



[Docket ID ED-2018-OCR-0064]

January 22, 2018

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202

Dear Secretary DeVos:

On behalf of AASA, The School Superintendents Association, representing more than 13,000 public school superintendents across the nation, I write to offer comments on the proposed amendments to regulations implementing Title IX of the Education Amendments of 1972. We generally applaud the Department's desire to simplify and streamline federal regulations on districts, but believe several elements of these proposed Title IX regulations will have the opposite impact: provide less flexibility to districts in handling potential Title IX violations, add new and unaccounted for costs in changing current policies and procedures, and open districts up to increased litigation costs. Our greatest concern is that the proposed Title IX regulations will undermine our efforts to ensure each and every child in our school has a safe and healthy learning environment. It is for these reasons that we oppose any regulatory changes that would compromise the integrity of the 2001 Title IX guidance, which has been of invaluable assistance to school leaders across the country

For the better part of two decades, the Department has used one consistent standard to determine if a school district violated Title IX by failing to adequately address sexual harassment and assault. The Department's 2001 Guidance, which went through public notice-and-comment and has been enforced in both Democratic and Republican administrations,¹ defines sexual harassment as "unwelcome conduct of a sexual nature."² The 2001 Guidance requires schools to address student-on-student harassment if *any employee* "knew, or in the exercise of reasonable care should have known" about the harassment. In the context of employee-on-student harassment, the Guidance requires schools to address

¹ These standards have been reaffirmed time and time again, in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama Administration, and even in the 2017 guidance document issued by the current Administration. U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Harassment* (Jan. 25, 2006) [hereinafter 2006 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>; U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) [hereinafter 2010 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. Dep't of Educ. Office of Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, &16 (Apr. 4, 2011) [hereinafter 2011 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014) [hereinafter 2014 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Campus Sexual Misconduct* (Sept. 2017) [hereinafter 2017 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

² U.S. Department of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

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harassment “whether the [school] has ‘notice’ of the harassment.”³ Under the 2001 Guidance, schools that do not “take immediate and effective corrective action” would violate Title IX. These standards have appropriately guided OCR’s enforcement activities, effectuating Title IX’s nondiscrimination mandate by requiring schools to quickly and effectively respond to serious instances of harassment and fulfilling OCR’s purpose of ensuring equal access to education and enforcing students’ civil rights.

We believe your proposed regulations will have the unintended impact of altering the policies and practices from the 2001 Guidance that district personnel have implemented for almost two decades, guidance they rely on and that has proven a critical asset in addressing these issues of harassment. There is a real cost in terms of training and professional development to changing practices and policies that are so embedded into the fabric of the school district that we believe are functional and working. We worry that at a time when district finances are stretched, these regulations, if implemented as proposed, present yet another unfunded mandate from Washington. While some regulatory changes certainly have merit, we believe these proposed regulations on Title IX do not have merit. Further, we believe these proposed rules have the potential to increase the likelihood of litigation in districts, which is something AASA has long sought for ways to reduce. Because the proposed rules greatly restrict when and how districts can investigate and under what circumstances students can report, we are deeply worried that students may be less likely to view the Office of Civil Rights (OCR) as the main avenue for addressing and resolving their Title IX complaints against schools. Currently, Title IX’s application to sexual harassment is more broadly interpreted for OCR enforcement than for civil litigation, and because of that, and the broader remedies that OCR can offer (which also would become more limited under the proposed rules if finalized), students have been able to find OCR’s response to their Title IX complaints against educational investigations sufficient. If OCR no longer offers the same remedies and has more stringent standards for enforcing Title IX, then presumably students will find civil litigation to be the better avenue for addressing their grievances against schools, which could lead to a significant and much costlier redirection of district resources towards addressing Title IX complaints and violations in court.

Below, we have listed our concerns with the proposed regulation in order of greatest to least importance.

1. § 106.44(a), 106.30

AASA believes that when a child reports they have been sexually assaulted or harassed to any school personnel then the district has an obligation to investigate, and that allowing schools to ignore reports made to the majority of school employees under the proposed rules would be an unconscionable attack on the safety of students and our obligations to ensure their safety in school. Limiting the responsibility of the district to investigate only incidents that children report to teachers or an official with the authority to institute corrective action could lead to the child’s report going unaddressed and the child being harmed again. We know young children can form bonds with a host of school personnel whether it be a cafeteria worker, coach, bus driver, janitor or paraprofessional and we would never want to assume that these individuals should not be obligated to report any potential Title IX violations. We are opposed to any scenario in which the district could somehow disregard the information a child presents to those without the authority to institute corrective action simply because of their technical status within the regulation. It also underestimates the care we entrust all our employees to put towards students’ safety. These individuals are valued members of the school community and there are

³ *Id.*

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countless examples of how their knowledge about a child's home-life, experience in school or personal needs has been critically important to ensuring the child is safe in and out of school and receives an appropriate education.

The Department has long required schools to address *student-on-student* sexual harassment if almost any school employee⁴ either knows about it or should reasonably have known about it.⁵ This standard takes into account the reality that many students disclose sexual abuse to employees who do not have the authority to institute corrective measures, both because students seeking help turn to the adults they trust the most and because students are not informed about which employees have authority to address the harassment. The 2001 Guidance also requires schools to address all employee-on-student sexual harassment, "whether or not the [school] has 'notice' of the harassment."⁶ The 2001 Guidance recognized the particular harms of students being preyed on by adults and students' vulnerability to pressure from adults to remain silent and accordingly acknowledged schools' heightened responsibilities to address harassment by their employees. As leaders of our school districts, it is of utmost importance to us that if a student is sexually abused by an employee, that our schools do everything they can to stop the abuse and ensure that the student is able to learn in a safe educational environment.

Further, we have concerns with how this regulation would interact with state mandatory reporter laws that require that all school personnel to bring concerns to the district if they suspect rape or sexual abuse of any kind. If a cafeteria worker reports to a principal that a student confided that she has been sexually abused by a teacher at the school would the district really have no responsibility to address the harassment within the context of Title IX, but have a simultaneous obligation to report this information to Children and Family Services divisions? At the very least, the conflicting requirements will create confusion to schools and employees regarding their responsibilities to report sexual harassment, including sexual assault, of which they are on notice. Consequently, this would likely open up schools in our districts to litigation and require us to expend resources to train our employees on how they must concurrently comply with the Title IX rules and with state laws that seem to have conflicting requirements.

Finally, we are concerned that the district would have no obligation to investigate or implement corrective action if a child reports harassment or abuse by a teacher. This, again, really makes no sense and does not consider the reality that students will report to who they trust the most, and that these individuals are often not district-level Title IX Coordinators or officials with authority to institute corrective measures. This also runs counter to some state laws that prohibit sex between a school employee and a student.

There is no good reason why a school district would not choose to investigate a Title IX claim just because the claim was shared with someone other than a teacher or official who can institute corrective measures. We strongly oppose this proposed change to the Title IX rules.

2. § 106.30

⁴ This duty applies to "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility." 2001 Guidance, *supra* note 2 at 13.

⁵ *Id.* at 14.

⁶ *Id.* at 10.

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The proposed regulations also change the definition of sexual harassment to define it as “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school’s] education program or activity”⁷ and mandates dismissal of complaints of harassment that do not meet this standard. AASA believes that all students have a right to a safe and healthy learning environment and activities and that the new, elevated standard could put less pressure on district personnel to address harassment when it first appears and is most easy to address. The current standard that school administrators rely upon from the 2001 guidance defines sexual harassment as unwelcome conduct of a sexual nature⁸ which appropriately charges schools with responding to harassment before it escalates to a point that students suffer severe harm. Under the Department’s proposed, narrower definition of harassment, students would be forced to endure repeated and escalating levels of abuse, from a student or teacher, before their schools would be required to investigate and stop the harassment. This proposed standard inappropriately imports a standard used in lawsuits for money damages into the standard used for administrative enforcement of Title IX, and would move districts in the opposite direction of what we believe the federal government should be encouraging school personnel to do today.

3. § 106.45(b)(3)(vi)-(vii)

School leaders strongly object to allowing K12 students to be subject to a live hearing. While we understand that schools can continue to ask students to submit and answer written questions or have a neutral school official ask questions orally, we oppose the possibility of a new layer to the investigative process that would subject students to a cross-examination by a parent, lawyer, or another student (including, possibly, friends of the student who perpetrated the offense). It is totally unclear under what context the district would have to grant the opportunity to have a live hearing, who would preside over the live hearing, what responsibility the district would have to mitigate any re-traumatization of students during the live hearing, what district personnel would have to attend the live hearing, whether the district would have to hold the live hearing on school grounds, and most importantly why it is appropriate to force a minor to participate in this type of activity. The live cross examination requirement would also lead to sharp inequities if one party can afford an attorney and the other cannot. If anything, the addition of a live hearing places a new burden to districts as personnel will need to be trained in how to facilitate and monitor a live hearing and ensure appropriate participation by all parties involved in a live hearing and how to view the evidence that arises during a live hearing. Furthermore, what is the obligation of district personnel if a student or school employee does not show up to the live hearing? Is the investigation terminated? We urge you to remove this investigatory option from districts’ purview.

4. (§ 106.45(b)(4)(i))

AASA is concerned by the requirement that districts adopt a separate definition that that which applies under Title VII to employees-- and, perversely, imposes a more stringent definition for students, which would make it harder for students than adults in non-education workplaces to get help when they are sexually harassed. Under Title VII districts are potentially liable for harassment of an employee if the harassment is “sufficiently severe or pervasive to alter the conditions of the victim’s employment.” If the employee is harassed by a supervisor, the school is automatically liable if the harassment resulted in a tangible employment action such as firing or demotion, and otherwise unless the school can prove that

⁷ Proposed rule § 106.30.

⁸ 2001 Guidance, *supra* note 2.

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the employee unreasonably failed to take advantage of opportunities offered by the school to address harassment.⁹ However, under the proposed rules, a school would *only* be liable for harassment against a student if it is (1) deliberately indifferent to (2) sexual harassment that is so severe, pervasive, and objectively offensive that it denied the student access to the school’s program or activity; (3) the harassment occurred within the school’s program or activity; *and* (4) a school employee with “the authority to institute corrective measures” had “actual knowledge” of the harassment. In other words, under the proposed rules, schools would be held to a far lesser standard in addressing the harassment of students—including minors—under its care than addressing harassment of adult employees.

The drastic differences between Title VII and the proposed rules would mean that schools would be prohibited from taking the same steps to protect children in schools from harassment and discrimination that they are required to take to protect adults in the same setting. AASA does not believe that there should be a more demanding standard for taking action to address sexual harassment experienced by children than adults in the workplace. We also think these two opposing standards will be confusing to school personnel who need to understand what they can and should report and address in both contexts. In addition, the conflict between the proposed Title IX rules (which apply to the harassment of employees) and Title VII will create confusion and expose school districts to potential liability, given that in many cases it will be impossible to comply with both these rules and Title VII in addressing sexual harassment of employees.

5. **§ 106.30, 106.45(b)(3)**

As an organization that strongly advocates for increased local control and flexibility we are shocked by the change in the proposed regulation that would take away the ability of districts to initiate an investigation because the sexual misconduct occurred online or off-campus. It is common practice for district administrators to discipline students for off-campus conduct whether it’s the use of drugs or alcohol at a house party, cyberbullying, hazing, physical assault, etc. What may start in school often spills over into student life at home, in the community, and online. Conversely, something originating on a weeknight or on a weekend—in person or online—will often spillover into the school day and school environment. While monitoring and taking steps to address these activities can be burdensome district policies have been built around doing so. The way we read this regulation, if a student is *sexually* assaulted over the weekend at a friend’s house—instead of, for example, *physically* assaulted at that same home—the school cannot investigate the assault simply because it is sexual in nature. This would unduly tie the hands of school leaders who believe every child deserves a safe and healthy learning environment. Superintendents understand that student relationships continue outside the school and need the flexibility to continue to address harassment that happens outside of school grounds. Why limit how districts can respond to sexual harassment that occurs outside of an education program or activity, when our districts are already responding to other forms of misconduct that occur outside an education program or activity when it impacts a student’s ability to feel safe and learn? What these proposed rules would do is make schools vulnerable to litigation by students rightfully claiming that they are being treated differently based on sex because schools would be forbidden to investigate sexual harassment, but not other forms of harassment that are not sexual. These rules will tie our hands not only in how we protect our students, but in how we mitigate any potential litigation.

⁹ *Meritor*, 477 US at 476, 477 (citing *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998)).

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The Department notes that if conduct occurs off campus the district may still process the complaint under a different conduct code, but not Title IX. This alternative to its required dismissals for Title IX investigations is confusing and impractical. The proposed regulations offer no guidance or safe harbor for schools to offer parallel sexual harassment proceedings that do not comply with the detailed and burdensome procedural requirements set out in the proposed rule. Districts that did so would be forced to contend with respondents' complaints that the school had failed to comply with the requirements set out in the proposed regulation and thus violated respondents' rights.

6. § 106.45(b)(6)

AASA is also opposed to adding a new, specific administrative option such as mediation for resolving Title IX allegations and investigations. Given the age of our students and need to frequently engage with parents, district administrators already have many informal measures they can and do deploy to ensure the parties understand what an investigation means and what consequences can occur if an investigation takes place that is legitimate or unfounded. None of these informal options currently preclude a student from pursuing a formal investigation. We do not need any more tools at our disposal, particularly those that would potentially be subject to additional federal guidance or legal guidelines when the current options we use are adequate.

In conclusion, AASA asks that you do not move forward with this regulation as it will have a harmful impact on the ability to fairly and appropriately address Title IX allegations and investigations in the K-12 context. If you have any additional questions, please reach out to AASA's Advocacy Director, Sasha Pudelski, at spudelski@aasa.org.

Sincerely,



Sasha Pudelski
Advocacy Director
AASA, The School Superintendents Association