



May 15, 2020

Executive Summary: 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.

Overall, we conclude that 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 the 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.

The AAUP's specific comments include the following:

Defining Sexual Harassment

First, 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.

Second, we find in the final version no consideration of the ways gender equity intersects with other bases for inequality, including race, class, sexuality, gender identity, disability, and other dimensions of social difference.

University Responsibility

First, 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.

Second, we object to the inclusion in the new regulations of a standard of "deliberate indifference" rather than "reasonableness," as the Association recommended. 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.” We note that defining deliberate indifference in terms of “unreasonableness” creates a way out for administrators who may want to avoid addressing charges of sexual harassment at their institutions.

Third, 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 from making all faculty members mandatory reporters. Further, we note that administrators are not required to define “mandatory reporters” in consultation with faculty.

Fourth, the department 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.

Fifth, we object to the department’s 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.”

Academic Freedom

We object to the way in which 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. We object to the absence in the regulations of any reference to academic freedom.

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 other cases not involving sexual harassment. We find that, although the AAUP had recommended “clear and convincing evidence” as the best standard, the final regulations appear to be an improvement because they enable universities to adopt the “clear and convincing” standard in sexual harassment cases.

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.

Some Final Comments on Political Hypocrisy

Finally, we note 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.” *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. We conclude that the department’s emphasis on President Trump as the standard-bearer for sexual harassment regulations is likely to confirm those arguments.