January 14, 2019

Comments Submitted in Response to
US Department of Education's
Notice of Proposed Rulemaking
Title IX of the Education Amendments of 1972
83 FR 61462

Bowdoin College, a private, residential liberal arts college located in Brunswick, Maine, submits these comments in response to the US Department of Education's (DOE) November 15, 2018, Notice of Proposed Rulemaking under Title IX of the Education Amendments of 1972 ("Proposed Rules"). Bowdoin submits these comments to make the DOE aware of the College's serious concerns with several aspects of the Proposed Rules, which, in practice, will have numerous negative consequences and will unduly burden students and the educational institutions they attend.

On college campuses across the country, sexual misconduct—including sexual assault—is a significant problem (AAU, 2015; Fedina, Holmes and Backes, 2018) that has a lasting impact on the individuals involved and on their communities. The serious problem of sexual misconduct is, of course, not limited to college campuses, as evidenced by larger cultural conversations like the "#MeToo" movement. Our society must work to effectively address and eliminate these behaviors on our campuses, in our workplaces, and in our communities.

To that end, Bowdoin is committed to effectively preventing and addressing the problem of sexual misconduct on our campus and to ensuring the well-being and safety of all members of our community through processes and policies that are fundamentally fair.

Bowdoin believes the Proposed Rules, as currently drafted, will set society back in its work to address the problems of sexual assault and sexual misconduct. The Proposed Rules' prescribed procedures do not provide a fundamentally fair process, nor do they assist institutions in effectively confronting sexual misconduct. Instead, the requirements of the Proposed Rules will chill reporting and prevent participation in Title IX processes. Moreover, DOE's proposed revisions will significantly limit—if not prevent—the ability of institutions to meaningfully and fairly address and adjudicate allegations of sexual misconduct, to the detriment of students across the country. The Proposed Rules will also impose a number of institutional burdens on colleges and universities, both financial and administrative.

Bowdoin views the following specific provisions of the Proposed Rules to be particularly problematic:

1. Chilling Effects and Unreasonable Burdens of the Proposed Rules

A. § 106.45(b)(3)(vii): Required Live Hearings with Cross-Examination

The most troubling aspect of the Proposed Rules is the requirement that institutions conduct live hearings with cross-examination conducted by parties' advisors, who are permitted to be attorneys. According to the proposed regulation, a *"grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice . . . ."* 34 C.F.R § 106.45(b)(3)(vii) (2018).

Bowdoin believes that a Title IX process should be fundamentally fair for all parties, but these proposed requirements are significantly at odds with preventing sex-based discrimination in educational institutions, which is the primary policy goal of Title IX. Mandating participation in live hearings will deter would-be complainants from reporting sexual assault or sexual misconduct (Anderson, 2016). Even if a complainant is willing to participate in a live hearing, knowing that they could be subjected to live cross-examination by the respondent's advocate/attorney will almost certainly prevent many students from pursing a complaint (Swartz, Gibson and Lewis-Arevalo, 2017).

The College appreciates the DOE's goal to provide tools to increase the ability of institutions to determine responsibility and to ensure fairness for parties. However, as written, the Proposed Rules do not meet these objectives or the primary policy goal of Title IX. A more fair and equitable revision would be to permit parties to submit written questions to an investigator or decision-maker who, after determining relevant questions, would pose those questions to another party or witness. This proposal is in keeping with the DOE's own proposed rule for investigations conducted in K-12 schools.

The College asks DOE to consider alternative approaches, like the one proposed above, to ensure a process that is fair and, as such, not intimidating and adversarial in ways that have the potential to significantly chill reporting. This is necessary if colleges are to effectively address sexual assault and sexual misconduct in educational settings.[1]

B. § 106.30: Definition of "Sexual Harassment"

Bowdoin also has serious concerns regarding the proposed definition of "sexual harassment" under the Proposed Rules, which includes quid pro quo harassment and also:

> *(ii) 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 (iii) sexual assault as defined in 34 CFR 668.46(a).*

§ 106.30.

This proposed definition creates an unnecessary burden for students wishing to pursue relief from harassment—first, by requiring formal complaints to meet an unclear and unreasonably high standard of harassment *("so severe, pervasive and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity")* and second, because the Proposed Rules also require "actual knowledge" of the alleged harassment by the proper institutional representative before requiring an institutional response. §§ 106.30; 106.44(a).[2]

Contrary to its aim, the proposed definition does little to clarify what constitutes actionable conduct under Title IX. This narrow definition is problematic because it appears to limit actionable behavior to only the most extreme instances of sexual harassment and sexual assault, thereby leaving unaddressed complaints involving other problematic behavior. At the same time, this definition creates uncertainty about what DOE believes is and is not covered by Title IX. For example, it is unclear whether this limited definition includes allegations of sexual exploitation or allegations of unwanted conduct of a sexual nature that is sufficiently serious to interfere with a student's access to an educational program or activity (Mellins et al, 2017).

These uncertainties will give rise—as they have in the context of sexual harassment in employment—to numerous lawsuits to establish what constitutes sexual harassment as defined. By closely mirroring the definition of sexual harassment in the employment setting, the proposed definition excludes many of the forms of sexual misconduct that often occur outside of that setting and yet can negatively impact a student's access to an educational program or activity (Fisher and Sloan, 2013; Jordan, Combs, and Smith, 2014; Mellins et al, 2017).

The Proposed Rules impose a definitional standard that does not fully define the severity, nuance, and seriousness of sexual misconduct that can occur on a college campus. As a result, Bowdoin contends that these proposed changes will dramatically minimize the reporting of instances of sexual harassment and other sexual misconduct that occur on campuses throughout the country.

Bowdoin acknowledges DOE's intent to bring greater clarity to sexual harassment within the context of Title IX, but disagrees with the proposed definition as currently written. The College asks DOE to reframe the proposed definition of actionable sexual harassment to encompass sexual misconduct, including not only nonconsensual sexual intercourse, but also sexual exploitation and nonconsensual sexual contact, and to extend the definition to unwanted conduct of a sexual nature.

C. § 106.45(b)(3)(iii): Confidentiality

Bowdoin is also concerned that the Proposed Rules essentially prohibit confidential processes and do not address, or even mention, the issue of retaliation. The Proposed Rules provide, *"a recipient must . . . [n]ot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence."* § 106.45(b)(3)(iii).

While Bowdoin understands the policy goal of this proposed provision is to allow the parties to more effectively gather evidence, this proposal raises more questions than it ostensibly aims to

answer: How can institutions protect students' interests and the very sensitive nature of these matters if they cannot restrict the ability of parties to discuss the allegations? How can institutions protect against retaliation if there are no restrictions on discussing the allegations? How do institutions ensure that parties or their advocates are not tampering with evidence or witnesses, or interfering in the investigation, if they cannot require confidentiality? Bowdoin believes that the interests of both parties in collecting and presenting evidence can be balanced against the interests of confidentiality, preventing retaliation and maintaining the integrity of the investigation.

Similarly problematic is DOE's proposed requirement that all evidence *"directly related to the allegations obtained during the investigation,"* including medical, mental health, or education records—regardless of its probative value or the institution's intention to rely upon it—will now be subject to review by the opposing party without any safeguard of confidentiality.[3] Sensitivity to private records and the possibility that "anything" can be included will further chill the reporting process and could be punitive for all students who are faced with participating in this difficult and emotional process.

Bowdoin believes it is essential that any proposed rules pertaining to sexual misconduct require confidentiality of the parties. The Proposed Rules must also prohibit retaliation. Given the sensitive nature of these investigations and to encourage a fundamentally fair process these expectations of privacy are critical. Additionally, as discussed further below, Bowdoin asks that DOE reconsider the Proposed Rule's automatic discovery rule.

2. Institutional Burdens Imposed by the Proposed Rules

DOE has stated that it is keenly interested in hearing about the burden the Proposed Rules may cause for institutions. In response, Bowdoin is very concerned that the quasi-judicial requirements of the Proposed Rules will cause a number of significant institutional burdens, including financial and administrative burdens. Chief among these is the requirement of a formal adversarial process that requires institutions to essentially run quasi-judicial proceedings, discussed more particularly below:

A. § 106.45(b)(3)(vii): Requirement that the Recipient Provide an Advisor at a Hearing

It will be a significant institutional burden to address the relative equities of the parties' respective advisors. The Proposed Rules provide that *"[i]f a party does not have an advisor present at the hearing the recipient must provide that party an advisor aligned with that party to conduct cross-examination."* § 106.45 (b)(3)(vii).

Critically, §106.45(b)(3)(vii) will have a disparate impact on students of lesser financial means or students not wishing or able to share allegations, brought either by or against them, with their families. Those students will not have access to the same level of advocacy that a student with parental support may have. Students with financial means may be able to retain highly experienced legal counsel who can participate in a live hearing with cross-examination and will therefore be afforded a significant advantage over the other party under this Proposed Rule.

In an effort to narrow the disadvantage created by this rule, institutions will be obligated, where a party does not have an advisor, to provide an advisor aligned with a party to conduct cross-examination at the hearing. Placing this burden on institutions will inevitably lead to arguments and conceivably even litigation about whether institutions fairly or adequately met that obligation, which may become arguments for a party's appeal or lawsuit. Although the Proposed Rules do not strictly require attorneys, the alternative—that institutions must maintain a cadre of advisors "aligned with that party" capable of performing quasi-legal functions like cross-examination—is impractical and creates an undue financial burden for institutions. It is, therefore, very likely that many institutions will, under the Proposed Rules, be paying for students' attorneys. It is conceivable that, in some cases, colleges and universities will be required to pay for both parties' attorneys.

Bowdoin asks that DOE reconsider the requirement to provide an advisor to perform cross-examination if a party does not have one. This requirement creates serious, unintended burdens for institutions and will not serve the policy goal of fairly and fully addressing sexual misconduct.

B. § 106.45(b)(4)(i): Standard of Evidence

Bowdoin believes there will be significant institutional burdens if DOE made final the provision of the Proposed Rule that *"[t]he recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty."* § 106.45(b)(4)(i).

It is unclear whether this requirement will also apply to complaints against employees (including faculty), whether or not related to sexual misconduct. If that is DOE's intent, requiring such uniformity across any and all investigative or disciplinary processes, whether or not related in any way to Title IX, will implicate, if not contravene, employment contracts, tenure agreements, and federal and state employment laws. It will be excessively cumbersome and burdensome to comply with this requirement, and it will require institutions to rework numerous legal documents and policies that in no way relate to Title IX.

If, instead, DOE intended only to propose a requirement that the standard of evidence for Title IX complaints against employees must be the same as the standard used for complaints against students, Bowdoin requests that DOE clarify that intent in any final rules.

C. § 106.45(b)(3)(vii): Relevance Rulings

Finally, under the Proposed Rules, this formal process will require a live hearing presided over by a decision-maker who is able to manage professional advocates and make and substantiate on-the-spot relevance rulings. The Proposed Rules specifically require a decision-maker to *"explain to the party's advisor asking cross-examination questions any decision to exclude questions that are not relevant."* § 106.45(b)(3)(vii).

The quasi-judicial nature of the process imposed by the Proposed Rules is beyond what institutional administrators could reasonably perform. As with Bowdoin's concerns regarding §

106.45(b)(3)(vii) *"Requirement that the Recipient Provide an Advisor at Hearing,"* this provision will essentially require institutions to hire additional staff, most likely staff with legal training, to serve as investigators or hearing officers, once again creating inconsistencies across institutional disciplinary conduct processes contrary to DOE's stated goal.

3. Responses to Select Directed Questions Posed by the Department (p. 61483)

Applicability of provisions based on age of parties

DOE requested comment on whether regulations should differentiate the applicability of provisions of the Proposed Rule based on whether the complainant and respondent are eighteen or over, rather than differentiating between higher education and elementary and secondary schools.

While Bowdoin does not agree that differentiation should be made at all in many instances (for example, live hearings to adjudicate claims of sexual misconduct have a chilling effect at higher education institutions and elementary and secondary schools alike), differentiating on the basis of age, rather than type of institution, will create problems. Since both higher education institutions and secondary schools have students under and over eighteen, differentiating requirements based on age will require single institutions to provide and run two different processes, resulting in burdensome and disjointed processes and risking inconsistent results. Furthermore, such a rule will not support the policy goals of addressing sexual misconduct and sexual assault in fundamentally fair ways without undue institutional burden.

Potential clarification regarding "directly related to the allegations" language[4]

DOE requested comment on whether the proposed requirement that parties be given an equal opportunity to inspect and review any evidence *"directly related to the allegations"* requires further regulation.

DOE states that it derived this standard from the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which defines "education record" as those that "contain information directly related to a student." 20 U.S.C. § 1232g(a)(4)(i). The policy goals and subject matter of FERPA are distinct from Title IX.[5] Bowdoin is concerned that using the standard "directly related to the allegations" for purposes of Title IX investigations is unclear and does not account for records that are highly sensitive in nature, such as extraneous medical records, and upon which the institution does not intend to rely in reaching a determination of responsibility. § 106.45(b)(3)(viii).

Bowdoin requests that DOE scale back this automatic discovery rule and clarify this standard to require the investigative report to list, in general terms, all information received and to specify separately and provide the information that will be relied upon or, if the live hearing requirement becomes final, information that will be presented to the decision-maker. The parties could then comment on those provisions and all other provisions of the investigative report as contemplated by the Proposed Rules. This will allow the parties to challenge a decision not to provide or rely

on a particular piece of evidence without requiring automatic discovery that will risk disclosure of sensitive, but irrelevant, information.

Concluding Comments

Bowdoin College is very concerned about the proposed changes to Title IX as they relate to sexual assault and sexual misconduct on college campuses, which Bowdoin believes is one of the most important issues facing educational institutions today.

We believe that the best way for our institution to address allegations of sexual assault and misconduct is to provide a fundamentally fair process that allows for all involved to be treated with respect and dignity. It is imperative that students know they have opportunities and resources throughout the process and that our institution sets the standards for conduct, accountability, and expectations.

The proposed regulations undermine the fairness in this process by creating a quasi-judicial, adversarial process that does little to facilitate reporting or protection from unacceptable behavior. Furthermore, the limited definitional standard of sexual harassment does not sufficiently address the array of behaviors that constitute sexual assault and sexual misconduct, which further limits the ability of Title IX to address gender discrimination. The Proposed Rules also provide a significant unfair advantage to students with financial means who may be able to retain highly experienced legal counsel to participate in a live hearing with cross-examination.

The burdens the Proposed Rules place on institutions will further impede an effective process in establishing standards of responsibility and accountability.

Taken individually, the Proposed Rules highlighted above are deeply problematic; however, the cumulative effect of DOE's proposed changes fundamentally disrupt and disable Title IX to the point of inefficacy. We urge DOE to reconsider the proposals as they currently stand and consider our concerns in crafting amended guidelines.

Notes:

[1] Perhaps recognizing the significant problem created by requiring an adversarial live hearing and cross-examination, the Proposed Rules allow that "*[a]t the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering the question"* 34 C.F.R § 106.45(b)(3)(vii) (2018). Bowdoin believes strongly that this proposed requirement does not sufficiently recognize or properly address the extreme stress and discomfort (Schwartz, Gibson, and Lewis-Arevelo, 2017) that both parties will likely experience during the hearing and cross-examination. Bowdoin is especially concerned that this remote contact with be distressing for both parties. The prospect of such an emotionally difficult process will almost certainly chill reporting in the first instance, and the College will, as a result, learn of and investigate fewer complaints.

[2] *"Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient . . ."* § 106.30.

[3] It is also important to note that this provision will create illogical inconsistency across conduct processes within an institution, with conduct cases such as academic dishonesty or physical violence often being protected by confidentiality, while Title IX cases would not be.

[4] Right to Inspect and Review: *"A recipient must . . . [p]rovide both parties an equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in the complaint, including evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility. . . ."* § 106.45(b)(3)(viii).

[5] Bowdoin is also concerned that this requirement is, in fact, at odds with FERPA and would potentially require disclosure of a student's education record to another student where that record does not, in fact, relate directly to the student receiving the information.

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