



May 15, 2020

AAUP Response to Final Title IX Regulations

The US Department of Education released on May 6 its final rule under Title IX of the Education Amendments of 1972. The American Association of University Professors had earlier submitted [comments](#) on the proposed revisions to the regulations in response to the secretary of education's 2018 request. The final regulations appear to take into account some of the AAUP's comments, while others were not addressed. Still others—those that emphasized the need to protect academic freedom—are gestured to repeatedly in the comment section of the new regulations, but the regulations themselves fail to adequately protect faculty academic freedom inside or outside the classroom.

Overall, the regulations represent small steps forward in some areas and large steps backward in others. Parts of the new regulations will make it more difficult for victims of harassment to come forward and for the perpetrators to be held responsible, thus making it easier for harassment to be minimized. The standard for harassment has been overly narrowed, the responsibility of the university to address harassment has been excessively limited, and the evidence needed to prove harassment has been increased significantly. While the new regulations have expanded protections for the accused, they do not directly address protections for the vital interests of the academic freedom. Improvements related to the burden of proof and some elements of due process, while welcome, are overshadowed by the overall regressive nature of the proposed regulations.

1. Defining Sexual Harassment

- a. We object to the Department of Education's retention of an overly narrow definition of hostile-environment sexual harassment. The final regulations define it as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive, that it denies a person equal access to the recipient's education program or activity." We recommended using a "severe or pervasive" standard because a hostile environment can be produced by severe conduct that is not pervasive and by pervasive conduct that is not deemed severe. Single instances of misconduct need not be pervasive in order to create the hostile environment that denies equal access to education; pervasive misogyny (for example, ongoing sexually charged statements by a faculty member targeting individual students) is as discriminatory as are single instances of severe misconduct. Our more flexible definition of sexual harassment is a more accurate one, which recognizes the variety of ways in which such harassment occurs. A careful examination of all the circumstances under a "severe or pervasive" standard is more than adequate for distinguishing between unprotected speech or expression (speech that constitutes a hostile environment) and speech or expression protected by academic freedom.
- b. As we argued in our comments on the proposed regulations, gender equity should not be separated from consideration of race, class, sexuality, gender identity, disability, and other dimensions of social difference. The final version does not include attention to these other bases for inequality.

2. University Responsibility

- a) We object to the Department of Education's retention of an evaluation of institutional compliance based only on the standard of "actual knowledge," rather than that of "knew or should have known," about sexual harassment. By assigning authority for "actual knowledge" only to those who are in a position to institute corrective measures, the regulations seem to preclude a finding of knowledge based on reports made to employees with authority to recommend that such corrective measures be instituted. The new regulation overly narrows university responsibility.
- b) The new regulations include a standard of "deliberate indifference" rather than the standard of "reasonableness" recommended by the Association. According to the final regulations, "A recipient with actual knowledge of sexual harassment . . . must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response . . . is clearly unreasonable in the light of the known circumstances." Defining deliberate indifference in terms of "unreasonableness" creates a way out for administrators who, for various reasons, may want to avoid addressing charges of sexual harassment at their institutions. A properly defined standard of "reasonableness"—one with deference to the standpoint of the complainant—is far more consistent with the Department of Education's role as an administrative agency enforcing Title IX in the public interest.
- c) The regulations leave it to universities to decide whether to require "mandatory reporting" by all employees about information regarding possible sexual harassment or instead restrict that function to designated reporters. We recommended that the regulations prohibit university policies that make all faculty members mandatory reporters, as such overly broad policies compel faculty members to report information that they consider confidential. Further, the regulations do not require university administrators to define "mandatory reporters" in consultation with faculty members. For further discussion of the impact of mandatory reporting requirements on faculty members, see our 2018 comments.
- d) The Department of Education did not adopt the Association's recommendation that qualifications for any Title IX coordinator should include knowledge of and experience working within a university setting. In the past, administrative preference for appointing nonfaculty lawyers to serve in this capacity has often conflicted with customary practices of faculty governance and has resulted in some of the kinds of harm that the department professes to want to correct.
- e) We object to the decision to eliminate the requirement that an educational institution seeking an exemption must submit a written statement to the department identifying the Title IX regulations that "conflict with a specific tenet of the religious organization." That requirement was a reasonable way to ensure that any claimed religious exemption is sufficiently supported by a specific tenet of the religion. It is difficult to conceive of a religious tenet that is inconsistent with prohibiting sexual assault and other forms of sexual harassment. At the very least, it is certainly reasonable to require an educational institution to identify how adopting and enforcing policies against sexual assault and other forms of sexual harassment is in conflict with specific religious tenets.

3. Academic Freedom

As discussed above, the final regulations too narrowly define hostile-environment sexual harassment as speech or conduct that is "severe, pervasive, and objectively offensive." At the same time, the regulations do not adequately protect faculty academic freedom. In fact, the regulations do not make any reference to academic freedom. The Department of Education's commentary

states, “Because academic freedom is well understood to be protected under the First Amendment, the Department declines to expressly reference ‘academic freedom’ in §106.6(d)(1), but that provision applies to all rights protected under the First Amendment.” This statement, however, fails to recognize that academic freedom extends beyond First Amendment definitions and protects faculty members in public and private universities in their teaching, research, and extramural speech. Further, §106.6(d)(1) provides only that “[n]othing in this part *permits* a recipient to: (1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution.” The AAUP had recommended a stronger requirement be added: *“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, whether public or private, must formulate, interpret, and apply its rules so as to protect academic freedom, free speech, and due process.”*

4. Protecting Due Process

The Department of Education leaves it to a university to determine the standard of evidence to be applied in sexual harassment cases (either preponderance of evidence *or* clear and convincing evidence.) It further specifies that the standard chosen need not be the same as that used in cases not involving sexual harassment. Although the AAUP had recommended “clear and convincing evidence” as the best standard, we find the final regulations to be an improvement because they enable universities to adopt the “clear and convincing” standard in sexual harassment cases. We also view as an improvement the regulations’ due-process requirement that university grievance processes include a live hearing with a cross-examination conducted by the parties’ advisers, with the parties located in separate rooms at either party’s request. However, certain parts of the regulations, including the “severe and pervasive” standard, make it much more difficult to prove sexual harassment, which is inappropriate for attempts to remedy sexual misconduct.

We object to the absence in the new regulations of any requirement that universities implement AAUP-recommended due-process protections in cases involving faculty members, including the right to a hearing by an elected faculty committee using the “clear and convincing evidence” standard of proof.

5. Some Final Comments on Political Hypocrisy

Finally, we cannot refrain from noting the enormous hypocrisy with which the Department of Education has heralded its new regulations as a gift from President Trump to America’s students: “PRESIDENT DONALD J. TRUMP IS WORKING TO PROTECT STUDENTS FROM SEXUAL MISCONDUCT AND RESTORE FAIRNESS AND DUE PROCESS TO OUR CAMPUSES.” The [various documents](#) announcing the new regulations attribute them all to the president. *But these regulations come from a president who has never been formally called to account for his alleged sexual misconduct and for the (bad) example it sets for the nation’s youth.* Some readers of these new regulations will argue that they unduly protect harassers and the hostile climates they create. The department’s emphasis on President Trump as the standard-bearer for sexual harassment regulations is likely to confirm those arguments.