



CAPPA POSITION STATEMENT ON TITLE IX IMPLEMENTATION FOR CAMPUS SEXUAL ASSAULT

September 13, 2017

The Campus Advocacy and Prevention Professionals Association (CAPPA) represents professionals working on and with a wide range of college and university campuses to prevent gender-based violence and to support and advocate for the educational and wellness needs of survivors of gender-based violence. Navigating accountability processes and accommodations resources that preserve our students' educational access comprises a significant portion of our work and expertise.

Last week, Secretary of Education Betsy DeVos signaled her intention to replace subregulatory guidance on how federally funded educational institutions address Title IX as it relates to sexual assault. In anticipation of interim guidance, CAPPA joins with coalitions of student survivors, higher education professionals, and legal advocates and makes the following policy recommendations, grounded in both the experiences and knowledge of thousands of our students as well as research-based practice and legal and legislative precedent.

Affirming preponderance of the evidence as the appropriate evidentiary standard in disciplinary proceedings

We can link the appropriate standard of evidence in Title IX cases to two concepts: seriousness of the penalty imposed (which in these cases will never exceed anything other than expulsion from a given institution) and the standards employed in similar kinds of cases.

Title IX demands that both higher education and K-12 institutions receiving federal funding address sexual discrimination: behavior that overlaps the realms of student conduct, civil rights, and criminal law. Detractors of the 2011 Dear Colleague letter have made an effort to portray the preponderance of the evidence standard as new and lacking in precedent and merit.



However, the 2011 *Dear Colleague* letter is a further articulation of guidance from Department of Education guidance provided in 2001.¹ In that guidance, the Department of Education reaffirms that the definition of actionable gender-based harassment derives from a Title VII-based definition of harassment. Given that preponderance is the standard in Title VII discrimination cases, it is only appropriate to use a consistent and established standard of evidence for both types of civil rights cases. To do otherwise means that Secretary DeVos is advocating that children in K-12 schools and students in higher education are less deserving of civil rights protections than adults in the workplace.

It is worth posing the question of whether the push to abandon preponderance as the evidentiary standard is designed to limit the likelihood of any student being found responsible for sexual misconduct via campus disciplinary and Title IX processes. We are in agreement that the charge for schools is to safeguard the educational civil rights of students who have experienced gender-based violence and sex discrimination and not to create a copy of the criminal legal apparatus. Certainly, then, schools will never have at their disposal the power of subpoena, criminal discovery processes, or crime labs, nor should they. Schools are not finding students guilty or not guilty of violating criminal statutes. If it is impossible to meet the clear and convincing standard with the investigative tools and structures available, it renders the policies, accountability, and remedies of a civil rights process functionally meaningless.

Trauma-informed processes are key to procedural equity

Title IX originally charged institutions with providing a prompt and *equitable* response to sexual harassment. The 2001 guidance from the Department of Education further charges institutions with taking “immediate effective action.”² Equity neither requires nor implies identical treatment, and indeed the Department of Education has long required interim, non-punitive measures to remedy the effects of sexual harassment, of which gender-based violence is an established component.

¹ U.S. Department of Education Office for Civil Rights (2001). *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*. <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

² *Id.* at 12.



The question at issue in disciplinary proceedings is whether a respondent's behavior is a violation of the institution's code of conduct and Title IX policies, and complainants, respondents, and institutions benefit from a full and fair investigation to make that decision, as well as (when policies are violated) a decision about the appropriate sanction.

Institutions and student affairs professionals can and should respond to the acute wellness and educational civil rights needs of survivors, needs which exist separately from and not mutually exclusive to the questions of accountability and procedural due process.

As professionals, we consistently see the stress of students involved as respondents in conduct processes equated to and conflated with the trauma of students who have experienced gender-based violence. Certainly, regardless of whether an individual student is found responsible for a conduct violation, it is appropriate to offer respondents in gender-based violence cases psychological counseling resources, and stress or crisis management tools via the institution's existing structures or via referrals to off-campus resources. However, respondents have not experienced a trauma (that is, exposure to actual or threatened death, serious injury, or sexual violence) in the context of the specific behavior at issue in the disciplinary case.³ Creating a false equivalency between these two experiences prevents us from providing appropriate services to both students.

The VAWA Amendments to the Clery Act--promulgated after an extensive negotiated rulemaking process--already require institutions to notify complainants and respondents of their right to an advisor of their choice in campus disciplinary processes for gender-based violence.⁴ We support this regulation, whether that advisor of choice is an attorney or a trained campus or community-based advocate.

Trauma-informed investigation protocols and adjudication processes best serve the goals of procedural equity and due process. This approach is considered best practice

³ Lash, Julie. 2017. Is it trauma or is it distress?: Differences between victim/complainant trauma and perpetrator/respondent stress. IUPUI Counseling and Psychological Services.

⁴ Violence Against Women Act Final Regulations; Office of Postsecondary Education, U.S. Department of Education. 79 Fed. Reg. 62752 (July 1, 2015) to be codified at 34 C.F.R. pt. 668.
<https://www.federalregister.gov/documents/2014/10/20/2014-24284/violence-against-women-act>



by victim advocates, education professionals, and law enforcement agencies.⁵ We have and will continue to advocate for trauma-informed systems and protocols as a mechanism for procedural equity.

It is worth noting that professional associations of attorneys and the faculty of law schools have been some of the most vocal proponents of processes which are not trauma-informed and mirror the criminal system's use of attorneys as gatekeepers of student rights and options. These formats systematically disadvantage both reporting and responding students who can't afford an attorney and are structured primarily for the benefit of the legal profession, not the students trying to navigate them.

Title IX ultimately compels us to preserve educational opportunity for those who have experienced gender-based violence and discrimination. And yet, the actual harm to educational opportunity and the academic and economic impact on survivors are always subordinated to the hypothetical future impact on respondents.⁶

Accountability is necessary for repair and prevention is necessary for wellness

One of the most disturbing parts of Secretary DeVos' and her staff's comments on Title IX to date has been perpetuating the myth that no college student really has any inappropriate or abusive sexual behaviors: they are all either victims of false accusations by scorned former partners or unwitting victims of the "campus sex police."

Every institution, regardless of the student population served, has individuals who have harmed others with their inappropriate and abusive sexual behaviors or who are at risk to harm others. There are pressing and important questions at hand: about how to

⁵ See <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=842> and <http://www.theiacp.org/Trauma-Informed-Sexual-Assault-Investigation-Training>.

⁶ Jordan, CE, et al. 2014. An exploration of sexual victimization and academic performance among college women. *Trauma, Violence, and Abuse* 15(3): 191-200.

Loya, R.M. 2012. Economic consequences of sexual violence for survivors. Doctoral dissertation. Retrieved from Proquest (UMI Number 3540084).

Mengo, Cecilia and Beverly M. Black. 2016. Violence Victimization on a college campus: Impact on GPA and school dropout. *Journal of College Student Retention* 18(2): 234-248.

Banyard, V., et. al. 2017. Academic correlates of unwanted sexual contact, intercourse, stalking, and intimate partner violence: An understudied but important consequence for college students. *Journal of Interpersonal Violence*, doi: 10.1177/0886260517715022



ensure that our campus-based conduct processes do not replicate the racial and economic injustices so entrenched in the criminal system; about how to apply sanctions and remedies to cases that advance the goal that our students may live safely in the campus community--without fear of further harm and without harming anyone further; and about how we ask more from our students in terms of their respect and care for others and give them the tools to be successful in that charge.

Prevention professionals have at their fingertips solid evidence-informed strategies for educating students in this realm. These are focused on what decades of scholarship tell us about what factors are associated with harming others, especially in late adolescents and young adults, who comprise the majority of our students. These include both individual-level risk factors like a preference for impersonal sex and hostile masculinity, as well as community-level risk factors like general tolerance for sexual violence and weak community sanctions for sexual violence. It is our responsibility as student affairs and allied professionals to address the full range of risk factors in order to enable our students to live safely and thrive, not just on our campuses but in their family systems and post-education lives.

Finally, we are compelled to focus on prevention work not simply because of the Title IX charge to prevent recurrence of harassment which creates a hostile environment, but for a broader vision for our students, from kindergarten through graduate and professional schools. At some point, the DeVos Education Department will issue interim and final guidance on campus disciplinary processes, which may or may not align with best practice in a range of fields. Yet those protocols will always proceed from an inflection point where someone was already harmed. Our campuses can be free of gender-based violence, but only if we combine equitable accountability processes, trauma-informed and accessible survivor support, and comprehensive prevention education. This is the commitment Advocates and Preventionists have made to this field and the survivors we serve, and this is the charge we will continue to follow.

ABOUT CAPPA

The Campus Advocacy and Prevention Professionals Association (CAPPA) is the professional association representing over 500 professionals in 48 states, the District of Columbia, and 3 countries working as campus-based advocates and prevention specialists. CAPPA envisions campuses free from all forms of interpersonal and



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gender-based violence, including dating and domestic violence, sexual assault and harassment, and stalking. For more information visit: <http://www.nationalcappa.org/>

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