

January 28, 2019

Brittany Bull
U.S. Department of Education
400 Maryland Avenue S.W., Room 6E310
Washington, D.C. 20202

**Re: Docket ID ED-2018-OCR-0064
Office for Civil Rights, Department of Education
Title IX of the Education Amendments of 1972 NPRM**

Dear Ms. Bull:

The member institutions of the Vermont State Colleges System (“VSCS”) hereby submit the following comments for consideration by the Department of Education’s Office for Civil Rights with respect to the proposed Title IX regulations. The member institutions of the VSCS are Castleton University, Community College of Vermont, Northern Vermont University, and Vermont Technical College. Per the Department’s instructions, the VSCS has organized its comments by the specific section or sections of the proposed regulations.

Part 106—Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

§ 106.6 Effect of other requirements and preservation of rights.

(f) Title VII of the Civil Rights Act of 1964.

Comment: It is unclear whether the proposed regulations cover only student victims who are sexually harassed by other students and institutional employees. If the proposed regulations do not cover employee-on-employee, student-on-employee, or third party-on-employee sexual harassment, there will be added compliance costs to develop Title IX sexual harassment policies and procedures, separate and apart from existing institutional sexual harassment policies, including development costs, training costs, and administrative costs. In addition, having multiple sexual harassment/sexual assault policies is likely to cause confusion to complainants and respondents alike, as well as create obstacles to reporting alleged violations.

§ 106.44 Recipient's response to sexual harassment

(b) Specific circumstances

Comment: Sub-section 2 states that “[w]hen a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint.” This full sweep of this language is unclear. Does the subsequent language in sub-section 4 permit a Title IX Coordinator to file or pursue a formal complaint in other circumstances? For example, if a victim of sexual harassment chooses not to file a formal written complaint or not to continue a formal investigation process, may the Title IX Coordinator step in if the Coordinator finds that the allegations, if true, would pose a threat to the safety and well-being of the victim and/or others in the campus community?

§ 106.44 Recipient's response to sexual harassment

(e) Definitions

Comment: In sub-section (1), the proposed regulations narrow the definition of *sexual harassment*. In the preamble, the Department states “the text of Title IX prohibits only discrimination that has the effect of denying access to the recipient’s educational programs or activities. Accordingly, Title IX does not prohibit sex-based misconduct that does not rise to that level of severity.” See p. 21. It would be helpful if the Department could expand on this statement to make clear whether a recipient may continue to prohibit sexual misconduct that does not meet the proposed narrower definition of Title IX sexual harassment and whether, in doing so, the recipient may implement grievance procedures that differ from those set forth in § 106.45.

Comment: In sub-section (2), the proposed regulations define *complainant*. The proposed definition does not appear to permit anyone to submit a complaint on the victim’s behalf, such as a parent or legal guardian. What if a complainant is a minor, or is too traumatized or injured to submit a formal written complaint, or suffers from a disability that impedes the complainant’s ability to submit a formal written complaint? Can others submit a complaint on the complainant’s behalf? Does the Title IX Coordinator have flexibility to assist a complainant with preparing a formal written complaint?

Comment: Sub-section (4) defines *supportive measures* as “non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant and respondent before or after the filing of a formal complaint or where no formal complaint has been filed.” The VSCS supports the flexibility permitted by the proposed “reasonably available” language and without mandating that particular supportive measures be provided.

Comment: In sub-section (5), the proposed regulations define *formal complaint*. See comment on sub-section (2) above regarding the ability of others to file a formal complaint on behalf of a complainant.

§ 106.45 Grievance procedures for formal complaints of sexual harassment

(b) Grievance procedures

(1) Basic requirements for grievance procedures

General Comment: The VSCS supports the requirement that complainants and respondents be treated equitably.

Comment: In sub-section (vi), the proposed regulation requires that the “range of possible sanctions and remedies” that the recipient may implement be described. The VSCS recommends that recipients be permitted to state, for example, “suspension of varying lengths” rather than having to itemize every possible length of a suspension.

Comment: In sub-section (vii), the proposed regulation requires that “the standard of evidence to be used to determine responsibility” be described. The VSCS recommends that recipients be permitted to choose the applicable standard rather than having the regulations dictate a single standard for all recipients. If the Department chooses to impose a standard of evidence, the VSCS would advocate that the applicable standard be the preponderance of the evidence standard. See Directed Question No. 6.

(3) Investigations of a formal complaint.

Comment: The proposed regulation states: “If the conduct alleged by the complainant would not constitute sexual harassment as defined in section 106.44(e) even if proved or did not occur within the recipient’s program or activity, the recipient must dismiss the formal complaint with regard to that conduct.” It is

unclear what is meant by “did not occur within the recipient’s program or activity.” For example, would a sexual assault of a student by another student at an off-campus apartment, not owned or controlled by the recipient, be considered as not occurring within the recipient’s program or activity, even though the impact of such assault could adversely affect the ability of the victim to continue to meaningfully access the recipient’s educational programs or activities? Furthermore, assuming that the alleged sexual harassment, if proven, would not meet the narrower proposed definition of Title IX sexual harassment, is it the Department’s contention that a recipient could not investigate such conduct at all? (*i.e.*, even outside of the Title IX investigation process). Such an outcome would have a significant adverse impact on the ability of recipients to protect students’ access to and participation in educational programs and activities free from discrimination, as required by Title IX.

Comments: In sub-section (vii), the proposed regulation requires that “[f]or institutions of higher education, the recipient’s grievance procedure must provide for a live hearing.” The VSCS strongly opposes the requirement for a live hearing. The process required by sub-sections (i) through (v) and elsewhere in the proposed regulations are more than adequate to protect the due process rights of respondents in an internal administrative proceeding. These investigations are not criminal in nature and respondents are not entitled to the full panoply of due process protections provided to criminal defendants. The due process protections otherwise provided for in the proposed regulations are largely fair, reasonable and appropriate. However, requiring a live hearing, on top of all of the other requirements, provides no meaningful additional due process protection for respondents but will deter victims from filing formal complaints and will significantly increase a recipient’s costs and administrative burden in adjudicating formal complaints. The existing due process protections are sufficient to ensure that a finding of responsibility is adequately supported by the facts. Requiring a live hearing will have a chilling effect on the willingness of victims of sexual harassment/sexual assault to come forward and file a formal complaint without ensuring additional due process protections for respondents. Even without a live hearing, the investigative process is long and can deter victims from reporting. Adding the requirement of a live hearing seems designed to deter victims from participating in the process.

Permitting cross-examination, even if not conducted by the respondent, could be unnecessarily traumatic for complainants and would be unlikely to provide respondents with further due process protections. Moreover, the requirement that cross-examination be conducted by a party's advisor will likely result in considerable inequity. Respondents are far more likely to hire lawyers to serve as their advisors than complainants, which will likely result in an imbalance in expertise and ability to conduct—and defend—a meaningful cross-examination, as well as deterring employees, family and friends from serving as a complainant's advisor. In addition, requiring recipients to provide advisors aligned with the parties to conduct cross-examination if a party does not have an advisor present at the live hearing will impose a significant additional administrative burden and financial cost on recipients. The need to provide the technology to allow the parties to be in different rooms during cross-examination, while being able to see and hear the party asking/answering questions simultaneously would also impose a further cost on recipients.

The proposed regulation requires that the decision-maker explain to a party's advisor asking cross-examination questions any decision to exclude questions as not relevant. Again, if the advisors are lawyers, expecting a lay decision-maker to make evidentiary rulings on the fly in the midst of a live hearing when confronted by one, if not two, lawyers seems unrealistic, impractical, and unfair. Even experienced trial court judges typically sustain or overrule objections, without offering detailed explanations, during trial.

Finally, the proposed regulation prohibits a decision-maker from relying on any statement by a party or a witness if the party or witness does not submit to cross-examination at the hearing. This is highly problematic. A party has no ability to subpoena a key witness to appear at the hearing. A witness who was interviewed and participated in the investigation may have since graduated, moved across the country, decided not to participate further, or be unavailable for any number of other reasons. To ignore such witnesses' prior statements to the investigator because they are unable or unwilling to attend a live hearing will likely lead to absurd and unfair results.

The VSCS strongly opposes the proposed requirement that a recipient's grievance procedure must provide for a live hearing.

(4) *Determination regarding responsibility.*

Comment: In sub-section (i), the proposed regulation requires that the recipient apply either the preponderance of evidence standard or the clear and convincing evidence standard in reaching its determination on responsibility. As noted above, the VSCS recommends that recipients be permitted to choose either standard, without limitation, and that, if the Department were to impose a single standard, it should be the preponderance of the evidence standard. *See Directed Question No. 6.*

Directed Question No. 3 – Applicability of the rule to employees.

The Department seeks the public's perspective on whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider.

Response: The vast majority of the VSCS's employees are covered by collective bargaining agreements. The proposed grievance procedures are incompatible in several respects with Vermont's State Employees Labor Relations Act governing these employees and their existing collective bargaining agreements. In particular, employees who are subject to discipline for engaging in sexual harassment, sexual assault, or sexual misconduct and who grieve such discipline already receive a *de novo* hearing before the Vermont Labor Relations Board as the final step in the grievance process. This includes the right to conduct discovery, subpoena witnesses, cross-examine witnesses, *et cetera*. Requiring a live hearing as part of the administrative adjudication of a formal complaint in cases involving employee-respondents would be unnecessarily duplicative and burdensome.

Directed Question No. 5 – Individuals with disabilities.

The Department seeks comments from the public on whether the proposed rule adequately takes into account issues related to the needs of students and employees with disabilities who are a party in a sex discrimination complaint.

Response: It is not unusual for parties to sexual harassment/sexual assault complaints to identify as individuals with disabilities. The requirement of a live

hearing would create significant additional challenges in providing individuals with disabilities equal access to the adjudication process.

Directed Question No. 6 – Standard of Evidence.

The Department seeks comments on whether it would be desirable to require a uniform standard of evidence for all Title IX cases rather than give recipients the option to choose a standard.

Response: As noted above, the VSCS recommends that recipients be given leeway to choose the applicable standard of evidence, without limitations, but that, if the Department were to impose a uniform standard, it should be the more common preponderance of evidence standard, given the potential penalties. This would be consistent with the standard of proof applicable in a civil case, alleging sexual harassment or assault and battery. Imposing the higher “clear and convincing evidence” standard is unnecessary and may deter complainants from reporting incidents of sexual harassment.

Directed Question No. 9 – Technology needed to grant requests for parties to be in separate rooms at live hearings.

The Department seeks comments on whether institutions would likely incur new costs associated with this requirement.

Response: Some of the member institutions and/or academic centers of the member institutions of the VSCS would likely incur significant new costs if this requirement were to be implemented as proposed.

Dated this 28th day of January, 2019, in Montpelier, Vermont.

SUBMITTED ON BEHALF OF THE
VERMONT STATE COLLEGES SYSTEM

A handwritten signature in black ink that reads "Jeb Spaulding". The signature is written in a cursive style with a large, sweeping flourish at the end.

By: Jeb Spaulding, Chancellor