



January 30, 2019

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U.S. Department of Education

400 Maryland Avenue SW, Room 6E310

Washington, DC 20202

Re: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Solicitation of Comment [Docket ID ED-2018-OCR-0064-0001]

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed Title IX regulations entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.”

The University of Miami is a private research university with more than 17,000 students from around the world. The University comprises 11 schools and colleges serving undergraduate and graduate students in more than 180 majors and programs. As an inclusive community, the University has established programs aimed at the prevention of and response to sexual misconduct, and we continually assess and update our policies and practices to ensure we conduct a prompt and equitable investigation into all reports of sexual misconduct.

The University has reviewed the Notice of Proposed Rulemaking officially published in the Federal Register and we are greatly concerned with several specific proposed provisions. We comment on the regulations that have implications on a private institution’s responsibility under Title IX.

- I. **Proposed 34 C.F.R. Section 106.30** defines “sexual harassment” actionable under Title IX to mean any of three types of behavior: (1) A school employee conditioning an educational benefit or service upon a person’s participation in unwelcome sexual conduct (often called quid pro quo harassment); or (2) 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 (3) Sexual assault as that crime is defined in the Clery Act regulations.

COMMENTS:

During college, 62% of women and 61% of men experience sexual harassment;¹ and more than 1 in 5 women and nearly 1 in 18 men are sexually assaulted.² The definition of sexual harassment proposed is unnecessarily narrow and would undermine Title IX’s overarching objective to eliminate sex discrimination in education programs and activities. First, the proposed regulation would cause students to not report the incident until the harassment escalates, thereby potentially having a more profound impact on the educational pursuits of students who have experienced harassment. Second, the proposed definition applies a burden to determine what constitutes “severe and pervasive” before an investigation is even conducted. This will have a ‘chilling effect’ on students who may not report because their allegation/facts (in their mind) do not meet this higher standard for an investigation. This “legal standard” of sexual harassment is too restrictive a standard for launching an investigation.

In order to deal with sexual harassment, colleges and universities should be able to act when there is any type of behavior that threatens a student’s well-being or feeling of safety because such threats, by their very nature, impact the student’s participation in the recipient’s education program or activity. Overall, 47.7% of students indicated that they have been the victims of sexual harassment and more than half of female undergraduates (61.9%) reported being sexually harassed. The most common behavior cited by the students was making inappropriate comments about their body, appearance, or sexual behavior (37.7%); followed by making sexual remarks, or insulting or offensive jokes or stories (29.5%).³ This is consistent with the University of Miami’s 2018 Campus Sexual Misconduct Survey of Undergraduate

¹ Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005)

² E.g., David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASSOCIATION OF AMERICAN UNIVERSITIES 13-14 (Sept. 2015)

³ *Report on the AAU Climate Survey on Sexual Assault and Sexual Misconduct* (September 2015)

Students who responded that they had experiences that interfered with academic or professional performance, limited their ability to participate in an academic program, or created an intimidating, hostile, or offensive social, academic, or work environment; 53% experienced inappropriate comments about their or someone's appearance or attractiveness; 45% experienced offensive sexist remarks or jokes; and 37% experienced harassing or degrading comments about sexual orientation or gender expression.

This proposed narrow definition effectively would communicate to those alleging sexual harassment that their experience may no longer be worthy of investigation. This proposed regulation would, in effect, allow institutions to ignore issues presented by students regarding sexual harassment because their complaints do not rise to the level of requiring an investigation. This proposed definition would discourage vulnerable students from communicating about these matters and would be psychologically harmful such that they would be forced to endure prolonged harassment, rather than being able to take action as soon as the problem begins.

According to the Justice Department, over 80% of college students do not formally report their victimization to school authorities. According to the National Sexual Violence Resource Center⁴, two thirds of college students experience unwanted and unwelcome behavior, including 20-25% of college women and 15% of college men who are victims of forced sex during their time in college.⁵ The proposed definition would result in more than two thirds of those who experience unwelcome sexual behavior without recourse. This new definition would prevent students from reporting harassment until considered severe or until the behavior is shown to have occurred repeatedly.

The Department of Education should retain the current definition of sexual harassment which allows recipients to intervene in cases of harassment at the onset and prevent these cases from escalating.

⁴ Hill, C., & Silva, E. (2005). Drawing the line: Sexual harassment on campus. Retrieved from the American Association of University Women: <http://www.aauw.org/files/2013/02/drawing-the-line-sexual-harassment-on-campus.pdf>

⁵ Cullen, F., Fisher, B., & Turner, M., The sexual victimization of college women (NCJ 182369). (2000). Retrieved from the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice: <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>

- II. **Proposed 34 C.F.R. Section 106.44(a)** states that a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

COMMENTS:

According to the Department's summary of the proposed regulations, a recipient's obligation to respond is triggered only when certain conditions are met. First, the school must have actual knowledge of sexual harassment allegations. Second, the alleged harassment must involve conduct that occurred within the school's own program or activity. Third, the alleged harassment must have been perpetrated against a person in the United States.

While the proposed regulations focus on a recipient having actual knowledge of sexual harassment, the regulations ignore that recipients are employers as well. In turn, when considering the recipients' obligations related to sexual harassment of their employees, recipients are liable for both actual and constructive knowledge of sexual harassment. In other words, recipients, as employers, can be found liable for sexual harassment where they knew or should have known about the conduct and failed to stop it. With the implementation of the proposed regulation, recipients would be required to apply two standards governing the same type of conduct solely because of the individual's status. Employees would be able to argue both actual and constructive knowledge under Title VII, while students would only have Title IX protections where the recipient (who is also an employer) has actual knowledge.

With respect to the second trigger, the Department's proposed rules ignore the reality that sexual harassment that happens off campus and outside of a school activity is no less traumatic than on-campus harassment and often within the legal authority of schools to resolve. The negative impact on the student's education is typically the same if they are forced to see their harasser regularly at school, continuing the effects of the harassment, assault, or discrimination.

Under proposed 34 C.F.R. Section 106.44(a), the number of incidents investigated would decrease because this proposed section requires that an incident of harassment or assault both involve a member of the university community *and* take place on university property for it to be investigated by the institution. This proposed regulation does not take into account the realities of student life on or in proximity to a college or university. For example, students may participate in Greek life at a college or university and such organizations and student participation may be governed by a code of conduct for school. However, under the proposed regulation, fraternity houses that are located off-campus may not necessarily be subject to the jurisdiction of the school in cases involving allegations of sexual misconduct. It should be noted that students are far more likely to experience sexual assault if they are in a sorority (nearly 1.5x more likely) or fraternity (nearly 3 times more likely). Other examples of off-campus locations where sexual harassment can occur can be seen in: off-campus housing proximal to the university where high-density student tenancy can create a sense of community similar to on-campus housing; online harassment; off-campus sports arenas utilized by the University; and restaurants, bars, venues, and other public spaces proximal to the university and associated with a culture of usage and community by students.

In addition to the aforementioned, Title IX should protect individuals enrolled at a U.S. institution and studying abroad if that program is organized and wholly controlled by that institution. In these types of programs, the student is required to travel abroad in order to pursue an educational program or activity offered by the school. The school's faculty and staff who work in the program are employees of that university. By removing Title IX protections from these types of study abroad programs, equal access to education will be denied to potential victims. Moreover, the Clery Act (as amended by the reauthorization of the Violence Against Women Act of 1994) defines campus parameters as on-campus buildings and property, public property within or immediately adjacent to the campus, and non-campus buildings and property owned or controlled by the institution and used for educational purposes, or those that are owned or controlled by a student organization officially recognized by the institution for any acts of violence, including sexual; and the new regulations would be in direct conflict with those laws. The proposed regulations would therefore be inconsistent with a private institution's obligations under the Clery Act.

Regardless of where students experience sexual harassment or misconduct, the school should be required to provide the necessary support for the student when the violence and trauma have interfered with their educational experience, including their residential and social environments that correlate to their education. Student perpetrators should be held accountable regardless of whether the misconduct occurred on or off campus.

- III. **Proposed 34 C.F.R. section 106.44(e) (6)** defines “actual knowledge” as notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.

COMMENTS:

Sexual assault is already very difficult to discuss. Studies find that the percentage of sexual harassment reports are generally low; with only 20% of females students reporting sexual violence to law enforcement, 5%-28% generally reporting to campus officials and law enforcement, and about 95% of campus rapes not reported at all (Everfi, 2018).

It is unreasonable and an unfair burden on students to know which university personnel have “the authority to institute corrective measures” and to feel safe enough trusting those same personnel enough to disclose incidents to them. Once students find the courage to speak with a school employee that they trust, schools should have an obligation to respond. It should not be the responsibility of the student to discern to which school official they should report allegations of sexual harassment. Increasing the number of professionals on campus who can address sexual harassment incidents, will provide students with increased access to report, or simply the opportunity to speak with someone they trust to discuss their incident experience.

The 2001 Guidance requires schools to address student-on-student harassment if *any employee* “knew, or in the exercise of reasonable care should have known” about the harassment. In the context of employee-on-student harassment, the Guidance requires schools to address harassment “whether or not the [school] has ‘notice’ of the harassment.” The 2001 Guidance recognized the particular harms of students being preyed on by others and students’ vulnerability

to pressure from others to remain silent, and accordingly acknowledged schools' heightened responsibilities to address harassment by their employees

Any student who has experienced sexual harassment or abuse should be able to choose which staff/faculty member they feel they are most comfortable with discussing this difficult issue and should have the reasonable expectation that the staff/faculty member will take measures to report their disclosure to help keep them safe from their harasser, assailant, or abuser.

The college or university should have the discretion to investigate all allegations that come to its attention, whether through informal complaints, to an employee not designated as an official, anonymous complaint systems, or a pattern of rumors. This proposed rule would effectively eliminate all anonymous channels for complaint including a hotline system. It is unclear how this provision intersects with Clery and VAWA, where allegations of violent sexual assaults cannot be ignored.

- IV. Proposed 34 C.F.R. Section 106.45(b) (4) (i)** states that in reaching a determination regarding responsibility, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

COMMENTS:

Under the "preponderance of evidence" standard, the burden of proof is met when there is greater than a 50 percent chance that the claim is true. "Clear and convincing" sets a higher standard of evidence; the recipient must be convinced that the contention is highly probable.

It is desirable to have a uniform standard of evidence for all Title IX cases and that standard should be the “preponderance of evidence” standard. Allowing or mandating the “clear and convincing” standard has the potential to severely discourage survivors of sexual assault from reporting their incident. The “clear and convincing” standard is used in the criminal context as a standard of evidence. Schools are not criminal justice systems and should not be treated as such. Title IX investigations and their resultant sanctions are internal and have limited legal ramifications, the standard of evidence should therefore not be as extreme.

Notably, the stated reason in support of applying the “clear and convincing” standard is that it would decrease the likelihood that a false accusation would result in a sanction for the respondent. However, it is unlikely that a false accusation could even meet the “preponderance of evidence” standard, and the harm caused by tightening the evidentiary requirements far outweighs the harm caused by applying a less stringent standard.

In studies of sexual assault reporting nationwide, it has consistently been found that only 2 – 7% of reported sexual assaults are false accusations (National Sexual Violence Resource Center, 2012). Opponents of the current policy frequently cite the lives ruined by false accusations, elevating the issue to the same level as unreported and unresolved cases of sexual assault. In reality, our current nationwide system fails to convict 93 – 98% of rapists (RAINN, 2017). These statistics make clear the significant disparity in justice between sexual assault survivors and accused perpetrators.

The “preponderance of the evidence” standard is more consistent with existing civil rights law than the “clear and convincing” standard. There is ample precedent for use of the “preponderance of the evidence” standard in sex discrimination claims, including those brought under Title IX. As campus disciplinary proceedings evaluate sexual harassment as a civil rights violation, it would be inappropriate for a school to apply a higher evidentiary standard when investigating or adjudicating sex discrimination than the standard used in federal civil rights litigation.

Furthermore, “preponderance of the evidence” standard affords equal weight to the needs and interests of both complainants and respondents. Preponderance of the evidence is applicable to cases where an erroneous finding would cause equal harm to either party. In this sense, it gives equal weight to the interests of students who report sexual harassment and students who are accused by treating the consequences of an erroneous finding as equally harmful. By treating the consequences of an erroneous finding in favor of a respondent as worse than the consequences of an erroneous finding in favor of a complainant, the clear and convincing evidence standard privileges the interests of students accused of sexual harassment and places a greater burden on complainants.

According to the American Civil Liberties Union, “[b]y raising the standard of proof and limiting the definition of sexual harassment and assault, the proposed rule will harm already-vulnerable students. Sexual assault and harassment can happen to anyone, though it disproportionately harms female students, students of color, students with disabilities, and LGBTQ students.” In fact, in the U.S., one in three women experienced some form of contact sexual violence in their lifetime and almost half (49.5%) of multiracial women and over 45% of American Indian/Alaska Native women were subjected to some form of contact sexual violence in their lifetime.

- V. Proposed 34 C.F.R. Section 106.45(b) (3) (vii):** requires institutions to provide a live hearing, and to allow the parties’ advisors to cross-examine the other party and witnesses. If a party does not have an advisor at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination.

COMMENTS:

We recognize that cross-examinations are an integral part of our nation’s legal system afforded in courts of law. However, conduct review processes at colleges and universities are not courts of law, but rather private, conduct hearings.

Currently, students are afforded an advisor of their choice, including legal counsel; however, that individual is not permitted to cross-examine a complainant, respondent, or witness. In a court of

law, legal counsel who are conducting a live cross-examination are kept “in check” by a judge who oversees the process and can stop a certain line of questioning if inappropriate and hold individuals in contempt. That is not the same at a college or university where the hearing board is generally coordinated by a senior student affairs professional who is not operating in the capacity of a jurist.

Another complication arises with regards to this proposed section in that universities are required to provide a party with an advisor if they do not have one. This would require the universities to provide a party with an attorney if the opposing side has an attorney. Although the proposed regulations would allow the complainant and respondent to be in separate rooms while questioned via conference call or video systems, it does not protect that individual from being re-victimized by the questioning or falsely accused in such a manner that could be deemed prejudicial to the results of the proceedings. To that end, we would ask that the DOE strongly reconsider its position on how this provision is applied and afford colleges and universities with more latitude for implementing this rule including, but not limited to, allowing questions to be submitted in writing in advance and only asked if approved by the Title IX Coordinator (or his/her designee) and/or allowing the questions to be asked only by the designated hearing officer or to be directed by the parties involved through the hearing officers.

To ask a complainant to submit to cross-examination by a respondent’s advisor is unnecessary, will deter complainants from entering the formal hearing process, and create the potential for an inequitable hearing process. We agree that questioning is an important part of the hearing process; however, these are all things that could still be achieved through a live hearing where questions are submitted to and asked through the hearing officers.

Simply writing into Title IX guidance that questions about the complainant’s sexual behavior or history are not allowed and expecting that to be sufficient in protecting complainants during a live cross-examination conducted by an advisor who would most likely be an attorney, does not prevent it from occurring. The only way to guarantee that questioning remains compliant to the rape shield protections of Federal Rule of Evidence 412 is to keep the responsibility of questioning in the hands of the impartial governing body, the college or university.

Not only is cross-examination unnecessary, it may result in fewer reports of an issue that is already drastically underreported. Studies by organizations such as the Department of Justice, the Association of American Universities, and the American Civil Liberties Union report that, on the high end, sexual harassment is reported in just above one-quarter of cases, while the lowest rates are a mere 5% (Everfi, 2018). Any regulation or action that may lower these rates anymore is a grave injustice to survivors of sexual assault and/or harassment.

When the concern of access to hired counsel is considered along with statistics on what characteristics increase risk of experiencing sexual violence, class-based inequality in the Title IX process becomes more evident. Considering this, one can conclude that it is more likely than not that if a complainant in a Title IX investigation is of a disadvantaged socioeconomic status as compared to the respondent, the complainant is likely not going to have the financial means to afford a lawyer. Therefore, a complainant will be especially disadvantaged during the hearing process if cross-examined by the respondent's attorney.

We appreciate the Office of Civil Rights' desire and commitment to create just and responsible guidance for educational institutions to handle Title IX, especially sexual misconduct, incidents. While there are many good proposed sections, the proposed rule is a step backwards in addressing serious issues of sexual harassment. It would severely limit the definition of sexual harassment, forcing students to endure related and escalated levels of abuse before their schools steps in.

It is important for the Department of Education to seriously consider the comments and suggestions from professionals who are on the front line serving students who are involved with Title IX processes, and to make appropriate adjustments to this proposal.

Thank you for the opportunity to comment and your consideration.