

## **Title IX Overhaul: Higher Education Community Response.**

The Department of Education's recent [Notice of Proposed Rulemaking](#) (NPRM) addressing how colleges and universities investigate campus sexual harassment under Title IX drew nearly 100,000 public comments – a record high. The high number of comments will almost certainly delay issuance of final regulations as ED must now review and respond to each comment submitted.

NACUBO joined other higher education associations signing on with the [letter](#) submitted to ED by the American Council on Education (ACE). The substantive comments addressed myriad issues raised by the proposal and highlighted both positive and negative facets of ED's proposed regulations as are listed below:

*Note: The comment letter uses terms like, "survivor," "complainant," "accuser," "respondent," and "accused" in different ways and for different reasons throughout the letter—as we will here—to indicate different things, but no such term is intended to indicate the veracity or credibility of any specific claim or party to a claim generally. Similarly, use of "sexual harassment" both here and in the letter is meant to indicate both sexual harassment and sexual assault. Use of the term "sexual assault" is meant to refer to those cases specifically.*

### **Positives:**

- Providing survivors more flexibility to determine how they wish to proceed; including formal Title IX grievance procedures, but also other measures such as mediation or more informal resolution methods; and allowing for supportive measures to be provided to survivors even if they choose not to file formal Title IX complaints.
- Clarifying that institutions may always remove an individual posing an immediate threat to health or safety from a campus.
- Elimination of the "60-day rule" present in previous guidance that offered campuses little flexibility to conduct thorough and equitable investigations that could potentially take longer than 60 days.
- Requiring institutions to provide both parties with reasonable time to prepare for interviews or disciplinary hearings stemming from a complaint.
- Bringing Title IX regulations in this area in line with Clery Act regulations that allow for appeal of a decision by either party.
- Charging ED's Office of Civil Rights to consider whether an institution's actions were clearly reasonable or unreasonable in light of known circumstances when determining if an institution has violated Title IX.
- Bringing Title IX regulations in line with the Supreme Court definition of sexual harassment to include the phrase "severe, pervasive, and objectively offensive" regarding what constitutes a hostile environment.
- Requiring objective evaluation of evidence without bias to either party.
- Clarifying "actual knowledge" language that makes clear the circumstances under which Title IX requires an institution to take action.

**Areas of Concern and Recommendations:** Most areas of concern stem from an underlying presumption in the proposal that college and universities should offer a more legalistic approach to the handling of campus sexual assault investigations and related hearings.

- The proposed changes legalize campus disciplinary proceedings by requiring live hearings with direct cross-examination by the parties' advisors.
  - Recommendation: Remove the mandate for a live hearing and allow institutions flexibility to choose live or non-live hearing models that allow parties to test the credibility of other parties and witnesses in writing.
  
- The requirement that both parties have an absolute right to inspect "any evidence...directly related" to allegations, regardless of their personal or otherwise legally protected nature, will do more harm than good.
  - Recommendation: Allow both parties access to information and evidence with appropriate limitations and allow the institution to redact confidential or other sensitive information; this is more in line with Clery Act requirements.
  
- The NPRM inappropriately uses the phrase "due process" in a manner likely to cause confusion and further legalize non-legal proceedings.
  - Recommendation: If ED uses "due process" in the final rule, it should clarify that its use is not meant to signal an expectation of judicial protections given to criminal defendants in legal proceedings or impose constitutional due process requirements on private institutions.
  
- The NPRM appears to require an institution to dismiss complaints that fall outside of Title IX, even if they violate campus codes of conduct, and appears to bar institutions from taking disciplinary actions without formal Title IX complaints even if the relevant conduct would violate Title IX and campus codes of conduct.
  - Recommendation: Drop "must dismiss" language from the final rule and affirm the rights of schools to address misconduct that falls outside the scope of Title IX.
  
- The proposed rule would effectively result in a single, federally-mandated evidentiary standard of proof across all campus disciplinary hearings by requiring institutions to use one standard for all campus proceedings with the same disciplinary penalty.
  - Recommendation: ED should not allow institutions to choose between the preponderance of evidence and clear and convincing standards in Title IX cases without also imposing those standards on other types of disciplinary proceedings.
  
- The NPRM would significantly increase regulatory burden, redirecting time and resources away from other institutional missions and student resources, and would have the greatest monetary impact on smaller and/or less-resourced institutions.
  - Recommendation: ED should actively seek ways to provide greater institutional flexibility so schools can seek out effective, responsible, and cost-efficient ways to achieve federal policy goals and compliance.
  
- The proposal should make clear that it proposes to regulate only those allegations involving student complaints against other students and student complaints against employees; not complaints involving two employees.
  - Recommendation: The proposal, as currently written, leaves open the potential that these regulations could also be applicable in cases involving two employees. However, existing HR functions, contracts, and employee bargaining agreements already have

standards in place to govern incidents involving two employees; changing them now would be unnecessary, costly, and potentially legally impossible.

- The proposal requires that formal notices of allegations explicitly state that the respondent is "presumed not responsible."
  - Recommendation: The Department should remove this requirement because it indicates a presumption in favor of one party. If the Department feels similar language is necessary, it should adopt more neutral language requirements that indicates both parties will be treated equally and fairly.