



January 24, 2019

Brittany Bull  
U.S. Department of Education  
400 Maryland Ave., SW Room 6E310  
Washington, D.C. 20202

Dear Ms. Bull:

The Association of American Universities (AAU), an organization of America's 60 leading public and private research universities, appreciates the opportunity to provide comments on the proposed Title IX Regulations through both the listening sessions held by the Department of Education and the notice of proposed rulemaking (NPRM) of November 29, 2018. It is critical that the higher education community and other relevant stakeholders shape the rules for how colleges and universities respond to allegations of campus sexual assault and misconduct.

AAU and its member universities take seriously our responsibilities to: educate members of our communities about sexual harassment, sexual assault and prevention; encourage students to report sexual harassment, including sexual assaults; support all students impacted by sexual harassment, including sexual violence; and ensure all students involved have access to support services and fair and equitable processes. We are also deeply committed to ensuring the safety and wellbeing of students, faculty, staff, and all those who enter our communities of learning, and complying with federal civil rights laws.

Central to our commitment, AAU has gathered sexual assault and misconduct information across our campuses and the practices universities use to combat these behaviors. Four years ago, AAU administered a landmark survey assessing the prevalence of sexual assault and misconduct on campuses. More than 150,000 undergraduate and graduate students across 27 universities participated, and the results provided much-needed insight into students' experiences.<sup>1</sup> Then in 2017, AAU surveyed 55 of its member universities on the practices they use to prevent and respond to campus sexual assault and misconduct and published a report detailing its findings.<sup>2</sup> Last summer, AAU announced that it will conduct another student survey in 2019.<sup>3</sup> Our efforts

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<sup>1</sup> <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>

<sup>2</sup> <https://www.aau.edu/sites/default/files/AAU-Images/Key-Issues/Campus-Safety/AAU%20Climate%20Activities%20Full%20Report.pdf>

<sup>3</sup> <https://www.aau.edu/newsroom/press-releases/aau-announces-2019-survey-sexual-assault-and-misconduct>

have given not only AAU members, but universities across the country, actionable information and helpful perspective to better combat sexual assault and misconduct.

AAU worked closely with the American Council on Education (ACE), the Association of Public and Land-grant Universities (APLU), the American Association of Community Colleges (AACC), the American Association of State Colleges and Universities (AASCU), and the National Association of Independent Colleges and Universities (NAICU), among others, on a response to the proposed Title IX regulations. We support the comments and requests for clarification made in the joint association comment letter and offer comments in addition to the ones made by these groups.<sup>4</sup>

Informed by our research and AAU's members' experience administering campus sexual harassment disciplinary proceedings, AAU offers the following comments on the Department of Education's ("the Department's") draft Title IX regulation:

**1. The Department's one-size-fits-all approach fails to account for the diversity among higher education institutions that helps make the American higher education system great.**

The diversity of American institutions of higher education—in terms of size, mission, religious affiliation, and other characteristics—affords students and their families the opportunity to select a school that best fits their needs and educational goals. The NPRM imposes one model for responding to sexual harassment claims on all higher education institutions. Most noticeably, the approach ignores a fundamental and significant difference between public and private universities: The former are subject to Constitutional due process requirements, while the latter are not.<sup>5</sup> For the purpose of these comments, we assume that the use of the term "sexual harassment" in the NPRM encompasses both sexual harassment, sexual assault, and other forms of sexual misconduct. As such, this letter will only use the term sexual harassment.

The NPRM subjects universities to an unprecedented amount of federal control when it comes to how to investigate and adjudicate allegations of sexual harassment. This approach stems from a faulty premise: that the entire existing adjudication system has failed students. As AAU's 2017 report makes clear, however, universities across the country are continually working on developing effective and varied approaches to adjudicating sexual harassment claims.

The Department should continue to allow institutions to determine what processes are best for their campus community. Different approaches are helpful as our institutions strive to create and improve policies and practices and identify and retire what is ineffective. These approaches also

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<sup>4</sup><https://www.acenet.edu/news-room/Pages/Comments-ED-2019-Title-IX-rule.aspx>

<sup>5</sup> Generally, private institutions are required to provide a "fair process" for deciding matters such as these but are not required to provide all the same procedures and as due process would require in court trials

allow institutions to maintain, utilize, and respect the different schools' values, student populations, community resources, and educational philosophies. Student populations vary widely in terms of the proportion of students residing on-campus or off-campus, the mix of undergraduate and graduate/professional students, the presence of nontraditional students, and so on. Mandating that all schools address these issues in the same way will limit their ability to tailor their policies and procedures to their campus community and implement their individual educational missions. If the Department is to make changes to existing guidelines, the rights of all parties can be protected with less prescriptive rules than in this NPRM.

## **2. The NPRM would require universities to run quasi-courts, something that is inconsistent with their educational missions.**

The NPRM mandates that universities develop an adversarial, hearing-based system with many features of the criminal justice system. In doing so, the NPRM ignores the fact that internal disciplinary processes at a college or university are separate and distinct from the adversarial procedures that govern the criminal and civil justice systems.

Requiring universities to incorporate certain elements of the courtroom experience into Title IX hearings will not create a fairer process for seeking truth. In the courtroom context, judges (trained jurists and lawyers themselves) are able to control attorney advocates, in part because they have the authority to sanction lawyer misconduct. In the university context, dedicated professionals most often oversee the process. These dedicated professionals will not be able to control the attorneys who would be directly involved in the process currently contemplated by the NPRM. The potential implications will likely include, among other things:

- unnecessary contention and disruption of the proceedings;
- universities having to hire seasoned litigators to oversee the proceedings; and
- lack of interest among faculty and staff in serving on conduct committees where the experience is so adversarial.

Requiring universities to appoint aligned advisors will not eliminate these problems and will create others. The introduction of more individuals who may not be experts—however well trained—into the process is unlikely to result in fairer outcomes and might well lead to even more litigation with dissatisfied parties. This could in turn open universities up to lawsuits based on a new theory of liability: the advisor the institution appointed was ineffective. The same could be said of many other requirements in the proposed grievance procedures for formal complaints of sexual harassment. The requirement that the institution provide all gathered records to both sides is even broader than the discovery rules in courts, which do not require production of irrelevant and confidential materials. There is a danger that private information, including information pertaining to medical and mental health issues, and grades, would need to be produced under the

proposed rule, even if not relevant to the complaint, and could be misused in the hearing or otherwise and potentially traumatize either party. This could create a chilling effect on reporting.

The NPRM's proposed mandated hearings will undermine universities' educational missions. Existing university disciplinary proceedings and models in themselves are intended to be educational processes. They are not intended to be criminal or civil courts. Universities might not readily have the funds available to absorb the higher costs associated with the regulation's prescribed quasi-court models. Moreover, the proposed new hearing model will supersede the educational benefits of other models. For instance, schools will no longer be free to opt for alternative investigation and adjudication models that avoid the potentially traumatic experience of participating in a quasi-judicial hearing and allow students to continue participating in other aspects of their education at the institution.

The NPRM imposes unrealistic requirements on universities and sets them up to be potentially legally liable for implementation of these requirements without benefitting students or making the process more equitable.

### **3. The NPRM is inconsistent with existing contracts as well as the principles of local control and federalism.**

The requirement that universities apply the same rule to all sexual harassment cases will upend existing contractual relationships with students, faculty, and staff. Traditionally, colleges and universities, as educational institutions, have generally had the right to define the processes and procedures they use to discipline students for violations on their campuses. Similarly, universities have employment contracts and collective bargaining agreements with faculty and staff members (created by policies or otherwise) that speak to what process the university can use to resolve sexual harassment disputes. In other instances, universities hire at-will employees. For faculty, it is not just negotiating an employment contract, but having a long-standing agreement that promises certain disciplinary procedures. For at-will employees, the NPRM could hamper the employer's ability to take swift action against employees the university deems in violation of disciplinary procedures.

Requiring universities to apply the same process to these different members of the university community would invalidate existing agreements and parties' expectations. The imposition of a blanket federal evidentiary standard negates the ability of various parties to select educational and work environments that align with their values, as well as undermines the authority of individuals, schools, and organizations to negotiate and agree on acceptable terms.

The NPRM also potentially overrides states' attempts to regulate universities' treatment of sexual harassment. Universities have developed effective approaches for adjudicating sexual harassment

claims that are informed by and consistent with their respective state laws. By requiring one standard, the NPRM ignores these differences in various state laws and gives insufficient credence to federalism and the tradition of local control over education. Courts already require institutions to provide a fundamentally fair process. Additionally, the Due Process Clause and state laws set limits on the kind of processes schools can employ. Given the detailed and specific nature of the NPRM, it may require institutions to turn to seasoned lawyers (likely litigators at outside firms) to conduct preemption analyses on the federal regulations and appropriate state laws in real time. This may delay processes and require additional resources to ensure institutions are in compliance with the NPRM and respective state laws. It should be noted that public institutions are already subject to the Due Process Clause. The NPRM seeks to impose those same obligations on private institutions without taking into account the differences in their cultures and existing state law requirements for a “fair process.” As AAU’s 2017 report shows, institutions have implemented a number of different effective strategies for responding to sexual harassment that make these requirements superfluous.

#### **4. The Department’s rule would make it more difficult for universities to protect students who experience sexual harassment.**

Universities are dedicated to protecting all of their students from all forms of harm, including those who experience sexual harassment. Under the NPRM’s model for adjudication, schools will no longer be free to opt for alternative investigation and adjudication models that avoid the potentially traumatic experience of participating in a quasi-judicial hearing.

Mandating an adversarial hearing that includes cross examination is likely to chill participation by student complainants, witnesses, and respondents. Many victims will likely conclude that going through an adversarial hearing is simply not worth it. This will likely also be the case when there is a faculty-student dynamic, especially when there are graduate students involved. Graduate students who rely on faculty member recommendations may not be willing to testify against a faculty member in this type of setting. Even if students want to participate, they might not be physically able to due to a mental illness or other medical conditions, or may be on leave, studying abroad, or the investigation may occur during the summer. If a student witness does not participate in the hearing, their statement cannot be used. Witnesses cannot be compelled to testify and may choose not to do so if they will be subjected to an adversarial cross-examination by a lawyer or adviser. Without witnesses and the evidence they provide, the accused and the accuser will not be able to support their cases. Universities, in turn, will be limited in their ability to create safe learning environments and reasonably implement their community standards as outlined in their codes of conduct.

#### **5. The NPRM represents an unprecedented infringement on universities’ autonomy and expertise.**

The NPRM outlaws models that experience and practice have shown to be effective and of educational benefit. The principle of regulatory flexibility counsels in favor of giving universities as much leeway as possible to devise compliant processes for responding to allegations of sexual harassment for their campus community.

The NPRM subjects universities to an unprecedented amount of federal control as it pertains to how to investigate and adjudicate allegations of sexual harassment. The Department has never before attempted to prescribe in this level of detail the process that a university must employ. And for good reason: universities have expertise in dealing with students and how best to structure effective student disciplinary processes, which are intended to address student conduct, as well as be educational, as previously noted. In light of this expertise, it makes sense for the Department to suggest some baseline requirements for investigations and adjudications, while allowing universities to implement a model that accounts for students' and institutional needs. The current NPRM goes past baseline requirements.

Given these problems with the proposed regulation, the Department should amend the proposed rule in ways that allow universities to choose the model that will work best for them and their educational missions. Specifically, the Department should:

**1. Remove requirements that institutions permit cross-examination and appoint aligned advisors.**

Universities should be free to decide whether cross-examination is consistent with their educational philosophies and can be implemented effectively on their campuses given their resources. The cross-examination process can be traumatizing and humiliating, not just for complainants but for respondents, and third-party witnesses as well. It also likely undermines other educational goals like teaching acceptance of responsibility or providing avenues for respondents to make amends. There are other ways to address issues of credibility that do not involve live cross-examination by attorneys. For example, institutions could allow attorneys to appear as non-participating advisors. Or they could allow for questioning through a panel—a process that two California appellate courts recently held met the requirements for a fair hearing and process. *See Doe v. Claremont McKenna College*, 25 Cal.App.5th at 1065; *Doe v. University of Southern California*, (2018) (slip opinion). Alternatively, they could allow both parties to submit written questions, protecting both the complainant and respondent. This would also allow a student who did not participate in the cross-examination to submit a statement, which the current regulation does not allow.

Removing the cross-examination requirement would largely remove the need for universities to appoint aligned advisors. In any event, universities should be able to choose whether appointing

aligned advisors is the best way to use university resources to protect all members of the university community.

**2. Remove the requirement that universities apply the same standard of evidence and process across all disciplinary processes.**

Requiring an institution to use the same evidentiary standard for other, unrelated violations, like plagiarism, does not make sense. Universities should be free to decide that certain processes are better suited to particular violations. The evidence available in particular types of cases often differs. For instance, findings of plagiarism violation—which, like sexual harassment, can lead to expulsion at some institutions—are often based on facts that are less sensitive, more easily verified (especially in light of plagiarism software), and less dependent on witness testimony. A university could sensibly want to require a higher standard of proof for a plagiarism violation because, in that context, factual uncertainty might signal more strongly that a student is not actually responsible. In contrast, in cases of sexual harassment where fact-finding is more nuanced, complicated, and most often dependent on witness testimony, a university might reasonably determine that holding plagiarism violations to a higher evidentiary standard is appropriate based on information it would expect to have available for adjudicating such matters.

There are similarly good reasons to permit different processes or standards of evidence for employees. For example, a university might reasonably conclude—or state law contracts or policies may require—that a higher evidentiary burden should be required for dismissing a tenured professor or long-serving university staff person. Employees under a collective bargaining agreement may have yet another process for addressing sexual harassment that would govern them.

**3. Clarify whether the Department intends to preempt other relevant laws and whether and under what circumstances an institution may forbid and investigate behavior that falls outside the Department’s definition of “sexual harassment.”**

The NPRM is unclear as to how it relates to other laws governing universities. Currently, state laws impose varying standards that may be in conflict with the regulation’s requirements.

The NPRM is also unclear about how it relates to Title VII Office of Civil Rights in practice. The Department should consider clarifying what process it expects to be applied, in what scenarios, and why (e.g., alleged employee-on-employee harassment; alleged employee-on-student harassment). In an attempt to align universities’ responses to sexual harassment, the Department may actually hinder schools’ ability to respond effectively to allegations of workplace harassment, which is defined far more broadly. In general, the NPRM should be changed to clarify that it does not seek to require any particular process when an employee is the respondent.

Additionally, the current NPRM does not make clear that universities retain the freedom to investigate and punish behavior that falls outside of the Department’s definition of “sexual harassment.” The Department’s summary of the NPRM states that a university “remains free to respond to conduct that does not meet the Title IX definition of sexual harassment.” 83 Fed. Reg. 61,475. But section 106.45(b)(iii) also states that “[i]f the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved or did not occur within the recipient’s program or activity, the recipient must dismiss the formal complaint with regard to that conduct.” *Id.* at 61,498. The Department should clarify that, because of universities’ expertise in these matters, they are free to pursue investigations of behavior beyond the minimum requirements laid out by the Department. For example, if the conduct does not occur within a program or activity but may affect a student’s education, then the university should be empowered to investigate. Assuming that the Department explicitly states that institutions have the authority to address sexual harassment that falls outside of its definition, AAU views it as consistent with the Supreme Court’s definition in *Davis* and *Gebser*.<sup>6</sup>

For these reasons, AAU urges the Department to revise its proposed regulations. Doing so would respect the autonomy and educational missions of America’s higher education institutions, while allowing them to tailor their sexual harassment proceedings to effectively protect the rights of all students, faculty, and staff members.

Finally, it is clear the proposed rule will make significant changes on how universities are to handle sexual harassment matters. If enacted, any new rule should recognize that even small changes could have large consequences. As such, any new rule should provide sufficient time for universities to implement the changes before the rule becomes effective.

Sincerely,

A handwritten signature in cursive script that reads "Mary Sue Coleman".

Mary Sue Coleman  
President

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<sup>6</sup> *Davis v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998).