

January 28, 2019

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

Docket ID: ED-2018-OCR-0064

Dear Ms. Bull:

Thank you for the opportunity to comment on the U.S. Department of Education's (ED) proposed regulations for Title IX of the Education Amendments of 1972. The Wisconsin Department of Public Instruction (WDPI) is dedicated to the belief that all children should feel safe and valued at school. Harassment should never be accepted or tolerated, whether we are talking about the students or adults in our schools. With that in mind, we have concerns about these regulations and their impact on children and recommend that ED establish a different approach when applying a rule to K-12 students, given both child development and school processes. Our responses to directed questions follow below.

1. *Elementary and Secondary Application - What parts of the NPRM [Notice of Proposed Rulemaking] may be unworkable for elementary and secondary schools and should ED direct agencies to take into account age and developmental level of the parties involved?*
This rule does not take into account the different school processes and developmental ages that are present in a K-12 setting. States regulate K-12 education significantly more than they do institutions of higher education. In that regard, consideration must be given to the very different processes contained in state statutes that schools must follow in regards to pupil nondiscrimination, bullying, harassment, suspension, and expulsion.

For instance, Wisconsin State Statutes 120.13 details suspension and expulsion processes under state law. State law outlines the due process available, which does not align to these regulations. As a result, either federal regulations are meant to override state statutory requirements or school districts will be required to follow two different processes for the same incident. We would see this as potentially harmful to the student and difficult, at best, for the school district to navigate.

The proposed definition of sexual harassment needing to rise to the level of being "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program activity," should be revisited. It fails to encompass a broad

range of conduct that should never be acceptable in a school setting. Schools must be responsible for addressing instances of harassment long before those behaviors become severe and pervasive enough to meet the high bar set forth in the NPRM. Moreover, this standard appears to be even higher than that of a hostile work environment under employment law. Under that standard, the work environment is severe or pervasive, meaning a single act may trigger action, and does not contain the additional criteria of being objectively offensive.

In a K-12 setting it is also possible for there to be multiple investigations stemming from one complaint. Those investigations could include those conducted by the school itself, law enforcement, social services, and even the Office of Civil Rights (OCR). These competing investigations can result in conflicting timelines and direction.

2. *Applicability of provisions based on the age of the parties and institution type. Whether certain parts of the NPRM such as cross-examination or exchange of written questions should be based on whether the parties are over the age of 18 rather than the parties being in an elementary and secondary school.*

As stated earlier, concerns with the proposed rule are both about development and school processes.

These regulations are not developmentally or age appropriate when applied to elementary and secondary schools. School districts are serving students beginning at age three under the Individuals with Disabilities Education Act through the age of 21. This needs to be acknowledged. Moreover, some children may be victims of assault and harassment outside of school. Processes should not further traumatize children.

The requirement for cross-examination stands out as inappropriate when applied to minors. Rape shield protections are not adequate for the age of students involved in a K-12 setting and district staff are not trained attorneys. This lack of training could result in harm to either party or the case itself, especially considering the potential young age of the complainant and the need to manage power dynamics and trauma. Moreover, there are no protections listed ensuring the student has guidance or counsel if a parent or legal guardian is not available to be present. In addition, it could lead to a fear of reporting, and consequently, prevent school staff from being able to address potentially harmful situations.

Given the age of those involved, supportive services should be broadly applicable to those offered to the student accused of certain behaviors as well as the complainant. This is not dissimilar from best practices around bullying, where schools are not only addressing the behavior, but also working to educate the student to correct future behaviors in a developmentally appropriate fashion.

Additionally, the proposed regulations under § 106.44 (b)(2) would appear to require the Title IX Coordinator to file a formal complaint in light of multiple complainants of conduct. Is the rule meant to require that formal complaints be filed without parental consent or

knowledge? What about instances where the complaints are related to a student who may not understand their behavior?

3. *Employee applicability. Whether there are parts of the NPRM that are unworkable in the context of sexual harassment by employees and whether there are unique aspects to such conduct by employees versus students.*

In addition to aforementioned comments regarding student developmental age, we would reiterate that the evidence standard should not be the same across the board for students and staff as it applies to all policies. It should also be noted that students are required to be in school under compulsory attendance laws. Victims should not have to make accommodations to their educational program.

4. *Training adequacy. Whether the existing NPRM requirements will ensure adequate training is provided to Title IX coordinators, investigators, and those making complaint determinations.*

Teachers play an important role in creating a safe and supportive environment at school. If teachers know of student on student harassment or assault they should be reporting it for follow up by the appropriate staff or authorities. Conversely, it is important to know who is included in the definition of a teacher and the implications for both training and, more importantly, children. Young children may not know the difference between licensed and unlicensed adults.

Teachers and district staff are not trained attorneys and rule provisions asking them to operate in that manner are inappropriate.

5. *Individuals with disabilities. Whether the proposed rule adequately takes into account issues related to the needs of students and employees with disabilities.*

We have the same concern with students with disabilities as we do any other student in the K-12 setting. Because of their age and vulnerability, they should not be subjected to cross-examination. We want to make sure that all students feel comfortable in reporting sexual harassment, and that no barriers are put in place that prevents them from doing so. School districts should have the flexibility to investigate allegations of sexual harassment, and impose disciplinary consequences in accordance with school district policies, as well as to determine what additional supports and services may be necessary to ensure a safe and welcoming environment for all students.

An incident under Title IX may also trigger a need for an individualized education plan team to meet to discuss behavior modifications. The interplay between IDEA requirements and Title IX needs to be taken into consideration.

6. *Standard of evidence. Whether there should be a uniform standard of evidence rather than leaving the option for agencies to choose a standard, and if so, then what should be the standard, and, if agencies retain the option to select the standard of evidence, should they be required to use the same standard for cases in which a similar disciplinary sanction may be*

imposed.

Given the age of the students involved in a K-12 setting, we believe a preponderance of evidence standard, or a burden-shifting framework where direct evidence may be hard to find, is more appropriate. However, requiring schools to apply this same standard across all other conduct code violations would not be appropriate.

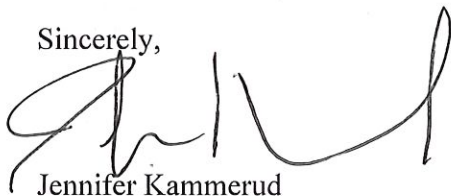
7. *Evidence Directly Related to Allegations. Whether the concept of being able to review evidence that is "directly related to the allegations" needs further definition in regulation.* According to the notice, "The "directly related to the allegations" language stems from requirements in FERPA, 20 U.S. Code 1232g(a)(4)(A)(i)." The language from this section of the U.S. Code states, "(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which- (i) contain information directly related to a student." This is a broad definition that should be narrowly construed in relation to the allegation.

8. *Three-year record retention. Whether the time period of three years to retain records is appropriate.* Different states may have different record retention policies for elementary and secondary schools. We would recommend schools keep records based on their state's student record retention policies. If there are none than they should be kept for a minimum number of years as laid out in rule.

While not part of the directed questions, two other issues merit attention. One is the likely increase in legal fees. We expect legal fees to increase substantially for school districts given the manner in which processes are laid out in the proposed rule. The other is the complete absence of any mention of the rights of transgender students. It is important these students be protected under provisions of Title IX.

Thank you again for the opportunity to comment. If you have any questions, please contact me at jennifer.kammerud@dpi.wi.gov.

Sincerely,



Jennifer Kammerud
Policy Initiatives Advisor