

June 11, 2021

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U.S. Department of Education
400 Maryland Avenue, SW
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RE: Department of Education’s Office for Civil Rights Virtual Public Hearing to Gather Information for the Purpose of Improving Enforcement of Title IX

The American Society for Biochemistry and Molecular Biology is an international nonprofit scientific and educational organization that represents more than 11,000 students, researchers, educators and industry professionals. The ASBMB strongly advocates for strengthening the science, technology, engineering and mathematics (STEM) workforce and ensuring diversity, equity and inclusion in STEM.

As established by the groundbreaking [2018 National Academies report](#) on Sexual Harassment in Academic Science, Engineering and Medicine, women in STEM experience sexual harassment at alarmingly high rates—the academic workplace has the [second highest rate of sexual harassment at 58 percent](#), only second to the military. Considering that the Department of Justice found that less than [5 percent of sexual assaults on campus will be reported](#) to campus authorities, institutions of higher education have clearly not done enough to uphold a system of accountability for survivors of sexual assault and harassment. Title IX guidance and rules are an opportunity to ensure a safer learning and work environment for women in STEM across the country.

The ASBMB has identified three aspects of the final rule published by the Department of Education on Title IX that hinder a just and equal legal process: first, its narrow definition of sexual harassment does not align with federal law; second, requiring live hearings with cross-examinations is harmful to survivors of sexual harassment and actively dissuades complainants from coming forward; lastly, the standard of evidence for sexual harassment cases should follow the standard for civil rights cases, not criminal court cases, to protect survivors and uphold a fair and just system.

Defining sexual harassment

The [Title IX final rule](#) from the Department of Education uses a narrow definition of sexual harassment compared to previous guidance issued from the department. It “...defines sexual harassment broadly to include any of three types of misconduct on the basis of sex.... any instance of quid pro quo harassment by a school’s employee; any unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal education access; any instance of sexual assault, dating violence, domestic violence, or stalking as defined in the Violence Against Women Act.” In contrast to the [2011 definition](#) of sexual harassment under the Obama administration as “unwelcome conduct of a sexual nature, including verbal conduct”, this rule creates [three separate categories](#) of wrongful conduct: sexual assault, quid pro quo, and sexual harassment.

This definition also significantly differs from the [federal definition](#) of workplace sexual harassment, which includes “unwelcome sexual advances, requests for sex favors and other verbal or physical harassment of a sexual nature.” Importantly, the legal definition includes harassment based on gender, not solely on sex, which is imperative to fulfill Biden’s Executive Order [Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation](#).

In its 2018 report, the National Academies concluded that academic climates that communicate tolerance of gender harassment and other behaviors that do not rise to the level of illegal sexual harassment tend to foster more egregious sexual harassment and sexual violence. This final rule genuinely prohibits schools from investigating complaints of sexual harassment that do not fall within this limited definition.

This narrow definition allows schools to dismiss any allegations of misconduct that do not [strictly meet this definition of sexual harassment](#), such as sexual advances that might not be considered “severe” and “pervasive” and “objectively offensive” but are still damaging to an individual. An incident must meet all three requirements in order for it to follow through the Title IX process even though, for example, a single severe instance can still be damaging to an individual. Not only does this allow academic institutions to ignore harassment incidents; but as [the ASBMB has covered before](#), the initial institutional response to a report of sexual harassment or sexual violence can be an even stronger predictor of the complainant’s future well-being than the sexual harassment itself.

We urge the department to broaden the definition of sexual harassment so it aligns with the federal law’s definition of sexual harassment. This is vital to ensure that students who experience sexual harassment can fairly report the incidences and to ensure that complainants of diverse gender identities are not excluded from a fair Title IX process.

Requiring cross live examination

The [final rule requires](#) a “live hearing with cross-examination conducted by the parties’ advisors at postsecondary institutions.” Decision-makers cannot rely upon the statement of any witness who is unwilling to submit to cross-examination by the advisors appointed.

[Cross-examinations threaten](#) to re-traumatize survivors of sexual assault and harassment, discourage the reporting of misconduct and give an unfair advantage to those who can hire lawyers. In sexual harassment cases, the survivor’s testimony may be the only evidence and therefore, will be the focus of attack for the defense.

[Legal experts have written](#) that this attack is done by undermining the survivor’s credibility and reliability and their story’s plausibility and consistency: “Rape myths and stereotypes can be invoked. Detailed questioning can recreate the powerlessness and terror of the original assault. This is referred to as secondary victimization [and] it can have serious consequences for survivor’s mental health and well-being.”

We urge the department to remove this requirement for live hearings with cross-examinations. This requirement is an active barrier for survivors of sexual harassment to report their experiences to their universities and will allow environments permissive of sexual harassment to flourish on campuses.

Standard of evidence

Prior to this final rule being published, the predominant standard for establishing culpability in Title IX hearings was preponderance of evidence, [which means](#) “more likely than not, or anything above a fifty-fifty likelihood of guilt.” Under the new rule, institutions can choose whether to use the preponderance of evidence standard or the clear and convincing evidence standard, which requires the evidence to establish that an incident was [substantially more probable](#) than not.

The preponderance of evidence standard is used in [most civil litigation](#) contexts in both state and federal court, including civil rights claims. Because universities are not arbiters of criminal justice, this standard should also apply to university adjudication of sexual harassment cases. The clear and convincing standard is based in criminal law, and requires evidence of a quantity and type that is [virtually impossible for schools to access](#), adding to the burden placed on the complainant.

The preponderance standard also ensures an equitable process for both the accused and the accuser in that each has the same opportunity to prove the pertinent facts. In contrast, the clear and convincing standard places a higher burden on the complainant to prove their case.

Lastly, using a more demanding standard of proof will dissuade survivors of sexual assault from coming forward and will likely depress the already-low institutional reporting rate. It is important to note that in cases involving sexual assault allegations, skepticism of complainants already undermine their credibility. [Numerous legal reviews](#) and [scholarly articles](#) have outlined the necessity of the preponderance of evidence standard and the same should apply for Title IX cases.

If the appropriate changes are made to the interpretation of Title IX in sexual harassment cases, the organizational climate at institutes of higher education can be changed from a permissive environment that leads to more instances of sexual harassment to an environment that promotes diversity and inclusion. It is vital not just for the American research enterprise, but for this country that people are protected from both sexual and gender harassment. We must put a stop to permissive environments to sexual harassment and reform a system that fails to protect survivors of harassment.