

From: Joan Scott
Sent: Fri, 11 Jun 2021 11:31:09 -0400 (EDT)
To: Risa Lieberwitz
Cc: T9PublicHearing
Subject: Re: Written Comment: Title IX Public Hearing (2020 Amendments to the Title IX Regulations related to Sexual Harassment)

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We did it!! Thanks for your leadership on this Risa.
Joan

On Jun 11, 2021, at 11:18 AM, Risa Lieberwitz <rliberwitz@aaup.org> wrote:

To: U.S. Department of Education's Office for Civil Rights
From: American Association of University Professors
Re: Written Comment on the 2020 Amendments to the Title IX Regulations
Attached please find the "**Comment to the U.S. Department of Education's Office for Civil Rights on the 2020 Amendments to the Title IX Regulations related to Sexual Harassment,**" submitted by the **American Association of University Professors (AAUP)** in response to the U.S. Department of Education's Office for Civil Rights "Announcement of Public Hearing; Title IX of the Education Amendments of 1972.

The AAUP contacts are:

Risa L. Lieberwitz, General Counsel <rliberwitz@aaup.org>
Anita Levy, Senior Program Officer <alevy@aaup.org>
Kaitlyn Vitez, Government Relations Officer <kvitez@aaup.org>
American Association of University Professors
1133 19th Street NW, Suite 200
Washington, D.C. 20036

Thank you.

Sincerely,

Risa L. Lieberwitz, General Counsel
American Association of University Professors
Academic Freedom for a Free Society

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<AAUPWrittenCommenttoEDOCRonTitleIXRegulations.June11,2021.pdf>

From: Risa Lieberwitz
Sent: Fri, 11 Jun 2021 15:17:55 +0000
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (2020 Amendments to the Title IX Regulations related to Sexual Harassment)
Attachments: AAUP Written Comment to ED OCR on Title IX Regulations. June 11, 2021.pdf

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To: U.S. Department of Education's Office for Civil Rights
From: American Association of University Professors
Re: Written Comment on the 2020 Amendments to the Title IX Regulations
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**Comment to the U.S. Department of Education's Office for Civil Rights on the 2020
Amendments to the Title IX Regulations related to Sexual Harassment**

Comment submitted by:

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

June 11, 2021

Contacts:

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I. INTRODUCTION

The American Association of University Professors (AAUP) submits these comments in response to the U.S. Department of Education's Office for Civil Rights (OCR) "Announcement of Public Hearing; Title IX of the Education Amendments of 1972," to "gather information for the purpose of improving enforcement of Title IX of the Education Amendments of 1972 (Title IX)." These written comments elaborate the live comments that were provided by the AAUP at OCR's public hearing on June 10, 2021.

The AAUP is the oldest organization of its kind, representing faculty and graduate employees in institutions of higher education. Since its founding in 1915, the AAUP has been an active and influential voice in higher education. The AAUP defines and develops fundamental professional values, standards, and procedures for higher education; advances the rights of academics, particularly as those rights pertain to academic freedom and shared governance; and promotes the interests of higher education teaching and research.

This text responds to OCR's request for public comments concerning "steps the Department of Education (ED) can take 1) to ensure that schools are providing students with educational environments free from discrimination in the form of sexual harassment, which encompasses sexual assault and other forms of sexual violence; 2) to ensure that schools have grievance procedures that provide for the fair, prompt, and equitable resolution of reports of sexual harassment and other sex discrimination, cognizant of the sensitive issues that are often involved; and 3) to address discrimination based on sexual orientation and gender identity in educational environments."

Whereas OCR's request emphasizes students, the AAUP's comments relate to faculty (including all teaching and research faculty, librarians, and graduate student employees), as well as staff, because Title IX affects them in multiple ways. Faculty are central to educating students and to promoting students' equal access to educational environments free from sex discrimination or sexual misconduct. Faculty may be subject to complaints filed against them by students or colleagues. Faculty may also file Title IX complaints against administrators or colleagues. In these contexts, defining the

scope of sex discrimination, including sexual harassment, is essential for faculty as well as for students.

The AAUP has consistently emphasized four elements that are essential to achieving gender equity in institutions of higher education:

1. **Free Speech and Academic Freedom.** Title IX regulations should make clear that rights of free speech and academic freedom continue to apply in cases that do not involve assault or other forms of physical misconduct, but are otherwise alleged to constitute a hostile environment.
2. **Due Process.** Faculty, like students, need the protections of due process provided in grievance procedures. These procedures should be the result of faculty participation in the creation of university policies.
3. **Faculty Governance.** For faculty, shared governance and/or collective bargaining processes are forums in which faculty participate in drafting Title IX-related policies and procedures because these have a direct impact on the educational environment and on faculty employment conditions.
4. **Analysis of the sources of inequality.** To achieve the goals of Title IX, gender equity issues should be addressed within the context of more comprehensive assessments of the bases for inequality—including race, class, sexuality, disability, and other dimensions of social difference—both on and off campus. Attention to these concerns will promote students' access to a quality education and—equally important—the faculty's ability to provide it.

II. AAUP's COMMENTS ON SPECIFIC PROVISIONS OF THE TITLE IX REGULATIONS ADOPTED IN 2020.

A. §106.6(d) should be amended to provide positive protections for freedom of speech and academic freedom.

The Title IX regulations do not adequately protect faculty academic freedom. In fact, the regulations do not make any reference to academic freedom. In institutions of higher education, academic freedom is essential to protect faculty speech inside and outside the

classroom. Overly broad definitions of sexual harassment may be applied to censor or punish faculty for presenting provocative ideas and language that are well within the scope of academic freedom. Gender studies departments and other disciplines that have long worked to improve campus culture by teaching about issues of systemic inequity—including those of sex, sexuality, race, class, and gender identity, among others—are likely to be disproportionately affected by Title IX, particularly where definitions of sexual harassment are not clearly limited by rights of academic freedom. Such concerns also apply to speech outside the classroom. Academic freedom protects faculty members' right to comment on practices and policies that are relevant to, but also extend beyond, the walls of the university. Clarifying that sexual harassment does not restrict academic freedom is essential to avoid a chilling effect on faculty willingness to experiment and take risks in their teaching, research, and in expressions of opinion in other venues. It is also necessary to ensure that established, although sensitive, subjects--from rape law to global histories of sexuality--continue to be researched, discussed, and taught.

The AAUP recommends that §106.6(d) be amended to include provisions contained in the OCR 2001 *Revised Sexual Harassment Guidance*, which clarifies that “all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that are not directly subject to the First Amendment.” The OCR 2001 *Guidance* explains:

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX. In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program.

Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), *a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights.* [emphasis added]

B. §106.30 should use a standard of “severe or pervasive” to define hostile environment harassment, rather than “severe, pervasive, and objectively offensive.”

§106.30 of the current Title IX regulations describes three types of sexual harassment: (1) where an employee conditions provision of an aid, benefit, or service of the educational institution on an individual’s participation in unwelcome sexual conduct; (2) where an individual is subjected to unwelcome sexual conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the education program or activity; or (3) sexual assault, dating violence, domestic violence, or stalking.

§106.30 uses subjective and objective factors to define the first type, often called “quid pro quo” sexual harassment, and the second type, often called “hostile environment” sexual harassment. In both quid pro quo and hostile environment claims, the subjective factor is the same – that the complainant finds the conduct to be “unwelcome.” However, the objective factor differs for the two types of harassment. For “quid pro quo” claims, the objective factor is relatively easy to define as an employee’s demand for sexual favors in exchange for an institutional aid, benefit, or service. In the case of hostile environment claims, the objective factor is more difficult to define, as a complainant may allege that speech in the context of teaching or research that departs from their beliefs creates a hostile environment.

There is a need in the Title IX regulations for sensitivity to power differentials beyond the obvious faculty/student ones. In some cases, Title IX has given disproportionate power to student accusations, especially on matters of speech. And in these circumstances, those teaching courses on gender, sexuality, and ethnic studies have been accused of “sexual harassment,” when the charges have ultimately proven to be about political or religious differences, not instances of discrimination or the creation of a “hostile environment.” There is a difference between the unacceptable misogynist comments (irrelevant to the course material at hand) of some professors and the comments about gender difference (based on scientific findings, disciplinary or scholarly expertise, and lived experience) of a teacher in a course devoted to that issue.

The AAUP recommends that §106.30 be amended to define the objective factor of a hostile environment claim as “conduct determined by a reasonable person, *in the position of the complainant, to be so severe or pervasive* that it effectively denies *or limits a person’s* equal access to the recipient’s education program or activity” [recommended amendments in italics]. The current standard in §106.30 of “severe, pervasive, and objectively offensive” sets too high a bar to prove the objective factor in a hostile environment claim. The recommended “severe or pervasive” standard, with deference to the standpoint of the complainant, recognizes that in some instances one serious incident of sexual misconduct can create a hostile environment, particularly where physical misconduct is involved. At the same time, the “severe or pervasive” standard provides protections against allegations based on the potentially idiosyncratic beliefs of a complainant about what constitutes appropriate speech. As noted earlier in these comments, explicit protections for academic freedom in the Title IX regulations and in

policies of institutions of higher education will help clarify the scope of the “severe or pervasive” standard.

Further, §106.30 sets the bar too high in requiring proof that the conduct “effectively denies a person equal access to the recipient’s education program or activity.” As noted above, the AAUP recommends expanding the standard to state “effectively denies *or limits*.”

C. §106.30 and §106.44 should not use “actual knowledge” and “deliberately indifferent” standards to assess an institution’s response to sexual harassment.

§106.44 applies overly narrow standards for evaluating an educational institution’s responsibility to respond to allegations of sexual harassment. The “actual knowledge” standard is inappropriate, as it creates an incentive for the educational institution to look the other way to avoid liability rather than addressing problems of sexual harassment or other forms of gender inequality. The AAUP recommends that the Title IX regulations use a “knew or should have known” standard to define an educational institution’s responsibility to respond to reports or complaints, whether formal or informal, alleging sexual harassment. Further, by assigning authority for “actual knowledge” only to those who are in a position to institute corrective measures, §106.30 incorrectly precludes a finding of an institutional recipient’s knowledge based on reports made by employees with authority to effectively recommend that corrective measures be instituted.

§106.44 also applies an overly narrow standard of “deliberate indifference,” defined as “clearly unreasonable in light of known circumstances.” This minimal standard creates a way out for administrators who, for various reasons, may want to avoid addressing charges of sexual harassment at their institutions. A properly defined standard of “reasonableness”—one with deference to the standpoint of the complainant—is far more

consistent with the Department of Education's role as an administrative agency enforcing Title IX in the public interest.

D. Title IX regulations should prohibit institutions of higher education from requiring all employees, including faculty, to be "mandatory reporters."

§106.30 incorrectly leaves it to institutions of higher education to decide whether to require "mandatory reporting" by all employees or instead to restrict that function to designated reporters. The AAUP recommends that Title IX regulations prohibit institutions of higher education from adopting policies that make all faculty members mandatory reporters, as such overly broad policies harm students by compelling faculty members to report information that they consider confidential. Institutions of higher education should restrict mandatory reporting to "designated reporters," with that group being defined in consultation with faculty governance processes and collaborative engagement with students and others invested in addressing campus inequities.

Mandatory reporting policies have a strong and negative impact on higher education faculty members, given their teaching and advising relationships with students. After having had a disturbing experience that may constitute sexual harassment, a student often goes to a trusted faculty member to discuss the experience and to seek advice. It is also common that students discuss these issues with underrepresented faculty—including those who identify as women, queer, transgender, nonbinary, or are members of racial or other minorities. These faculty often teach in disciplines related to feminist studies, sex discrimination, or other fields dedicated to researching social injustice. The faculty member's ability to be helpful to the student can depend on the trusting nature of the relationship, where the faculty member is able to be a sounding board, to help the student

think through various options, and to respect the student's choices about whether and how to respond to the situation.

Institutions of higher education can better facilitate the achievement of Title IX's commendable goal of remedying sex-based discrimination if they more resolutely focus on creating and implementing educational initiatives and recommending procedural models that involve faculty members in more relevant ways. For example, Title IX policy development at the institutional level could support ways for faculty members to engage students who are concerned about how best to achieve gender and sex equity on campus. They would work collaboratively to address those issues without violating confidentiality, academic freedom and due-process rights. This is an issue not only of shared governance but also of the educational mission of institutions of higher education.

E. §106.45 grievance procedures for complaints of sexual harassment should provide due process, including the use of the "clear and convincing" evidence standard.

Title IX regulations should not be expected to provide a one-size-fits-all blueprint for procedures that educational institutions must use to implement sexual harassment policies. However, the regulations should require a level of due process that provides all parties with fair and reliable procedures for filing complaints, determining the facts, applying sexual harassment policies to the facts to determine responsibility for misconduct that may have occurred, and evaluating the appropriate level of any remedies or any disciplinary action.

Providing the right to a hearing is one hallmark of due process that is appropriate in institutions of higher education. The AAUP supports the due process requirement in §106.45 that institutions of higher education carry the burden of proof in sexual

harassment proceedings and that grievance processes include a live hearing where the parties have the right to call witnesses and to question opposing witnesses.

Another hallmark of due process is the use of an appropriate standard of proof. Although the AAUP had recommended “clear and convincing evidence” as the best standard, we find §106.45 to be an improvement in enabling institutions of higher education to adopt the “clear and convincing” standard in sexual harassment cases. There are several reasons why the “clear and convincing” standard of evidence is an important element of grievance processes under Title IX. First, the AAUP has consistently stated that regardless of the allegation, the “clear and convincing” evidence standard is appropriate to ensure fair and reliable hearings. This is especially important to provide due process where faculty members face severe disciplinary sanctions including dismissal, given the substantial risk to livelihood and reputation. Since no campus-based hearing will include the full array of procedural rights required in judicial proceedings, the “clear and convincing evidence” standard helps guard against erroneous findings of sexual harassment. This is important in all cases, including hostile environment complaints where academic freedom may be at issue and involve a complex of racial, class, and gender issues.

The “clear and convincing” standard, especially when coupled with a commitment to shared governance attuned to the complex atmospheres of bias, discrimination, and inequities at institutions of higher learning along with careful attention to speech and academic freedom, would help guard against well-documented racial bias in sexual harassment cases, for students and faculty alike. In this context, the higher standard of proof can help ensure that Title IX enforcement initiatives do not, even unwittingly,

perpetuate race-based biases in the criminal and civil systems of justice, which disproportionately impact men who are identified as racial minorities. Clear guidance regarding the evidentiary threshold of the “clear and convincing” standard – developed through shared governance and other collaborative efforts to address the broader complex of campus inequities – would in turn address how charges of sex discrimination by women of color and others are often invalidated, while safeguarding risks to academic freedom and speech.

It is also important that all faculty members receive the same due process protections. The Title IX regulations do not take into account that higher education faculty “employees” hold different statuses in the campus hierarchy – and therefore different procedural protections. All faculty members, those tenured, on the tenure track, or in contingent appointments, and including graduate employees who hold positions as teaching or research assistants, should receive the same due process protections. Those without the protections of tenure are usually not granted the due process and grievance procedures customarily enjoyed by tenured and tenure-track faculty. The AAUP recommends that §106.45 of the Title IX regulations should explicitly require equal treatment in due process protections for all levels of faculty employees.

It should be noted that the Title IX regulations defining substantive and procedural requirements are interrelated. The regulations define sexual harassment and the grievance process for handling complaints, which educational institutions then incorporate into their policies defining prohibited conduct and the procedures to enforce those policies. Properly defining the scope of sexual harassment is necessary to ensure that the grievance process applies to the full range of prohibited conduct. As discussed above, the

AAUP recommends amending §106.30 of the Title IX regulations, to define hostile environment sexual harassment under the “severe or pervasive” standard, which more accurately describes the full scope of conduct prohibited by Title IX. With this amendment, the procedures required for a fair and reliable grievance process will then apply to the full range of complaints alleging sexual harassment. To ensure this, the AAUP further recommends amending §106.45(b)(3)(i) to delete the provision stating that dismissal of a formal complaint because the alleged conduct does not meet the definition of sexual harassment in §106.30 “does not preclude action under another provision of the recipient’s code of conduct.” This provision in §106.45(b)(3)(i) has the harmful effect of encouraging educational institutions to adopt dual systems of grievance processes, one system for sexual harassment prohibited under Title IX and another system for the institution’s separate definition(s) of sexual harassment, including hostile environment. Thus, as written, §106.45 requires an institution of higher education to use a hearing model to evaluate Title IX sexual harassment complaints, but also permits that same institution to provide a lower level of due process, such as an investigator-only model, to enforce its own separate definition of sexual harassment. This is confusing and unfair to students, faculty, and staff who have a right to know how sexual harassment is defined in institutional policy and what procedures will be used to enforce that policy.

F. “Emergency removal” [§106.44(c)] and “administrative leave” [§106.44(d)] are disciplinary actions that should be carried out with due process protections recognized in §106.45(b)(1)(iv).

§106.45(b)(1)(iv) includes “a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.” Yet, §106.44(c) allows for emergency removal of

an accused harasser based on “safety and risk analysis” *before* the process of determination of responsibility has begun. What counts as safety and risk is not adequately defined in §106.44(c). In a number of cases in which a faculty member’s speech provided the grounds for the accusation, the university has, upon receiving the complaint, removed them from the classroom and the campus (e.g., the cases of Teresa Buchanan, Louisiana State University, Baton Rouge, and Patricia Adler, University of Colorado, Boulder).¹ In such cases, the only apparent threat is the one to the university’s reputation; there is no imminent danger to students or colleagues. To ensure due process in all cases, including those where faculty speech is at issue, the AAUP recommends that the regulations provide a clearer definition of what counts as an emergency.

Furthermore, §106.44(d) states that “nothing in §106.44 precludes a recipient from placing a non-student employee on administrative leave during the pendency of an investigation.” Yet this provision, too, may constitute a punitive action, implying a conclusion about the guilt of the faculty member before an investigation has begun. In practice, administrative leave is no different from emergency removal; both often rest on the university’s desire to protect its reputation rather than to offer protection to students or due process guarantees to an accused faculty member. The regulations need to be more specific about the conditions under which administrative leave and emergency removal are appropriate. Further, given the serious harm that suspensions, even with

¹ See, AAUP, [Academic Freedom and Tenure: Louisiana State University, Baton Rouge. A Supplementary Report on a Censured Administration](https://www.aaup.org/report/academic-freedom-and-tenure-louisiana-state-university-baton-rouge-supplementary-report) <https://www.aaup.org/report/academic-freedom-and-tenure-louisiana-state-university-baton-rouge-supplementary-report>; AAUP Statement on the University of Colorado’s Treatment of Professor Patricia Adler, December 20, 2013, <https://www.aaup.org/file/ColoradoStatement.pdf>; Boulder Faculty Assembly Ad Hoc Committee, *Report of the Boulder Faculty Assembly (BFA) Ad Hoc Committee to Investigate the Patricia Adler Case*, May 1, 2014, <https://spot.colorado.edu/~tooley/ReportBFAdlerFinalReport05.2014.pdf>.

pay, have on a faculty member's position and reputation, appropriate due process protections should apply prior to the decision to suspend.²

G. Amend §106.44 to consider as a positive factor that a higher education institution engages in shared governance processes to develop and implement Title IX-related policies.

The AAUP urges OCR to endorse the important role of shared governance in higher education institutions' development and implementation of policies in compliance with Title IX. This would enable faculty governance bodies, such as faculty senates, to share their institutional knowledge and disciplinary expertise through participation in institutional planning and implementation of structures that address sex discrimination and Title IX compliance. Such recognition would encourage the administrations of institutions of higher education to improve Title IX compliance by working with faculty governance bodies to build on long-established procedures for shared governance.³

Through shared governance, faculty should be part of all stages of developing and implementing Title IX-related processes. The inclusion of faculty from the earliest stages of crafting policies and procedures enables an institution of higher education to benefit from those with an understanding of the principles and practices of the college or university, including faculty with expertise on issues such as what academic freedom means in teaching, research, and public speech; what constitutes harassment in the classroom setting and in other asymmetrical power relationships between faculty and

² See, AAUP, *The Use and Abuse of Faculty Suspensions*, <https://www.aaup.org/report/use-and-abuse-faculty-suspensions>.

³ See, AAUP, *Statement on Government of Colleges and Universities*, <https://www.aaup.org/report/statement-government-colleges-and-universities> ; AAUP, *On the Relationship of Faculty Governance to Academic Freedom*, <https://www.aaup.org/report/relationship-faculty-governance-academic-freedom>

students; and what due process means in the context of disciplinary investigations and hearings.

Broad faculty participation in Title IX-related policy development can build on existing institutional structures, including disciplinary hearing boards by faculty peers.⁴ Shared governance may also be used to develop new policies that address sexual harassment, such as the University of Oregon’s “Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy,” which was developed by the Faculty Senate.⁵ Other policies and programs developed through shared governance could include education, restorative justice, and alternative dispute resolution (ADR) programs to address issues of sexual harassment and other sex-based systemic inequalities. Shared governance – and the ability to tailor policies to advance Title IX goals – also allows for policies that address sex discrimination to be developed and operate together with institutional efforts to address other systemic inequities, including those involving race, gender identity, and disability on campus.

H. §106.8(a) should be amended to clarify that Title IX coordinators should be knowledgeable about the workings of the university and experienced in dealing with relationships among students, faculty, and other employees.

Academic freedom requires the intimate knowledge of the principles and practices of institutions of higher education as experienced by faculty as well as other members of the community— indeed, in our view, faculty members are the most appropriate candidates for the position of Title IX coordinator. Their knowledge of the workings of

⁴ See, AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure*, Regulation 5, <https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure>

⁵ University of Oregon Policy V.11.06, <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>.

the university gives them the insight to distinguish between “sufficiently serious” claims of discrimination and ones that do not merit further scrutiny under Title IX—especially as they pertain to the teaching function of the faculty. This is a position that rather than being confined to a single administrator, should be shared by several members of the university community with experience dealing with relationships among students, faculty, and other employees. These people should possess insight into teaching as well as local knowledge of racial, class, and other campus social dynamics. Title IX coordinators, in the position to make the very first assessments of the validity of an accusation, need to be sensitive to these matters. The training received by such coordinators requires not just matters of risk and liability, but insight into how universities and shared governance work, how university curriculum is decided, and what counts as serious academic inquiry.

I. The provisions in §106.12(b) should be rewritten to deny religious exemptions for sexual harassment accusations.

§106.12(a) of the current regulations restate the statutory provision that Title IX “shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.” The current version of §106.12(b) eliminates the requirement that an educational institution seeking an exemption shall submit a written statement to the Department of Education identifying the Title IX regulations that “conflict with a specific tenet of the religious organization.” In 2014, the OCR granted requests by George Fox University, Spring Arbor University, and Simpson University for Title IX religious exemptions from compliance with such protections for transgender

individuals.⁶ Some educational institutions have also been granted Title IX exemptions from compliance with protections on the basis of sexual orientation.⁷

Accusations of sexual harassment should not be precluded or silenced by religious exemptions. A balance between religious liberty and anti-discrimination goals can be struck without creating carve-outs that artificially pit religion against LGBTQ, reproductive, or gendered rights. Recent legal developments and the growing consensus of legal scholars support this claim.

On June 15, 2020, the United States Supreme Court issued its decision in *Bostock v. Clayton County*,⁸ which found the term “sex” to encompass sexual orientation and transgender status for purposes of a related civil rights law, Title VII of the Civil Rights Act. Subsequently, the Biden Administration issued the Executive Order on Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation, which extended *Bostock’s* reasoning to Title IX of the Education Amendment Acts of 1972. In this way, the executive order restored the treatment of gender identity outlined in the Department of Education’s 2016 Dear Colleague Letter on Transgender Students. The executive order emphasizes that students “should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports,”

⁶ Amanda Bryk, “Title IX Giveth and the Religious Exemption Taketh Away: How the Religious Exemption Eviscerates the Protection Afforded Transgender Students under Title IX,” *Cardozo Law Review* 37 (December 2015): 751–91.

⁷ Human Rights Campaign, *Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk*, (Washington, DC: 2015), 12.

⁸ ___ U.S. ___, 140 S.Ct. 1731 (2020).

and so, “prohibits discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.”⁹

A religious exemption for sexual harassment is not required by any federal legal protections for religious liberty, including the First Amendment’s Free Exercise Clause, the Religious Freedom Restoration Act, or accommodations of religious liberty in other federal non-discrimination laws, including Title VII. While *Bostock* and the executive order did not consider the religious exemption provision of the Civil Rights Act, it is difficult to conceive of a religious justification for sexual assault and other forms of sexual harassment. To insist otherwise can promote the targeting of LGBTQ individuals by religious institutions of higher education on the basis of sex. This is a violation of the goals of Title IX. While Title IX enforcement should be sensitive to differences in university contexts, this contradictory treatment of LGBTQ persons has resulted in the exclusion of a class of individuals from Title IX protection.

III. CONCLUSION

The AAUP appreciates the opportunity to submit comments to the Department of Education’s Office for Civil Rights. We hope that these comments and recommendations concerning institutions of higher education are helpful in the Department’s review of the Title IX regulations for the purpose of improving enforcement of Title IX.

⁹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>