Attorneys of Zalkind Duncan & Bernstein LLP
Comment on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance[1]

Docket ID ED-2021-OCR-0166

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We are Title IX attorneys at Zalkind Duncan & Bernstein LLP, a boutique law firm in Boston that has been representing students in civil rights matters for fifty years. 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] We write today to offer our thoughts on the proposed Title IX regulations published in the Federal Register on July 12, 2022.

Changes to the requirements for grievance procedures provide substantive improvements but diminish procedural protections and erode fairness

We agree with the Department that if Title IX requires certain grievance procedures, those procedures should apply generally to claims of discrimination on the basis of gender (including sexual orientation and gender identity), not only to claims of sexual harassment. (Proposed § 106.2).

The Department provides useful clarification in Proposed § 106.45(a)(5) both that a recipient has a responsibility to maintain the privacy of parties and witnesses if possible, and also that the parties are permitted to contact witnesses and "obtain… evidence." While many universities are properly concerned about confidentiality, in some cases blanket restrictions on independent investigation has gotten in the way of the truth-finding process. Certain schools have policies that preclude parties from themselves contacting potential witnesses. That sometimes puts parties in a bind – if they are uncertain who of a group of people may have relevant information, they must either give an investigator a long list of people who may know nothing (but will learn from the questioning about the parties' identities and allegations), or run the risk that someone with important knowledge may be missed. In addition, where

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

students are involved in both Title IX proceedings and criminal or civil proceedings arising out of the same set of facts, school policies that prohibit students from contacting witnesses may lead to schools disciplining students for attempting to prepare for parallel legal proceedings. The Department's approach would allow the parties to identify relevant witnesses and encourage them to participate in the recipient's investigation.

However, we are concerned to see the proposal that certain procedural protections in the current regulations, which enhance the fairness and neutrality of grievance processes, are slated to be removed. Under the existing regulations, the decision maker in the case cannot be the Title IX coordinator or the investigator. (34 CFR § 106.45(b)(7)(i)). The proposed regulations eliminate this procedural safeguard, allowing the decisionmaker and investigator to be the same person. And if the Title IX Coordinator serves as an investigator or decisionmaker, they would be tasked with overseeing or reviewing their own work in assessing compliance with Title IX. Moreover, because the proposed regulations eliminate the requirement for a hearing, but require that the decisionmaker assess the parties' and witnesses' credibility, in practice decisionmakers will have to serve as the investigators (or duplicate the efforts of the investigators) in order to interview the witnesses and make the credibility determinations.

Relatedly, although the requirement that a decisionmaker have the ability and obligation to question parties and witnesses in individual meetings is critical <u>if</u> a live hearing is not being held, it may prove unworkable. (Proposed 34 CFR § 106.46(f)(1)(i)). Because parties have the right to suggest questions and have them asked of witnesses under the proposed regulations, witnesses may find themselves having to be interviewed numerous times: first by an investigator (often more than once for a key witness), then by the decisionmaker who must ask questions suggested by the parties, and then again by the decisionmaker after the parties have been given an opportunity to submit questions in response to the witnesses' responses, and again ad infinitum. That will end up being significantly time-consuming for witnesses, for parties, and for decisionmakers.

Under the current regulations, institutions are required to provide detailed notice to the students of what they are investigating. (34 CFR § 106.45(b)(2)). That notice must include notice of the facts alleged and the policies allegedly violated, which allows both parties to know the scope of the case and adequately prepare relevant evidence and testimony. The proposed regulations would remove the requirement that institutions notify the students involved of what policies are alleged to have been violated. This means that a student accused of misconduct would have to guess at what policy or policies may be at issue, and may not be able to craft a defense because they do not know what it is they need to refute. For example, a respondent may receive an allegation of sexual assault and gather evidence relating to expressions of affirmative consent, only to learn weeks later that the complainant is

asserting they were too intoxicated to consent. Moreover, respondents would be systematically disadvantaged because complainants would have the ability to prepare to discuss relevant issues, whereas respondents given only a vague description of the allegations, e.g., ("sexual misconduct"), would typically be expected to respond immediately in an investigative interview without an opportunity to understand or consider the relevant issues.

We are alarmed that the proposed regulations significantly loosen the obligations of recipients to give complainants and respondents a meaningful opportunity to respond to the evidence and the findings of the investigator. Whereas § 106.45(b)(5)(vi) and (vii) currently require a recipient to provide the parties with a written investigative report that "fairly summarizes relevant evidence" in paper or electronic form, which the parties may review, and to which the parties may respond in writing, Proposed § 106.45(f)(4) only mandates that the recipient provide a "description of the evidence" to which the parties get a "reasonable opportunity to respond." The current regulations ensure that the recipient investigates transparently and then give the parties the opportunity to respond in detail to the reports that the decisionmakers see. The proposed regulations would allow recipients to share vague, high-level descriptions of the evidence with the parties while providing different or more detailed information to the decisionmakers.

Added protections for pregnant and nursing students will provide expanded access to education

We applaud the Department for recognizing that pregnant students should be granted accommodations to allow them to continue to pursue their educations. It is important for educational institutions to be accessible to students who are or become pregnant. The expansion of protections against discrimination to include "current, potential, or past pregnancy" is also vital to ensure that students can learn equally regardless of their sexual or reproductive choices.

However, with respect to Proposed § 106.40(b)(1)(F), we ask the Department to consider whether the formal grievance procedures under § 106.45 are always the best fit for a complaint about pregnancy discrimination, particularly for failure to make resources or voluntary modifications available. If a recipient fails to make a lactation room available, against whom would a grievance be filed – a facilities manager? And would the student have to wait for a months-long investigation to be completed for the recipient to take action? It would be more important for a pregnant student to get a timely and positive response when requesting reasonable accommodations than for the recipient to investigate individuals after the fact.

Expansion of informal resolution helps students control their cases

While 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, the requirement that students must first file a formal complaint before being allowed to engage in the informal resolution process will prevent many students from accessing this option. Proposed 106.44(k) allows students to seek an informal resolution from the beginning of their case, instead of requiring them to first file a formal complaint. This proposed revision gives complainants more control over the process. Those complainants who are less interested in a disciplinary outcome and more interested in restorative outcomes that might remedy the harm caused will be able to make that clear from the beginning, increasing the chance that the respondent might engage in the informal resolution process. In cases where both parties may have allegations against each other, an informal resolution holds the promise of reaching a genuinely fair solution.

The revised definition of "sexual harassment" would appropriately bring Title IX law in line with other federal civil rights laws

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 proposed regulation would appropriately bring Title IX's definition of a sexually hostile environment in line with the definition of hostile environment sexual harassment under Title VII, and racial harassment under Title VI. While the Supreme Court has held that in lawsuits based on peer harassment plaintiffs have to show a heightened level of harassment to recover money damages (not injunctive relief) under Title IX, it is appropriate for OCR to use the "severe, persistent, or pervasive" standard to determine when an institution is in compliance with Title IX, and for its own enforcement actions. This is particularly true because Title IX applies not only to students, but to employees of education institutions, who are simultaneously protected by employment civil rights laws that use this standard. Consistent Title IX and Title VII standards ensured parity in investigation and enforcement mechanisms for faculty and staff-related sexual harassment matters.

We also support the clarification that Title IX includes protection based on sexual orientation and gender identity, consistent with the Supreme Court's *Bostock* decision.

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

We encourage the Department to include a data retention and publication provision in the regulations. Under the existing regulations, schools are not required to maintain or publish any statistics about the students involved in sexual misconduct cases at their institutions, how the institutions handle these cases, and what types of outcomes they have. 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

We appreciate the Department's efforts to revise the existing regulatory approach and ensure that the regulations promote and effectuate the purposes of Title IX. We hope that our feedback will help the Department improve and strengthen the final regulations from the draft contained in the Notice of Proposed Rulemaking.

Sincerely,

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