



Office of the President

1700 Van Hise Hall
1220 Linden Drive
Madison, Wisconsin 53706-1559
(608) 262-2321 Phone
(608) 262-3985 Fax

e-mail: tthompson@uwsa.edu
website: www.wisconsin.edu/

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Office for Civil Rights
U.S. Department of Education

The University of Wisconsin System's Comments Regarding the U.S. Department of Education's Announcement of Public Hearing on Title IX of the Education Amendments of 1972

I write on behalf of the University of Wisconsin System (UW System) to provide feedback on the U.S. Department of Education's (ED) regulations relating to Title IX. These changes have caused confusion and sowed doubt about the fairness of Title IX procedures among the University of Wisconsin's students, faculty, staff, and administrators as well as program participants.

More stability in ED's Title IX guidance will help educational institutions improve their response efforts and build trust with their communities. UW System believes such stability will be facilitated by consensus building around the broad goals mentioned above and less focus on procedural minutiae.

Some aspects of ED's August 2020 Title IX regulations assisted colleges and universities to clarify their procedures for combating sexual harassment and sexual violence. However, parts of these Title IX regulations cause concern, including 1) the extremely complex and prescriptive requirements for disciplinary procedures; 2) the live cross-examination requirement; 3) the narrowed definition of "sexual harassment"; and 4) application of the hearing requirements for higher education institutions to youth programming offered by such institutions. On behalf of the UW System, I appreciate the opportunity to participate in the formal notice and comment process.

We believe that institutions of higher education have benefitted from the implementation of Title IX. Title IX legislation has prohibited sex-based discrimination in an effort to ensure that all students have access and equality in education. We continuously promote these ideals so that our students may be free from a hostile environment to seek the best quality education. This is our goal as a public educational institution. Therefore, we ask that any additional rulemaking is mindful of the fundamental premise that colleges and universities are

educational institutions, not arms of or alternatives to the criminal justice system. We urge ED to be conscious of this distinction. We also caution against a "one-size-fits-all" approach. Requirements on institutions should reflect the differences among institutions and students.

Introduction

The UW System is one of the largest systems of public higher education in the country, serving more than 170,000 students each year and employing approximately 39,000 faculty and staff statewide. The UW System is made up of 13 four-year universities, including our two doctoral campuses at UW-Madison and UW-Milwaukee, and 13 two-year branch campuses affiliated with seven of the four-year institutions.

The UW System takes all allegations of sexual assault and harassment seriously. As research suggests, such claims are not brought forward frivolously. Due to various reasons, cases of sexual harassment and sexual violence are often underreported. We want those on our campuses to come forward. This underscores the importance of developing rules and systems that are trusted as well as not overburdensome so those who come forward with claims know they will be properly investigated, and respondents know their rights will be respected. We are also concerned about the mental health and well-being of all our students and we cannot look at how to best implement Title IX rules without ensuring that we take into consideration the toll that sexual violence, harassment, and the ensuing disciplinary process has on all students.

The UW System is continuously working to improve our policies and procedures to ensure a respectful and safe campus climate. Over the past several years, the UW System engaged in substantial work to harmonize policies and procedures with the expectations set by the ED's April 4, 2011, "Dear Colleague Letter" and April 29, 2014, "Questions and Answers on Title IX and Sexual Violence," as well as the procedural due process rights the UW System, as a public institution, must provide. The UW System worked fervently to implement the Title IX regulations effective August 14, 2020, through extensive administrative rulemaking within our own state legislature and policy updates. The UW System's student and employee disciplinary procedures are part of the Wisconsin Administrative Code, so revising those procedures requires engagement with state government through the formal rulemaking process. The requirements of the Title IX regulations have been implemented by all the UW institutions.

Below, I share the UW System comments pertaining to the Title IX regulations, which highlight areas of concern. In each section, we offer recommendations to help improve the new Title IX regulations.

Areas of Concern

Extremely complex and prescriptive procedural requirements: College and university disciplinary proceedings are not criminal trials, do not carry criminal penalties, and

intentionally avoid incorporating criminal procedures to reinforce the distinction between campus disciplinary proceedings and criminal trials. While the UW System believes it should play a role in investigating sexual assault and sexual harassment cases and disciplining appropriate parties, we remain concerned with certain requirements that blur the lines between the disciplinary and criminal proceedings. We urge ED to be conscious of this distinction as it considers additional rulemaking to define educational institutions' role in such cases. We believe the essence of Title IX is to ensure the safety of all our students, and to ensure that those that come forward are afforded protections and support and the removal of any hostile element that are preventing them from receiving their education. We also believe the significance of those that are accused must be afforded certain protections and supports as well.

The new Title IX regulations do not prohibit the UW System institutions from addressing sexual misconduct off campus, they only constrain the jurisdictional responsibility of our Title IX compliance. If the alleged conduct meets all of the elements necessary in order for it to be covered by Title IX, then copious detailed procedural requirements must be met, including: specific language in notification documents, acceptance or dismissal for a formal complaint based on the specific parameters of the Title IX regulations (which may be a separate assessment than application of campus policy), assignment of specific staff for specific duties (including new staffing requirements for university provided advisors, application of overly broad hearsay rules, a prescriptive appeal process (which includes specific bases for appeal that may now differ from appeal bases in other categories of misconduct), etc. These go far beyond what is constitutionally required, are confusing to our students, shift effort from promptly investigating and responding to allegations of sexual harassment and sexual violence to ensuring that numerous procedural requirements are completed, and create fodder for parties or their representatives to derail investigations and proceedings by focusing on procedural minutiae instead of the alleged misconduct. These extremely complex procedures do not apply to any other type of student or employee misconduct. Moreover, little to no process is required to discipline or dismiss at-will employees and non-student program participants for other types of misconduct.

Colleges and universities should be permitted to provide respondents and complainants similar rights and university appropriate process regardless of whether it meets the somewhat arbitrary requirements of the current Title IX rules, including exact geographical locations. Using the same procedures for all misconduct regardless of its exact context or where it physically occurs is less administratively burdensome, and it creates clear expectations for our campus communities.

Cross-examination requirement: Of particular concern is the current bar to considering any information provided by a witness unless that witness appears at hearing and submits to cross examination. The UW System does not have the legal authority to compel complainants or witnesses to appear at disciplinary proceedings, and the Title IX regulations prevent colleges and universities from exercising such authority. U.S. Supreme Court decisions require universities to provide students notice and an opportunity to be heard before imposing discipline. The UW System relies upon impartial investigators to gather exculpatory

and inculpatory evidence during the investigation, which provides information that hearing panels use to evaluate credibility. Sometimes complainants, respondents, and witnesses agree to testify at the hearing but if they do not, under the new Title IX regulations, the university is not able to present that evidence at the live hearing. This limits the ability of colleges and universities to address the important issues of sexual harassment and sexual assault when otherwise credible evidence is available to make informed decisions.

Instead, the UW System recommends allowing the hearing committee to rely on the investigative report, witness statements included in the investigative report, and/or available witness testimony to make decisions. It is within the hearing committee's discretion to weigh the credibility of any witness statement included in the investigative report or in available witness testimony.

For elementary and secondary schools, ED recognizes that posing written questions to parties and witnesses, through the investigator, after receiving the investigatory report provides an effective opportunity for cross-examination and meets due process requirements. Similarly, for colleges and universities, allowing indirect cross-examination, through written questions via a hearing committee or otherwise, would provide the ability to challenge witness testimony while still encouraging witnesses to participate without fear of potentially intimidating cross-examination by a party's attorney. In balancing the goals of full participation and a fair and thorough process, we think this balance tips in favor of allowing indirect cross-examination.

Narrowed definition of "sexual harassment": The new Title IX regulations adopted a narrower definition of sexual harassment than previously utilized by ED and narrower than is utilized for Title VII enforcement. The UW System continues to address sexual harassment that falls under the jurisdiction of Title VII and outside of Title IX. The different definitions of sexual harassment cause confusion in implementation and create different standards when addressing similar conduct in the employment context. The UW System recommends adopting the Title VII definition of sexual harassment for purposes of Title IX in order to create consistent standard of behavior required of employees.

Minors participating in youth programs and high school students enrolled in college or university courses: The UW System institutions engage in a plethora of youth programming that occurs on campus or is sponsored by a university, including day care centers, and allows high school students to enroll in college courses. The new Title IX regulations require that any allegation of Title IX misconduct be addressed through the same hearing process as outlined for students, employees, and faculty. This includes the requirement of cross-examination.

For elementary and secondary schools, ED recognized that the requirement of a live hearing with cross-examination is not appropriate as a means to address allegations involving minors. The UW System recommends that in any additional rulemaking, ED is conscious of this and allows colleges and universities to implement a similar process as outlined for elementary and secondary schools in matters involving minors in youth programming and

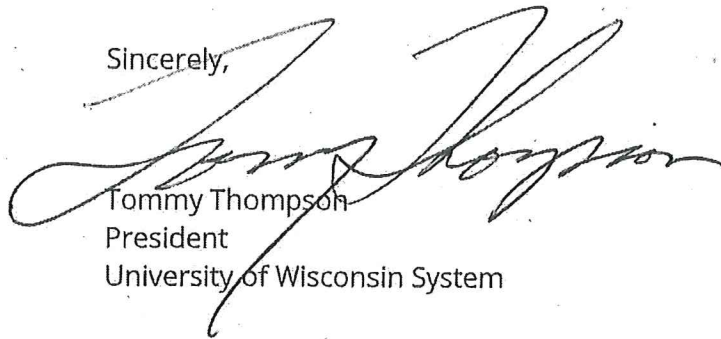
high school enrollees.

Conclusion

As stated above, the UW System believes parts of the new regulations provide some clarity and improve upon our current procedures. The UW System takes seriously its obligations to provide support to students, employees, and faculty who allege sexual assault and harassment as well as robust due process protections to students and employees accused of misconduct. We believe that we are in a time where mental health is of utmost importance. We commend the ED for using the rulemaking process to address the critical issue of sexual harassment and assault and holding the June public hearing so that the public can offer critiques and recommendations to the new Title IX regulations.

Thank you for the opportunity to comment on the new Title IX regulations.

Sincerely,

A large, stylized handwritten signature in black ink, which appears to read "Tommy Thompson". The signature is written over the typed name and title.

Tommy Thompson
President
University of Wisconsin System

