



Student Senate of Stockton University
Resolution SP19-01

Comment on Proposed Changes to the Nondiscrimination on the Basis of Sex in Educational Programs or Activities Receiving Federal Financial Assistance

- Whereas,** the Student Senate is the elected voice of the approximately 9,200 students who attend Stockton University; and
- Troubled By,** the Department of Education’s proposed changes to the Nondiscrimination on the Basis of Sex in Educational Programs Receiving Federal Financial Assistance; and
- Concerned,** that these changes directly oppose Stockton University’s “Student First” policy and the Student Senate’s commitment to all students’ intellectual, social, and economic welfare; and
- Emphasizing,** how these changes do not have students’ success, wellbeing, and best interest at heart; and
- Aware Of,** the public commenting period for this proposed legislation which ends on January 28th, 2019; and
- Recognizing,** it as our civic responsibility to be educated and active in government and politics at all levels; and
- Noting,** that the views and opinions expressed in this document are that of the Student Senate and do not necessarily reflect those of the administration and leadership of Stockton University; therefore
- Be It Resolved,** the Student Senate of Stockton University submits the attached comment to the Federal Department of Education to review and consider.

President Katie Coburn
Student Senate President

Vice President Monica O’Kane
Student Senate Vice President

Re: ED-2018-OCR-0064

To Whom It May Concern,

Thank you for the opportunity to comment on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance¹. We are the Student Senate of Stockton University in New Jersey, representing the over 9,000 undergraduate and graduate students who attend the University. The Student Senate has a history of advocacy on behalf of survivors of sexual harassment at our own institution and across the state of New Jersey; this includes increasing resources for victims and survivors of sexual misconduct; helping to open, and later expand, Stockton's Women's, Gender, and Sexuality Center; as well as working with New Jersey's Coalition Against Sexual Assault (NJ CASA) on their Student Prevention Initiative². Given our history, knowledge, and experience of how sexual harassment affects not only students' education, but their livelihood, we are sure that the proposed changes to Title IX will have a significant negative impact on students not just at Stockton, but at schools across the country, and we cannot sit idly by, allowing our students to be placed in harm's way.

Many aspects of this proposed rule will be detrimental to students who have been victimized by sexual misconduct, specifically by making the process to report and investigate sexual assault and sexual harassment unnecessarily strenuous. Specifically concerning are the updated definitions of sexual harassment and actual knowledge which open many loopholes institutions will be able to exploit to avoid being held responsible for sexual misconduct, allowing for the cross-examination of survivors by the accused's representative, and the new standard of evidence.

I. Definitions of Sexual Harassment and Actual Knowledge

The proposed definitions of "sexual harassment" and "actual knowledge" make the reporting process unnecessarily difficult to navigate as well as allow institutions to ignore many of the reports filed, putting an undue burden on a student attempting to file a Title IX violation. Sexual harassment and sexual assault are the most underreported crimes in the country, especially on college campuses, despite being deeply pervasive at schools across the United

¹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance is commonly referred to as Title IX.

² NJ CASA's Student Initiative is a collection of student organizations from colleges and universities across New Jersey working to find gaps in education regarding sexual assault and ways to effectively close them.

States. At Stockton University, between 2015 and 2017, there were 14 Clery-reported rapes, in addition to 49 Title IX reports of sexual harassment and rape. Meanwhile, the Student Campus Climate Survey conducted by the Stockton University Faculty Senate in Spring 2018, which was taken anonymously by 2,511 Stockton students, reported that 7.1% of respondents had “experienced unwanted physical sexual conduct (including sexual harassment) at Stockton”. Providing the Climate Survey accurately represents the entire student body, this suggests that of the enrolled 8,770 undergraduate and graduate students at Stockton during the Spring 2018 term, 622 students faced sexual harassment of some sort, while only 58 Clery and/or Title IX reports of rape and sexual harassment were filed, many of which came from mandatory reporters and not student themselves. This disparity is reflected at institutions across the country and exists under current guidelines, which utilize a broader definition of sexual harassment and in which schools must act when any mandatory reporter at any level of the institution is made aware of an accusation or crime- standards that assure students their reports will be taken seriously. In narrowing the definitions of “sexual harassment” and “actual knowledge,” students will lose that assurance and will be further discouraged from reporting, widening the gap between occurrences and reports.

A. Sexual Harassment

The new, overly restrictive definition of “sexual harassment³” may result in schools ignoring allegations of sexual harassment that are not severe enough to qualify under the new definition and will cause students to be unsure if they have faced sexual harassment according to the law- both cases discouraging students from reporting an incident. Institutions must be required to take some kind of action on even the most minor reports of sexual harassment; otherwise, students will likely be subject to repeated and escalating levels of abuse. This abuse is known to affect the victim’s mental health, academic success, relationships, and overall wellness; over 90% of rape victims experience Post Traumatic Stress Disorder (PTSD) symptoms and are ten times more likely to use major drugs. Additionally, one-third of women who are raped contemplate suicide (RAINN). The federal government must hold institutions

³ The previous definition of “sexual harassment” was from Obama-era guidance which stated conduct constitutes sexual harassment “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.” The new, proposed definition is much more restrictive of what type of conduct constitutes sexual harassment; it states that sexual harassment is “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.”

responsible for intervening on these crimes before they escalate to such a level by re-adopting the definition of “sexual harassment” from the Department of Education’s 2011 Dear Colleague Letter which states that behavior constitutes sexual harassment “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.” Failure to reinstate this standard places students’ welfare in jeopardy, risking their academic success, mental health, and lives.

Additionally, changing the “sexual harassment” definition to allow schools to ignore off-campus incidents of sexual misconduct is a clear act of gross negligence on the part of the federal government. With over half of the student body involved in student organizations, athletics, study abroad, and other opportunities, Stockton students are traveling off campus for school-affiliated events constantly, as well as for academic-related events. During the Fall 2018 semester, students traveled off-campus thousands of times for their courses, organizations, and athletics, among other involvement opportunities provided by the institution. Each time a student left campus, it presented an opportunity for sexual harassment, sexual assault, and other violence to occur at official programming that Stockton would no longer be forced to investigate, even though the event was sponsored by the University. By not requiring schools to investigate claims of sexual harassment during these institutionally-sponsored events and trips, the federal government is allowing schools to provide unsafe conditions for students’ education and development with little to no repercussions. In addition to being reckless, the change will obstruct more incidents of sexual misconduct from being reported. If students know their institution is not required to investigate claims of off-campus sexual misconduct, it is even more unlikely they will seek to report the incident, knowing nothing will be done. Forcing a student who was harassed off-campus to live with the burden of what happened with no support from their institution is blatantly negligent. This change in requirement is a careless, dangerous, and egregious proposal that directly transgresses the purpose of Title IX.

B. Actual Knowledge

The change in definition of “actual knowledge⁴” fails to hold institutions accountable for taking action as soon as any employee at the institution is made aware of an accusation. Requiring the institution to act only when higher-level administrators are aware of the incident allows for reports to be covered up, ignored, and not taken with the severity these crimes demand. This rule also makes it more difficult and uncomfortable for victims to come forward about the harassment, assault, or other violence they may have faced. Students are likely to report sexual harassment and sexual violence to lower-level employees with whom they feel most comfortable- faculty and staff they know and trust, such as their professors or advisors. These employees often do not have authority to institute corrective measures; therefore, under the proposed regulations, the school would not be required to act. Stockton, like many institutions, has created a network of support services that include confidential and non-confidential resources which students nearly always utilize before deciding to pursue a Title IX or criminal investigation. Many of the Title IX reports at Stockton are reported by Resident Assistants, as students tend to know them best and feel most comfortable with them. Under the proposed regulations, many of the employees who work in these student support systems, including Resident Assistants, would no longer be required to report their knowledge, and Stockton would no longer be required to act, therefore effectively ignoring many incidents of sexual harassment. Forcing a student out of their comfort zone following a traumatic experience in order to report an incident of misconduct would be devastating and is likely to negatively affect the student’s ability to recover from the incident. Each employee must be trained to handle reports of sexual harassment and sexual violence so that victims are comfortable, know they are being taken seriously, and do not have to traverse the complicated bureaucracies of their schools throughout the reporting process.

The proposed definitions of “sexual harassment” and “actual knowledge” permit institutions to ignore and mishandle allegations of sexual misconduct, which comes with severe

⁴ Once an institution has “actual knowledge” of an allegation of sexual harassment, they are required to take action. These actions can include activating support systems for the victim and opening an investigation. Under Obama-era guidance, schools and institutions had actual knowledge as soon as any employee of the institution was made aware of an allegation; this is why many employees, such as professors and RAs, identify themselves as “mandatory reporters”. The new regulations define actual knowledge as “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient”. This effectively gets rid of “mandatory reporters” and makes it so victims must go to the Title IX Office or higher to submit a report and have the school act on it.

repercussions regarding students' wellbeing and ability to achieve. By changing these definitions, the federal government would be allowing institutions to cover up and mishandle allegations, utilize loopholes in investigations, and deter victims from reporting.

II. Cross-Examination of Survivors

Requiring school investigations to include a real-time cross-examination of a victim⁵ by the accused's representative is dangerous to the victim's mental health as well as being misleading to an investigation. Forcing a victim to recount a traumatic incident is likely to re-victimize them as they attempt to find closure and learn to continue on with their life in the wake of such a disturbing incident. A cross-examination is also unlikely to be effective in providing an accurate, clear account of an incident from the victim's point of view, as trauma is known to affect its victim's ability to recount a story from memory. Creating this requirement is a precipitous decision that could compromise both the victim's mental health and the integrity of the investigation.

Studies show there is a clear link between mental health issues and having experienced sexual harassment and/or sexual assault, with survivors being more likely to suffer from anxiety and depression, PTSD, and have more trouble sleeping compared to those who have not victimized by sexual misconduct. These types of illnesses and disorders are easy to retrigger, especially in a hostile environment- an environment a cross-examination will create when an untrained representative begins asking a victim questions about their experience. Medically, triggers are known to "set off an immediate panic attack or a flashback that makes the victim think the trauma is happening again" in PTSD victims, according to Dr. Glenn Schiraldi's *The Post-Traumatic Stress Disorder Sourcebook*. The Rape and Abuse National Network (RAINN) notes that over 90% of rape victims suffer from PTSD, while Schiraldi explains that the most affected victims of PTSD are often victims of sexual assault and rape; these crimes "result in the most severe forms of PTSD. They seem to last longest and are hardest to cure. [...] The traumatic event takes over their lives. They repeatedly relive the event in their minds." The new regulations ignore these medical studies and instead subject survivors who are prone to trauma-related panic attacks and flashbacks to cross-examinations that will presumably trigger their PTSD and other anxiety-related disorders. Both Stockton University and the Student Senate

⁵ These cross-examinations would happen during a Title IX hearing in front of the hearing board.

strive to put student success and wellbeing above all else; the University operates under a “Students First” policy and the Student Senate remains committed to protecting students’ intellectual, social, and economic welfare. The new regulations will directly oppose both the University’s and the Senate’s pledge to the student body by risking the mental health of students who faced sexual harassment when the goal, assuring the credibility of evidence, has been accomplished in the past without such risk. This regulation cannot be explained as a careless oversight; this is a display of flagrant disregard for a victim’s wellbeing.

In addition to trauma affecting a victim’s mental health, trauma also affects the victim’s ability to recount an incident from memory. Several studies, including *Post-traumatic stress disorder and declarative memory functioning* completed by Kristen Samuelson, show clear connections between memory problems, especially when recounting something from memory verbally, and the test subject’s history with trauma. *Learning and Memory in Rape Victims With Posttraumatic Stress Disorder* by Dr. Melissa Jenkins, Dr. Philip Langlais, Dr. Dean Delis, and Dr. Ronald Cohen explains the connection between memory problems and rape-related PTSD; subjects who were victims of rape and suffered from PTSD had worse long-term memory than both subjects who were victims of rape and did not suffer from PTSD and subjects who were not victims of rape and did not suffer from PTSD. The same study also showed victims of rape who suffered from PTSD displayed significant gaps in their memory as compared to the other test groups. These studies conclude that even if a victim is able to undergo a cross-examination without suffering from a trauma-related panic attack or flashback, their testimony may not be reliable or accurate, which will threaten the accuracy and precision of the investigation.

Requiring schools to establish a live cross-examination process for sexual harassment cases completely overlooks the many studies that show victims of traumatic events are not fit to be placed under the scrutiny of a hearing board, much less under the scrutiny of a representative not trained to interact with trauma survivors. Rather than use this standard, the Department of Education should permit the victim to submit written reports of the events that occurred as well as responses to any questions. Utilizing a written standard allows the credibility of evidence to be tested while protecting the victim from trigger-induced panic attacks. It also allows for the victim to work with a trained advocate in a comfortable environment when recounting the incident and answering any questions, which will help to ensure their submission is as clear and accurate as possible. The Department of Education’s proposed standard risks the wellbeing of students- a

risk no experienced education professional, and surely no employee of Stockton University, would willingly take- while also undermining the integrity of the investigation itself.

III. Standard of Evidence

Changing the standard of evidence from “preponderance⁶” to “clear and convincing” is an unwarranted encumbrance for those seeking justice following an incident of sexual misconduct. Establishing a “clear and convincing” standard for only sexual harassment and no other conduct violation singles out and discriminates against victims of sexual harassment and creates an imbalance of power that heavily benefits the accused. This proposal enacts biases and reinforces stereotypes that Title IX was created to dismiss.

At Stockton University, like many higher education institutions, “preponderance” of the evidence is used in all conduct violation investigations, including for violations comparable to sexual harassment and sexual assault, such as physical assault. Replacing this standard of evidence for only cases of sexual misconduct with a standard higher than that used for all other violations is a discriminatory recommendation rooted in sexism. While men are overall more likely to be the victims of violent crime, women are more likely to be the victims of gender- and sex-based violent crime; according to *Homicide Trends in the United States 1980-2008*, a study completed by the US Department of Justice in 2010, 76% of murder victims are male while 63% of domestic homicide victims and 81% of sex-related homicide victims are female. These statistics show crime trends that college campuses aren’t exempt from; women are disproportionately the victims of sexual misconduct (1 in 6 women is a rape victim as opposed to 1 in 10 men), while men are typically the victims of other conduct violations. Requiring a higher standard of evidence for crimes women are more subject to facing is deeply discriminatory and compromises Title IX’s mission of equity in education.

This change in standard also heavily benefits the accused by placing unsubstantiated doubt on the victim; rather than treating allegations of sexual harassment with validity and treating the accused as innocent until proven guilty, this standard treats the allegations as false and treats the victim as guilty of false accusation until they prove it to be true. The proposal is meant to protect against false accusations, but, as has been proven time and time again, false

⁶ “Preponderance” of the evidence essentially means it is more likely an incident happened than not; there is greater than a 50% chance that the claim is true. “Clear and convincing” requires the evidence to prove the claim is substantially more true than untrue. “Preponderance” of evidence is the burden of proof used in most civil trials.

accusations are extremely rare. The National Sexual Violence Resource Center cites a 2010 study entitled *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases* which found that on average, only 6% of rape allegations are false. This standard does not protect the accused's due process rights as much as it puts an uncalled for burden on the victim; rather than ensure equality in an investigation, it creates an imbalance of such.

To restore equity in investigations of sexual assault, the Department of Education must require institutions to adopt a standard of preponderance of the evidence. As preponderance is the standard of evidence required for general conduct violations at most schools, this ensures victims of sexual harassment, who are primarily women, are not discriminated against, thereby protecting the purpose of Title IX, while also guaranteeing non-bias in investigations. By implementing a "clear and convincing" standard, the Department of Education is fortifying an archaic system of oppression against women and is taking unnecessary precautions against a proven fallacy at the cost of equality.

The Student Senate of Stockton University is committed to championing the wellbeing, success, and rights of the Stockton student body. We fully understand our responsibility to help end sexual harassment and sexual violence on campus while supporting the victims and survivors of these crimes, which is a responsibility we consistently seek to hold ourselves, our institution, and the greater education community accountable for. To see the federal government take this responsibility so lightly is not only disheartening, but appalling. These changes use the disguise of protecting the accused's due process rights to suppress and undermine the voices of survivors. Instead of finding the balance of power the Department of Education claims to be seeking, the proposed guidelines shift the scales to heavily favor the accused's education over a victim's wellbeing. We urge you not to decrease schools' responsibility and ability to protect their students from sexual harassment. Institutions of all levels must be held to only the highest standard in educating, supporting, and protecting their students, and this legislation will effectively do the opposite.

Sincerely,

Student Senate
Stockton University