



AMERICAN ATHEISTS

January 28, 2019

Kenneth L. Marcus
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW
Room 6E310
Washington, DC 20202

Re: Comments regarding Proposed Rulemaking on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (RIN 1870-AA14; Docket No. ED-2018-OCR-0064)

Dear Mr. Marcus:

American Atheists writes in response to the request for public comments regarding the proposed rulemaking entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” published on November 29, 2018.¹ We are strongly opposed to the proposed rule because it undermines students’ protection against sexual assault and sexual harassment by narrowing the definition of sexual harassment, restricting schools’ responsibilities to discipline perpetrators of these activities, and undermining investigation procedures in ways that threaten the safety, health, and well-being of students. Moreover, the proposed rule allows religious schools to completely and spontaneously exempt themselves from Title IX nondiscrimination protections. The proposed rule will undoubtedly lead to increased sexual assault, harassment, and discrimination for students in colleges and universities across our nation, and so we emphatically urge you to withdraw it.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the “wall of separation” between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation’s communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. As advocates for religious liberty and equality, American Atheists opposes laws and policies which would allow discrimination against vulnerable individuals and communities based on religious beliefs.

Reporting, Enforcement, and Discipline concerning Sexual Harassment and Assault

By defining sexual harassment as “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity,” the proposed rule subverts the purpose of Title IX. This limited

¹ Notice of proposed rulemaking on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance. Docket No. ED-2018-OCR-0064. 83 FR 25314, Nov. 29, 2018 (hereafter “proposed rule”).

definition would allow schools to ignore all but the worst cases of sexual harassment -- only harassment that reaches the level where the student is denied equal access to education will be actionable. According to a 2015 report by the Association of American Universities (AAU), 11.2% of all graduate and undergraduate students experience nonconsensual sexual contact through physical force or incapacitation.² The proposed definition fails to deal with the startling prevalence of this behavior in our colleges and universities. Moreover, narrowing the definition will lead to more harassment as students are forced to endure repeated and escalating levels of inappropriate conduct without being able to seek help from their educational institutions. Perhaps most disturbingly, the proposed rules would create a culture of impunity for harassers, as they are permitted to continue their inappropriate behavior without intervention by the educational institution.

Additionally, the proposed rule significantly narrows the scope of educational institution's responsibility for enforcement. The rule gives educational institutions increased flexibility to overlook off-campus incidents of sexual assault and harassment. Specifically, by focusing on effective denial to an educational program or activity, the rule ignores the many other ways that sexual harassment may indirectly affect or contribute to a students' inability to take participate in educational programs. This interpretation disfavors enforcement when incidents take place outside of educational institutions, such as in off-campus apartments, fraternities, sororities, local public accommodations, and in other environments.

The proposed rule also introduces significant barriers to reporting incidents of sexual violence by requiring that complaints must be made only to the Title IX coordinator or to specific administrators. In practice, this limitation makes it much more difficult for students to make reports, not only because students will not be able to approach professors or mentors they trust, but also because survivors may now know how or to whom sexual violence must be reported. Unfortunately, this obstacle affects LGBTQ students disproportionately. According to the 2015 AAU report, as many as 60 percent of gay and lesbian students and nearly 70 percent of bisexual students report being sexually harassed on campus. However, LGBTQ students frequently do not report incidents of victimization to school staff because they doubt that effective intervention would occur or fear that reporting would make the situation worse.³

Moreover, the reporting requirements outlined in the proposed rule undermine many educational institutions' efforts to address sexual violence. A 2017 study analyzing 150 universities in the US concluded that schools are widely implementing policies that require most, if not all, employees to

² Association of American Universities, (2015). Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct (September 21, 2015). Available at https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.

³ See Kosciw, J. G., Greytak, E. A., Zongrone, A. D., Clark, C. M., & Truong, N. L. (2018). The 2017 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools. New York: GLSEN. Available at <https://www.glsen.org/sites/default/files/GLSEN%202017%20National%20School%20Climate%20Survey%20%28NCS%29%20-%20Full%20Report.pdf>.

report student disclosures of sexual assault.⁴ This proposed rule would unnecessarily tie the educational institution's hands and undermine both enforcement and assistance to survivors.

The Department's proposed rule also requires educational institutions to adopt a clear and convincing evidentiary standards regarding sexual harassment complaints, even if the institution handles other types of allegations via a preponderance of the evidence standard. By adopting a higher standard of proof for sexual harassment, the school would set up an unfair bias against victims of sexual assault and harassment. The Department attempts to justify this requirement through appeal to misogynist stereotypes about false allegations. In fact, studies show that less than 10% of allegations concerning sexual assault are false.⁵ Because these incidents of sexual violence can be especially traumatic, educational institutions must take victims at their word and support them throughout the disciplinary process in order to have effective enforcement.

Finally, the proposed rule sets up several procedural hurdles which undermine enforcement and harm survivors. For example, the rule would allow accused perpetrators to cross-examine victims directly rather than through written questions submitted to a hearing panel. This procedure will effectively revictimize survivors and discourage many from reporting future incidents. Moreover, the rule would allow educational institutions to delay sexual violence investigations and hearings in the case of an ongoing criminal investigation. Educational institutions must not wait for the conclusion of a criminal investigation to begin their own Title IX proceeding. To do so would effectively deny the complainant access to educational programs and activities, possibly for months, as the external investigation proceeds.

Religious Exemptions in Title IX Enforcement

Our Nation has a long history of fostering diverse educational opportunities, including both religious and secular institutions. However, the proposed rule threatens this education system by prioritizing the ability of religious educational institutions to engage in sex-based discrimination over the basic rights of students. Current rules allow religious institutions to claim an exemption from Title IX by providing a written notification to the Department regarding which portions of Title IX and the accompanying regulations conflict with the specific tenets of their faith. The proposed rule eliminates this provision, and instead allows religious institutions to claim exemptions to Title IX after the discrimination has occurred.

While we strongly disagree that religious educational institutions should be able to exempt themselves from essential nondiscrimination protections, the previous system met the requirements of Title IX adequately. For example, more than six dozen colleges and universities notified the Department of Education of their intent to be exempt from Title IX with respect to their treatment of LGBTQ students since 2013.

⁴ Holland, K. J. & Cortina, & L. M. (2017). "It happens to girls all the time": Examining sexual assault survivors' reasons for not using campus supports. *American Journal of Community Psychology*. Available at [https://lsa.umich.edu/psych/lilia-cortina-lab/Holland%20Cortina%20&%20Freyd%20\(in%20press,%20American%20Psychologist\).pdf](https://lsa.umich.edu/psych/lilia-cortina-lab/Holland%20Cortina%20&%20Freyd%20(in%20press,%20American%20Psychologist).pdf).

⁵ Lisak, D., Gardinier, L., Nicksa, S.C., Cote, A.M. (2010). False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases. *Violence Against Women*. Available at <https://journals.sagepub.com/doi/abs/10.1177/1077801210387747>.

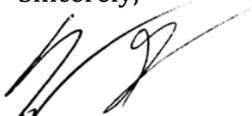
However, the Department previously sought to balance this facilitation of religious discrimination with at least some accommodation for students by informing them in advance about the educational institution's ability and intention to legally discriminate against them. This allows students to choose an alternate school during the application process, transfer to another university, or even delay coming out as LGBTQ until after graduation. If schools are not required to preemptively inform the Department about their intent to discriminate, current and prospective students and their families will lack the information necessary to make informed decisions.

While we think it is disgraceful that students are allowed to suffer discrimination and harassment because of the beliefs of their educational institutions, we understand that the Department is bound by Title IX. At the same time, the Department should not magnify the problem by allowing these religious institutions to hide their intent to discriminate or present post hoc rationalizations for this hateful behavior.

Conclusion

Instead of enforcing Title IX to protect students from victimization and discrimination, the Department of Education is proposing to undermine basic protections for students against sexual assault, sexual harassment, and sex-based discrimination. It is frankly astonishing that the Department is proposing a rule which sabotages critical and well-established sexual assault protections and which serves no purpose except to cater to misogyny and religious bigotry. We emphatically urge the Department to withdraw this pernicious proposed rule immediately. If you should have any questions regarding American Atheists' position on non-discrimination policies, religious exemptions, or comments on the proposed rule, please contact me at 908.276.7300 x9 or by email at agill@atheists.org.

Sincerely,



Alison Gill, Esq.
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American Atheists