



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK

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Secretary Betsy DeVos
c/o Brittany Bull
United States Department of Education
400 Maryland Avenue, SW
Room 6E310
Washington, DC 20202

Docket ID ED-2018-OCR-0064

Dear Secretary DeVos:

Please accept this letter on behalf of the New York State Education Department (“NYSED”) as a formal comment pursuant to the request for public comment on the United States Department of Education’s proposed rulemaking related to Title IX of the Education Amendments of 1972 (“Title IX”) as published in the Federal Register on November 29, 2018.

Congress enacted Title IX both to prohibit the use of federal resources to support discriminatory practices in education programs, and to provide individual citizens effective protection against such discriminatory practices. See Cannon v. University of Chicago, 441 U.S. 677, 704 (1979). It is essential that any implementing regulations do not frustrate the legislative intent of Title IX.

NYSED is concerned that the proposed rulemaking will have the opposite effect by discouraging the reporting of incidents of sexual harassment in elementary and secondary schools and institutions of higher education. For instance, section 106.30 narrows the definition of “sexual harassment” to “unwelcome conduct that is so *severe, pervasive and objectively offensive* that it effectively denies a person equal access to the school’s education program or activity” (emphasis added). The Department believes this definition is unduly restrictive and will provide students/employees with less protection than what is currently afforded. In addition, the proposed amendments to section 106.45 requiring live cross-examination in higher education settings may also be traumatizing and deter students from reporting sexual misconduct.

NYSED is also concerned with the definitions set forth in section 106.30 which limit the reporting of sexual harassment to a Title IX Coordinator or any official who has authority to institute corrective measures on behalf of the recipient, or for student-on-student contact in an elementary or secondary education setting, to a teacher. This is much too restrictive. NYSED believes these restrictions will have a chilling effect on the reporting of sexual harassment in

these settings. In the context of an elementary or secondary school, teachers, administrators and student support service professionals generally work as a team to support students educational and social-emotional needs and children have varying levels of comfort and relationships with different adults/educators within the school building. For instance, a student may feel more comfortable reporting sexual harassment to their school counselor or building principal or to a residential advisor or dormitory resident. NYSED believes this restriction is against the intent of Title IX, by reducing the number of incidents reported in these settings.

NYSED also believes that the purpose of Title IX is to provide individual citizens effective protection against discriminatory practices in education programs. As written, the proposed regulations raise the standard for evidence and may have the effect of constraining an educational institution's ability to address sexual harassment. For instance, the proposed regulation only requires a school to respond when the school has actual knowledge of sexual harassment that occurred within the school's own education program or activity. As a result, schools would no longer have to respond to off-campus complaints of sexual harassment and would only have to respond if they had actual knowledge of the complaint. Moreover, section 100.44 of the proposed rulemaking would only hold a school liable when it is "deliberately indifferent" to known sexual harassment, meaning its response is "clearly unreasonable in light of known circumstances". NYSED believes this standard does not provide citizens and vulnerable students with effective protection against discriminatory practices and thwarts the intent of Title IX.

NYSED is further concerned that the proposed rulemaking would result in bifurcated systems for reporting, investigating and resolving employee and student disciplinary matters involving the same incident. Section 106.45 of the proposed rulemaking creates a structure wherein complaints of sexual harassment, as narrowly defined in the proposed rulemaking, will be required to be addressed through a formal grievance process described in the rulemaking. In many instances, the same incident may involve both sexual harassment, as defined in the proposed rulemaking, and, for example, bullying/harassment under a school district or higher education institution's code of conduct, which may result in two different disciplinary proceedings and penalties for the same incident. Creating multiple disciplinary systems raises serious concerns in both the higher education and elementary and secondary education arenas. NYSED is concerned that having a bifurcated system of resolving such complaints, including the available appeals, will frustrate the purpose of Title IX by establishing different standards and procedures for different forms of prohibited discrimination for the same incident; and will be unduly burdensome for victims, schools and institutions of higher learning.

As written, the proposed rulemaking also raises serious concerns for protecting the privacy of both complainants and respondents. Specifically, the provisions of section 106.45(b)(3)(iii) prohibit an educational institution from restricting "the ability of either party to discuss the allegations under investigation." NYSED believes that this provision will compromise the privacy of both the complainant and respondent.

Lastly, NYSED is concerned that the proposed regulations do not expressly contemplate elementary and secondary educational institutions and the differences between those institutions

and institutions of higher learning both in structure and populations in a number of places and therefore has concerns about implementation in elementary and secondary educational settings.

Thank you for the opportunity to submit comments on the proposed rulemaking. NYSED is committed to ensuring equal access to educational programs within the State of New York and hopes to work together to achieve the common goal set forth by Congress upon enactment of Title IX to provide protection for citizens from discriminatory practices in educational settings.

Sincerely,



MaryEllen Elia
Commissioner

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