



Docket ID: ED-2018-OCR-0064

Submitted via www.regulations.gov

Kenneth L. Marcus
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

RE: Title IX of the Education Amendments of 1972 (34 CFR § 106)

Dear Mr. Marcus:

This letter responds to the Department of Education's Notice of Proposed Rulemaking ("NPRM") for rules that would govern the obligations of educational institutions receiving federal funds ("recipients") to respond to sexual harassment allegations. The NPRM was published in the Federal Register on November 29, 2018.

I am the Chancellor of the California Community Colleges, responsible for giving effect to the policies of the California Community Colleges Board of Governors ("Board"). The Board regulates 73 community college districts and 115 colleges that serve more than 2.1 million students annually. It is the largest and most diverse post-secondary educational institution in the United States. We serve Californians and international students in every region throughout the state. The Chancellor's Office also serves as an appellate body for hundreds of discrimination complaints arising at the college level. This letter is joined by the Los Angeles Community College District, Los Rios Community College District, San Francisco Community College District, El Camino Community College District, and Peralta Community College District.

The proposed rules are deeply concerning. Taken together, they fundamentally alter the threshold for investigating sexual harassment on our campuses to an unreasonable standard, create unnecessary barriers for already traumatized victims, and transform a respondent's presumption of innocence from a shield to a spear. Taken together, they will have a significant chilling effect on sexual harassment victims' ability and willingness to bring forward allegations of sexual harassment. This will make our campuses less safe. The proposed rules will also impose significant financial and logistical burdens on our campuses. The many California community colleges that already have resource



challenges or are located far from cities where expertise is available to implement the proposed rules fully will be disproportionately affected. At the core of these proposed rules is the department's decision to apply selectively the standards developed by courts for the imposition of liability under Title IX to an administrative process that should be focused on creating safe campus environments for students. This approach is unwise, and will undermine the effectiveness of Title IX.

To summarize the proposed rules, a recipient college must respond to allegations of sexual harassment only if the conduct rises to the level of quid pro quo harassment, "serious and pervasive" harassment, or constitutes a crime, and the recipient has "actual knowledge" of the harassment from a victim's report to either the Title IX Coordinator, or to another official "with authority to institute corrective measures." To avoid a violation of Title IX, a recipient is required merely to respond to allegations of sexual harassment in a manner that is not "deliberately indifferent." "Known reports" of sexual harassment must be addressed, but only with non-punitive, non-disciplinary "supportive measures." A recipient's duty to investigate sexual harassment allegations may be triggered under two circumstances: (1) a victim filing a formal written complaint with the recipient's EEO Officer, or an official "with authority to institute corrective measures;" or (2) where the recipient "has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment." When the formal grievance process is triggered, the proposed rules require an investigation, the exchange of evidence, a live hearing with cross-examination, and a written adjudication. Complainants and respondents must be treated "equally" in the formal process, and recipients must provide supportive measures to both, including an "aligned" advisor to conduct cross-examinations during the live hearing. According to the NPRM, a recipient's failure to treat complainants and respondents "equally" could constitute sex discrimination. Under the proposed rules, it is likely that determinations that sexual harassment occurred will require "clear and convincing evidence," a standard significantly higher than the more appropriate "preponderance of the evidence" standard.

Our concerns encompass each of the elements of the proposed rules described above, and are explained in more detail below.

34 CFR § 106.30 – The definition of "sexual harassment" is too narrow.

The proposed rules would allow recipients to ignore sex-based misconduct that could have significant impacts on student safety. They would define sexual harassment to



include: (1) quid pro quo harassment that conditions educational benefits on participation in sexual activity; (2) unwelcome conduct of a sexual nature that is so severe, pervasive, and objectively offensive that it denies equal access to education; and (3) sexual assault. The regulations do not purport to address conduct below these thresholds because “Title IX does not prohibit sex-based misconduct that does not rise to that level of scrutiny.” 83 Fed. Reg. 61466.

The practical effect of this regulation is that state and local governments will impose separate processes to address sexual harassment that falls below the Title IX threshold identified in the proposed rules. This will be inefficient for colleges and confusing for complainants and respondents. Those responsible for implementing sexual harassment policies will often find it difficult or impossible to determine whether sexual misconduct conduct falls above or below the Title IX threshold.

34 CFR § 106.44(a) – The “actual knowledge” requirement is too narrow.

The proposed regulations impose a duty to “respond” to allegations of sexual harassment only when a recipient has “actual” knowledge of sexual harassment. This approach is flawed.

First, the proposed rules do away with imputed knowledge and constructive knowledge that are common to this area of the law, and which motivate campus officials to be vigilant about sexual harassment. The actual knowledge requirement undermines this.

The definition of “actual knowledge” is also unduly restrictive. Actual knowledge of sexual harassment allegations only occurs with notice “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.” A complainant should be able to report sexual harassment to a broad class of officials, who would have a duty to take action. As the NPRM acknowledges, who constitutes an official with “authority to institute corrective measures” is undefined, and will be subject to a fact-intensive inquiry regarding the responsibilities of individual school officials that student complainants would have no knowledge of. 83 Fed. Reg. 61467. The identity of the officials to whom victims may report sexual harassment and expect a response should be certain, and should encompass a broader array of individuals than the proposed rules contemplate.

The consequences of the actual knowledge requirement are predictable. A department within a recipient college could have serious, pervasive sexual harassment known to



members of a department, including a department's leadership. Under the proposed rule, the recipient would not have actual knowledge, and would have no duty to respond. And actual knowledge would not be established by a third-party report of sexual harassment.

Recipients should be required to act when a broader range of school officials receive credible allegations of sexual harassment, regardless of their source. This change is necessary to protect students and faculty members adequately from discriminatory conduct that inhibits their ability to benefit from college educational programs.

34 CFR § 106.44(a) – The “deliberate indifference” standard is too weak.

The proposed rules would fail to incentivize recipients to take strong action to ensure campuses and students are free from sexual harassment. When a recipient has “actual knowledge” of sexual harassment (not merely actual knowledge of an allegation), the proposed rules only require that it must avoid “deliberate indifference” to the report. “Deliberate indifference” is described as a response that would be “clearly unreasonable in light of all the known circumstances.” 83 Fed. Reg. 61468.

The federal government should encourage recipients to strive for more effective responses through stronger rules, not ones that are so elastic they implicitly sanction “looking the other way.” The department's rationale for departing from the current “reasonableness” standard is that the “deliberate indifference” standard is more deferential to local campus disciplinary processes. That rationale does not justify giving license to a host of unreasonable responses that fail adequately to protect campuses and complainants and yet may not rise to the level of “deliberate indifference.”

34 CFR §§ 106.30, 106.45(b)(1)(i), and 34 CFR § 106.45(b)(1)(ix) – The “supportive measures” requirements are unnecessary and expensive.

We support in principle the presumption of innocence for respondents as proposed by 34 CFR § 106.45(b)(1)(iv). However, the department goes beyond this presumption of innocence to establish a concept of “equal treatment” that requires a host of non-disciplinary, non-punitive “supportive measures” to be provided to complainants and respondents alike that will impose expenses upon California community colleges that are not justified. In addition, and perhaps more insidious, the extent to which the rules would require recipients to provide services to accused harassers is unprecedented, belies the department's expressed view that claims of sexual harassment should be



taken seriously, and suggests instead that the department views claims of sexual harassment as unreliable.¹

The proposed rules also limit a recipient's duty to provide supportive measures to complainants who have reported sexual harassment to the Title IX Coordinator, or to another official with authority to institute corrective measures. A report to another college official will not require supportive measures, or any other response.

The department's effort to "level the playing field" between complainants and respondents by requiring equality in the provision of supportive services is blind to the fiscal realities of California community colleges, and the need to prioritize the allocation of scarce resources to the victims of sexual harassment. There may be circumstances where the provision of supportive services to respondents is "appropriate," but the proposed rules create a requirement that is not warranted by our collective experience.

34 CFR § 106.45 – The grievance procedure triggers are insufficient.

A recipient's duty to invoke the grievance process (which includes an investigation) is triggered under only two circumstances: (1) a victim of sexual harassment files a formal written complaint with the recipient's EEO Officer, or an official "with authority to institute corrective measures;" or (2) the recipient "has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment." Under the second circumstance, the EEO Officer is authorized to invoke the grievance process if a complaint has not been filed.

These grievance process triggers are infused with the deficiencies discussed above related to the narrow actual knowledge requirement, the heightened definition of sexual harassment, and the uncertain identity of the official with corrective measure authority. Taken as a whole, we can expect that under this approach, significant

¹ The Proposed rules define "supportive measures" as "non-disciplinary, non-punitive individualized services offered as appropriate, . . . without . . . charge, to the complainant or the respondent." Supportive measures the proposed rules would require complainants and respondents to have equal access to may include "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures." 83 Fed. Reg. 61470.



instances of sexual misconduct that adversely affect campus life will be unreported and uninvestigated.

34 CFR §§ 106.44, 106.45(b)(3)(vii) – The grievance process unduly expensive and will chill reporting of sexual harassment.

The proposed rules establish a grievance process that will be unduly expensive, and more importantly will have a chilling effect on the reporting of sexual harassment.

The proposed rules require that once a complaint gives the recipient actual knowledge of sexual harassment, the grievance process must be followed, through a gauntlet of due process protections for the respondent, to a full adjudication. There may be circumstances where an “off-ramp” would be appropriate. It is not clear that the proposed rules provide one.

Live hearing and cross-examination

The proposed rules require that at least ten days before the hearing, the parties must exchange their evidence. Then the recipient must provide a live hearing with cross-examination of witnesses. A decision maker may not consider the testimony of a party or witness who refuses to be cross-examined.

The proposed rules establish a special process for cross-examination. First, the cross-examination must be conducted by an advisor who is “aligned” with the person on whose behalf the cross-examination is being conducted. Second, the cross-examination of the complainant and the respondent are to be in separate rooms while allowing the other party to view the cross-examination through an audio-video linkage. The cross-examination process will lead to unfair proceedings, chill reporting of sexual harassment, and is unwarranted according to the department’s own rationale for the proposed rules.

The cross-examination requirement is not compatible with the stated purpose of the proposed rules, which are tailored in many ways to address the potential liability of recipients. Relying on *Cannon v. Univ. of Chicago*, 414 U.S. 677, 704 (1979), the department explains that Title IX is “designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner.” 83 Fed. Reg. 61466. This approach underlies many provisions including the “actual knowledge” requirement, and the limited definition of “sexual harassment.” The cross-examination



requirement, however, abandons this rationale. The confrontation inherent in cross-examination is designed to protect parties facing liability—it will not reliably serve the interests of a recipient in avoiding discrimination. A better approach for scrutinizing the parties' testimony, and one more in line with the department's stated concern for protecting against discrimination by recipients, would be to have an objective, trauma-informed decision-maker conduct any needed questioning.

Under this proposed rule, complainants will be required to submit to a trial in order to advance their right to a safe educational environment. While there may be rare instances where this level of process is necessary to separate fact from fiction, it should not be required in every case. This approach tips the balance too far in the direction of intimidating complainants, and will decrease the reporting of sexual misconduct.

Advisors

The proposed rules also require recipients to provide either party an advisor if the party does not have an advisor. This rule is problematic for at least two reasons.

First, it is not clear what level of training an advisor is expected to have. Under the proposed rules, the advisor role may be filled by an attorney retained by the complainant or the respondent. In many cases one party will be able to afford to retain a skilled attorney to conduct the cross-examination, while the other will need to rely upon a less well-trained advisor provided by the recipient. This disparity belies the department's stated objective of ensuring an equitable process.

In addition, the dual advisor requirement presents a significant financial and logistical burden for California community colleges that will likely not have sufficient, trained staff available to fulfill this obligation and so will be required to contract the service at significant expense. Requiring community colleges to hire advisors, in addition to a separate coordinator, investigator, and decision-maker, will create a financial burden that is unsustainable in our system.

Cross-examination technology

The proposed rules require that recipients provide separate rooms with technology to enable parties to simultaneously see and hear answers and questions. This rule would create an undue financial burden for our colleges due to the lack of space and facilities



to comply with this requirement. Further, purchasing the technology to enable cross-examination in different rooms would represent another unnecessary expense.

34 CFR § 106.44(a) and (b)(4) – The jurisdictional limitation will have adverse consequences within the United States

California Community Colleges offer programs abroad in Europe, Asia, and other countries through California Colleges for International Education, a consortium of California community colleges. (See ccieworld.org/index.html, last visited Jan. 18, 2019.) However, the proposed rules do not require recipients to respond when they have actual knowledge of sexual harassment allegations that arise outside the United States—regardless of the nexus those allegations have to recipient educational programs. Setting aside why the department would decline to exercise jurisdiction in this way, this rule will also have domestic consequences. Upon returning, victims may encounter perpetrators on campus, and be denied even supportive measures. A complaint could be dismissed merely because of where the sexual harassment occurred, and the student would have no remedy.

This rule is inadequately protective of students studying abroad.

34 CFR § 106.44(e)(5) – The requirement of a signed complaint is an unnecessarily bureaucratic obstacle.

The proposed rules impose strict requirements on the content of sexual harassment complaints that are unnecessary, unduly burdensome, and will chill the reporting of claims. All formal complaints must be signed and filed with the Title IX Coordinator. The signature requirement is anachronistic and unnecessary in the age of email.

In addition, the complaint must enumerate every allegation, and may not rely upon other documents like a police report or a previous verbal report. This requirement is incompatible with the California community colleges long-held view that sexual harassment victims need not file multiple reports of the same incident to trigger the procedures required by federal and state law. One incident report, whether with law enforcement or a responsible party on campus, will provide sufficient notice to all concerned parties.

The final rule should eliminate these unnecessarily bureaucratic requirements.



34 CFR § 106.45(b)(1)(iii) – The dual-investigator requirement is expensive and unnecessary.

The department claims that the proposed rules will decrease costs for recipients across the country. While it may be true that overall costs of compliance will decline due to the chilling effect the regulations will have on reporting incidents, it is clear that the costs of individual sexual harassment cases will significantly increase, without any expectation of improved results. This approach to cost containment strikes the wrong balance of public interests.

The proposed rules would eliminate the single-investigator model, creating financial and logistical concerns, especially for colleges in rural areas where the availability of expertise is limited. The proposed rules would require community colleges to hire and train a Title IX Coordinator, two investigators, a “decision-maker,” and advisors for both parties when they are unable to afford one. (34 CFR § 106.45(b)(3)(vii).) Recipients will need to be prepared to deploy five separate people to address every sexual harassment complaint. Community colleges often have individuals serving multiple functions in a Title IX matter due to their staffing constraints and limited resources.

The proposed rules should be amended to eliminate the need for multiple investigators, and the requirement to provide support persons for respondents. These changes would ease the financial burden of compliance.

34 CFR § 106.45(b)(4)(i) – The “clear and convincing evidence” standard is inappropriate.

This proposed rules appear to allow colleges to apply either the “preponderance of the evidence” standard that applies in most civil litigation, or the significantly higher “clear and convincing evidence” standard that typically applies in cases challenging administrative decisions, when determining whether a sexual harassment complaint is substantiated.

The effect of the “clear and convincing” evidence standard, particularly in combination with the other obstacles these proposed rules present to complainants, will be to impose a substantial additional burden on sex harassment victims, likely discouraging all but the most determined victims from proceeding with meritorious complaints. The department’s approach should be much more protective of students and campus safety.



34 CFR § 106.45(b)(5) – The appeals provisions are unequitable.

The proposed rules give colleges the discretion to allow both parties to appeal a determination following completion of the hearing process. However, the proposed rules prohibit complainants from appealing the adequacy of the sanction or discipline imposed (or not imposed) upon the respondent. No conditions are imposed upon a respondent's appeal. This approach is not equitable, and undermines the purposes of Title IX, which was intended to restore victims' ability to enjoy and access educational benefits or activities, free from sex discrimination or harassment. However, if a respondent's discipline does not fully restore a complainant's access to education, the complainant should be able to appeal.

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

A handwritten signature in black ink, appearing to read 'EOO', is positioned above the printed name.

Eloy Ortiz Oakley
Chancellor of the California Community Colleges