



January 24, 2019

Submitted via U.S. Mail and www.regulations.gov

Brittany Bull c/o Secretary Betsy DeVos
U.S. Department of Education
400 Maryland Avenue, SW, 6E310
Washington, DC 20202

Kenneth Marcus
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Ms. Bull, Assistant Secretary Marcus and Secretary DeVos,

The U.S. Department of Education (DOE)'s proposed changes to Title IX policy will significantly affect how schools, including K-12 public schools, handle cases of discrimination based on sex, including sexual harassment and sexual violence.

The Berkeley Unified School District (BUSD) is deeply committed to preventing and addressing sex-based discrimination, including all forms of sexual misconduct. We are an urban school district comprised of approximately 10,000 students with great diversity in terms of race, religion, ethnicity, and socio-economic status. No matter what the outcome of this rulemaking process, we will continue to emphasize best practices and ensure that our policies and resolution processes are open, equitable, and protect the rights of all involved parties.

Partly in response to effective advocacy on the part of our students, BUSD has made a concerted effort in the past few years both to prevent sexual harassment and to respond to it appropriately when it occurs. We have hired a Title IX Coordinator, revamped our District complaint processes, implemented professional development for our employees, and invested in preventive training programs for staff and students. We have also invested in restorative justice staff and programming in our secondary schools, in an effort to focus on redressing the harms caused by, among other things, unwelcome sexual conduct. We have long rejected the notion that respect for victims of sexual misconduct is inconsistent with a commitment to providing due process for students accused of doing harm, and we are proud of our efforts to uphold both values in our policies and practices. Despite the advances we have made in these areas, BUSD is aware that we have more work to do to ensure that all students feel safe and supported in our schools.

In light of our commitment to addressing this issue, and our community's deep involvement in it, we object to the time frame under which comments on this process are to be



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accepted by the DOE. The majority of the public comment period coincides with a time when students, families and educators are preoccupied with winter break and final exams. In December, our Superintendent wrote to Secretary DeVos, urging her to extend the timeline for public comment. To date, the deadline has not been extended.

BUSD is nevertheless submitting the following comments on the proposed rules. Our comments below are directed at the aspects of the proposed rules that most directly affect K-12 school districts.

We wish to emphasize that, while the proposed changes have received more attention in the higher education context, they will apply with equal effect in K-12 districts. The children we serve are different in many ways from the college students who will be affected by these revisions. The vast majority of our students have not reached the age of majority, and we now know that their brains are still developing in significant ways. College students - young adults but adults nonetheless - may be able to navigate bureaucratic systems, but many children cannot. We urge the DOE to keep that distinction in mind as you consider our comments. Our overriding priority is to **keep students** safe and in school, where they can learn and thrive. We fear that some of the proposed revisions will frustrate that mission, because they may make it more difficult for K-12 districts to foster safe and supportive learning environments.

The comments below do not necessarily comprise the entirety of the comments or concerns that members of our Board of Education or District staff have regarding the proposed rules. We expect that individual members of our community will also submit comments on the proposed rules.

These comments were adopted and approved by the Berkeley Unified School District Board of Education unanimously on January 23, 2019.

1. Addressing Harassment That Occurs Off-Campus or Online

Rule summary (§§ 106.30, 106.45(b)(3)): Schools “must dismiss” a formal complaint if the alleged conduct “did not occur within the [school’s] program or activity.”

Currently, Title IX requires schools to provide student survivors reasonable accommodations needed to stay in school and have equal access to educational opportunities, regardless of their decision to undergo a school investigation or the status of that investigation. This is true regardless of whether the incident occurred on-campus or during a school-related activity. Accommodations can include medical services, counseling, safety plans, and/or academic support services, such as tutoring.

The proposed rules would only require that schools be held responsible for investigating incidents reported to have taken place “within its education program or activity,” which may



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restrict a response to complaints of off-campus incidents, such as those that occur at off-campus student parties. It may also create confusion about whether schools are required to respond to social media/online harassment, such as the sharing of explicit photos or demeaning or racist messages. For example, if a middle school student is being sexually harassed by her classmates on Instagram or Snapchat, this could limit the school's obligation to investigate the complaint.

Under California Education Code, school districts are limited in their ability to discipline students for conduct that occurs off-campus and is unconnected to a school activity. Ca. Ed Code. section 48900(s). But we believe that it is critical that school districts maintain the tools to address all instances of harassment that affect students in school, even if the district's disciplinary options are limited by other laws.

Sexual harassment that happens off campus and outside of school activity is no less traumatic than similar harassment that happens on campus. The impact on the student's education can be the same or worse, especially if the student survivor is forced to see their harasser regularly at school.

The proposed regulations should continue to recognize that, even if not all disciplinary options are available, schools are responsible for addressing sexual harassment that occurs outside of a school program or activity, to avoid additional incidents, acts of retaliation, and to maintain safe and equitable learning environments.

2. Definition of Harassment

Rule summary (§§ 106.30, 106.45(b)(3)): Schools "must dismiss" a formal complaint if it alleges conduct that is not (i) an employee requesting sexual favors in return for good grades or other educational benefits; (ii) "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"; or (iii) "sexual assault."

The Supreme Court and current Title IX guidance define "sexual harassment" as "unwelcome conduct of a sexual nature," requiring a response by the school before it effectively forces a student out of class or school. Narrowing the definition may require that schools only respond to repeated conduct, or a well-established pattern of conduct. This definition fails to take into account the age and developmental level and capacities of K-12 students, who are unlikely to report a second instance of sexual harassment, particularly if their first report was ignored because the reported behavior had not yet risen to the "severe and pervasive" standard.

The proposed regulation should maintain the current definition of "sexual harassment" to prevent the dismissal of students' traumatic experiences and to ensure that it does not make it harder for reporting parties to prove their victimization.



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3. Notice

 Rule summary (§§ 106.44(a), 106.30): Schools would not be required to address sexual harassment unless there was “actual knowledge” of the harassment by (i) a Title IX coordinator; (ii) a K-12 teacher (but only for student-on-student harassment, not employee-on-student harassment); or (iii) an official who has “the authority to institute corrective measures.”

It is already the case that many sexual harassment and sexual assault victims do not report because they do not know how or to whom to report. The proposed rule sets a higher bar than under the existing rules, under which a District is required to intervene if they “reasonably” should have known about a violation. Under the proposed rule, schools will be faulted only if they are “deliberately indifferent” to known sexual harassment.

With the proposed changes, districts would also be given authority to be turn away from incidents that are reported to responsible adults working with youth. This is because the proposed rules also change who a student can report their sexual assault to, and what that person’s ability to pursue action would look like. A survivor will likely talk to someone they trust and believe will support them.

Right now, if a student goes to their playground supervisor or coach, that employee is responsible for reporting it to the school and/or Title IX Coordinator. The proposed rules, however, require that allegations are reported only to officials who have the authority to take “corrective action,” such as the school’s or district’s Title IX Coordinator, or for students in grades K-12, to a teacher. Requiring students to speak to someone they may not have met or feel comfortable with means that many cases will likely go unreported.

The proposed regulations should adopt the same “responsible adult” standard for responsibility of any K-12 district employee to relay a report in cases of disclosed or observed sexual harassment of a student to a designated authority, consistent with their obligation to report disclosed or observed abuse or neglect of a student to the local child protective services agency.

Thank you for the opportunity to submit comments on the NPRM.

Sincerely,

Donald Evans, Ed. D, Superintendent
On behalf of the Berkeley Unified School District Board of Education