



1615 Duke Street | Alexandria, VA 22314
Phone: 703.528.0700 | Fax: 703.841.1543
www.aasa.org

September 9, 2022

Catherine Lhamon
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: ED Docket No. ED-2022-OCR-XXXX, RIN 1870-AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

Dear Assistant Secretary Lhamon:

On behalf of AASA, The School Superintendents Association, representing 13,000 school district administrators across the United States, we write to comment on the Department's proposed Title IX regulations.

Background

In 2019, we submitted comments to the Department of Education in response to the Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance opposing the regulatory framework for Title IX as well as the detailed procedural steps proposed for addressing sexual harassment and assault. At the time we wrote, "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." While several of our specific concerns, such as a mandated live hearing, were removed from the final regulations, we still believe the regulatory approach taken by the Trump Administration compromised the integrity of the 2001 Title IX guidance and led to considerable burden, confusion and operational problems for school superintendents.

In 2021, we wrote to the Department of Education asking for the 2020 regulations to be rescinded and replaced with nonbinding guidance for K–12 schools, technical assistance, and best practices to ensure the fair, prompt, and equitable resolution of reports of sexual harassment and other sex discrimination. We stated that "our most significant concern [with the regulation] stems from the inability of district and school administrators to swiftly remove students from harmful educational environments because of paperwork, evidence, and notice requirements in the regulation."

As we reflect on yet another regulatory framework for Title IX in a span of less than 3 years, we are deeply concerned by the expansiveness of the new regulation and the unfunded mandates it places on districts to comply with the revised regulations. While we appreciate the cost burden estimates undertaken by the Department, we do not think they accurately reflect the real cost to districts for annual training. If every employee must be trained on how to address sex discrimination, the scope of conduct that constitutes sex discrimination, and all applicable notification and information requirements, those annual costs are totally borne by the LEA. This is in addition to the training required by Title IX coordinators, investigators,

decisionmakers, and other persons who are responsible for implementing more robust Title IX procedures as well as the duty to coordinate with IEP team and Section 504 teams for any relevant Title IX issues.

While the Department does not believe these new training requirements would meaningfully change the overall annual training burden for districts, we vehemently disagree. The scope of the Title IX regulation coupled with new definitions and changing processes will require extensive training at the LEA level. Furthermore, the politicized nature of Title IX complaints and investigations adds heightened pressures on districts to ensure compliance with federal law and to avoid inaccurate interpretations of the regulations. Therefore, to assume “a de minimis effect” on the time burden for districts to train personnel given the expansive scope of the regulation, demonstrates a complete misread of school operational practices. We urge OCR, since it has stated it will not change the training requirements for LEAs, to provide all LEAs with significantly more time to do implement key components of the regulations and to ensure small districts have at a minimum of nine months to implement the regulations before they are enforced.

For this regulation to have any chance of implementation success, the Department must commit significant resources to technical assistance at the K-12 level. Specifically, the Department should proactively ensure its regional centers are equipped to provide numerous in-person and virtual training opportunities for district staff and Title IX coordinators. In addition, there should be a channel that Title IX coordinators can access at the regional centers to request information about how to handle a potential or pending Title IX complaint and to ensure they are abiding by the regulatory processes. The Department should also develop and disseminate template Title IX model policies, handbooks, and training materials that districts could utilize or reference.

AASA Strongly Supports Proposed Changes to the 2020 Regulations

Despite the overarching issues mentioned above, we are very supportive of many of the changes the Department has proposed to the regulation. First and foremost, AASA is glad to see the Department's understanding that sex discrimination includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. AASA believes each and every student in our buildings should feel they are in a safe and healthy learning environment.

We also appreciate the clarity that sex-based discrimination, harassment or assault that occurs off-campus can be treated the same as any other discriminatory or disciplinary issues that occur off-campus that the LEA asserts jurisdiction over. There should be alignment in how an LEA treats disciplinary issues of a sexual nature when compared to all other disciplinary issues the district oversees whether they occur on-campus, off-campus or online.

There are a variety of process changes in the proposed regulation that we support:

- We support the flexibility in the regulation for schools to conduct “prompt” investigations and have reasonable timeframes for investigating sex-based discrimination especially as district activities can be delayed due to concurrent law enforcement investigations. We would oppose any further narrowing or more prescriptive definitions in the regulations around time frames.
- Given the ages of the K-12 students we educate, we also appreciate the flexibility for a complaint to be made in a variety of ways, including through conversation and in writing, without requiring a signature. We also support the reduction in the number of requirements that must be in the written determination and the notification processes. We support the flexibility that K-12 institutions could notify, in writing or orally, the outcome of the Title IX complaint as well as their determination as to whether sex discrimination occurred. We also support the narrowed appeals process in the proposed regulation.

- Because of the staffing challenges the regulation creates, we greatly appreciate the ability to designate some of the Title IX coordinator's duties to other assigned staff as needed. These building-level coordinators could carry out some of the Title IX Coordinator's duties, such as providing training or ensuring that grievance procedures are administered correctly in that school building.
- We support the elimination of the two separate ten-day review periods during the investigation process and the review and response to directly related evidence before the investigation report is finalized or decisions are made. This critical change will enable districts to investigate and start the process of resolving Title IX complaints in a few days rather than weeks. This is a critical update to the regulations that will enable district administrators to respond much more quickly to Title IX complaints.
- We also support the Administration's view that the preponderance of evidence is the standard of proof for complaints of sex discrimination that would best promote compliance with Title IX because it ensures that when a decisionmaker determines, based on evidence, that it is more likely than not that sex discrimination occurred in its program or activity, the district can take sufficient steps to deter the respondent from engaging in similar conduct and prevent future such violations.
- We strongly support changes that increase the likelihood of informal resolutions to Title IX violations at the elementary and secondary level. In particular, for our elementary-aged students, the situations that trigger Title IX violations for this age group require quick and expedited resolution processes for the parties and the LEA. It is frequently more appropriate for district personnel to explore informal resolutions without a complaint and/or to use informal resolutions at the earliest point possible if a Title IX violation arises.
- AASA supports the Department's inclusion of the proposed revision to § 106.45(b)(5) that requires recipients to take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures. As an organization that promotes increased flexibility and local control for schools, we commend the Department's recognition that reasonable efforts to prevent unauthorized disclosure may vary on a factual basis and request that specific determinations of what constitutes reasonable steps be left to the discretion of K-12 schools. However, AASA urges the Department to clarify for elementary and secondary schools the difference between the above provision (proposed § 106.45(b)(5)) and the requirement for postsecondary institutions in the proposed § 106.46(e)(6)(iii) to take reasonable steps to prevent and address any unauthorized disclosures by the parties and their advisors of information and evidence obtained through the sex-based harassment grievance procedures. It would be helpful to clarify what, if any, differentiating factors apply to the responsibilities of K-12 institutions vs postsecondary institutions when it comes to privacy protection.

In conclusion, we do appreciate the positive steps taken by the Department to provide critically needed flexibility for school districts when compared to the 2020 regulatory framework but would have strongly preferred a non-regulatory approach to addressing Title IX claims and investigations at the K-12 level and urge the Department to give districts the time, resources and robust technical assistance necessary to ensure compliance with the new regulations.

Sincerely,



Sasha Pudelski
Director of Advocacy
AASA, The School Superintendents Association