

January 27, 2019

Kenneth L. Marcus
Assistant Secretary for Civil Rights
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 Mr. Marcus:

I am writing on behalf of the American Association of University Women's (AAUW), Longmont, CO Branch, in response to the Department of Education's Notice of Proposed Rulemaking to express our strong opposition to the proposed rules relating to sexual harassment as published in the Federal Register on November 29, 2018.

AAUW's mission statement is "To advance gender equity for women and girls through research, education and advocacy."

As members of this group we are very supportive of having strong Title IX protections to ensure that both women and girls can forward their education in environments free from sexual harassment. Harassment should never force the end of anyone's education. As a result, we are concerned that the protections in place be clearly defined, consistent and most importantly, fair to everyone involved. The proposed changes to Title IX as written do not meet these standards and should be reworked with such standards in mind. Our specific suggestions for improving the most egregious sections of the proposal, in priority order, can be found below.

1. Definition of Harassment and Duty to Respond - Sections 106.30 and 106.45(b)(3)

The proposed changes allow schools to ignore a harassment complaint until it becomes severe and denies a student educational opportunities.

As proposed, these sections:

- Fail to clearly define key words and phrases such as "severe, pervasive, objectively offensive" and "denies access to educational opportunities" which makes harassment impossible to evaluate;
- May limit reporting of sexual harassment situations; and
- Create a situation where, by the time a situation meets some ill-defined but significantly high standard, it may be too late, causing such results as being disqualified from a college, failing to graduate, or being unable to apply for a class.

Alternatively,

- Develop clear, detailed definitions of harassment including how it creates a hostile environment, and exactly how it might interfere or limit a student's ability to participate in or benefit from a school's program.
- Consider using and possibly expanding the current Title IX definition of "unwelcome conduct of a sexual nature".

The key is to provide a robust definition that is clearly understood by everyone.

2. Due Process and Standard of Proof - Section 106.45(b)(4)(i)

The proposed changes basically give a school the choice of using either the "preponderance of the evidence" standard in evaluating sexual harassment complaints or the more demanding "clear and convincing evidence" standard.

As proposed, this section:

- Does not provide for equitable treatment of both the accuser and the accused. It, in fact, favors the accused.

Alternatively,

- Schools should be required to use the "preponderance of the evidence" standard only for all types of complaints but particularly for sexual harassment complaints due to their nature. It is fair to both parties and consistent with civil court proceeding.

3. Requirement of Notice - Sections 106.44(1), 106.30

The proposed changes allow a school to take no action in the case of sexual harassment if the complaint is not made to a Title IX coordinator, a K-12 teacher or an official who has the authority to institute corrective measures.

As proposed, these sections:

- Do not take into account the trauma of sexual harassment and make it more difficult for victims to come forward with a complaint; and
- May inhibit a non-designated adult in a position of trust and authority from speaking up on the behalf of a potential victim.

We do not find fault with the directive to designate an individual or group of individuals as having the responsibility for accepting sexual harassment complaints at each school.

To that end, it is imperative that the law include the requirements for each school or institution covered by this legislation to:

- Designate an adequate number of appropriate individuals at each school and endow them with the responsibility to take and process sexual harassment complaints with "the authority to take corrective measures".
- Train the designated individual in how to deal with potential victims as well as how to process the complaints; and
- Widely train students and parents, at every grade level, and all employees on what constitutes sexual harassment, the process for making complaints, including who to go to, and the process for their resolution.

4. Duty to Respond and Off-Campus/Online - Sections 106.30, 106.45(b)(3)

The proposed changes would require schools to dismiss a formal complaint if the alleged conduct occurred outside the school's programs or activities.

As written, these sections:

- May force a student to see their harasser on campus every day, with no recourse;
- Allow schools to ignore harassment that occurs outside of a school activity, including off campus and online, even though they are integral to the school environment;
- Ignore the facts that many cases of sexual harassment occur at sites off campus, including overseas sites, that are related to schools and school activities;
- Ignore the fact that that most college students don't live in dorms and that many encounters happen in apartments located off campus; and

- Conflict with Supreme Court Title IX precedent, as well as Clery Act requirements.

Alternatively,

- Schools should be required to provide services to students who are harassed or assaulted off-campus, online or in a study abroad program when the harassment or violence interferes with their education.
- Schools should also be required to discipline perpetrators who harass or assault students off-campus when the school exercises substantial control over them (i.e. they are also a student of the institution).

5. Due Process and Cross Examination - Sections 106.45(b)(3)(vi)-(vii)

The proposed changes would require survivors, in college and graduate school, to submit to live cross-examination by the accused's advisor of choice, in a live hearing.

As written, these sections support a process that:

- Could jeopardize the rights and safety of student survivors;
- Would be traumatic and intimidating for survivors and could escalate or perpetuate a hostile environment; and
- Are likely to discourage survivors of sexual assault from coming forward.

Alternatively:

- Instead of live cross-examination, which has major risks associated with it, a much better approach would be to use the submission of written questions to the hearing panel in all cases. Following such an approach strikes a balance between the need to test the strength of the evidence and the risk of re-traumatizing a complainant. All parties involved need to be afforded the same due process, including cross-examination.

In conclusion:

We consider Title IX to be critical federal legislation. In many cases, the proposed changes are dangerous and do not improve the current legislation in a complete or balanced manner. Our bottom line recommendation is that any revisions should include a process for handling complaints that:

- Is clearly defined and completely fair to all parties involved;
- Uses terms and phrases that are unambiguous so there is no confusion;
- Makes schools / organizations / businesses, as well as individuals, responsible for their environment and the actions that take place there;
- Does not just shift the reporting and action to other law enforcement agencies, and
- Brings consistency to how issues / complaints are handled from one entity to another.

Thank you for your attention to our concerns. Please do not hesitate to contact me to provide further information.

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Representing AAUW Longmont
American Association of University Women

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