University of Iowa Student Government

Division of Student Life

260B Iowa Memorial Union

Iowa City, Iowa 52242

Dear Assistant Secretary for Civil Rights Kenneth Marcus,

On behalf of the 24,000 undergraduate University of Iowa students we represent, we would like to share our concerns with you about several components of the proposed Title IX guidance. We hope that our concerns will be given careful consideration as you draft the final guidance that has the potential to positively impact the way cases of sexual misconduct are handled on college campuses across the country.

In 2017, The University of Iowa conducted a campus-wide Speak Out Survey on Sexual Misconduct which had a 22.8% response rate.[[1]](#footnote-1) The survey results revealed that sexual assault rates at the University of Iowa campus were consistent with national rates which are 1 in 5 women and 1 in 16 men experiencing sexual violence. The University of Iowa Student Government represents 24,000 undergraduate students. Applying national rates to the statistics from Iowa’s campus-specific survey, there are over 3,233 survivors of sexual misconduct at our university. It is the responsibility of UISG to advocate on behalf of these survivors, and ensure that the University of Iowa is taking reports of sexual misconduct seriously, as well as supporting survivors to the best of its ability.

We believe the Department’s newly proposed definition of sexual harassment, “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; or sexual assault as defined in 34 CFR 668.46(a),” to be too limiting in scope. This change would dismiss the trauma endured by survivors whose harassment may be deemed insufficient and ultimately reduce the level of protection under federal policy at institutions nationwide, including our own at the University of Iowa.

As explained in OCR’s 2001 Guidance, and reiterated in later forms of guidance[[2]](#footnote-2), “when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.” This should include, but should not be limited to: gender-based discrimination, catcalling, stalking, and sexual assault. As students who have experienced these types of incidents, or know peers who have, we know how detrimental harassment can be one’s academic environment and success in college. From our 2017 campus climate survey, 60% of female respondents and 44% of male respondents reported experiencing sexual harassment during their time at the university.[[3]](#footnote-3)[[4]](#footnote-4) Under the Department’s proposed regulations, many, if not most of these experiences of harassment will go unreported or without response from the university in the future.

Furthermore, the Department’s newly proposed changes limit the scope of reporting by saying an institution is only responsible for responding to an incident based on the circumstances in which a student was sexually harassed or assaulted, where it states,

Proposed section 106.44(a) also reflects the statutory provision that a recipient is only responsible for responding to conduct that occurs within its “education program or activity.” See 20 U.S.C. § 1681(a) (prohibiting a recipient from subjecting persons in the United States to discrimination “under any education program or activity”). The Title IX statute defines “program or activity” as “all of the operations of” a recipient. See 20 U.S.C. 1687. An “education program or activity” includes “any academic, extracurricular, research, [or] occupational training.” 34 CFR § 106.31. See also Doe v. Brown Univ., 896 F.3d 127, 132 n.6 (1st Cir. 2018) (“an institution’s education program or activity” may include “university libraries, computer labs, and vocational resources . . . campus tours, public lectures, sporting events, and other activities at covered institutions”). Whether conduct occurs within a recipient’s education program or activity does not necessarily depend on the geographic location of an incident (e.g., on a recipient’s campus versus off of a recipient’s campus). See e.g., [Rost ex rel. K.C. v. Steamboat Springs](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=2014606231&amp;pubNum=0000506&amp;originatingDoc=Ife271310096511e7ac16f865c355438f&amp;refType=RP&amp;fi=co_pp_sp_506_1121&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)&amp;co_pp_sp_506_1121) [RE-2 Sch. Dist., 511 F.3d 1114, 1121 n.1 (10th Cir. 2008)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=2014606231&amp;pubNum=0000506&amp;originatingDoc=Ife271310096511e7ac16f865c355438f&amp;refType=RP&amp;fi=co_pp_sp_506_1121&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)&amp;co_pp_sp_506_1121) (“We do not suggest that harassment occurring off school grounds cannot as a matter of law create liability under Title IX”).[[5]](#footnote-5)

We believe that though this definition is expanded to school sponsored educational programs and activities and is not limited by geography, the requirement should still be more all-encompassing. The aim of the reporting and response process is to support all students, so schools should not be encouraged to respond only when incidents are related to school sponsored educational programs, but whenever any student is a victim of sexual harassment or sexual assault, regardless of the incident’s location.

The requirement for an institution’s response, then, should encompass all students’ experiences with sexual harassment and sexual assault, regardless of their involvement or tie to school or liability concerns. To define college and university students merely by the time they spend participating in “educational programs or activit[ies]” is a mischaracterization of how students describe their experience at any academic institution. Our identities as students do not end when we step off campus at the end of the day. Students who experience instances of sexual harassment/assault at the hands of other students are necessarily impacted in their educational experience at Iowa. Incidents of harassment need not be, “So severe, pervasive, and objectively offensive”[[6]](#footnote-6) to limit one’s equality in education that they are privy to under the law. As such, we once again urge the Department of Education to reconsider its definition of harassment to be more inclusive.

We strongly disagree with and rebuke the proposed implementation of cross-examination by Department of Education Secretary DeVos as stated here:

“*In contrast, the Department has determined that at institutions of higher education, where most parties and witnesses are adults, grievance procedures must include live cross-examination at a hearing. Proposed section 106.45(b)(3)(vii) requires institutions to provide a live hearing, and to allow the parties’ advisors to cross-examine the other party and witnesses*.”1

Implementation of a cross-examination process in hearings could result in retraumatizing survivors of sexual assault and harassment. Retraumatization is defined by the United States Department of Labor as “A situation, attitude, interaction, or environment that replicates the events or dynamics of the original trauma and triggers the overwhelming feelings and reactions associated with them.” Allowing survivors to be cross-examined will put them in a situation to be retraumatized by the questions directed at them and the people around them. With the requirement of cross-examination, students may feel the need to hire a lawyer to represent their case, resulting in students of more affluent backgrounds having an unjust advantage over those that cannot afford legal representation. We believe that a due and fair process is met when both parties get an opportunity to ask questions, but it is not always necessary to do so as it can force the accuser to relive his or her traumatic experience or not feel as if their voices fall on deaf ears.

The application of cross-examination will discourage survivors from reporting the cases of harassment and assault committed against them. Because public knowledge of court proceedings is limited and often comes from the media’s inaccurate representations of legal processes, many survivors will be hesitant to report so as to avoid the strenuous, aggressive questioning depicted in the media. Attempting to lessen the negative effects of cross-examination by putting survivors and assailants in separate rooms and using a video chat system is not a dependable or effective solution. Because the sound and video quality of this system is not guaranteed to be reliable, it cannot be trusted as a solution. As such, we propose that these draft regulations utilize the guidance provided in the 2011 Dear Colleague Letter that prohibited the use of cross-examination.

On the University of Iowa campus, students who responded to the Speak Out survey were decidedly more likely to report an incident of sexual misconduct to someone they knew in a more informal setting than someone(s) in a formal setting. The proposed changes to the Title IX regulations would directly affect students who experience sexual misconduct by diminishing their routes to reporting and recovery assistance.[[7]](#footnote-7) Currently all collegiate deans, Department Executive Officers, advisors, departmental or collegiate directors or coordinators, presient, director of Equal Opportunity and Diversity, sexual misconduct response coordinator, vice president and staff, provost, directors and supervisors in an employment context, resident assistants, and orientation student staff at the University of Iowa are mandatory reporters.

The University of Iowa currently responds to all reports and complaints made by the parties listed above. Under the new regulations, only formal complaints made by the survivor would be investigated, which would limit mandated investigations that help connect survivors to resources and hold assailants accountable. There is a potential for schools to ignore third-party reports and miss opportunities to provide support to a survivor. The survey conducted by the University of Iowa in 2017 found that only 44% of University of Iowa students surveyed reported knowing where to go to make a report of sexual misconduct.[[8]](#footnote-8) The proposed changes have high potential to drastically reduce the number of reported sexual assault and/or harassment incidents. Given that many students at Iowa are unaware of where to go to file a report for cases of sexual misconduct, limiting the responsibility for who brings concerns forward means that fewer cases will be brought to light, and less people will be helped. Given that the current number or sexual assaults and sexual harassment incidents that get reported, the proposed changes will not only minimize data on the subject, but also stands to discourage victims from reporting. Thank you for your time and we sincerely urge you to reconsider these draft regulations so that survivors of sexual assault feel supported and empowered.

Respectfully,

The University of Iowa Student Government

1. *The University of Iowa 2017 Speak Out Survey*, 6 [↑](#footnote-ref-1)
2. Assistant Secretary for Civil Rights Russlynn Ali. *Dear Colleague Letter*, 1. September 26, 2018. Accessed January 21, 2019. https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html. [↑](#footnote-ref-2)
3. *The University of Iowa 2017 Speak Out Survey*, 6. 2017. [↑](#footnote-ref-3)
4. Sexual Harassment as defined by the survey includes: • Sexist Gender Harassment – being treated differently because of their sex or perceived gender identity, someone displaying sexist or suggestive materials, someone making offensive sexist remarks, or being put down because of their sex (faculty/staff and fellow students). • Crude Gender Harassment – being told offensive sexual stories or jokes, unwanted attempts to being drawn in to discussions of sexual matters, someone making offensive remarks about their appearance, body, or sexual activities, or making gestures or using body language of a sexual nature that were embarrassing or offensive (faculty/staff and fellow students). • Unwanted Sexual Attention – unwanted attempts to establish a romantic relationship (one item fellow students), continually being asked out for drinks or dinner, touched in a way that made them uncomfortable, or unwanted attempts to kiss, fondle or stroke them (all items faculty/staff). • Sexual Coercion – being bribed with a reward to engage in sexual behavior, feeling threatened with retaliation for not being sexually cooperative, treated badly for refusing to have sex, or someone implied better treatment if they were sexually cooperative (faculty/staff only). • Sexual Harassment Via Electronic Communication – someone sent or posted unwanted sexual comments jokes or pictures by text, email, social media; spread unwelcome rumors by text, email, social media or other electronic means; or called them gay or lesbian in a negative way by text, email, social media or other electronic means (fellow students only). https://speakout.uiowa.edu/assets/Uploads/f1d7611f3d/2017-Speak-Out-Survey-Full-Report-and-Anti-Violence-Plan.pdf. [↑](#footnote-ref-4)
5. Amendment of Regulations implementing Title IX of the Education Amendments of 1972 (Title IX), 83 FR 61462 (To be codified at 34 CFR 106). [↑](#footnote-ref-5)
6. 83 FR 61462, §106.44(A) [↑](#footnote-ref-6)
7. *Ibid.,* 17 [↑](#footnote-ref-7)
8. *Ibid*., 18 [↑](#footnote-ref-8)