

January 30, 2019

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue S.W.
Room 6E310
Washington, D.C. 20202

Dear Secretary DeVos:

The following comments are submitted by the American College Health Association (ACHA) in response to the notice of proposed rulemaking (NPRM) implementing Title IX policy of the Education Amendments of 1972 (ED-2018-OCR-0064).

Since 1920, ACHA has served as the voice for student health and wellness. ACHA represents over 1,100 Institutions of higher education, representing the collective health and wellness needs of 10 million college students.

Background

ACHA members have been on the frontlines treating the physical and emotional affects suffered by victims of campus sexual assault for many years. Campus sexual harassment and sexual violence are serious public health issues that adversely affect college and university students because students cannot learn in an atmosphere in which they do not feel safe.

Sexual assault and sexual violence comprise a continuum of behaviors that include, but are not limited to, sexual/gender harassment, sexual coercion, sexual abuse, stalking, sexual assault, and rape. Victims of sexual violence may experience alienation, barriers to academic success, lower graduation rates, higher rates of suicide, health problems, persistent mental health issues, and fear of retaliation.

College and Universities have an opportunity to engage with emerging research, evaluate the efficacy of their own prevention, response, and treatment efforts, and actively share lessons learned. Trauma-informed practices should be adopted in every aspect of care in order to provide a more sensitive response and lower the risk of re-victimization. Services, resources, and training should be congruent with best practices as they evolve.

Proposed Change: Define the conduct constituting sexual harassment for Title IX purposes

Since there is currently no definition of “sexual harassment” in the Title IX regulations, ACHA believes it is important for the Department to establish this definition to remove any legal ambiguity.

ACHA is aware that the term “sexual harassment” was defined in an April 2011 “Dear Colleague” letter issued by the Education Department but is unclear whether this letter and the policies adopted via this letter can fully withstand legal challenge. In that letter, it states that sexual harassment is

“... unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”

The NPRM proposes to replace the above language with the following:

Sexual harassment means:

- (i.) *An employee of the recipient conditioning the provision of any aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;*
- (ii.) *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 recipient’s education program or activity; or,*
- (iii.) *Sexual assault, as defined in 34 CFR 668.46(a). (34 CFR 668.46(a) defines sexual assault as “An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program and included in Appendix A of this subpart.)”*

ACHA Comment

ACHA is concerned that the language in (ii.) above

“...is so severe, pervasive, and objectively offensive”

ACHA believes that this definition is subjective and open to interpretation, which could lead to some Institutions refusing to act on complaints because they don’t believe the allegations were “pervasive” or severe enough to warrant Institutional intervention.

Furthermore, it substantially modifies the threshold at which an Institution of Higher Education must act on a complaint. Under the existing guidance, an Institution has an obligation to act on the alleged action if it is determined that the harassment “rises to a level that it denies or limits a student’s ability to participate in or benefit from the school’s program...”.

ACHA Recommendation

ACHA supports items (i.) and (iii.) above as written but recommends item (ii.) be revised as follows:

- (ii.) *Unwelcome conduct on the basis of sex that effectively denies a person equal access to the recipient's education program or activity; or,*

Proposed Change: The Department of Education is proposing that Institutions have an obligation to act when the Institution has “actual knowledge” of sexual assault or allegations of sexual assault. **Actual knowledge** would mean, “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the educational Institution who has authority to institute corrective measures on behalf of the Institution.”

The Department also proposes to clarify that in responding to any claim of sex discrimination under Title IX, recipients are not required to deprive an individual of their “due process” rights and, if adopted, would prohibit the Department’s Office for Civil Rights (OCR) from requiring a recipient to pay money damages as a remedy for a violation of any Title IX regulation.

Finally, the Department is proposing to eliminate the requirement that religious Institutions submit a written statement to qualify for the Title IX religious exemption.

ACHA Comment

ACHA believes that the proposed changes are problematic as the courts have struggled to define what constitutes “actual knowledge” of sexual assault or harassment in order to determine whether an Educational Institution has shown deliberate indifference to a complaint. The NPRM, as drafted, creates a legal loophole through which Educational Institutions who do wish to be deliberately indifferent to allegations of sexual harassment or assault can do so with legal impunity.

ACHA disagrees that Title IX only covers misconduct by the educational Institution (i.e., recipient of funds).

The NPRM’s narrow application of the scope of Title IX outlined in the proposed rule creates a protective legal environment shielding the Institution from charges of deliberate indifference rather than designing standards intended to facilitate the ability of students or employees filing of sexual assault or sexual harassment claims against so-called “third parties”.

Although the courts may have originally taken a narrow view of Title IX as only being applicable to the “recipient” in their direct actions with regard to equality of educational opportunities, they have increasingly established Title IX protections asserting that Institutions have an equally important role under Title IX to create a safe learning environment. If the

NPRM's narrow definition of "actual knowledge" is adopted, it will provide legal protections that will allow Institutions to ignore or fail to act on sexual assault/harassment claims asserting that the complaint was not made to the proper individual, no matter how legitimate that claim.

The NPRM seeks to establish a standard that the victim must report an allegation of sexual assault or sexual harassment to the Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient. The challenge with this approach is that if a College student, for example, makes a report of sexual harassment to the Resident Assistant (RA) and that RA reports the complaint to his/her supervisor and no further action is taken, the Institution would be shielded from a complaint of deliberate indifference because the complaint never made its way to the Title IX Coordinator or an individual in the Institution who could institute corrective action. This could have a chilling effect on students or employees to come forward with their complaints.

ACHA is also concerned that the language in the new rule will create confusion with the Institution's obligations under Title IX and the Institutions obligations under the Clery Act.

ACHA believes that the while the NPRM seeks to offer protections to Institutions, it will ultimately reduce protections for the victims (i.e., the students).

ACHA Recommendation

ACHA recommends that the Department of Education modify the definition of "actual knowledge" as follows:

"notice of sexual harassment or allegations of sexual harassment to a

- (i) A recipient's Title IX Coordinator or any official of the educational Institution who has authority to institute corrective measures on behalf of the Institution;
- (ii) Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a campus security department, such as an individual who is responsible for monitoring entrance into Institutional property;
- (iii) Any individual or organization specified in an Institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses; or
- (iv) Any official of an Institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings."

ACHA also recommends that the NPRM make clear that the adoption of Title IX regulations in no way diminishes the Institutions reporting requirements and obligations under the Clery Act.

PROPOSED CHANGE: Limiting a recipient’s exposure to conduct that occurs within its education program or activity

The NPRM proposes to define the scope of the reporting requirements to on-campus activity. More specifically, activity that “occurs within its education program or activity.”

ACHA Comment

Under the Clery Act, Institutions are responsible to report crimes occurring within “Clery Geography,” which includes on-campus locations, including student housing, public property within campus bounds, public property immediately adjacent to the campus, and non-campus buildings and property owned or controlled by the Institution, or by a student organization officially recognized by the Institution.

ACHA believes that the “Clery Geography” is a more appropriate boundary as it encompasses sites and locations where sexual harassment, or sexual assault has occurred and will continue to occur.

ACHA Recommendation

The NPRM should modify proposed section 106.44(a) to reflect the broader definition of applicability found in the “Clery Geography”.

PROPOSED CHANGE: Grievance Procedures and Investigation of Allegations of Sexual Harassment

The NPRM is proposing to add a new section addressing the required grievance procedures for formal complaints of sexual harassment.

Current Guidance: A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

Proposed Regulations:

The NRPM is proposing to add a new section addressing the required grievance procedures for formal complaints of sexual harassment. The proposed paragraph states that a recipient’s treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex, and states that a recipient’s treatment of the respondent may constitute discrimination on the basis of sex under Title IX.

The NPRM notes that the purpose of this section is to create a “safe harbor” for Institutions. If these standards are adopted in regulation and the Institution follows these processes, the Institution is insulated from a charge of “deliberate indifference”.

An educational Institution would be considered “deliberately indifferent” only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

The NPRM notes that this new procedure will establish a more even-handed process protecting the rights of both the complainant (individual alleging sexual harassment) and the respondent (individual who is alleged to have engaged in sexual harassment).

ACHA Comments

ACHA believes that this proposed regulation will be harmful to students and employees who are the victims of sexual assault or harassment. ACHA believes that the NPRM, if adopted as written, will create a process that more closely resembles a court proceeding that will only complicate an already difficult situation.

If the Grievance Procedures outlined in the NRPM are adopted, ACHA believes there will be significant barriers put in place by Institutions that will discourage students and employees from filing sexual harassment/sexual assault claims.

In an attempt to clarify and standardize the Institution’s response and avoid legal exposure (i.e. create a “safe harbor”), ACHA believes that the NPRM places students at risk and diminishes the likelihood that victims of assault will come forward with allegations.

ACHA believes that the NPRM will force universities to create an investigative/adjudication process comparable to what exists in the legal system. The principles of “innocent until proven guilty” and “equal protections for both the accused and the accuser” are the foundation for our nation’s system of juris prudence. ACHA believes that trying to incorporate these, as proposed in the NRPM, will not work in an educational setting. ACHA believes the operational realities of allegations of sexual harassment or sexual assault in an educational setting require a series of unique processes.

An educational Institution has an affirmative responsibility to ensure a safe environment for students to learn.

ACHA Recommendation

ACHA believes that the policies and requirements articulated in the 2010 Dear Colleague letter remain valid and rather than discarding those policies and expectation, ACHA believes the NPRM should simply adopt those as part of the formal regulatory process.

Therefore, ACHA recommends the following be codified via regulation:

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors.

In all cases, however, the inquiry should be prompt, thorough, and impartial.

Recipients should treat complainants and respondents equally, giving each a meaningful opportunity to participate in the investigation and requiring the recipient to apply substantive and procedural safeguards that provide a predictable, consistent, impartial process for both parties and increase the likelihood that the recipient will reach a determination regarding the respondent's responsibility based on objective standards and relevant facts and evidence.

If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target's educational program (e.g., not requiring the target to change his or her class schedule).

In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond.

A school also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district's Title IX and Section 504/Title II coordinators.

Finally, a school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. At a minimum, the school's responsibilities include

making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.

When responding to incidents of misconduct, schools should keep in mind the following:

- The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.*
- When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school's responsibility is to eliminate the hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.*

Conclusion

Campus sexual harassment and sexual violence are serious public health issues that adversely affect college and university students because students cannot learn in an atmosphere in which they do not feel safe. **ACHA stands by the victims of campus sexual assault.**

ACHA believes that efforts to provide clarity for Colleges and Universities through the NPRM will yield only further confusion and will add to the likelihood that allegations of sexual assault will go unreported. If the proposed rules put forward are adopted as presented, we fear that thousands of college students, who are the victims of sexual assault, will be harmed.

Finally, as a co-signer of the comments submitted by the American Council on Education (ACE), ACHA urges the Department of Education to adopt the recommendations contained within that letter in addition to incorporating the recommendations provided by ACHA.

ACHA appreciates your consideration of our comments. Please do not hesitate to contact Devin Jopp, CEO for the American College Health Association, at djopp@acha.org or (443) 270-4554 if you have any questions or you would like additional feedback or have any further questions.

Sincerely,

Devin A. Jopp, Ed.D.
Chief Executive Officer
American College Health Association