

Background Brief: Campus Responsibilities for Sexual Harassment¹ Prevention and Response

Title IX², the federal civil rights law pertaining to sex discrimination in education, is part of the Educational Amendments of 1972 to the Civil Rights Act of 1964. Under the administration of President Barack Obama, college and university responsibilities for prevention and response to sexual harassment incidents on campus were clarified, clearly outlining adjudication of sexual harassment incidents as falling within the bounds of Title IX protections and requiring institutions to take action. Our national conversation around campus sexual harassment has evolved greatly since the Obama administration directly addressed the culture of under-reporting on college campuses. Secretary of Education Betsy DeVos and her staff in the Department of Education (ED) Office of Civil Rights (OCR), most notably then-Acting Assistant Secretary for Civil Rights Candice Jackson, nonetheless walked back many of the provisions established under the previous administration in apparent response to concerns related to processes and protections for responding parties, to the detriment of accused students. A proposed rule released in late 2018 would impose a heavily legalistic and intricate process on institutions for investigating incidents of possible sexual harassment.

NASPA stands by the student affairs professionals and advocates who work on behalf of students – both reporting and responding parties – every day and who have spent countless hours in extensive training to ensure that campuses are handling these cases appropriately. Student affairs professionals, and the institutions that employ them, recognize the importance of addressing sexual harassment accusations to ensure supportive and productive educational environments for all students. Essential to ensuring such environments are campus adjudication procedures that uphold student civil rights while allowing for sensitivity to the level of ambiguity inherent in sexual harassment and assault incidents. It is the role of OCR to address the exceptions where a process or proceeding errs too far in favoring one side or the other. To imply that such missteps are the norm on all campuses is a misrepresentation of the many professionals who have dedicated their careers to ensuring fair and equitable campus conduct proceedings. Further, the role of the federal government should be to establish a minimum standard to which states and institutions will be held accountable by the Department,

¹ For the purposes of consistency, and in keeping with the language used in Title IX, we will use the term sexual harassment to encompass the broad array of sexually-based misconduct that may occur, including sexual assault.

² Title IX of the Educational Amendments of 1972: <https://www.justice.gov/crt/title-ix-education-amendments-1972>

but upon which states and institutions may build additional protections as appropriate for their communities.

The past several years have seen significant work on campuses across the country in developing fair and equitable processes to resolve Title IX cases; a significant increase in education and prevention efforts; and an increase in services and supports for victims of sexual violence. Campuses and the professionals who work to adjudicate sexual misconduct cases have the best interests of all students in mind. As Kenneth Marcus takes up responsibility for Title IX oversight as the ED Assistant Secretary for Civil Rights, NASPA will continue to work alongside campus professionals to advocate for the protection of students who have experienced harm through fair, prompt and equitable campus adjudication processes. This brief will provide a short review of the history of Title IX regulatory guidance, discuss a trend toward mandatory reporting in recent state proposed legislation, and identify some of the current issues and promising practices for institutions of higher education in the area of sexual harassment prevention and response³.

Title IX: A History of Regulatory Guidance

Title IX as it pertains to institutional responsibilities to respond to and address sexual misconduct has undergone a number of interpretations which have expanded the protections it provides for students over time. The first major reinterpretation of Title IX occurred in 1992 in *Franklin v. Gwinnet County Public Schools*⁴ when the Supreme Court expanded Title IX protections to include sexual harassment, and specifically rape as a form of sex discrimination. The case brought an increased focus on campus sexual harassment prevention from advocacy groups, policymakers, and the media nationwide. In 2001, the Office for Civil Rights (OCR), an administrative office under ED, released guidance⁵ on what constitutes sexual harassment under the law and specified how the Department expects institutions to respond.

The Obama Administration, with leadership from Vice President Joe Biden, further expanded guidance on Title IX to address institutional responsibilities to respond to accusations of sexual harassment⁶. “We are the first administration to make it clear that sexual assault is not just a

³ Title IX is also the primary vehicle for protection of trans student rights on college campuses; a separate background brief is available covering changes in trans student protections for those interested in recent developments.

⁴ *Franklin v. Gwinnett County Public Schools*, 502 U.S. 60 (1992):
<https://supreme.justia.com/cases/federal/us/503/60/case.html>

⁵ U.S. Department of Education. (January 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>

⁶ Larkin, M. (November 25, 2016). The Obama Administration Remade Sexual Assault Enforcement on Campus. Could Trump Unmake it? WBUR: <http://www.wbur.org/edify/2016/11/25/title-ix-obama-trump>

crime, it can be a violation of [an individual's] rights," Biden stated upon the release of the 2011 Dear Colleague Letter⁷ (DCL) which included sexual violence in the definition of sexual harassment under Title IX. OCR also created a detailed Question and Answer document⁸ (Q&A) in 2014 to more clearly explain institutional responsibilities under Title IX in adjudicating instances of alleged sexual misconduct. The expanded Title IX guidance, along with the update to the Jeanne Clery Disclosure of Campus Safety Policy and Campus Crimes Statistics Act⁹ (Clery Act) and the corresponding administrative push¹⁰ for campus sexual violence awareness, resulted in tangible changes¹¹ in higher education institutional policies across the country.

The legal requirements of the 2011 DCL and Clery Act made institutions responsible for playing multiple roles regarding campus sexual violence, from prevention efforts to investigation and adjudication of alleged incidents of sexual misconduct. In her 2014 essay "Only Yes Means Yes: An Essay on University Policies regarding Sexual Violence and Sexual Assault¹²," President of the University of California System, Janet Napolitano, explained some of the hurdles institutions faced at the time. She noted that while the guidance emphasized the rights of survivors, certain provisions seemed to simultaneously undermine survivors' rights; that the shift to a preponderance of evidence standard of proof created concerns regarding responding party rights; and that campus investigators may struggle with a lack of resources and tools to meet regulatory guidance.

Fall 2017 Interim Guidance Dear Colleague Letter

When appointed, Secretary of Education Betsy DeVos indicated that OCR would rectify some of the concerns raised in response to the Obama-era guidance. In September 2017, Secretary

⁷ U.S. Department of Education Office of Civil Rights. (April 4, 2011) Dear Colleague Letter. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

⁸ U.S. Department of Education Office of Civil Rights. (April 2014) Question and Answers. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁹ Jeanne Clery Disclosure of Campus Safety Policy and Campus Crimes Statistics Act: <https://www.knowyourix.org/college-resources/clery-act/>

¹⁰ U.S. White House. (September 19, 2014). President Obama Launches It's on Us Campaign. <https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus>

¹¹ Streng, T.K. and Kamimura, A. (2015). Sexual Assault Prevention and Reporting on College Campuses in the US: A Review of Policies and Recommendations. <https://files.eric.ed.gov/fulltext/EJ1083737.pdf>

¹² Napolitano, J. (2014). "Only Yes Means Yes: An Essay on University Policies regarding Sexual Violence and Sexual Assault," Yale Law & Policy Review: Vol. 33: Iss. 2, Article 4: <http://digitalcommons.law.yale.edu/ylpr/vol33/iss2/4>

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DeVos rescinded¹³ the 2011 and 2014 guidance, and released a new Q&A¹⁴ to serve as interim guidance, pending release of a formal Notice of Proposed Rulemaking (NPRM). This interim guidance removed the requirement for institutions to use the preponderance of evidence standard as the appropriate standard of proof for investigating allegations of sexual violence; eliminated the 60-day timeframe for the resolution of Title IX investigation and adjudication proceedings; allowed an appeals process initiated either by both parties or solely by accused students; and created an informal resolution option. In removing requirements previously in place that were more restrictive, the interim guidance gave institutions more flexibility in how to conduct their Title IX proceedings, however many of the changes lacked clear direction for implementation and raised concerns that survivors' rights may be undermined. The interim guidance did not address concerns involving survivors' rights or campus resources, including the role of law enforcement, and did not provide details on how institutions should operationalize any policy changes they choose to make. Perhaps more concerning, however, was the removal in the interim guidance of any timeline for case resolution. Under the Obama-era guidance, campuses were expected to resolve cases within 60 days, which may have been too short for cases with complex or extenuating circumstances. The absence of any timeline, unfortunately, creates new challenges and risks leaving both reporting and responding parties in perpetual states of limbo awaiting resolution.

The initial response¹⁵ to the interim guidance by campus administrators was largely to keep their current policies and practices in place and to carefully review current policies¹⁶ rather than make changes as the interim guidance allowed. While many campuses raised significant concerns with respect to the changes announced by Secretary DeVos in the September 2017 DCL, it should be noted that the letter did not require campuses to alter the basic policies and principles they are using to resolve sexual misconduct cases. For example, the guidance removed the *obligation* to use "preponderance of the evidence" as the evidentiary standard used to adjudicate cases, but it did not require campuses to use a stricter standard. Campuses were and are under no requirement to change their current standard of evidence, even now following the fall 2018 publication of the NPRM and proposed rule on Title IX. Given the interim

¹³ U.S. Department of Education Office of Civil Rights. (September 22, 2017) Dear Colleague Letter: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>

¹⁴ U.S. Department of Education Office of Civil Rights. (September 2017). Q&A on Campus Sexual Misconduct: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>

¹⁵ Kriehbaum, A. (September 25, 2017). New Instructions on Title IX. Inside Higher Ed: <https://www.insidehighered.com/news/2017/09/25/education-department-releases-interim-directions-title-ix-compliance>

¹⁶ Brown, S. (September 22, 2017). What Does the End of Obama's Title IX Guidance Mean for Colleges? The Chronicle of Higher Education: <https://www.chronicle.com/article/What-Does-the-End-of-Obama-s/241281>

nature of the guidance, and the promise of a final rule pending review of the over 100,000 public comments submitted on the proposed rule, it would be least disruptive to campuses processes not to alter the standard they currently employ.

Notices of Proposed Rulemaking and Comment Period

Administrative agencies, like ED, are responsible for releasing guidance and interpretation on how legislation will be implemented. Agencies are able to establish guidance through rulemaking and enforce compliance through the adjudication of those found to be out of compliance with current guidance. Rules and regulations issued by Executive agencies have the effect of law, and are released as federal regulatory and sub-regulatory guidance. Sub-regulatory guidance, like the 2011 DCL and September 2017 interim guidance on Title IX, are not subject to the public comment process that full federal regulatory guidance is held to. Therefore, these documents did not undergo an open call for comment for the general public to weigh in. When the September 2017 interim guidance was released, ED indicated a full NPRM¹⁷ on a final proposed rule related to Title IX would be forthcoming. It was over a year, before a formal NPRM was announced in mid-November 2018 and published in the Federal Register on November 29, 2018, launching a 60-day period of public comment that ended on January 30, 2019¹⁸.

Regulations related to Title IX fall under part 106¹⁹ of the Code of Federal Regulations (CFR), which governs nondiscrimination on the basis of sex in educational programs. This umbrella regulation has not seen significant regulatory reform in some time and, given the change in campus climate and approach to these matters, it was important for NASPA members, including those who are responsible for supporting students and administering sexual misconduct prevention and response programming, to take part in providing comments in response to the NPRM. NASPA submitted comments during the public comment period and encouraged our members to submit their own comments; additional information on NASPA's analysis of the proposed rule is provided in the next section.

¹⁷ For more information on the regulatory process and how it works, please review The Rule Making Process: Differences in Federal Regulatory and Sub-Regulatory Guidance: <https://www.naspa.org/rpi/posts/the-rule-making-process-differences-in-federal-regulatory-and-sub-regulator>

¹⁸ The comment period was originally scheduled to end on January 28, 2019. A brief outage in availability for Regulations.gov in mid-January, possibly related to the partial government shutdown occurring at the time, prompted ED to extend the deadline for public comments by two days and then to reopen the comment period for one day in mid-February.

¹⁹ U.S. Department of Education. (n.d.) Title 34, Subtitle B, Chapter I, Part 106 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html>

The rule-making process began when ED issued a proposed rule (the NRPM), which was made available to the public on the Department's website in mid-November 2018 and published formally in the Federal Register²⁰ and regulations.gov²¹ on November 29, 2018. The issuing of the rule corresponded with a call for comment, in which individuals, government officials, organizations, and associations were able to send comments for the following 62 days.²² Advocacy groups supporting both survivors of sexual harassment and responding parties to sexual harassment campus adjudication processes were active in encouraging members of the public, including students, to submit comments on the proposed rule. Over 100,000 comments were received, considerably more than are usually submitted on regulatory packages. Now that the comment period has concluded, ED is reviewing all comments received before publishing a final rule along with responses to any comments of significance and outlining any substantial revisions that have been made to the rule as a result of comments submitted. Once the final rule is published it will not be enforceable until its effective date, which will be announced when the rule is published, to allow room for institutions to make any necessary changes to ensure compliance.

ED is obligated to respond to comments of significance submitted on the proposed rule and either explain any changes they make to the rule in issuing it in final form or why the comments do not require changes. Given the unique ways in which various sectors of the higher education community would be impacted by the final rule, NASPA encouraged institutions and individuals to provide their insights to the Department for consideration. Detailed comments, including de-identified case examples from institutions, data and evidence of programmatic impact, and alternative solutions, help illustrate the ways in which institutions are likely to be affected by the new guidance, and can help shape revisions to the rule in support of the student affairs perspective. Student affairs professionals represent all facets of Title IX on campus.

Comments from individuals and institutions are very important to help ED understand the breadth and depth of institutional programming and consideration of sexual misconduct, as well as to more fully paint the picture of the diversity of students enrolled in higher education and institutional settings and how those factors influence sexual misconduct proceedings. This call for comment period was a crucial chance for both NASPA as an association, and individual members to consider policy impacts from both an administrative and a student-centered approach and relay this important information to ED. NASPA held a series of listening sessions in April (when the NPRM was originally expected to be released) to collect feedback and

²⁰ Federal Register website: <http://www.federalregister.gov>

²¹ Regulations.gov: Your Voice in Federal Decision-making: <https://www.regulations.gov/>

²² See Note 18.

information from our members to inform any comments NASPA submits in response to the NPRM. Once the NPRM was published, NASPA held a series of information sessions²³ and published a blog series²⁴ with initial analysis of the proposed rule in December 2018. In order to aid individuals and institutions in crafting their comments, NASPA also provided a set of eight Resource Guides²⁵ providing more detailed analysis of a variety of aspects of the proposed rule.

NASPA Position on Title IX Regulatory Reform

NASPA and the higher education community welcomed the opportunity for a review and comment process as ED develops new guidance. This ensures that any new guidance reflects important perspectives from campus-based student affairs professionals and Title IX staff who engage in this work every day. It also allows for input from the victim advocate community, whose work provides systems to support victims of sexual harassment. NASPA submitted comments²⁶ in response to the proposed rule, as well as signing onto community comments authored by the American Council on Education (ACE)²⁷, and a third set authored on behalf of a set of partner student affairs associations.

NASPA's members, student affairs professionals and the institutions that employ them, recognize the importance of addressing sexual harassment accusations to ensure supportive and productive educational environments for all students. Essential to ensuring such environments are campus adjudication procedures that uphold student civil rights while allowing for sensitivity to the level of ambiguity inherent in sexual harassment and assault incidents. NASPA values the important role of the Department in the issuance of guidance and providing oversight for how higher education institutions develop fair and equitable sexual harassment policies and processes. However, our comments on the proposed rule express

²³ Dunlap, J., Hinds, T., Tombros Korman, A., and Ali, D. (2018). Notice of Proposed Rulemaking on Title IX Information Session and Resource Guides. NASPA; recording available: <https://olc.naspa.org/catalog/notice-of-proposed-rule-making-on-title-ix-information-sessions>

²⁴ NASPA – Student Affairs Administrators in Higher Education. (December 2018). NASPA's Initial Analysis of the Proposed Rule on Title IX. <https://www.naspa.org/rpi/posts/naspas-initial-analysis-of-the-proposed-rule-on-title-ix-part-1>

²⁵ NASPA – Student Affairs Administrators in Higher Education. (January 10, 2019). Resource Guides for Responding to the Department of Education's Proposed Title IX Rule. <https://www.naspa.org/rpi/posts/resource-guides-for-responding-to-the-department-of-educations-proposed-tit>

²⁶ Hinds, T. (February 1, 2019). NASPA's Comments in Response to Proposed Title IX Rule.

<https://www.naspa.org/about/blog/naspas-public-comments-in-response-to-proposed-title-ix-rule>

²⁷ American Council on Education. (January 30, 2019). ACE, Higher Education Groups Comment on Proposed Title IX Rules, Caution That Colleges Are Not Courts. ACE: <https://www.acenet.edu/news-room/Pages/ACE-Higher-Education-Groups-Comment-on-Proposed-Title-IX-Rules-Caution-That-Colleges-Are-Not-Courts.aspx>

our concern that the net effect of the proposed guidelines would impose a heavily legalistic and intricate process on institutions for investigating incidents of possible sexual harassment.

Overall, NASPA finds that the Department's proposed Title IX of the Educational Amendments to the Civil Rights Act of 1964 (Title IX) rule would, if implemented as proposed, create a more adversarial process for adjudication of campus sexual harassment conduct incidents. NASPA objects most adamantly to the many and various ways in which the proposed rule conflates campus sexual harassment adjudication with criminal justice proceedings. We strongly request that this approach be reconsidered. Barring the removal of legalistic references, our comments identify several areas of the proposed rule that would require additional clarification or revision to maintain the environments of trust and responsibility institutions of higher education have worked diligently to create in recent years. Such trust is necessary to ensure that those subject to sexual harassment feel that coming forward to report an incident will be taken seriously and adjudicated fairly as well as to ensure those named in a report can be confident their rights will be respected. Our full comments address our major concerns.

We welcome a more collaborative relationship between OCR and colleges and universities. Colleges and universities have a vested interest in supporting all their students and they do so by creating fair and equitable processes related to sexual violence. While there are examples of egregious behavior around sexual harassment that exist, often involving high-profile college athletic teams, the vast majority of campuses work hard every day to get it right. The role of OCR should be to work with campuses to improve and clarify guidance and to provide oversight to catch and respond to those few egregious incidents.

Prior to 2011, when the Obama administration formalized guidance requiring it, most campuses were already utilizing the preponderance standard, which is the standard recommended by the Association for Student Conduct Administration (ASCA) for all student conduct proceedings.²⁸ Singling out sexual harassment incidents as requiring a higher burden of proof than other campus adjudication processes make it – by definition - harder for one party in a complaint than the other to reach the standard of proof. Rather than leveling the field for reporting and responding parties, setting a standard higher than preponderance of the evidence tilts proceedings to unfairly benefit responding parties.

As the formal guidance process proceeds, the broader culture around reporting sexual harassment (see below for more on the #MeToo movement) continues to evolve. Many survivors have to overcome social, physical, or emotional, and in some cases, procedural

²⁸ Loschiavo, C. and Waller, J. (n.d.) The Preponderance of Evidence Standard: Use in Higher Education Campus Conduct Processes. Association for Student Conduct Administration:
<https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf>

barriers to report an incident. In previous statements, ED OCR then-Acting Assistant Secretary for Civil Rights Candice Jackson has conflated the trauma experienced by survivors with the stress of a responding party who has been accused. Survivor trauma and responding party stress, while both very real, are not the same. Additionally, data indicate that survivor reports of sexual harassment and false accusations against responding students do not occur at the same rate; between 75-95% of survivors do not report their experiences to the campus,²⁹ while only between 2% and 10% of sexual assault reports are false.³⁰ These data make a clear point: responding parties are not being falsely accused at rates even approaching the underreporting of sexual harassment incidents. The context of these data and the information gathered from the field should be integral as ED considers new guidance to campuses that accounts for both the accused and victims.

#MeToo, Larry Nassar, and Mandatory Reporting³¹

Though it has existed for years as a social media movement founded by Tarana Burke to empower underprivileged women of color effected by sexual abuse,³² the #MeToo movement launched into national prominence in 2017 when Hollywood actors began sharing their stories of sexual harassment and assault in the industry following widespread accusations of producer Harvey Weinstein.³³ Campuses have also been grappling with the #MeToo movement³⁴ and how to handle lists of alleged perpetrators made public by student survivors and activists. But perhaps the most talked-about series of events to grip higher education in 2018 was the fallout

²⁹ Cantor, D., Fisher, B., Chibnall, S., Townsend, R., Lee, H., Bruce, C., and Thomas, G. (October 20, 2017). Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct. Westat: <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>

³⁰ Lisak, David, et al. "False allegations of sexual assault: An analysis of ten years of reported cases." *Violence Against Women* 16.12 (2010): 1318-1334.

³¹ Much of the content for this section originally appeared on the NASPA RPI blog in a post written by Dr. Jill Dunlap entitled Post-Nassar Campus Efforts Should Proceed with Caution: <https://www.naspa.org/about/blog/post-nassar-campus-efforts-should-proceed-with-caution>

³² Parker, N. (December 6, 2017). Who is Tarana Burke? Meet the Woman Who Started the Me Too Movement a Decade Ago. *The Atlanta Journal-Constitution*: <https://www.ajc.com/news/world/who-tarana-burke-meet-the-woman-who-started-the-too-movement-decade-ago/i8NEiuFHKalvBh9ucukidK/>

³³ Langone, A. (March 22, 2018). #MeToo and Time's Up Founders Explain the Difference Between the 2 Movements – And How They're Alike. *Time*: <http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/>

³⁴ Bauer-Wolf, J. (January 30, 2018). A College's List of Alleged Rapists. *Inside Higher Ed*: <https://www.insidehighered.com/news/2018/01/30/metoo-movement-inspires-similar-campaigns-among-colleges>

from the conviction and sentencing of Larry Nassar,³⁵ the former Michigan State University and USA Gymnastics doctor who sexually assaulted hundreds of his former patients. The case brought about the resignation of Michigan State University President Lou Anna Simon,³⁶ and calls for the ouster of the board of regents.³⁷ The NCAA³⁸ and the Michigan Attorney General³⁹ also initiated investigations. A Freedom of Information Act (FOIA) request from ESPN⁴⁰ resulted in release of a preliminary report of an investigation by the Department of Education completed and sent to the University in December 2018. The report revealed “several areas of serious noncompliance” with federal campus safety laws, including not properly notifying students of potential threats, under-reporting campus crime statistics, and not properly identifying or training campus security authorities on their duties.

The fallout from this tragic case is not localized to Michigan State. The question “could this have happened here?” echoed at campuses throughout the country. Nassar’s conviction and the persistent media attention to this case prompted many institutions of higher education to rethink their sexual harassment policies and procedures. Presidents directed their Vice Presidents, Title IX Coordinators, and other sexual harassment experts on campus to identify weak areas of training or response that could leave their institutions vulnerable. For other campuses, the directive for self-evaluation came externally: Ohio Governor John Kasich asked for a review of campus sexual harassment enforcement. The 115th Congress weighed in with legislation⁴¹ as well.

³⁵ Mencarini, M. (February 5, 2018). Larry Nassar’s criminal cases end with Eaton County sentence of 40 to 125 years. Lansing State Journal: <https://www.lansingstatejournal.com/story/news/local/2018/02/05/larry-nassar-sentenced-40-125-years-eaton-county/306237002/>

³⁶ Haag, M. and Tracy, M. (January 24, 2018). Michigan State President Lou Anna Simon Resigns Amid Nassar Fallout. The New York Times: <https://www.nytimes.com/2018/01/24/sports/olympics/michigan-state-president-resigns-lou-anna-simon.html>

³⁷ Seltzer, R. (January 29, 2018). Trustees Take Heat. Inside Higher Ed: <https://www.insidehighered.com/news/2018/01/29/trustees-face-pressure-resign-michigan-state-its-hard-force-out-boards>

³⁸ ESPN News Services. (January 24, 2018). NCAA begins investigation into Michigan State’s handling of Larry Nassar. ESPN: http://www.espn.com/college-sports/story/_/id/22193196/ncaa-begins-investigation-michigan-state-handling-larry-nassar

³⁹ Kelderman, E. (February 1, 2018). After Nassar Conviction, Michigan State Goes on Trial. The Chronicle of Higher Education (subscription required): <https://www.chronicle.com/article/After-Nassar-Conviction/242417>

⁴⁰ Lavigne, P. and Murphy, D. (January 30, 2019). Federal report cites Michigan State with systemic ‘serious violations’ of campus-safety law. ESPN: http://www.espn.com/espn/story/_/id/25885611/us-department-education-cites-michigan-state-university-clery-act-violations-espn-lines

⁴¹ Murphy, D. (January 30, 2018). Congress sends sexual abuse reporting law to President Trump. ESPN: http://www.espn.com/college-sports/story/_/id/22258840/congress-sends-sexual-abuse-reporting-law-president-trump

There are many strategies that might be offered to assuage the fears of campus presidents and legal counsel regarding an institution's response protocols and policies: better training for employees who learn about incidents of sexual harassment; more comprehensive education for students, faculty and staff who are impacted by sexual violence; and stronger mandatory reporting policies, among others. The problem with the last of these, however, is that stronger mandatory reporting policies might actually have a contravening effect on sexual violence efforts on campus.

A study by Holland, Cortina and Freyd (2018),⁴² argues that mandatory reporting policies, or compelled disclosure policies as they term them, are not evidence-based. Despite this lack of evidence, in a random sample of 150 campuses, 97% of institutions had a policy "mandating that some employees report any possible sexual assault disclosed to them by a student" while 69% had policies that identified all employees as mandatory reporters of sexual assault (Holland, et al., 8). The authors of the study make a compelling argument for why compelled disclosure policies aren't the panacea that campus administrators might hope.

Specifically, the authors reference data indicating that other, similar policies requiring campuses to notify law enforcement about sexual assault reports would result in fewer disclosures of sexual violence by survivors. While 88% of survivors indicated that mandatory law enforcement reporting would lead to fewer disclosures, another 21% indicated that they would be "extremely likely" to report if there was a policy "requiring employees to respect students' decisions about reporting," (Holland et al., 11). The authors also warn that there is no evidence to support the notion that compelled disclosures to campus authorities result in more – or more successful – investigation and adjudication of sexual assaults.

Compelled disclosure policies are opposed by national medical associations such as the American Medical Association,⁴³ the World Health Organization,⁴⁴ and victims' rights groups⁴⁵ alike because they take the choice about reporting away from an adult whose very recovery depends on being able to regain control over their own lives. Compelled disclosure policies can also sometimes serve to send survivors underground, resulting in their choice to "forego

⁴² Holland, K. J., Cortina, L. M., and Freyd, J. J. (accepted for publication). Compelled Disclosure of College Sexual Assault. *American Psychologist*, accepted for publication:

<http://dynamic.uoregon.edu/jjf/articles/hcfaccepted2017.pdf>

⁴³ Sachs, C. J. (2007). Mandatory reporting of injuries inflicted by intimate partner violence. *AMA Journal of Ethics*, 9(12), 842-845.

⁴⁴ World Health Organization (2013). Responding to intimate partner violence and sexual violence against women: WHO clinical and policy guidelines.

<http://www.who.int/reproductivehealth/publications/violence/9789241548595/en/>

⁴⁵ National Alliance to End Sexual Assault (March 10, 2015). NAESV opposes mandatory referral legislation. <http://endsexualviolence.org/files/NAESVMandatoryReferralPositionStatement.pdf>

treatment and support, rather than sacrifice their privacy and control under compelled disclosure,” (Ibid, 14).

Unfortunately, we see in the Nassar case an example of what sometimes happens when independent adults do come forward and want to make an official report to either the campus or to law enforcement. Clearly, the victims in this case did want to report and they simply weren’t believed. Better training for employees who may receive a report of sexual violence is a laudable goal, but the study’s authors also argue that many campuses are falling short of that goal. Instead, Holland, et al., outline several survivor-centered reforms, including policies that respect survivors’ wishes; creating restricted reporting options for survivors while they decide what they ultimately wish to do; and providing confidential advocates on campus with whom survivors can discuss their options while accessing accommodations. There is also hope that some state legislatures will require campuses to do just that. The Illinois Preventing Sexual Violence in Higher Education Act⁴⁶ already requires campuses to have confidential advisors for survivors, and Nebraska considered, but did not pass, legislation that would have required campuses to designate confidential advisors for survivors who disclose sexual violence.⁴⁷

Student affairs practitioners in many ways already know the potential negative impact of compelled disclosure policies. The work of supporting survivors, investigating cases, and adjudicating policy violations rests primarily within the purview of student affairs professionals. It is equally important that the voices and expertise of student affairs professionals and sexual harassment survivors are heard during the difficult conversations on campus in follow up to devastating Nassar case. Policies about compelled disclosure should be developed with a clear understanding of the impact on those whom they are designed to protect, and not with institutional liability in mind. If we truly want more survivors to come forward, we should consider survivor-centered, evidence-based, and effective reforms.

Evidence from Campus Practice: NASPA’s Culture of Respect Initiative

Although the Notice of Proposed Rulemaking (NRPM) started the legal process for creating regulatory guidance on Title IX and sexual violence, its publication was not a true beginning: it was one stop on what for many has been tumultuous journey towards ensuring institutions of higher education are responsive to sexual harassment, sexual assault, and other types of gender-based discrimination. This is especially true for those of us engaged with the Culture of

⁴⁶ Preventing Sexual Violence in Higher Education Act (110 ILCS 155):
<http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3672&ChapterID=18>

⁴⁷ Nebraska LB857: Adopt the Campus Confidentiality Act:
https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=34162

2019 National Student Affairs Day of Action: March 12, 2019
Background Briefing: Campus Responsibilities for Sexual Harassment Prevention & Response

Respect Collective⁴⁸, an ambitious program that brings together institutions of higher education who are dedicated to ending campus sexual violence and guides them through a rigorous, two-year process of self-assessment and targeted organizational change. The first cohort of Collective schools⁴⁹ started the program when President Trump took office in 2017 and completed their participation the month the NPRM comment period closed⁵⁰, in January 2019.

Over that two-year period, participating institutions⁵¹ faced significant uncertainty in a shifting social and political landscape: the 2011⁵² and 2014⁵³ guidance from the Department of Education (ED) was rescinded in September 2017⁵⁴, and replaced with an interim Question and Answers document⁵⁵. Though that 2017 guidance was brief and imposed minimal standards, it intimated the new priorities of ED under Secretary Betsy DeVos. Perhaps even more impactful for the field, however, was the birth of the #MeToo movement⁵⁶. The light #MeToo shed on the prevalence of workplace sexual harassment solidified for higher education both the urgency of addressing sexual assault. It also highlighted the need to simultaneously stay focused on interrelated harms that are also commonplace in higher education: sexual harassment, intimate partner violence, and stalking. Additionally, the powerful surge of #MeToo helped institutions of higher education clarify the broad scope of their mission to address violence, focusing not just on undergraduate students, but also on how employees, graduate students, and others connected to higher education are impacted by sexual violence. Though the horrific and highly publicized crimes of Dr. Larry Nassar⁵⁷ were just one extreme example of institutional failure, the crimes and the fallout at Michigan State weighed heavily upon all of higher education.

⁴⁸ Culture of Respect Collective: <https://cultureofrespect.org/programs-and-tools/the-collective/>

⁴⁹ Greenstein, S. (April 25, 2017). Announcing the 2017 Culture of Respect Collective Cohort. NASPA: <https://www.naspa.org/rpi/posts/announcing-the-2017-culture-of-respect-collective-cohort>

⁵⁰ Smith, T. (January 30, 2019). Trump Administration Gets an Earful on New Campus Sexual Assault Rules. NPR: <https://www.npr.org/2019/01/30/689879689/education-department-gathers-feedback-on-new-campus-sexual-assault-rules>

⁵¹ Culture of Respect Partners: <https://cultureofrespect.org/who-we-work-with/>

⁵² U.S. Department of Education Office of Civil Rights. (April 4, 2011) Dear Colleague Letter. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

⁵³ U.S. Department of Education Office of Civil Rights. (April 2014) Question and Answers. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁵⁴ U.S. Department of Education Office of Civil Rights. (September 22, 2017) Dear Colleague Letter: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>

⁵⁵ U.S. Department of Education Office of Civil Rights. (September 2017). Q&A on Campus Sexual Misconduct: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>

⁵⁶ Johnson, C. and Hawbaker, KT. (February 15, 2019). #MeToo: A timeline of events. Chicago Tribune: <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmllstory.html>

⁵⁷ Astor, M. (December 7, 2017). Gymnastics Doctor Who Abused Patients Gets 60 Years for Child Pornography. The New York Times: <https://www.nytimes.com/2017/12/07/sports/larry-nassar-sentence-gymnastics.html?module=inline>

Although Collective institutions felt the unmooring impact of these national events, their participation in Collective provided a clear structure and direction for their work to address sexual violence. Through the program, they were asked to complete a comprehensive inventory of their campus-wide efforts to address sexual violence, using the CORE Evaluation⁵⁸. Then, using their CORE Evaluation results along with other data about their campus culture and climate, participating institution developed detailed action plans that set specific targets for policy and programmatic improvements. Finally, they made a commitment to implementing those changes within this ever-changing social, political, and cultural context. At the end of the program, Collective institutions completed that same self-assessment, giving them an opportunity to clearly identify what had changed (or stayed the same) from 2017 to 2019.

The arc of the Collective was a learning process for everyone involved: Culture of Respect and NASPA staff, and a diverse set of diverse institutional partners. Though Culture of Respect staff are still weaving through the wealth of assessment data collected throughout the past two years, there are a few salient themes that are emerging. First, conversations with Collective institutions solidified how difficult this work is: not only is organizational change inherently challenging, but work related to Title IX and sexual violence on campus is fragile, complex, and politically fraught. Many Collective participants faced barriers such as changes in organizational structure (especially for Title IX offices), frequent turnover in key positions, bureaucratic delays, budget constraints and cuts, and competing staffing demands, particularly for Title IX and prevention positions.

Despite these pressures, Collective institutions have not paused or sacrificed their work to build structures for addressing sexual violence on campus. Though Culture of Respect will share more details in a formal evaluation report, we know that institutions who completed the Collective made significant improvements across the six pillars of the Culture of Respect CORE Blueprint⁵⁹: survivor support, clear policies, multi-tiered education, public disclosure, schoolwide mobilization, and self-assessment. And, because federal requirements were relaxed and not strengthened over that period, it is clear that institutions and their dedicated employees were motivated by a shared desire to improve their campus communities. Professionals who work in this area are passionate about envisioning and realizing a world where sexual violence is not tolerated. Students undoubtedly share that dedication. We are proud that Collective institutions stayed engaged with students throughout this process by inviting them to sit at the

⁵⁸ Culture of Respect's CORE Blueprint and Evaluation: <http://cultureofrespect.org/programs-and-tools/signature-tools/#coreevaluation>

⁵⁹ Ibid.

table on their task forces, seeking feedback from student groups and leaders, engaging and training peer educators, and much more.

Finally, one truth that has been with us throughout these past two years is the undeniable need to speak openly, act decisively, and respond compassionately to sexual violence. Collective institutions are not alone in reporting increasingly common disclosures of sexual harassment or sexual assault from students. Though painful in their frequency, the increase in Title IX reports is an indication that creating consistent, fair procedures for responding to sexual violence is necessary. It helps survivors get the support they need and allows all of us to think about meaningful strategies for preventing these harms.

Culture of Respect is humbled to be a witness to and a partner in the essential work that is happening across the country to address sexual violence. No matter the final outcome of the proposed rule from the Department of Education, we know institutions of higher education will continue undeterred in their effort to prevent and respond to all forms of sexual violence in our communities.

Promising Practices for Tumultuous Times

While campuses get better at condemning violence,⁶⁰ responding to offensive behavior,⁶¹ and supporting survivors,⁶² it is imperative they start to think how to expand the impact beyond student centers and residence halls. Below are five ways colleges and universities can focus their resources and energy to ensure campus efforts to end violence ripple throughout our society. Legislative approaches to compel reporting or create increasingly complex and duplicative campus adjudication processes related to sexual harassment incidents are unlikely to address campus and broader societal culture norms around sexual harassment. Advocates are encouraged to share examples of work they are doing to proactively address the culture on their campuses with policymakers to broaden the conversation and encourage more holistic approaches to preventing sexual harassment and sexual violence not just on our campuses, but in our communities.

⁶⁰ Quillen, C. (February 12, 2017). Davidson president: Solutions to campus sexual assault start with culture change. The Charlotte Observer: <http://www.charlotteobserver.com/opinion/op-ed/article132342879.html>

⁶¹ AP. (December 22, 2016). Princeton suspends men's swim team over vulgar offensive comments. AP: <https://www.usatoday.com/story/sports/college/2016/12/16/princeton-suspends-mens-swim-team-vulgar-and-offensive-materials/95511472/>

⁶² RAINN. (n.d.) Tips for Talking with Survivors of Sexual Assault. <https://www.rainn.org/articles/tips-talking-survivors-sexual-assault>

Develop and evaluate sexuality education curricula. We know students need to learn about consent and healthy relationships before they get to campus.⁶³ Providing ongoing, comprehensive sexuality education at the elementary, middle, and high school levels is the best way to make sure students are prepared for healthy romantic and sexual relationships. Yet, the CDC has identified only two programs⁶⁴ for secondary school students that have been effective at reducing sexual violence perpetration. We need more programs that can provide developmentally and culturally appropriate content to students of all ages. Institutions of higher education have a big role to play here: they can encourage faculty and students to develop new curricula and support researchers in conducting rigorous evaluations of these programs to ensure they are effective.

Partner with local school districts. Title IX has been a focus for college campuses due to the courageous activism of student survivors, the Obama administration's push for Title IX enforcement,⁶⁵ and the intense pressure from local and national media outlets. Though there hasn't been the same spotlight on secondary schools, any public or private school that receives federal funding is held to the same Title IX standard⁶⁶ of ensuring access to education without discrimination. Colleges can share their Title IX expertise by partnering with local school districts to help provide guidance on training employees, setting up reporting procedures, and implementing prevention education.

Prepare professionals to recognize and address violence. We cannot relegate this insidious problem into the hands of just a few. We need professionals in every field who are trained to recognize and respond to violence, and institutions of higher education are responsible for that training. It is essential that aspiring teachers are trained in the best practice standards for sexuality education,⁶⁷ that medical students are taught how to provide trauma-informed care,⁶⁸

⁶³ Auteri, S. (April 28, 2016). When Should Kids Start Learning About Sex and Consent? The Atlantic: <https://www.theatlantic.com/education/archive/2016/04/when-should-kids-start-learning-about-sex-and-consent/480264/>

⁶⁴ Centers for Disease Control and Prevention. (n.d.) Sexual Violence: Prevention Strategies. <https://www.cdc.gov/violenceprevention/sexualviolence/prevention.html>

⁶⁵ The Chronicle of Higher Education's Title IX Tracker: <https://projects.chronicle.com/titleix/>

⁶⁶ United Educators. (n.d.) Title IX and Sexual Harassment in K-12 Public Schools: Key Steps to Compliance. <https://www.ue.org/uploadedFiles/Title%20IX%20and%20Sexual%20Harassment%20in%20K-12%20Public%20Schools.pdf>

⁶⁷ Future of Sex Education Initiative. (2012). National Sexuality Education Standards: Core Content and Skills, K-12 [a special publication of the Journal of School Health]. <http://www.futureofsexeducation.org/documents/josh-fose-standards-web.pdf>

⁶⁸ National Council for Behavioral Health Trauma-Informed Primary Care Initiative: <https://www.thenationalcouncil.org/trauma-informed-primary-care-initiative-learning-community/>

and that media professionals start to acknowledge and shift their role in promoting rape culture⁶⁹.

Foster student activism and civic participation. In order to continue this essential anti-violence work, we will need capable and engaged citizens - and that is exactly the task of student affairs professionals.⁷⁰ Involving students in anti-violence work is not only essential to creating meaningful change on your campus, but to ensure the movement continues to be supported by politically engaged citizens. Institutions should professionalize the work that students do on campus by: compensating students who serve on Title IX committees; providing rigorous training for peer educators⁷¹ (including on the very critical issue of self-care); and listening to student input to ensure they know their voices are valued. This will prepare graduates to run for school boards, vote in local elections, and establish careers in activism.

Show us what works. Campuses are still struggling to figure out what works in sexual violence prevention and response. The pressure is on to get it right. If colleges can demonstrate what it takes to transform campuses into places where survivors are supported and all people are treated with respect, then we will have a roadmap for what might work within other types of institutions. That means colleges must continue their evaluation efforts, so we can see prevalence decline and evidence of culture change through regular campus climate surveys,⁷² ongoing program evaluation,⁷³ and sustained funding for evaluation efforts.

About NASPA

NASPA – Student Affairs Administrators in Higher Education is the leading association for the advancement, health, and sustainability of the student affairs profession. Student affairs is a critical component of the higher education experience, collaborating with colleagues across institutions of higher education to offer students valuable learning opportunities, meaningful social engagements, and safe and inclusive environments. NASPA’s Public Policy Agenda is grounded in a commitment to ensuring opportunity for all institutional members’ students and a belief that higher education is a great benefit to both individuals and society.

⁶⁹ Green, D. (May 18, 2013). 15 Recent Ads that Glorify Sexual Violence Against Women. Business Insider: <http://www.businessinsider.com/sex-violence-against-women-ads-2013-5>

⁷⁰ NASPA – Student Affairs Professionals in Higher Education and the American College Personnel Association. (January 2004). Learning Reconsidered: A Campus-wide Focus on the Student Experience. NASPA: https://www.naspa.org/images/uploads/main/Learning_Reconsidered_Report.pdf

⁷¹ Certified Peer Education (CPE) Training: <https://www.naspa.org/constituent-groups/groups/bacchus-initiatives/initiatives>

⁷² Administrator Researcher Campus Climate Collaborative (ARC3) Campus Climate Survey: <http://campusclimate.gsu.edu/>

⁷³ CDC Program Performance and Evaluation Office: <https://www.cdc.gov/eval/index.htm>