



January 28, 2019

Executive Summary

AAUP Comments on the Department of Education’s Proposed Title IX Regulations

On January 28, 2019, the American Association of University Professors submitted comments in response to a proposal by the US Department of Education to amend regulations implementing Title IX of the Education Amendments of 1972. The AAUP responded, in particular, to the department’s “Directed Question 3” on “the applicability of the rule to employees . . . seek[ing] the public’s perspective on whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider.” The AAUP’s comments are directed to the “unique circumstances” of faculty in higher education.

In 2016, the AAUP published [The History, Uses, and Abuses of Title IX](#). This report urges the Department of Education and universities to address and prevent problems of sexual harassment in ways that also fully protect academic freedom and due process, and in ways that enhance shared governance by faculty and students. While some of the department’s proposed regulatory changes technically comport with recommendations made in the AAUP’s 2016 report, we want to emphasize that narrow agreement on a legal rule or standard is not indicative of agreement about what counts as inequality and how to redress it. The AAUP is committed to abolishing systemic discrimination in higher education. As our 2016 report notes, while colleges, universities, and the education department focus on the sexual dimensions of sex discrimination, the plain language of Title IX is meant to protect those on campus more broadly from unequal access to educational resources, wage disparities, and inequitable representation across the university system. To these ends, we again caution against the extraction of gender equity from more comprehensive assessments of the bases for inequality—including race, class, sexuality, disability, and other dimensions of social difference—both on and off campus.

In addition, the proposed regulations ultimately fail to specify the importance of academic freedom and shared governance for Title IX proceedings. Moreover, we object to proposed regulations that unduly narrow the scope of protections against sexual harassment.

The AAUP encourages the Department of Education, as well as colleges and universities, to take note of the recommendations in our 2016 Title IX report and to work to improve the working and learning

conditions of all campus constituents. Such improvements should include fully committing to interdisciplinary learning on campus by adequately funding gender, feminist, and sexuality studies, as well as allied disciplines, as part of an effort to teach about all forms of inequality, including inequalities based on race, gender identity, disability, class, geographic location, and sexual orientation.

The AAUP urges the education department to adopt regulations that do the following:

- Define sexual harassment broadly enough to prohibit conduct that creates a hostile environment
- Protect freedom of speech and, in particular, academic freedom of faculty in their teaching and research
- Protect due process in investigations and hearings
- Endorse shared governance to bring faculty expertise and institutional knowledge into developing and implementing policies related to Title IX

To promote these goals, the AAUP's specific recommendations include the following.

Defining Sexual Harassment

First, we recommend using a "severe or pervasive" standard to define sexual harassment. We reject as overly narrow the Department of Education's proposed definition of sexual harassment as "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" (emphasis added). The broader "severe or pervasive" standard considers both the individual complainant's personal perspective that conduct was harassing ("unwelcome") and whether a person in the complainant's circumstances would reasonably have found that the conduct created a hostile environment. We also recommend substituting "limits . . . equal access" for "effectively denies . . . equal access" to more broadly protect individuals from the harmful impact of sexual harassment.

Second, we recommend rejection of the department's proposal to evaluate Title IX compliance based on whether the educational institution had "actual knowledge" of and was "deliberately indifferent" to complaints of sexual harassment. The proposed "actual knowledge" standard creates an incentive for the educational institution to look the other way to avoid liability rather than addressing problems of sexual harassment or other forms of gender inequality. We recommend that an educational institution should be held responsible to respond to sexual harassment about which it "knew or should have known." This would include formal or informal reports to employees and officials whose job duties are directly related to recommending or instituting corrective measures on behalf of the college or university. The proposed "deliberately indifferent" standard inappropriately lowers the bar for educational institutions' responses to sexual harassment. We recommend that a standard of "reasonableness"—one with deference to the standpoint of the complainant—is more consistent with the department's role as an administrative agency enforcing Title IX in the public interest.

Protecting Academic Freedom

First, we recommend applying sexual harassment policies in ways that distinguish between speech protected by academic freedom and conduct that consists of unwelcome actions or unprotected speech. We point out that faculty who teach in gender studies and other disciplines that address issues of systemic inequity are likely to be disproportionately affected by Title IX complaints. While such topics may be offensive or uncomfortable to some students, their content is serious and scholarly and rests on the expertise of the teacher, whose judgments on scholarly matters are protected by academic freedom.

Second, we recommend that the Department of Education adopt a fuller statement of what is required to protect free speech, academic freedom, and due process, specifically adding the following language to the regulations: “In regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), a recipient [educational institution], whether public or private, must formulate, interpret, and apply its rules so as to protect academic freedom, free speech, and due process.”

Third, we recommend that the department prohibit college or university policies that make it mandatory for all faculty to report any information of possible sexual harassment to the Title IX coordinator or other university official. Such overly broad policies have a negative impact on teaching and advising relationships by compelling faculty members to violate students’ confidentiality.

Fourth, we recommend that the qualifications for a Title IX coordinator include knowledge of and experience working in a university setting. The training received by such coordinators requires not just matters of risk and liability, but insight into how universities work, the nature of power relations in the university, how higher education curriculum is decided, and what counts as serious academic inquiry. Academic freedom requires knowledge of the principles and practices of the university as experienced by faculty members as well as other members of the community—indeed, in our view, faculty are appropriate candidates for the position of Title IX coordinator.

Protecting Due Process

We recommend using the “clear and convincing evidence” standard to provide due process in investigations and hearings concerning claims of sexual harassment, especially in cases involving faculty speech. The AAUP recommends this standard of proof in all cases where faculty members face serious disciplinary sanctions, including dismissal.

Enhancing Shared Governance

We recommend that the education department endorse the central role of shared governance in the development and implementation by colleges and universities of policies in compliance with Title IX. Through shared governance bodies, such as faculty senates, faculty can share their institutional knowledge and disciplinary expertise to ensure that policies and procedures are designed to prevent

and remedy sexual harassment and other forms of sexual misconduct, respect academic freedom, and provide due process to all parties. Several AAUP policies provide guidance for creating effective shared governance, including the [*Recommended Institutional Regulations on Academic Freedom and Tenure*](#), [*Sexual Harassment: Suggested Policy and Procedures for Handling Complaints*](#), and [*The Statement on Government of Colleges and Universities*](#).