

New York State Campus Working Group

Concerns with proposed Title IX Regulations 2018

Below is a summary of the *New York State Campus Working Group*'s comments on the new proposed regulations on Title IX now under consideration at U.S. Office on the Management of the Budget (OMB). For context – on September 22, 2017, the U.S. Office on Civil Rights rescinded guidance documents issued under President Obama – the 2011 Dear Colleague Letter and the 2014 Q&A document. They left in place the 2001 guidance put in place under President Bush and issued an interim guidance Q&A document as a “temporary measure” while they wrote more formal regulations. Their draft of the proposed regulations was obtained in September 2018 and can be found here:

Title: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

RIN: 1870-AA14

<https://atixa.org/wordpress/wp-content/uploads/2018/09/Draft-OCR-regulations-September-2018.pdf>

The *NYS Campus Working Group* requested a meeting with OMB and meet with them by phone on October 4, 2018. There were representatives from U.S. Department of Education Office of Civil Rights and Office of General Counsel on the call, as well as staff from OMB and OIRA (Office of Information and Regulatory Affairs).

Presenting for the *New York State Campus Working Group*:

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Overall Themes Noted:

- Conflicts with state and local laws;
- Equity issues – creating processes that treat categories of people unequally;
- Undermining the purpose of Title IX to maintain an educational environment free from sex discrimination and its effects;
- Inaccuracies and mistakes, for example costs and assumptions made without evidence.

(Please note that where applicable, we tried to break our specific issues within each concern into the above themes.)

Specific Concerns about Proposed Title IX Regulations:

1. THE NARROWER DEFINITION OF SEXUAL HARASSMENT

- **Concerns:**

- Equity issue:

- The Court held in Davis v. Monroe County in 1999¹ that “unwelcome sexual advances” can create a “hostile” and “abus[ive]” environment “in violation of Title IX.” The Department issued guidance in 2001, 2010, 2011, and 2014 defining sexual harassment as “unwelcome conduct of a sexual nature.” The proposed regulations define sexual harassment as *“conditioning the provision of an aid, benefit, or service [by the institution of high education] on an individual’s participation in unwelcomed sexual conduct: or unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to [the institution of higher education’s] education program or activity”*.
 - Conflicts with city and state laws (outlined below) will lead to equity issues. For example – the disparity between employees and students. Employees, including student employees, will be held to a different standard under Title VII than students. Campuses will have to figure out if students were acting in the scope of their employment when they engaged in (or experienced) sexual harassment before figuring out which standard applies. If the behavior crossed the timelines between ‘punching in and out’, how would campuses proceed - the more inclusive definition? This would cause confusion, would be potentially costly to campuses, and would lead to inequitable processes.
 - Conflict between how sexual harassment is treated versus other types of harassment and discrimination against protected classes, including based on race, color, or national origin.
 - Challenge bifurcating sexual assault and harassment (e.g. already a challenge with different standards and processes)
 - Schools seek consistency for many reasons, including that students talk. When someone gets hit in the face after someone says the sentence “I hate women, and you’re a woman, so I’m going to hit you in the face.” and someone else gets hit in the face after someone says “I hate people of Asian descent, and you’re Asian, so I’m going to hit you in the face,” why would there be different standard? It doesn’t make sense to students, it appears to prioritize or diminish certain protected classes. This was an issue with the previous guidance as well. The new proposed regulations go too far in the other direction.

- Undermines the purpose of Title IX – to protect right to access education. Education can be impacted regardless of whether or not the unwelcome conduct is *“so severe, pervasive, and objectively offensive that it denies a person access to the recipient’s education program or activity”* [pg. 17 proposed regulations]

¹ <https://supreme.justia.com/cases/federal/us/526/629/>

- Makes it harder for young adults and children to get help for sexual assault than adults
- Chills reporting because students may think their experiences were not serious enough to report. If it happens to one person one time, they may not think it's severe or pervasive enough to report. Combined with the fear of being charged with "bad faith reporting," we'd expect fewer reports.
- There should be a difference between how schools are held accountable in court for money damages and a school's obligation to respond as per OCR.
- **Conflicts with other laws:**
 - NY City and State have new sexual harassment prevention and response laws for the workplace that include higher education institutions. It affects all employees including student employees.
 - NY State has released guidance, a model policy, model training- all show a standard of sexual harassment that is easier to reach than the one in the new proposed regulation. These are very specific requirements in policy and training that contradict what's in the new proposed regulation.
 - We're required to do training by NYC and NY state law for all employees, including student employees, and such training must include the applicable definitions. What kind of message are we saying when we split the definitions of sexual harassment depending on who in our community has been affected? What do we do about student employees?
 - Title VII standard is severe OR pervasive. The new proposed regulations say severe AND pervasive, meanwhile the Interim Q & A (2017) said OR.
 - Compare to other protected classes: Title VI of Civil Rights Act of 1964 and OCR's standards for discrimination and harassment based on race, color, and national origin.²

2. LIMITING SCOPE – OFF CAMPUS

- **Concerns:**
 - Undermining the purpose of Title IX: about access to education – education can be impeded regardless of whether or not the assault happened a block from campus or on-campus.
 - Community/ non-residential colleges will be mainly off the hook for addressing sexual assault.
 - Excludes semester abroad programs organized by high education institutions. (Study shows increasing number of students studying abroad – 2015-2016 academic year showed 4% increase to over 325,000 students and about 10% US graduates.)³
- **Conflicts with other laws:**
 - VAWA amendments to Clery, which requires certain responses, including offering remedies and resources in writing, regardless of where the conduct occurred, and regardless of whether the perpetrator is a member of the campus community.

² <https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201701-religious-disc.pdf>

³ https://www.nafsa.org/Policy_and_Advocacy/Policy_Resources/Policy_Trends_and_Data/Trends_in_US_Study_Aboard/

- Creates confusion, and can make a school liable - as they will be aware of the violence due to Clery reporting requirements, and if they don't do anything under Title IX could be liable as they were on notice.

3. APPEALS

- **Concerns & Conflicts:**

- Inequitable effects: In complying with both Clery, NYS Education Law 129-B (hereafter NYS 129-B), and these guidelines, campuses would splitting off sexual assault from other types of sex discrimination as far as process, including appeals. The VAWA amendments to Clery require equal access to appeal if there is an appeal. NYS 129-B requires that any rights provided to one party must be afforded to the other.
- Further complicated by cross complaints. Consider the scope of appeals - where there are limited bases for appeal, it makes sense to allow appeals by both parties because either party could conceivably come up with new, relevant evidence that wasn't available at the time of a hearing. If there was a procedural error, both parties should be able to raise that and have it resolved. Schools would end up in court anyway for a procedural error if they didn't follow their published procedure, so offering the appeal internally to address that concern would be preferable.
- It's problematic to treat misconduct so disparately, and this was a problem previously, one that the new proposed regulation does not resolve. Consider that sexual harassment may also constitute stalking.
- Undermines the purpose of Title IX – to protect right to access education. Education is negatively impacted by violence and trauma – not only by disciplinary action.

- **Conflicts with other laws:**

- Clery⁴ (outlined above)
- NYS 129-B (outlined above) language states: *“any rights provided to a reporting individual must be similarly provided to a respondent and any rights provided to a respondent must be similarly provided to a reporting individual.”*⁵

- **Mistake/ inaccuracy:**

- The proposed regulations state that *“Many recipients had a longstanding practice of allowing appeals only by the student who would be the subject of discipline under the recipient's policy.”* [pg. 51 of proposed regulations] This is inaccurate and contradicts with 2014 Senate report spearheaded by Senator McCaskill that the proposed regulations cite elsewhere, which finds that only very few schools provided appeal rights only to the respondent.⁶

⁴ The preamble to the Department's Clery Act regulations (at page 62778) states that if a university allows appeals, that it must provide equal rights to appeal. <https://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf> The [Clery Center](#) also agrees that the Clery Act requires colleges and universities to give “both parties ... the right to appeal.”

⁵ Education Law 129-B, S 6444. RESPONSE TO REPORTS. 5.B

⁶ July 9, 2014, *Sexual Violence on Campus: How too many institutions of higher education are failing to protect students*, U.S. Senate Subcommittee on Financial and Contracting Oversight – Majority Staff, <https://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>

- Study shows that 85% of schools provided an opportunity to appeal to reporting students. At the 40 largest private universities that statistic was 97%, and at the 50 largest publics it was 84%. Note that some schools consider the school itself as the “charging party” and a victim, survivor, or reporting individual as a witness. The rescinded guidance and the VAWA amendments to Clery and state education law have led some of those schools to add a category - a witness with a certain status that gives them these equitable rights as required by state and federal law, including the right to appeal.

4. OPPORTUNITY TO REQUEST EVIDENCE OBTAINED

- **Concerns and conflicts:**
 - Note that there is no concern with the right of parties to submit evidence, and to review relevant evidence in the College’s possession, and to review an investigative report if there is one. This is all best practice and consistent with NY law.
 - Context:
 - The 2001 revised guidance talks about the opportunity to present evidence, but not the review of such evidence by the parties. The rescinded guidance offers an equal opportunity to submit evidence, and if one party has access to the other’s statement, then the other must also have access.
 - NYS 129-B offers the opportunity to offer evidence, review available evidence that is relevant to the case and in the control of the institution
 - Conflict with NYS 129-B:
 - NYS 129-B is narrower than the new proposed regulations – can only share evidence that is deemed “relevant to the conduct case and consistent with institutional policies”⁷
 - Additionally, NYS 129-B states that you must exclude prior sexual history and mental health diagnoses.⁸
 - What the proposed regulations proposes would amount to pretrial discovery, with the school as a conduit. This would be VERY costly to schools and creates a lot of FERPA concerns. Who

⁷ 129-B, S 6444 RESPONSE TO REPORTS:

5. EVERY INSTITUTION SHALL ENSURE THAT EVERY STUDENT BE AFFORDED THE FOLLOWING RIGHTS:

C. THROUGHOUT PROCEEDINGS INVOLVING SUCH AN ACCUSATION OF SEXUAL ASSAULT, DOMESTIC VIOLENCE, DATING VIOLENCE, STALKING, OR SEXUAL ACTIVITY THAT MAY OTHERWISE VIOLATE THE INSTITUTION'S CODE OF CONDUCT, THE RIGHT:

V. TO REVIEW AND PRESENT AVAILABLE EVIDENCE IN THE CASE FILE, OR OTHERWISE IN THE POSSESSION OR CONTROL OF THE INSTITUTION, AND RELEVANT TO THE CONDUCT CASE, CONSISTENT WITH INSTITUTION POLICIES AND PROCEDURES.

⁸ 129-B, S 6444. RESPONSE TO REPORTS. 5. C.

VI. TO EXCLUDE THEIR OWN PRIOR SEXUAL HISTORY WITH PERSONS OTHER THAN THE OTHER PARTY IN THE JUDICIAL OR CONDUCT PROCESS OR THEIR OWN MENTAL HEALTH DIAGNOSIS AND/OR TREATMENT FROM ADMITTANCE IN THE INSTITUTION DISCIPLINARY STAGE THAT DETERMINES RESPONSIBILITY. PAST FINDINGS OF DOMESTIC VIOLENCE, DATING VIOLENCE, STALKING, OR SEXUAL ASSAULT MAY BE ADMISSIBLE IN THE DISCIPLINARY STAGE THAT DETERMINES SANCTION.

would do the redacting? How would they know what to redact? Are they owed copies or merely review? What are the deadlines?

- Schools with investigative models allow parties to review the investigative report and relevant evidence that's incorporated or attached to that report. Requiring schools to provide copies of anything it obtained during the investigation, relevant or not, and screening and possibly redacting them is costly and concerning.
- This would also encourage retaliation and chill reporting:
 - Encourages students not to report, or to leave out chunks of evidence, or delay in providing evidence so they can redact it first, if they have the time, expertise, and/or funding to hire an attorney to do it for them.
- **Conflicts with other laws:** (outlined above)
 - NYS 129-B
 - VAWA rape shield laws: excluding prior sexual history⁹
 - FERPA and potentially other state privacy laws - documents provided could be education records under FERPA, of one or both of the parties or of other students.

5. CROSS-EXAMINATION

- **Concerns:**
 - Title IX is a civil process – it does not house the expertise or protections of the courtroom e.g. objections.
 - Again undermines the purpose of Title IX – a civil rights statute protecting access to education from sex discrimination - aiming not to (re)traumatize or intimidate students from continuing their studies/ disrupting school activities
 - Prospect of cross-examination would chill reporting and intimidate students.
 - Trial-like experiences would be harmful to all parties - we are committed to due process.
 - Not developmentally appropriate for (at least) undergraduate students
 - *“The Dept determined that for elementary and secondary schools, where most parties and many witnesses are minors, sensitivities associated with age and developmental ability may outweigh the benefits of cross-examination.”* [pg.45 of proposed regulations]
 - Numerous neuroscience studies show that the brain is continuing to actively develop and mature through mid-20s, so the ED's above consideration should carry past secondary school.¹⁰

⁹ Rule 412. Sex-Offense Cases: The Victim [https://www.law.cornell.edu/rules/fre/rule_412]

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

- (1) evidence offered to prove that a victim engaged in other sexual behavior; or
- (2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions:

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

- (NB: a proposed model: In NY many public schools allow opportunity for Qs to be asked, typically in writing submitted to hearing officer. If college allows written Qs to be submitted for a hearing panel/ investigator to ask, college should document reasons why any particular Qs weren't asked/ were reworded. Perhaps multiple inappropriate Qs written slightly different/ Qs that ask about off-limits/ irrelevant topics. Written Qs should be reviewed and on bottom of paper marked as "asked/rejected" as well as the reason for rejection, or "modified" and new wording noted. These papers should become part of case file.)

6. INFORMAL RESOLUTION/ MEDIATION

- Safety assessment and additional guidelines needed for schools.¹¹
 - Safety assessments and screening methods to establish whether mediation is viable is standard in cases of DV/IPV.
 - Trauma is a result of a threat or perceived threat of violence.¹² The presence of the individual who harmed them in the room can result in an additional experience of trauma – against purpose of Title IX.
- Protections against both parties being "forced to consent to process" by school?
- Power dynamics a significant concern with sexual and intimate partner violence¹³
 - "If the abuser perpetuates control of the victim in the proceeding, then our judicial system has denied those victims a fair forum"¹⁴
 - Because the very nature of these relationships is built upon dynamics of power and control, there is no way to guarantee or expect that this will not be present during mediation (seen or unseen)

Note: there is a general lack of specific dating & IPV considerations in these regulations.

7. RETALIATION "BAD FAITH"

- **Concern/ inaccuracy:**
 - Anecdotally, universities report this rarely comes up. But if it did, schools already have the ability to address it. It is absolutely actionable - it's appropriate to bring an employee up on disciplinary charges or a student on disciplinary charges. Colleges see forgery, dishonesty, and falsification in a variety of areas - spoofed/hacked emails, edited text

¹⁰ [https://www.cell.com/neuron/fulltext/S0896-6273\(16\)30809-1](https://www.cell.com/neuron/fulltext/S0896-6273(16)30809-1)
Dosenbach and colleagues (2010)

<https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=1&ContentID=3051>

"The rational part of a teen's brain isn't fully developed and won't be until age 25 or so."

¹¹ <https://www.ncjrs.gov/pdffiles1/nij/grants/164658.pdf> (see page ii)

¹² <https://www.ncbi.nlm.nih.gov/books/NBK207191/>

¹³ https://kb.osu.edu/bitstream/handle/1811/79867/1/OSJDR_V9N1_027.pdf (see page 28 & 50) Irvine, M., Mediation: Is it Appropriate for Sexual Harassment Grievances? Ohio State Journal on Dispute Resolution: Volume 9, Issue 1 (1993)

¹⁴ <https://cardozo.jcr.com/vol8no1/CAC101.pdf> (see page 253) Davis, A., Mediating Cases Involving Domestic Violence: Solution or Setback? Cardozo Journal of Conflict Resolution: Vol. 8 (2006).

transcripts, and more. To present them to a school official is a violation of the code of conduct.

- Why single out those making a sexual assault report? Why not anyone submitting any evidence, in any type of case (not just sex discrimination) including a witness?
- This may be better addressed in a Q&A of guidance, as clarification. Because any member of the community who brings forward any allegation of any kind in bad faith could face adverse action, whether it's a warning or other discipline. To say "I saw Jane, coworker, key my car on Tuesday," and then there's video evidence that the reporting party keyed their own car and tried to get Jane in trouble - that's a problem and the College has a right to address it. The same for any kind of knowing, intentional, willful false report.
- By singling this out in this way it makes it seem like the only reporting individuals who are scheming and lying are those reporting sex discrimination, including sexual harassment and sexual assault. The research does not support this..
 - In fact sexual assault is significantly under-reported.¹⁵
 - Additionally, rate of false sexual assault reports very low (comparable to other crimes, if not lower – particularly when under-reporting to law enforcement considered).¹⁶

8. PROPOSED REGULATIONS IGNORE COSTS TO SURVIVORS & INSTITUTIONS OF HIGHER EDUCATION

- **Concerns:**

- Proposed regulations do not reduce costs – they shift them from schools to victims. Studies show that victims already experience great financial and psychological costs to violence.¹⁷
- Ignores the likely effect of under-reporting – the ED has a responsibility to consider this given what is documented evidence of the reluctance of many victims to come forward.
- Ignores costs of likely increased litigation
- Regulations do not consider additional costs to schools who will dedicate resources to sorting out confusing inconsistencies and need to navigate the conflicts with state laws.

9. RELIGIOUS EXEMPTION

- **Concern:** Encourages discrimination by schools against students
 - Particularly of LGBTQ, pregnant and parenting students, women, and students who make decisions about their reproductive health

¹⁵ <https://search-proquest-com.ezproxy.cul.columbia.edu/docview/1931961897?pq-origsite=summon>

"More than 5% of college women — that's 300,000 students — are raped each year. Only 12% of these rapes are reported to law enforcement, less than the already low 16% national average. Of reported rapes, as much as a third are prosecuted and even fewer convicted. False accusations exist in all crimes, but only between 2 percent and 10 percent of rape allegations are determined to be false."

¹⁶ Lisak, D., L. Gardinier, S. C. Nicks, and A. M. Cote. "False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases." *Violence Against Women*, 2010, 1318-334

¹⁷ **Gender Violence Costs: Schools' Financial Obligations Under Title IX**, Yale Law Journal Vol 125 N. 7, May 2016, Dana Bolger, <https://www.yalelawjournal.org/feature/gender-violence-costs-schools-financial-obligations-under-title-ix>

- **Conflict**
 - NYS 129-B: NYS has 42 religious colleges¹⁸

10. TRANSPARENCY OF PROCESS

- Study shows that the Department of Education ignored overwhelming public support for the pre-2017 guidance and rescinded it anyway – while stating that they were following the public’s comments during the deregulation period.¹⁹
- How do we know this won’t happen again?
 - Out of step with public opinion.

CLOSING STATEMENT - Given the inconsistencies, conflicts with other laws, (especially NYS and City laws and policies in place), as well as the inequities that these regulations would create – we cannot support these regulations being issued.

¹⁸ 17 Roman Catholic, 2 Lutheran, 2 Baptist, 18 Jewish, 1 Wesleyan, 1 Free Methodist, 1 Interdenominational, Christ and Missionary Alliance Church

<https://www.collegesimply.com/colleges/new-york/religious-colleges/>

¹⁹ “Of the 12,035 public comments addressing Title IX, **99%** (n: 11,893) of the commenters filed a comment in support of Title IX, with 97% of Title IX supporters (n: 11,528) specifically urging ED to uphold the 2011 DCL,” the report says. “Only 1% (n: 137) filed comments opposing Title IX, of which 90% (n: 123) specifically urged that ED rescind the 2011 DCL. When all the individual comments, as well as the petition and jointly-signed comments, are included, 60,796 expressions of support for Title IX were filed by members of the public, in marked contrast to the 137 comments in opposition,” the study found.” <https://www.campusafetymagazine.com/clery/departement-of-education-ignored-widespread-support-obama-title-ix-sexual-violence-guidance/>

Tiffany Buffkin, Nancy Chi Cantalupo, Mariko Cool, & Amanda Orlando of the University Dwayne O. Andreas School of Law, “*Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education’s Executive Order 13777 Comment Call*”, Sept 2018