1-25-2019

JR-19S-3345 Public Comments on Title IX Proposed Changes

Student Government Association University of North Florida

Student Government
University of North Florida

SENATE LEGISLATION

JR-19S-3345

JR-19S-3345: Public Comments on Title IX Proposed Changes

Whereas: The Student Government of the University of North Florida was established to represent student concerns in all University wide matters, and represent the concerns for student morale, welfare, responsibility, and integrity, and;

Whereas: The Student Government of the University of North Florida has the responsibility and constitutional duty to advocate for matters concerning the student body on a university, state, and federal level, and;

Whereas: The Department of Education (DOE) has recently proposed changes to Title IX "Part 106-Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance." These changes would directly affect the protection against sex-based discrimination of all students and student employees, and;

Whereas: As part of the federal rule making process, the DOE has asked for comments from stakeholders and the public on these proposed changes, and;

Whereas: As stakeholders, the Executive Branch of the University of North Florida Student Government has drafted comments attached to this document for the DOE that reflect the interests of the student body, and;

Therefore: Let it be enacted that the Senate supports sending the attached comments to the Department of Education on behalf of the University of North Florida Student Government before the deadline of January 28, 2019, and;

Furthermore: Let this resolution be forwarded to Dr. David Szymanski, President of the University of North Florida, Dr. Pamela Chally, Interim Provost of the University of North Florida, and the office of the General Counsel.

Legislative Action

Author: Maria Bermudez and Madison Brantley
Sponsor: Kathryn Schneider
Committee: University and Student Affairs
Committee Action: No Quorum
Senate Action: 28-0-0
Date of Action: 1-25-19

Signed and Delivered to the Student Body President
on this 28th day of Jan., 2019.

Place Time Stamp Here

Signed: [redacted]
Thomas Pluchon, Student Senate President

Executive Action

Let it be known that **JR-19S-3345** is hereby
APPROVED / VETOED
on this 28th day of January, 2019.

Signed, [redacted]
Jenna DuPilka, Student Body President

Signed and Delivered to the Senate Secretary

Place Time Stamp Here

Docket ID: ED-2018-OCR-0064-0001

To Whom it may concern,

The Student Government of the University of North Florida makes the following comments regarding the proposed changes to Title IX "Part 106-Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance". These comments have been made based on its statutory authority to speak on behalf of the Student Body of the University of North Florida in issues of their concern, and to advocate for their best interest. Because the body is comprised of students of an institute of higher education, we believe we are relevant stakeholders, and as such have familiarity with and are impacted by policies relating to sex based discrimination, and sexual harassment on our campus.

§ In response to directed question 2. *applicability of provisions based on type of recipient or age of parties*: We believe it would be beneficial to the applicability of the specific provisions 106.45 (b) (3)(vi) and (vii) to differentiate on the basis of whether the complainant or respondent is over 18 as it is not appropriate for a student who is not legally an adult to be required to participate in a live hearing if they want their case to continue formally. This is because in the case of live hearings, that closely resemble legal proceedings and may have attorneys present, a minor cannot be expected to possibly undergo a live cross examination that could potentially be done by an attorney, and could be admissible in court. In cases where the student in question is a minor, answering questions in writing or to a university official can allow for due process, without subjecting them to being probed in person by an attorney, which can be excessively intimidating and lead to self-incrimination. However, in the case of proposed 106.44 (3) if this same distinction was made it would take away the ability of universities to consider the emotional and developmental capacity of students in allowing for it to be the complainant to decide if they want to subject themselves to a formal investigation or are considered supportive measures to be enough. Since a formal complaint can still be initiated by a Title IX coordinator, the university has the flexibility to still act although not required to. If proposed 106.44 (3), also differentiated by age, it would fail to acknowledge that a student under 18, who may be enrolled at an IHE or in secondary education may have the capacity to decide how they want their grievances handled for a more equitable process.

§ In response to directed question 4. *Training*: We believe that it would be beneficial for the department to better define what adequate training would entail, especially considering the differences in grievances procedures in LEA and IHE.

a. When taking into consideration the panel system employed by IHE, which utilize students and staff, a self-guided training format may be insufficient for a

university to ensure the decision makers have the minimum knowledge required to make fair decisions. Most individuals who serve in these panels have no previous knowledge of the student conduct process and sexual harassment and may be unable to fully comprehend training material without expert guidance. Therefore, the regulation should stipulate that in cases where the decision maker will not be a university official whose position guarantees knowledge of these processes and definitions either an in-person training or assessment on training materials should be implemented.

b. At the University of North Florida student panelist receive annual training by the Student Conduct Office for all panelist and advisors that must be completed before they may act in those roles. These trainings are 8 hours and conducted in two sessions. There is an optional additional training for panelist specifically related to Title IX that is required to hear such cases. The additional Title IX training is around an hour long. The Conduct Office also provides monthly supplementary optional training sessions that panelist is encouraged to attend.

§ In response to directed question 6 *Standard of Evidence:* We find the preponderance of evidence standard to be the best standard of evidence, as it is what is used in civil litigation. The conduct process more closely resembles civil cases than criminal cases, and as such should model its procedures to more closely resemble civil litigation than criminal. While it is true that university conduct procedures lack certain features of civil litigation like rules regarding evidence and discovery, it is also true that they lack the features of a criminal litigation process like subpoena power, rules on evidence, and the ability to issue warrants, which would make it reasonable to meet this standard of evidence. We believe that universities can have the flexibility to pick the standard of evidence. If it is the case that universities can decide the standard of evidence, it should be the same standard used in cases with the same maximum sentences, but not the same standard for cases with differing sentences. While it is true that a finding of fault in the case of sexual harassment may carry more stigma than conduct violations with similar maximum penalties, the damage to complainants as a result of sexual harassment also exceeds the damage conduct violations with similar maximum penalties have on a complainant. As a result, the impact that the finding would have on the respondent is equal to that on the complainant and as such institutions should not be allowed to prioritize the impact on the respondent by applying a higher standard only to sexual assault. We came to this conclusion with support from research from experts such as the Association for Student Conduct Administration and our own Student Conduct Office. As well as referenced articles such as "Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault "(Chmielewski 2013) and "The

Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes" (Chris Loschiavo, JD and Jennifer L. Waller, PhD)

§ In response to directed question 7: We believe it would be beneficial for the department to regulate further what is considered directly related to allegations to ensure that evidence that is irrelevant or detrimental isn't unnecessarily provided to all parties. For example, evidence of sexual history should not be considered directly relevant to the allegations.

§ In response to changes to 106.44 a: We ask the department to clarify what constitutes an educational program and activity and to rethink the idea that an incident must occur at a university activity or program to be of a university's concern. We recommend the basis for deciding whether the University is responsible for the incident be the involved parties' ties to the school and not the context under which the incident occurs. For example, an incident could occur between two students from the same University at an off-campus apartment; them being together was not directly tied to educational activity but that should not decide the universities involvement, since they are both students at the same university. This should be the same case when it comes to any situation between same university employees, such as professors, staff, etc, and same university students, no matter if they are adjunct or visiting professors and online, part time, and or full-time students.

By not responding to conduct that occurred outside of the academic program they fail to consider the impact this conduct could still have on educational activities. Those involved could have a hard time ever taking part in educational programs or activities ever again for fear of proximity or contact with the offender. This could lead to lower graduation rates as victims may feel afraid to be involved or even at school anymore and drop out. Even if there are applied rules and changes in class schedules, those involved always run the risk of seeing each other on campus in the library, at sporting events, and even just walking on campus, especially for small campuses. By taking this into consideration, the department would not be regulating activities of an individual but would protecting the right to educational attainment of all parties.

We also believe that the standard for actual knowledge should include imputation of knowledge. As it is a universities duty to supervise its own operations and to collect facts in relation to sexual harassment, and the definition of imputation of knowledge includes

the need for the facts to be open to discovery, it is not unreasonable to use this standard. Moreover, the requirement for constructive notice should be used as it asserts that any reasonable person would have known. This would protect students from sex-based discrimination as the result of negligence on behalf of the university.

§ In response to section 106.45(B)(3)(VII): The department fails to consider the significant increased cost to universities that requiring them to provide advisors would cost in the departments cost analysis. It also fails to take into account the possible inequity created in advisors. This requirement for grievance procedures was made to mimic the due process procedures of the legal system, without the same safeguards. Either party could have a lawyer as an advisor, however the recipient does not have to provide an advisor of equal caliber. This would make it so that a live hearing and advisor does not actually guarantee due process as the regulation claims, since in legal proceedings the state must provide an attorney. It puts respondents in a position to act in much the same way as a criminal investigation, with cross examination and full discovery rights, which they are not currently in the position to do. This regulation also does not at any point acknowledge, address, or attempt to rectify the effect this could have on reporting. Making the process more intimidating will likely reduce the number of complainants willing to come forward.

§ In response to section 106.45(B)(6): We believe that the department should regulate further and clarify the requirements for an informal resolution, as it is a part of the formal complaint process it should have the same consideration as a formal resolution process. The Department should advise on what type of informal resolution is appropriate. For example, mediation that usually requires in person close proximity and insinuates reconciliation and compromise, which could be utilized under some cases of sexual harassment as defined by Title IX, would be inappropriate in cases such as sexual assault. The regulation can protect against this by requiring that the means for informal resolution proposed by the respondent not be clearly unreasonable. It should also include a safeguard for both respondents and complainants from pressure from the recipient to undergo an informal resolution. This is necessary because the informal resolution process would involve significant less cost to the recipient and therefore, it would not be unreasonable to conclude that some recipients may be motivated to put pressure on students to choose that method of resolution.

§ Overall, we find that this policy proposed may reduce the reporting of sexual harassment by making the process more difficult or intimidating to complainants. This may further contribute to an already existing problem of under reporting these types of

incidences. Under "4.a. Establishing a Baseline on page 92", it is said "These estimates were then weighted by the number of Title IX- eligible institutions in each category to arrive at an estimated average 2.36 investigations of sexual harassment per IHE per year." According to the National Sexual Violence Resource Center, one in 5 women and one in 16 men are sexually assaulted while in college and more than 90% of sexual assault victims on college campuses do not report the assault. This begs the question how the estimated average is 2.36 investigations of sexual harassment per IHE per year, when statistics show it is happening so much more often than that. Moreover, we believe that this regulation cost analysis greatly underestimates the cost to respondents. Specifically, by failing to consider the cost associated with providing an advisor. These costs could be transferred to students in light of the tight budgets many institutions already operate on.

These are all the comments the University of North Florida Student Government has at this time. As students, it was a privilege to look over the proposed changes and offer some input. We look forward to hearing the results of what was proposed with the student perspective taken into consideration.

References:

Amy Chmielewski,Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault, 2013 BYU Educ.& L.J. 143 (2013). https://digitalcommons.law.byu.edu/elj/vol2013/iss1/8

Chris Loschiavo, JD, Jennifer L. Waller, PhD, The Preponderance of Evidence Standard: Use In Higher Education Campu Conduct Process, Association for Student Conduct Administration. https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf

"Statistics about Sexual Violence." National Sexual Violence Resource Center, 2015, https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf