



179 Rehoboth Avenue, #1131  
Rehoboth Beach, DE 19971  
Phone: (202) 438-5929  
dstafford@naccop.org

---

## **NEWS RELEASE: NACCOP Meeting with Office of Management and Budget (OMB)**

**January 29, 2020**

**NACCOP Representatives:** Cathy Cocks, Beth Devonshire, Bill Lafferty, Adrienne Murray, Ann Todd

**Federal Representatives:** Alexander Hunt, OMB; Sam Wice, OMB; Vanessa Santos, Program Legal Group, Office for Civil Rights (PLG); Christian Corrigan, OCR; Jennete Bustos, PLG.

NACCOP representatives were given the floor to discuss key talking points from the questions and comments previously submitted by NACCOP regarding the draft Title IX regulations. The representatives were also invited to submit accompanying documents within 24 hours of the meeting.

Following introductions, the NACCOP team explained that the association membership includes Clery compliance officers and professionals and other campus administrators with responsibilities that include compliance with the Clery Act and Title IX including campus safety and police, conduct officers, student development, human resources administrators, and Title IX Coordinators. The goal for the meeting was to represent issues that have been raised by the membership, particularly around the intersection of Title IX and the Clery Act, as well as the practical implications of the draft regulations on campus policies and procedures, including significant impacts the draft regulations would have on student and employee conduct processes.

### **Jurisdictional Issues--Geography**

NACCOP representatives discussed the challenges schools face with the current language of the proposed regulations around issues of geographic jurisdiction. Proposed § 106.44(a) states that an institution will only be responsible for conduct that occurs within its "educational program or activity." The team gave examples of challenges faced by member institutions including incidents of sexual misconduct involving a student which have an on-going impact on education but occurred in an off-campus apartment complex, a study-abroad program, or online.

Given NACCOP members' concern for safety, most schools include off-campus conduct under the jurisdiction of the institution's conduct codes as a way to investigate and adjudicate off-campus incidents that could threaten the safety and wellbeing of those on campus and/or create a continued hostile environment on campus for others. For example, if an incident of sexual violence was reported to have occurred between two students off-campus, but due to jurisdictional issues, is now outside the scope of the Title IX grievance procedure, what should a school do?

The proposed regulations suggest that schools could refer these cases to the "conduct process." But what does the shift from the Title IX process to the conduct process look like? And, given the Clery Act implications (advisor of choice for the parties, required written notices, written explanation of rights, etc.), the conduct processes for both student and employees would need to include special procedures to ensure Clery Act compliance for sexual misconduct, overseen by conduct officers, many of whom were relieved of these duties in the past as institutions sought to have single (and compliant) umbrella policies overseen by Title IX Coordinators. The regulations as written would certainly push us back



179 Rehoboth Avenue, #1131  
Rehoboth Beach, DE 19971  
Phone: (202) 438-5929  
dstafford@naccop.org

to a time of multiple and likely conflicting policies overseen by different administrators and would create again the very “labyrinth” of policies the government previously advised schools not to have in place.<sup>1</sup>

Related would be the impact the proposed regulations have on conduct codes broadly. It would seem fundamentally unfair that a student who is alleged to have engaged in sexual misconduct would receive different procedural protections than students who are alleged to have engaged in other egregious behaviors. Under the proposed regulations, the rights afforded to accused students under Title IX are not required currently in student conduct processes. This means that the type of behavior and its reported location will be the driving factor in providing due process, not the potential sanction that could result. The proposed regulations unjustly afford considerable procedural protections to SOME students for SOME alleged behavior, but not ALL students for ANY serious allegation. Simply stated, the draft regulations separate “Title IX” from “conduct” when in fact, they are parallel tracks at many universities and either track can result in separation of a student.

### **Jurisdictional Issues--Standing**

In addition to jurisdiction based on geography, member institutions are concerned about language in the proposed regulations that limit a school’s ability to address sexual harassment, including sexual assault, based on status of the parties. What happens when the Complainant or the Respondent is not associated with the institution? If the Complainant is not a student, how do they have status to bring a complaint? Many IHEs currently investigate and follow-up on a variety of behaviors in which there is a non-student complainant (child pornography, for example) but do not utilize live hearings with cross-examination.

The team raised considerable points regarding the interests of our constituents who are community college or other two-year institutions. With the rise in dually enrolled high school students, and the proposed regulations creating some different requirements for colleges and universities than K-12, how are we expected to proceed with, as an example, a 14-year-old dually enrolled high schooler who alleges nonconsensual sexual touching by a regularly enrolled adult college student? We cannot simply say that since this involved the abuse of a child that it is a criminal matter and we should ONLY defer to the police. (Of course, we would call the police; but that is not where our duty ends.) What about the safety of the school setting? What policy attaches to this complaint? We usually look to the status of the respondent when determining policy jurisdiction, so in this case, we would use the postsecondary Title IX policy if it occurred in our jurisdiction (and our conduct policies if it occurred “outside” of the educational program). If this did fall under Title IX, the draft regulations, as written, imply that we would require the 14-year-old to participate in a live hearing and to be “examined” by the respondent’s lawyer. The government must think through the fact that there is no longer a bright line between high school and colleges as many districts are creating programs where these two populations are co-mingled for at least part of the day.

### **Jurisdictional Issues—Employees**

In the last several years, schools have worked to consolidate policies. A college campus does not include only students—the community is comprised of students, faculty, staff, volunteers and visitors. Having different policies based on the different constituencies doesn’t take into consideration that a student can harass an employee. Which policy should then apply?

---

<sup>1</sup> Letter from DOJ to the University of New Mexico (“New Mexico letter”), 9-10 (April 22, 2016), available at <https://www.justice.gov/opa/file/843901/download>.



179 Rehoboth Avenue, #1131  
Rehoboth Beach, DE 19971  
Phone: (202) 438-5929  
dstafford@naccop.org

---

An additional consideration is that the proposed Title IX regulations would define sexual harassment for student complaints differently than Title VII does for employee complaints. No employee would file under Title IX if Title VII afforded a more reasonable interpretation of what constitutes sexual harassment, thus pushing employee cases to HR and away from the institution's Title IX Coordinator, who is supposed to be the institutional representative tasked by the government with stopping harassment, remedying its effects, and preventing recurrence. (The proposed regulations state that nothing should be read "in derogation of an employee's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. and its implementing regulations.") Further, even with these definitions, a school can (and most do) want the ability to address sexual harassment on campus that does not rise to the level defined under the proposed regulations. Schools should have the flexibility to address behaviors that have no place in the workplace or educational space—even if the behaviors do not rise to a criminal or civil level.

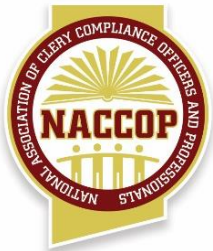
OMB asked if the proposed regulations were not clear around jurisdiction and standing. The team spoke to the dual needs for both clarity of what would be covered under Title IX, but how institutions would be expected to handle behaviors occurring outside of the scope of the Title IX process but still within the school's interest to investigate and adjudicate. The team also pointed out the need for OMB to understand the administrative and financial burden that will be placed on schools forced to create staffing lines to oversee new policies and procedures that are Clery Act compliant to handle VAWA offenses that can no longer fall under the purview of Title IX.

### **Due Process**

NACCOP member institutions appreciate ED's recognition of the high stakes for all parties involved in sexual harassment investigations and the importance of some level of due process. The team members expressed their interest in all parties having appropriate notice, the opportunity to be heard, and the ability to pose questions for the opposing party and witnesses to answer. This is most appropriately done by trained investigators and hearing officers. NACCOP members have strong reservations to the cross-examination language in the proposed regulations and the requirement that parties submit to live hearings with cross-examination by advisors thus creating an adversarial, criminal court-like environment.

It is important to remember that colleges and universities are not addressing issues under criminal codes—these are disciplinary matters based on conduct violations. There are no criminal sanctions involved and these are school-led, administrative processes. In criminal proceedings there are rules of evidence and discovery; these administrative processes do not have such rules. Currently, some schools have employees that have been trained to serve in an advising capacity. These employees will no longer be willing to serve if they are put into a position of cross-examining parties. It will then force schools to hire lawyers to serve in this capacity to meet necessary equity requirements.

Further, NACCOP members are concerned that the proposed regulations do not allow the parties to submit written statements in lieu of a hearing. § 106.45(b)(3) states, "if a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility." The NACCOP team discussed parties, particularly Respondents, that have been advised by legal counsel not to present verbal statements or answer questions in a live hearing because of a pending or potential criminal investigation and to only submit written statements. What does "submit to cross-examination" mean? Could a student participate in some, but not all, of a hearing? Forcing these students to fully participate in a hearing is counter to the 5<sup>th</sup> Amendment and may prevent individuals from invoking their Constitutional rights.



179 Rehoboth Avenue, #1131  
Rehoboth Beach, DE 19971  
Phone: (202) 438-5929  
dstafford@naccop.org

---

### **Intersections with Clery**

As the fines have gone up to \$58,328 for each Clery violation, NACCOP members are astutely focused on complying with both laws. The team members discussed that while these are two different laws, they are clearly wed. And yet the proposed regulations result in conflict as the proposed regulations are silent as to dating violence, domestic violence, and stalking.

### **Financial Burden**

The team raised a concern that the proposed costs and financial burden estimated in the proposed regulations are not realistic. The resources needed may, in actuality, be overly burdensome and not reasonable, particularly for small institutions or community colleges.

### **Final Comments**

While schools have wanted clarity around Title IX, NACCOP members are concerned that the proposed regulations do not give schools the flexibility they need and create additional spaces for non-compliance with the Clery Act. Our members are community colleges and medical schools; small liberal arts institutions and large research universities. Each school needs the ability to design processes and draft conduct codes that meet the needs of their unique campus constituencies. Our members support due process appropriate for an educational institution managing institutional policies but not to the extent where such regulations are financially and organizationally untenable.

The NACCOP team concluded by stating that our focus had been on the overarching issues related to the proposed regulations but did not have time given the set length of the meeting to touch on other issues of major concern to our member institutions including silence in the regulations to retaliation, gender-based discrimination, dating violence, domestic violence, and stalking.

OMB concluded the meeting by discussing the public comment process. OMB's policy is to accept as many meetings as are requested by the public. The public comment submissions and meetings on Title IX have easily set a record for their office. NACCOP sincerely thanked OMB and the OCR representatives who joined via call in for listening to our association's concerns.

### **About NACCOP**

The National Association of Clery Compliance Officers and Professionals (NACCOP) provides a professional association for Clery Compliance Officers and Professionals to collaborate with each other, share resources and best practices. Members are also offered opportunities to participate in professional development engagements which support colleges and universities in their efforts to comply with the Clery Act. NACCOP delivers members with resources to enhance their knowledge of the Clery Act by offering education and training opportunities for the employees who are acting as Clery Compliance Officers on college and university campuses as well as information about Clery related news and legislative updates. For more information, or to join NACCOP, visit [www.naccop.org](http://www.naccop.org).

### **Contact**

Dolores A. Stafford, Executive Director  
(202) 438-5929  
dstafford@naccop.org