How the Title IX Proposed Regulations Hurt Campuses
The Aurora Center Notice and Comments

**Sexual Harassment Definition Change (Section 106.44(e))**

- **Problem**: Limits a school's responsibility to respond to sexual harassment/assault only if it is "so severe, pervasive, or objectionably offensive" that "it denies a person equal access to an education program or activity" (victim/survivor has to drop out of class/activity/work/school).

- **Impact**: Prevents schools from early intervention to redirect, interrupt, and educate individuals about unhealthy behaviors which could reduce severe, pervasive behavior.

- **Impact**: According to proposed language, victim/survivors have to drop out of a program for school to investigate sexual misconduct.

- **Impact**: Victim/survivors will still report all forms of sexual harassment/assault, but schools will not be legally required to respond. School inaction makes victim/survivors more vulnerable to more severe acts of sexual harassment/assault, and a record of uninvestigated reports may put schools more at-risk.

- **Recommendation**: Modify definition to "Unwelcome conduct (physical, verbal, or non-verbal) on the basis of sex that is so severe, pervasive, and objectively offensive that it interferes with, limits a person's ability to participate in or benefit from, or denies equal access to an education program, service, opportunity, or activity."

**Jurisdiction Change (Section 106.44(e))**

- **Problem**: Limits a school's responsibility to respond only to "conduct that occurs within its education program or activity."

- **Impact**: Schools may not respond to off-campus or online sexual harassment/assault, even if it impacts a victim/survivor's ability to learn, work, or live on-campus.

- **Impact**: Victim/survivors would have to attend class/activity/work with a perpetrator if the incident occurred off-campus or online.

- **Impact**: Perpetrators may interpret where and when it is okay to sexually harass/assault people.

- **Recommendations**: Modify language "recipient is responsible for responding to conduct that occurs within its education program or activity" and replace with "recipient is responsible for responding to conduct that interferes with, limits a person's ability to participate in or benefit from, or denies equal access to an education program, service, opportunity, or activity."

Approximately 41% of campus sexual assault involved off-campus parties according to United Educators' Report: Confronting Campus Sexual Assault: An Examination of Higher Education Claims, 2011-2013. Case law like Ross v. University of Tulsa, Doe v. University of Alabama at Huntsville, etc. have established schools have jurisdiction of off-campus incidents of sexual assault and harassment.
Deliberate Indifference/Actual Knowledge (Section 106.44(e)(5))

• **Problem:** Limits school employees who must respond to sexual harassment/assault reports to only "Title IX Coordinators or an official who has authority to institute corrective measures". This may exclude coaches, deans, department heads, supervisors, and other employees with school authority but do not deal with sexual harassment/assault cases.

• **Impact:** This change protects schools from private litigation, money damages, and lawsuits rather than protect victim/survivors and campus communities from perpetrators.

• **Impact:** Many victim/survivors don't realize they must report to a Title IX Coordinator for the school to investigate a sexual assault/harassment report. Victim/survivors report to school employees they trust and who will support them, not realizing the report may not result in any efforts to stop harassment/assault.

• **Impact:** The proposed rule doesn't require other school employees to provide information or refer victim/survivors to the Title IX Coordinator to report. This can result in the institutional cover-up of sexual harassment/assault.

• **Recommendation:** Modify definition of "actual knowledge" to "notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any employee of the recipient who has authority to take action to redress, or has a duty to report to appropriate officials, or an employee a student could reasonably believe has authority or responsibility, or a teacher in the elementary and secondary context with regard to student-on-student harassment."

Caselaw like Williams v. Board of Regents of the University System of Georgia and Simpson v. University of Colorado Boulder, etc. exists where courts have recognized students who reported to coaches/university employees and can reasonably believe those university employees have a responsibility to act.

Standard of Evidence (106.45 (b)(4)(i))

• **Problem:** Requires a school to "employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty."

• **Impact:** Most schools use the preponderance of evidence standard for all student conduct code violations. This is the same standard used for civil trials and administrative hearings across the country. The proposed regulation creates inconsistency within school’s student conduct policies and practices. It creates a higher, inequitable standard for victim/survivors reporting sexual harassment/assault - a form of gendered violence - than what it may use for other student conduct code violations like physical assault.

• **Impact:** Some faculty and staff governance create their own disciplinary process and standards for tenure and termination that schools have no jurisdiction over. Faculty and staff governance should not regulate student conduct code protocol.

• **Impact:** The proposed regulation conflicts with some state laws and case laws. Several state statutes require the use of the preponderance of the evidence standard for student sexual misconduct complaints. It also restricts state rights to self-regulate.

• **Recommendation:** Strike the language "...must apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty."
Release of Evidence (Section 106.45 (c) (3)(viii))

• **Problem:** Requires a school to "provide both parties an opportunity to inspect and review any evidence obtained as a part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in making a determination regarding responsibility."

• **Impact:** Schools will release a victim/survivors' medical records like forensic rape kits with sensitive information not relevant to the case, as well as mental health records and history to perpetrators. Medical professionals and therapists may not realize schools release this evidence to other parties and provide unredacted, HIPPA protected information.

• **Impact:** A victim/survivor's medical records and photos and mental health records and history not relevant to the case will be shared with the perpetrator. The result could be publishing private, sensitive, identifying information with malicious intent, also known as doxxing.

• **Impact:** Sensitive, irrelevant information could be used as personal attacks during hearings.

• **Impact:** Concerns about how schools uphold both HIPAA and FERPA exist when releasing medical and mental health records, especially if permission is not granted and the submitted evidence is not used by a school to determine responsibility.

• **Recommendation:** Strike the language "...including the evidence upon which the recipient does not intend to rely in making a determination regarding responsibility."

• **Recommendation:** Add stronger parameters of when it is appropriate to release evidence. Current language states "Prior to completion of the investigative report..." This is too broad. Parties could request to review evidence immediately after evidence is submitted.

• **Recommendation:** Define who decides what evidence is relevant to be released to the parties and what rules or protocol is followed to determine the relevance of a given piece of evidence. View rules outlined in Article 4 of the Federal Rules of Evidence (Rule 401 and 403).

Investigation Timeline (Section 106.45(b)(1))

• **Problem:** Creates too much ambiguity for schools to determine what a "reasonably prompt timeframe is for conclusion of the grievance process".

• **Impact:** Perpetrators and witnesses can intentionally delay school grievance processes stating delays occurred for good cause related to "the absence of the parties or witnesses, concurrent law enforcement activity or the need for language assistance or accommodation of disabilities." Perpetrators may use delay tactics to graduate and not participate in grievance process.

• **Recommendation:** Define appropriate timeframe for grievance procedures that don't have "good cause" and define a reasonable timeframe for grievance procedures with "good cause". Define "absence of the parties" and the acceptable range of situations and school tools of accountability to prevent delay tactics.
Informal Resolution (Section 106.45(b)(6))

- **Problem**: Encourages schools to "at any time prior to reaching a determination regarding responsibility to facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication."

- **Impact**: The provision provides vague direction about what is acceptable for informal resolutions. There is no information on when to implement or how to operationalize informal resolutions. It needs more definition and has no safeguards for the victim/survivors, schools, or accused if things would go wrong.

- **Impact**: Schools may coerce victim/survivors into pursuing informal resolution to avoid investigation, particularly for high-profile perpetrators.

- **Impact**: Schools may require gag orders or non-disclosure agreements as part of participating in informal resolutions even when victim/survivors don't want to sign them.

- **Impact**: The proposed regulation limits Title IX investigations to be "so severe, pervasive, and objectionably offensive that it denies a person access to an educational program or activity" but then allows schools to engage in informal resolutions of these high stakes incidents. In the past victim/survivors experienced schools trying to "sweep things under the rug" and it had devastating impacts for the victim/survivors and legal consequences for schools.

- **Recommendation**: Provide more guidance and regulation as to when informal resolution is appropriate and when and how to operationalize and provide resources for schools to possibly implement that are evidence-based and data driven.

- **Recommendation**: Define and regulate what constitutes reasonable informal resolution strategies.

- **Recommendation**: Prohibit non-disclosure agreements unless both parties involved request it.

Religious Exemption (Section 106.12(b))

- **Problem**: Allows a school who receives Federal financial assistance to claim religious exemption without applying to the Department of Education, as is currently required, but "by submitting a letter to the Assistant Secretary."

- **Impact**: Victim/survivors will not know upon applying or enrolling to a school if the school responds to sexual harassment/assault.

- **Impact**: In addition to victim/survivors, LGBTQIA students, pregnant or parenting students (unmarried), and students who access or attempt to access birth control could face discrimination in schools who claim religious exemption with no protections.

- **Recommendation**: An application for religious exemption seems appropriate versus submitting a letter, particularly if the Federal financial assistance is provided to the religious organization and the school has to abide by other federal regulatory requirements attached to those funds.
Title IX Notice & Comment Next Steps:

**Prepare Comments**

The Department of Education opened the public comment period on their proposed regulations on Title IX. Comments are due January 28, 2019.

Comments should:
- Be unique (not a copy/paste template)
- Include specific feedback about the proposed regulations
- Provide alternative policies
- Include data/statistics/case law in addition to personal narrative

**Learn to write a good comment:** Check out Know Your IX’s 5 minute video and Notice & Comment Guide.

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**Submit Comments**