

**From:** Storch, Joseph  
**Sent:** Fri, 11 Jun 2021 16:07:31 +0000  
**To:** T9PublicHearing  
**Subject:** Written Comment: Title IX Public Hearing: Comment from The State University of New York  
**Attachments:** SUNY Title IX Hearing Comment June 11, 2021 Final.pdf

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Dear Department of Education,

Attached please find a comment of The State University of New York, submitted by the undersigned, as part of the Title IX hearing process. Thank you for the time you are devoting to gathering information on this important topic. Please kindly confirm receipt of this email and attachment.

Sincerely,  
Joseph Storch



**Joseph Storch**

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June 11, 2021

Suzanne Goldberg  
Acting Assistant Secretary for Civil Rights  
Office for Civil Rights  
United States Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

Re: Title IX Hearing Written Comment

Dear Assistant Secretary Goldberg,

Thank you for the opportunity to offer verbal and written testimony about Title IX and a meaningful response to sexual and interpersonal violence and harassment. I serve as an Associate Counsel at The State University of New York and serve as Principal Investigator for a number of grants and programs (summarized at the bottom of this letter) in the SUNY Center for Advanced Research in Reducing the Impact of Violence in Education.

As a nation, we have spent the past decades with a Title IX pendulum swinging back and forth from the 1997/2001 Notice and Comment Dear Colleague Letter, to the extensions of that letter in the 2011 and 2014 DCL's, to the withdrawal of those documents (and later others) in 2017, to the 2020 Final Rule. Still, millions of college students have enrolled in a world where we collectively have not yet sufficiently addressed harassment and violence. There is an enormous amount that we as a nation *could* be doing to address sexual and interpersonal violence on campus and in the community, but we have spent a large amount of time simply trying to comply with changing requirements.

Reasonable minds can differ on the details, but there is wide agreement on a system that takes violence and harassment seriously and addresses it meaningfully, protecting those impacted while ensuring a fair and equitable process. Trauma-informed investigations are not inconsistent with due process and indeed are a key part of ensuring that colleges "get it right" when making determinations. We are aware that in nearly all cases, one or all parties will be disappointed by the outcome, but that does not mean that an effective system has to be tilted towards one side or the other. Importantly, developing standards for the long term will open doors to what we really need to concentrate on: preventing these crimes and violations before they occur.

### **The VAWA Balanced Standard**

The Department should return to the balanced approach prescribed by Congress in the 2013 Violence Against Women Act (VAWA) Amendments to the Clery Act, and defined in the Department's 2014 Regulations, developed after a successful negotiated rulemaking session. The

VAWA Amendments to Clery built upon the Higher Education Act, decades of case law covering public and private colleges, and prior guidance to create a flexible system that required equitable rights in the process of responding to disclosures of domestic violence, dating violence, sexual assault, or stalking that occurred on or off campus. Within this balanced approach, the VAWA Amendments to the Clery Act allowed the presence of an advisor of choice, but with reasonable limits on participation in the process (and the ability of colleges to center the student participant, rather than their lawyer), and notice and an opportunity to be meaningfully heard in a process before a neutral decision maker who was trained annually in a variety of relevant topics. The Regulations were aimed at maintenance and extension of the educational process, not a quasi-court proceeding. Unfortunately, the 2020 Department of Education Final Rule went well beyond that system for Title IX response. Because the definition of Title IX incorporated the Clery Act definitions of domestic violence, dating violence, sexual assault, and stalking, this effectively overruled the VAWA statute and Regulations to require a floor that is much different than Congress and the Department laid out for all but the few cases that do not overlap. Simply saying, as the Department did in the Preamble to the Final Rule, that the Regulations had no effect on Clery Act obligations does not make it so. The Department should return to the path established by Congress and the Department itself in that law.

## **Title VII and Title IX**

The Department should return to the status quo ante of Title IX and Title VII for employees. For decades, public and private colleges, as employers, have followed rules set by Title VII (and its case law) as well as state law for investigating and responding to reports of harassment and misconduct by employees. In fact, Title VII brings an expectation that employers respond in a reasonably prompt way to such disclosures. Without clearly indicating that this was a possibility in the Proposed Regulations, the Department in its 2020 Final Rule swallowed decades-old Title VII rules for employment based reports into this new, complicated Title IX process. That led to deep confusion, making it very difficult to take meaningful action in many employment situations. Where action is possible, the timeline is significantly extended. Interestingly, for private not-for-profit and for-profit employers, and for public employers with management or other non-represented employees, this Title IX Final Rule requirement of significant due process is the *only* such system for those employees. Those accused of sexual assault, harassment, dating violence, domestic violence, and stalking receive more employment protections than those accused of other violations, or those who lose their job for any other reason. The Title VII covered employment system was not broken, but the new Title IX system would make action nearly impossible in many of the college employment cases that have made national news. It was hard to justify this change based on the text of Title IX and prior case law, and the Department should return to longstanding practice.

## **Cross Examination**

The Department should return to the VAWA Amendments to Clery standard for hearings, especially for cross examination.

In the 2014 VAWA Final Rule Preamble, the Department made clear that, despite the recent statutory authority to promulgate Regulations for this process, it did not have the authority

to require that institutions allow attorneys or advisors to speak or participate in any way. There was no requirement to allow cross examination.

In the 2020 Title IX Final Rule, despite no similar Congressional authorization, the Department famously added the requirement for a hearing at public and private colleges that would allow for direct and live cross examination by the adviser of choice who may be, but does not have to be, a trained attorney.

Further, the Department's requirement, posted in a sub-regulatory blog, that all parties and witnesses fully submit to cross examination lest all of their statements be permanently erased is one not found in any criminal or civil process. These requirements silence students and witnesses unnecessarily and should be abandoned as a public policy mistake.

Higher education developed a meaningful opportunity to test evidence, cross examination through the hearing officer or panel. Constitutional experts and multiple federal and state courts blessed it as meeting due and fair process requirements. Yet the Final Rule barred it for public and private colleges alike, based on a decision in the Sixth Circuit that applies to public colleges in only four states. Tellingly, a number of other Circuits have declined to follow the Sixth Circuit and we now have a mix of requirements. OCR should return flexibility to colleges to implement direct or trauma-informed cross examination, based on what is best for students (most critical) and in consideration of the law of their Federal Circuit, state court, or statutory obligations.

### **Relevance Determinations**

One thing we are consistently hearing from colleagues across the country is that the requirement that the hearing officer conduct a relevance analysis and make a determination of relevance after every single question is unnecessarily prescriptive and is slowing hearings to a crawl. Further it leads to disagreements and requests to reconsider, and generally makes a mess of the proceedings. This is a requirement not found anywhere in criminal or civil proceedings. While we understand the reasoning for the requirement, in practice it does not work and only serves to muddle the process. This does not serve students or anyone involved in these cases and there is no evidence that it aids in making accurate determinations of responsibility.

### **LGBTQIA+ Students**

Our LGBTQIA+ students are impacted by elevated rates of sexual and interpersonal violence. Study after study has found elevated prevalence among LGBTQIA+ students, with very high prevalence reported among Transgender students. Yet the 2020 Title IX rules specifically did not extend protections on the basis of sexual orientation or gender identity. We can surmise from documents and orders that this Administration has already released that there is a very different view on the matter and that is appreciated by SUNY. Title IX case law has generally followed Title VII case law (of which there is quite a bit more). The Supreme Court issued landmark opinions in 2020 finding that sex in Title VII also offers protections on the basis of sexual orientation and gender identity. We strongly urge the Department to follow the reasoning of the Title VII decision in *Bostock v. Clayton County* line of cases and ensure that these students share the protections of Title IX, if not specifically enshrined into the statute, then

clearly delineated in Regulations. We hope that the protections for these students are not dependent upon each successive Presidential administration.

### **Publishing Material**

The Title IX Final Rule, for the first time, required that colleges and universities publish on their website (unless they do not maintain a website) all training materials. The Department made this requirement in response to accusations that certain trainings rely on sex stereotypes and could lead to bias, claiming that commenters “urged the Department to make the training materials...publicly available because transparency is the most effective means to eradicate the problems with biased Title IX proceedings, which problems are often rooted in biased training materials.” The Department added that the new public posting requirement will allow material to be “transparently viewed by the [institution’s] educational community and the public, including for the purpose of holding [the institution] accountable for using training materials that comply with these final regulations.”

There is no support for such a requirement in the Education Amendments of 1972 statute, and no similar requirement in any other educational program that I am aware of, within or outside of education. The Department does not require posting of training for financial aid or admissions professionals to prove that the training did not rely on stereotypes. There is no companion requirement even within Title IX, for instance to show that athletic department staff are appropriately trained in equal access to athletics, or that leadership of single-sex institutions are appropriately trained on standards. The Department does not post the training material it relies on itself to educate its own staff so as to prove that the training does not use stereotypes or support bias. There may indeed be for-profit or not-for-profit training organizations that utilize sex stereotypes in their training material. But there are certainly many that do not. Yet requiring the publication of all materials used to train the covered individuals on the websites of institutions damages the constitutionally and statutorily protected rights of all such creators, including The State University of New York.

SUNY operates the Student Conduct Institute and other programs and creates a significant amount of training material that does not rely on sex stereotypes. While SUNY does not seek to “profit” off of this content, it does charge for access to cover the personnel and other costs of creation and delivery. The Department’s requirement that institutions post training materials will damage for-profit and not-for-profit organizations, violative and accurate training providers alike. The Department can make specific requirements for its trainings, as it does in the Final Rule, and let the market (and OCR findings of training violations) determine quality. We worry that a “tragedy of the commons” will arise where few will be incentivized to pay for access to materials that others are required to make available for free. Without even a cost-covering income stream (let alone the profits that private companies have the right to make), the availability and quality of training will *decrease*. It will have the effect of damaging organizations, for-profit and not-for-profit, that dedicate themselves to creating high quality training, not reliant on sex stereotypes, and being compensated for their work (as any other creator is).

The Department didn't notice this as a possibility in its Proposed Regulations and yet implemented it anyway. To help institutions comply, SUNY has nevertheless made dozens of hours of training available to the public to comply and help colleges comply, in abrogation of its Constitutionally protected Copyright.

## **Prevention Funding**

As colleges and universities struggle to comply with the changing requirements of Title IX, the Clery Act, and state law, they have less bandwidth to work on preventing these crimes and violations before they occur. Even for those that devote staff and resources to prevention, federal funding for prevention is very thin. Our Center for Advanced Research in Reducing the Impact of Violence in Education (ARRIVE Center) at SUNY has brought in about \$15 million in federal and state grant funds of which the vast majority are limited to response or victim services. There is very little funding available for upstream prevention and the funding that is available comes with spending restrictions that make it impracticable for large systems like SUNY to make meaningful change. Further, this is compounded by a private funding system in which foundations are more likely to donate towards response side initiatives than to prevention. While not uniform, this system leads to less funding for development and experimentation in prevention approaches. We all agree that we are better served preventing harassment and violence than just responding to it, and we hope that the Department will lead a federal government initiative to invest significantly in proven and promising prevention strategies.

## **Areas to Maintain**

Two areas that the Department should consider maintaining from the 2020 Final Rule are the continued efforts toward professionalization of the Title IX Response and the clear and standard timing of the process.

SUNY has a demonstrated commitment to professionalizing prevention of and response to sexual and interpersonal violence. From our Prevention Summits to the SPECTRUM conference (addressing violence against members of the LGBTQIA+ community), to our webinar series, to our Student Conduct Institute, which provides training to faculty and staff at hundreds of institutions, we believe strongly that violence and harassment training must go beyond the law to include best practices and implementation. The Department took a step in the right direction in 2013/2014 with the VAWA annual training requirements in a slew of topics. While the 2020 Final Rule required some additional areas of training, the Department abandoned the annual requirement for a single training standard (meaning a 2020 training in cross examination would be sufficient to hear a 2032 Title IX case). We urge the department to standardize the training requirements and continue professionalizing the field.

Further, we understand from the Preamble that there were concerns about the training content of certain organizations and their use of sex stereotypes. As an organization that works hard to train on response and prevention without regard to sex, gender, or gender identity, we share some of those concerns. As a higher education institution that provides training without the profit incentive, we would support further standard setting by the Department, and further efforts to raise capacity across the board. As an institution deeply concerned with equity, we support

any efforts by the Department to help make training accessible for institutions of all sizes and resource levels, not just those who can afford to pay tens of thousands of dollars to private consultants.

While we may quibble with details of the 2020 Final Rule investigation and adjudication timeline, we support some standards laid out for timing of a process so students and institutions can set and maintain expectations. We would prefer more flexibility and less detailed requirements (the Department actually requires specific sentences in the notice of allegations, a significant overreach), but appreciate minimum standards and clarity in the timeline of response.

Further, some of the process standardizations in investigations and appeals have raised standards and clarity. While these may be more familiar for larger institutions and public institutions, it seems to be helpful to public and private institutions of all sizes. We take no position on the use by private institutions of a single investigator or single investigator hybrid method.

### **Closing**

Finally, we urge the Department to write balanced rules that stand the test of time. The last several years, and especially the last year, have seen Title IX requirements change markedly both in emphasis and in application. This is good for no one. When a civil rights pendulum swings so wildly, it is hard for students to grab hold of its protections. And that should be our north star goal. Our hope is the Department can craft a set of Regulations that are fair, forward-thinking, and provide a meaningful process with flexibility built in for implementation. Success can be measured in part by the years and decades before the Regulatory process must open again, and by the millions of students who can attend school in a system that works toward reducing the impact of violence and harassment.

Thank you for your commitment to this important law and this process.

Sincerely,

**Joseph  
Storch**

Digitally signed by  
Joseph Storch  
Date: 2021.06.11  
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Joseph Storch  
Associate Counsel  
The State University of New York

## Resources Created by the ARRIVE Center at SUNY

To help colleges and universities meet and exceed the legal obligations of Title IX, the Clery Act, and state law, and to help prevent crimes and violations before they occur, SUNY has developed a number of trainings, programs and resources:

- **SUNY SPARC:** To help colleges and universities educate students about harassment and violence, as well as reporting options, bystander intervention, healthy relationships, and related matters, we developed SPARC, the Sexual and interpersonal violence Prevention And Response Course. A highly customizable training that can be run in any learning management system. In April, we released SPARC Go, a new version that requires little or no customization and uses modern educational techniques and animation to “reach students where they are.” SPARC (and its alcohol education companion TRAC) are available for download and customization free. <https://system.suny.edu/sparc/>
- **RAPID:** Responsible Authority Proficiency in Incident Disclosure. Training for Clery Act Campus Security Authorities and Title IX Persons with Authority/Responsible Employees. Runs 11 minutes and is intended for last mile staff (coaches, faculty) not for core staff (Title IX Coordinator, University Police, Student Affairs). Includes a proficiency quiz at the end with questions randomly pulled from a bank. Campuses can download, customize, and use at no cost. <https://system.suny.edu/rapid>
- **SUNY Visa:** To help colleges meet and exceed the VAWA Amendments to Clery requirement to provide victims with, among other things, visa and immigration resources, we worked with immigration law experts to build the SUNY Visa resource, a two-page quick reference for immigrant and international victims of violence. The resource can be customized by any higher education institution and is automatically translated into 120 languages (we contracted with a translation company to ensure accuracy). Available for any institution to customize and use at no cost. <https://www.suny.edu/visa>
- **SUNY SAVR:** The Sexual Assault and Violence Response resource is the nation’s largest collection of on and off campus violence response resources covering all corners of the State of New York, as well as key policies translated into 120 languages. Users can search by campus, zip code, or find themselves on a map. Over 70,000 visits in the five years since launch. <https://www.suny.edu/violence-response>
- **SUNY SPECTRUM:** The nation’s largest conference addressing prevention of and response to violence against members of the LGBTQIA+ community, held annually in Albany (and during COVID online) for thousands across the country. <https://www.suny.edu/events/spectrum/>
- **Pivot to Prevention:** Joint conference of SUNY and the One Love Foundation to surface high-quality prevention programs and help institutions set and meet goals for healthy relationships and dating violence prevention education.
- **SUNY’s Got Your Back:** The nation’s largest education comfort bag program to provide necessities to any New Yorker who is a victim of violent crime. Bags are assembled at educational programs on SUNY campuses and include toiletries, violence response resource information, and a hand-signed message of support. In just four years, 118,000 bags have been assembled by thousands of volunteers for 481 rape crisis programs, domestic violence shelters, law enforcement agencies, and hospitals serving victims and survivors across New York. <https://www.suny.edu/gotyourback/>

- **The SUNY Student Conduct Institute:** Training in response to conduct violations and sexual and interpersonal violence for faculty and staff at 475+ public and private colleges and universities in 39 states. Offered at a very low cost per institution to improve equitable access to high quality training content and raise capacity across the board. <https://system.suny.edu/sci/>
- **Joint Guidance on Federal Title IX Regulations:** Conceived of and hosted at SUNY, brought together 50 attorneys from leading firms and institutions to develop hundreds of pages of detailed guidance and analysis on the Title IX Regulations. The Joint Guidance was made available for free to colleagues across higher education. More than 30,000 readers took advantage of the dozens of resources in making changes and implementing the Regulations. <https://system.suny.edu/sci/tix2020/>

The Center for Advanced Research in Reducing the Impact of Violence in Education (ARRIVE Center), <https://www.suny.edu/arrive/>