipulate to use prior testimony of witnesses, and to clarify when the parties' prior admissions, and verbal or written acts that themselves constitute harassment, can be admitted even if the person who made the statement does not submit to cross-examination.

Institutions should be required to maintain and publish statistics about their sexual misconduct cases

For students involved in sexual misconduct cases at their institutions, how the institutions handle these cases, and what types of outcomes they have is usually a black box. Even for those institutions that publish some statistics as part of their Clery Act reporting, those statistics often fail to include meaningful demographic data that would help OCR monitor how institutions are implementing its regulations and would help students identify if there are trends in how the institution applies its policies that indicate some type of improper bias.

Various Title IX experts have raised concern about schools applying their sexual misconduct policies in racially-discriminatory ways. One study found that at Colgate, in the 2013-2014 year, while only 4.2% of the student body was Black, 50% of the students accused of sexual misconduct, and 40% of those put through the adjudication process, were Black. Most schools similarly do not maintain data on the genders, sexual orientations, religions, or nationalities of those students who bring complaints, who are investigated, and who are sanctioned for sexual misconduct. OCR should require schools to maintain and publish this data to bring transparency to how schools are addressing sexual misconduct complaints and to identify and address any illegal discrimination in the application of these policies.

Conclusion

While the regulations have brought much-needed procedural protections, and more flexible resolutions to campus sexual misconduct adjudications, there is still room for improvement. After the first academic year handling cases under these new procedures, it is evident that in some important ways the regulations make the process more complicated, confusing, and lengthy than necessary. Returning to the "severe, persistent, or pervasive" standard for hostile environment sexual harassment, requiring schools to have a single process to handle all cases of sexual misconduct, and clarifying how parties' and witnesses' statements can be used if those individuals do not appear at a hearing would make these processes both easier to navigate and fairer to both parties.

Sincerely,

Naomi R. Shatz