

ASSEMBLY BILL 04

**A RESOLUTION TO BE ENTITLED
AN ACT TO DISCOURAGE THE IMPLEMENTATION OF PROPOSED
REGULATIONS TO TITLE IX POLICY BY THE UNITED STATES DEPARTMENT OF
EDUCATION**

Short Title: Title IX Protections Act (Public)

Sponsored by: Jess Errico (Student Body President; North Carolina State University), Naila Segule (Campus Liaison; North Carolina State University), James Withrow (Graduate Student Association President; North Carolina State University), Adam Schmidt (Student Senate President, North Carolina State University)

Submitted Date: January 20, 2019

First Reading: January 25, 2019

First Reading Status: COMMITTEE

Second Reading: January 26, 2019

Second Reading Actual: VOTE (PASSED)

Referred to: Committee on Governmental Outreach.

Section 1. The General Assembly of the University of North Carolina Association of Student Governments adopts the following Resolution:

WHEREAS, Title IX is a federal civil rights law that prohibits discrimination on the basis of sex in any federally funded educational program or activity; and,

WHEREAS, the Department of Education (DOE) has proposed new Title IX regulations¹ that are currently under a 60-day official public comment period until January 28th; and,

WHEREAS, the key proposed revisions include, among other things, changes to the definition of sexual harassment, geography/jurisdiction, obligated response, live hearing and cross-examination, standard of evidence, informal resolutions and mediation; and,

WHEREAS, the current definition of sexual harassment by the Office of Civil Rights (OCR), and by the 2011 Dear Colleague Letter², is “unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment”; and,

WHEREAS, the DOE has proposed in Section 34 CFR 106.44(e)(1)¹ changes to the definition of sexual harassment to “mean either an employee of the recipient conditioning the

provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or sexual assault as defined in 34 CFR 668.46(a), implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act)."; and,

WHEREAS, the *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001)³ states, "Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program. Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance;" and,

WHEREAS, the DOE has proposed, in Section 34 CFR 106.44(a)¹, that Title IX regulations only be enforced in circumstances where harassment occurs within the school's own program or activity within the United States; and,

WHEREAS, these proposed changes could result in students who are sexually harassed off-campus or within a study abroad program would no longer be eligible to and/or legally entitled to receive supportive measures under Title IX; and,

WHEREAS, the DOE has proposed in Section 34 CFR 106.44(a)¹ that universities are only obligated to respond to a Title IX complaint in which the university has "actual knowledge" of allegations of sexual harassment; and,

WHEREAS, "actual knowledge" is defined as reporting the alleged harassment as given by the definition in 106.44(e)(i)¹ that is within an educational program or activity as defined in 106.44(a) to an official with the authority to take corrective action (e.g. reporting to a Title IX coordinator); and,

WHEREAS, The 2011 Dear Colleague Letter states that a university is obligated to respond if it has knowledge of, or reasonably should have known, that sexual harassment was occurring and must take action to eliminate the harassment and prevent its recurrence (e.g. reporting to a responsible reporter); and,

WHEREAS, The 2011 Dear Colleague Letter allows but does not require cross-examinations; and,

WHEREAS, the DOE's proposed changes in Section 34 CFR 106.45(b)(2)-(b)(3)¹, regarding cross-examination, require that a final determination of Title IX violations must be

made at a live hearing where parties may be in separate rooms and cross-examination may be conducted by each party's advisor of choice; and,

WHEREAS, President of the Title IX Association of Administrators, Brett Sokolow⁶, has noted that this increased incentive to bring legal counsel as an advisor for the cross-examination has the potential for income-inequality to become a greater factor in the outcomes of Title IX cases; and,

WHEREAS, proposed changes stipulate that questions regarding a survivor's prior sexual history are disallowed, except in some limited circumstances (such as establishing consent); and,

WHEREAS, the DOE's proposed changes in Section 34 CFR Section 106.45(b)(4)(i)¹ for the standard of evidence by which a determination of responsibility is made, states that "the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty;" and,

WHEREAS, Section 603 of Chapter 100.1 in *The Code* published by the UNC Board of Governors⁴ states in regard to the removal of faculty members, "In evaluating the evidence, the committee shall use the standard of "clear and convincing" evidence in determining whether the institution has met its burden of showing that permissible grounds for serious sanction exist and are the basis for the recommended action;" and,

WHEREAS, the proposed change would require all UNC System Schools to switch to a clear and convincing standard of evidence for all Title IX cases, which is considered to be a much higher burden of proof than the preponderance of evidence standard; and,

WHEREAS, the DOE's proposed changes in Section 34 CFR 106.45(b)(6)¹ states: "... any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication;" and,

WHEREAS, Title IX regulations under both the Bush³ and Obama Administrations² (Dear Colleague Letter) state that mediation is not an appropriate method for resolving sexual misconduct complaints due to the risks of coercion into mediation as well as the potential psychological impacts on the alleged victim; and,

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WHEREAS, a 2015 survey by the Association of American Universities⁵ found that 11.2% of all graduate and undergraduate students experience rape or sexual assault through physical force, violence, or incapacitation, of which a 2016 study found that 34% of those students drop-out of college, indicating a substantial barrier to equal access to education; now therefore so be it,

RESOLVED, due to the possibility of these proposed changes becoming law, The General Assembly of the University of North Carolina Association of Student Governments is concerned that the proposed changes improperly limit the investigative scope and supportive measures available to complainants of sexual harassment under Title IX to those cases that are considered to be “the most severe”; and be it further

RESOLVED, that the General Assembly of the University of North Carolina Association of Student Governments acknowledges that sexual harassment in any form limits the ability of students to fully access their educational programs; and be it further,

RESOLVED, that the General Assembly of the University of North Carolina Association of Student Governments strongly objects to the aforementioned proposed 34 CFR Part 106 regulations¹; and be it further,

RESOLVED, that the General Assembly of the University of North Carolina Association of Student Governments urges all UNC System schools to discourage the implementation of proposed regulations to Title IX policy by the DOE; and be it further,

RESOLVED, that the General Assembly of the University of North Carolina Association of Student Governments calls on the President of the Association of Student Governments to convey to the Board of Governors the importance and impact these changes would have on the UNC system student populations; and be it further,

RESOLVED, that a copy of this resolution be sent to UNC System Interim President Dr. William Roper, all UNC System Chancellors, and the UNC System Board of Governors, upon enrollment.

Section 2. This Act shall be effective upon enrollment.

Sources:

1. United States Dept. of Education. Title IX, 34 CFR Part 106, RIN 1870-AA14 [Docket ID ED-2018-OCR-0064]. [Web](#). November 2018.

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2. United States Dept. of Education. Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali. [Web](#). April 2011.
3. United States Dept. of Education. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties. [Web](#). January 2001.
4. University of North Carolina Board of Governors. 100.1 The Code of the Board of Governors. [Web](#). July 2001.
5. David Cantor, Bonnie Fisher, Susan Chibnall, Reanna Townsend, et. al. Association of American Universities (AAU), Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct (September 21, 2015).
6. Andrew Kreighbaum, Inside Higher Ed., New Uncertainty on Title IX, (November 20, 2018)