



American Association of Collegiate Registrars and Admissions Officers  
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January 30, 2019

Brittany Bull  
Attorney Advisor  
U.S. Department of Education  
Office for Civil Rights  
400 Maryland Avenue SW, Room 6E310  
Washington, DC 20202

Re: November 29, 2018 Notice of Proposed Rulemaking Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Docket ID: ED-2018-OCR-0064

Dear Ms. Bull,

On behalf of the American Association of Collegiate Registrars and Admissions Officers (AACRAO), I write to respectfully submit the following comments in response to the Notice of Proposed Rulemaking (NPRM), issued by the U.S. Department of Education in the November 29, 2018 Federal Register, regarding nondiscrimination on the basis of sex in education programs or activities receiving federal financial assistance.

AACRAO is a nonprofit association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions and agencies in the United States and more than 40 other countries. The vast majority of our individual members are campus officials with direct responsibility for admissions, recruiting, academic records, and registration functions. Because they serve as custodians of education records for current and former students, our members are particularly knowledgeable about privacy issues in general, and specifically about information security and privacy requirements of Federal and State laws. Compliance with the Family Educational Rights and Privacy Act (FERPA) has long been a primary area of professional jurisdiction for AACRAO members, who are often the leading FERPA experts on their campuses.

First, we appreciate the inclusion of § 106.6(e) to clarify that the proposed regulations under Title IX are not meant to obviate or alleviate a recipient's obligations under FERPA. Our members have a clear interest in protecting the legitimate privacy interests of all individuals and maintaining appropriate confidentiality of institutional and student education records. However, from our perspective, there are certain aspects of the proposed rule that fail to balance these concerns.

While we understand the need to establish fair and equitable grievance procedures, AACRAO is concerned with language included in the proposed rules that would expand access to personally identifiable information from student records on a nonconsensual basis. Because evidence relevant to the investigation may be collected from a student's education record, it is important to consider how the proposed rule treats the release of and access to that evidence with regard to FERPA.

More specifically, the association is greatly concerned with additions in § 106.45(b)(3) regarding investigations of a formal complaint. Under § 106.45(b)(3)(viii), a recipient would be required to

provide both the complainant and respondent 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. Then, § 106.45(b)(3)(iii) expressly allows the parties to discuss and share details of the investigation without restriction. AACRAO believes that the proposed language in subsection (b)(3)(iii) conflicts with requirements in FERPA, 20 U.S. Code 1232g(b)(1), regarding the possible release of education records (or personally identifiable information contained therein) without consent or permissions outside of the limited exceptions. In order to comply with FERPA, the recipient would need to obtain written consent from both the complainant and the respondent.

Similarly, the applicability of the proposed rule to employees is problematic. AACRAO is concerned that, in cases where the complainant or the respondent is an employee, § 106.45(b)(3)(iii) could require a recipient to share student education records with an employee who may not otherwise be authorized access via their work-related duties without written consent of the student.

The association also believes that additional clarification is needed regarding proposed language in § 106.45(b)(3)(viii) with respect to evidence “directly related to the allegations” obtained as part of the investigation. The Department’s reference in Directed Question 3, 83 FR 61483, to requirements in FERPA, 20 U.S. Code 1232g(a)(4)(A)(i), implies that the proposed rule is deferring to that definition of an education record, which contains information directly related to a student, more broadly. While our assumption is that the Department intends to limit the evidence each party may inspect and review to only information deemed pertinent to the investigation of the allegations, we ask for more specific clarification that the proposed language in subsection (b)(3)(viii) is simply similar to and should not be conflated with the FERPA definition of an education record.

With regard to recordkeeping, the proposed retention period of three years is consistent with AACRAO’s recommendations in records management for federal disclosure records. As records custodians, AACRAO and our members are especially reliable resources on best practices in institutional records retention and disposition schedules. We would, however, recommend that the Department include additional information under § 106.45(b)(7) to more explicitly state that these records are subject to the applicable provisions of FERPA; that any records collected be protected in a manner that will not permit access to the personal identification of students to individuals or entities other than the authorized representatives of the Secretary; and that any personally identifiable data be destroyed at the end of the retention period.

AACRAO would like to thank you for your consideration of our views regarding the Notice of Proposed Rulemaking. We stand ready to work with the Department to protect students’ rights regarding the privacy and accuracy of education records and to ensure that institutions remain in compliance with FERPA.

Sincerely,



Michael V. Reilly  
Executive Director