

**NDSA-12-1819**

A Resolution Urging Action on Title IX

WHEREAS, the North Dakota Student Association (NDSA) represents the voice of North Dakota's 45,000 public college and university students; and,

WHEREAS, the purpose of NDSA is to represent all students enrolled in the North Dakota University System (NDUS) and advocate on issues of higher education in support of access, affordability, quality, and the student experience; and,

WHEREAS, the Department of Education has proposed new changes to the Education Title IX regulations, found within Federal Regulations volume 34, part 106; and

WHEREAS, section 106.45(b)(3)(vii) "requires institutions to provide a live hearing, and to allow the parties' advisors to cross-examine the other party and witnesses," a practice that may subject the reporting party to relive a traumatic experience and discourage survivors of sexual harassment and sexual assault from reporting said harassment and assault; and,

WHEREAS, section 106.45(b)(3)(vii) "allows either party to request that the recipient facilitate the parties being located in separate rooms during cross-examination while observing the questioning live via technological means" while including no specifications of any grant or federal funding for the staffing or technological complexities it implies; and,

WHEREAS, section 106.45(b)(3)(viii) "would require recipients to provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint," which could infringe upon the privacy rights guaranteed in the Health Insurance Portability and Accountability Act (HIPAA) and the Family Educational Rights and Privacy Act (FERPA) if a reporting party intends to use a decline in physical or mental health or academic performance as evidence during the hearing; and,

WHEREAS, the previous Title IX standards defined "sexual harassment" as "unwelcome conduct of a sexual nature," while the proposed section 106.44(e)(1) now redefines "sexual harassment" more narrowly as "an employee of the [institution] 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 denies a person access to the school's education program or activity," or "criminal sexual assault," creating ambiguous loopholes that would allow institutions to interpret the definitions of "severe," "pervasive," and "objectively offensive" while also putting additional responsibility on the reporting party to prove severity, pervasiveness, and offense; and,

WHEREAS, proposed section 106.44(a) limits the mandatory jurisdiction of the institution to only those reported cases in which misconduct occurs within its "education program or activity" so that any sexual misconduct that occurs in a location or at an event not supervised, funded, or otherwise endorsed by the institution, which alleviates pressures of the institution to investigate reported instances that occur near campus and may limit the ability of survivors of sexual assault to report Title IX infractions; and,

Approved by the NDSA General Assembly on Saturday, January 19, 2019



WHEREAS, institutions of higher education were required, under previous Title IX guidance that was far too vague, to intervene if they “reasonably” should have known of sexual misconduct and will now, under section 106.30 be held responsible only in instances in which these institutions have “actual knowledge” of such sexual misconduct, which could alleviate institutional responsibility too much, devaluing vigorous attention and awareness of warning signs of sexual misconduct that certain campus administrators should have; so,

THEREFORE, BE IT RESOLVED, that, in order to protect sexual harassment and assault survivors’ mental wellbeing, avoid discouragement of those individuals from reporting cases of sexual misconduct, and eliminate the need for additional funding for staff and technology, the NDSA urges the Department of Education and the North Dakota University System and the institutions that constitute it to denounce the proposed section 106.45(b)(3)(vii); and,

BE IT FURTHER RESOLVED, that, in order to protect the privacy rights of students guaranteed by HIPAA and FERPA, the NDSA insists that the Department of Education seriously reconsiders the need and constitutionality for both parties to receive all evidence presented as evidence including health and academic records; and,

BE IT FURTHER RESOLVED, that, in order to ensure all sexual misconduct is treated with the utmost severity, the NDSA insists that the Department of Education abandons the definition of “sexual harassment” proposed in section 106.30 and the upholds the existing definition as “unwelcome conduct of a sexual nature” as the standard for reportable cases of misconduct; and,

BE IT FURTHER RESOLVED, that, in order to effectively protect the rights and potential academic success of students, the NDSA insists that the Department of Education investigate any sexual misconduct between individuals associated with the institution or the learning environment that may hinder the educational pursuits of survivors, without strict regard to the physical and financial jurisdiction of the institution outlined in 106.44(a); and,

BE IT FURTHER RESOLVED, that, in order to be fair to institutions while holding them to a high standard of awareness, the NDSA urges the Department of Education to reevaluate the responsibilities of institutions and propose a different standard that is neither vague nor neglectful of warning signs of sexual misconduct.