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September 12, 2022

Secretary Miguel Cardona
U.S. Department of Education
400 Maryland Ave. SW
Washington, D.C. 20202

Re: Docket ID ED-2021-OCR-0166

Dear Secretary Cardona:

On behalf of the higher education associations and other groups listed below, representing two- and four-year, public and private colleges and universities, presidents, chancellors, and other higher education leaders and senior administrators and the millions of students they serve, I write to provide comments in response to the Department of Education's July 12, 2022 notice of proposed rulemaking ("NPRM" or "proposed rule") amending regulations implementing Title IX of the Education Amendments of 1972 ("Title IX"), *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, Docket ID ED-2021-OCR-0166.

Introduction

We greatly appreciate the Department acknowledging in the NPRM's opening lines "that schools vary in size, student populations, and administrative structure," and expressing hope that "[t]he proposed regulations would enable all schools to meet their obligations to comply fully with Title IX while providing them appropriate discretion and flexibility to account for these variations." We thank the Department for crafting a rule that, in many respects, reflects the administration's attentiveness to this important issue and provides institutions with more flexibility to address sex-based discrimination in a way that makes sense for their particular campus communities.

America's colleges and universities are committed to ensuring, as Title IX requires, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. section 1681(a). They are also committed to promptly and effectively taking action to address sex-based discrimination and to ensure safe and supportive environments for all their students. Particularly with respect to sexual harassment and sexual assault, campuses want to support survivors and maintain policies and processes that are fair to all parties. It is critical that the final Title IX rule advances these goals across a broad range of campus stakeholders and distinctive college and university environments.

This NPRM is an opportunity to stop the churn of perpetually changing rules. We sincerely hope the current regulatory effort will put an end to the costly and confusing changes in regulatory requirements that have marked the last decade. Even with the most exemplary campus training and education efforts, constantly revised and reissued policies regarding sex-based discrimination inevitably result in confusion among members of our campus communities and undermine the perceived legitimacy of institutional processes.

Equally important, if these regulations are to be designed for the long haul, they need to align with each institution's own sense of how its students are expected to act and how misconduct should be addressed, with a focus on both the individuals involved and the larger campus community. Student codes of conduct seek to inform and enrich a student's educational experience, as well as that of the broader campus community. They do not seek to punish as a first priority, but rather to ensure accountability for one's actions and to provide a safe and secure campus environment. Together with academic expectations and requirements, codes of conduct reflect institutions' individual missions and values developed and refined over time, as well as their informed beliefs about how to best prepare students for the workplace and society.

Title IX regulations provide significant guideposts to institutions, but they must be assessed and applied in the context of a broad array of additional considerations and obligations (e.g., applicable state law, judicial precedent, institutional and system policies, other federal laws) that inform a campus's policies and responses. As such, it is critical that the final regulations are sufficiently flexible to be effectively implemented across diverse institutions, reflect a sensible level of simplicity, and provide clarity about federal expectations for institutions and their community members. We urge the Department to adopt this three-part focus on flexibility, simplicity, and clarity as its lodestar while it considers comments to the NPRM and refines the proposed regulations. A final rule that provides a more flexible regulatory structure and takes into account these values will make future swings of the regulatory pendulum less likely.

Below, we organize our comments in three sections. First, we identify provisions that provide greater flexibility and clarity for campuses and would aid efforts to address sex-based discrimination and ensure a fair process. Second, we offer two observations regarding likely implementation challenges campuses would face and provide suggestions for how the Department might address them. Finally, we identify specific provisions in the rule that we believe would benefit from additional flexibility and clarification to minimize unintended consequences.

I. Provisions of the proposed rule that will help institutions better address sex-based discrimination, including sex-based harassment.

In many respects, the proposed rule provides greater flexibility for campuses in ways that would advance college and university efforts to address sex-based discrimination, including protecting survivors of sexual harassment and ensuring fair processes for all parties. Among these provisions, the proposed rule:

1. **Provides flexibility for institutions to decide how to evaluate allegations of sexual harassment and assess the credibility of the parties, rather than mandating a live hearing with cross examination by advisors at every institution.** While some institutions are required by applicable law or will choose to employ a live hearing and allow cross examination by advisors, we agree

with the Department that imposing this particular process on every campus is unnecessary. There are other effective ways to test party and witness credibility while ensuring a thorough and fair process, and we appreciate the flexibility provided by the proposed rule.

2. **Recognizes that there may be occasions when the nature of an institution and other circumstances reasonably leads an institution to conclude that it is preferable to have a capable, unbiased individual or individuals conduct the factual investigation and reach a determination of responsibility.** While we recognize that there are jurisdictions where this may not be permissible for public institutions (and perhaps some private ones as well), prior to the 2020 regulations, this approach was efficiently, effectively, and fairly embraced by some institutions. Again, enabling this option where appropriate offers helpful flexibility.

3. **Allows campuses more flexibility to determine the best process for communicating to the parties the relevant information collected during the investigation process.** The current regulations require institutions to provide access to "any evidence" directly related to the allegations, regardless of whether an institution intends to rely on it in making a determination. The proposed rule permits an institution to set aside anything it does not intend to rely on in making a determination, and in some cases, to provide an accurate "description" of evidence rather than the evidence itself. This change would encourage speedier processes and final dispositions without threatening fairness. It would also offer fair and reasonable means of protecting sensitive or private information concerning a party or witness.

4. **Permits campuses to reasonably define the appropriate role of advisors in sex-based harassment proceedings involving students, provided the rules are applied equally to both complainants and respondents and are consistent with other legal requirements.**

5. **Continues to allow institutions to use informal resolution procedures to resolve all types of sex-based discrimination complaints, except for allegations of sex-based harassment of a student by an employee.** Informal resolution can be an effective tool to address sexual harassment, when desired by the parties and deemed appropriate by the institution. We appreciate that the proposed rule would make informal resolution available at any stage of the process, as well as the explicit clarification that institutions may decline to offer informal resolution despite one or more of the parties' wishes. We also appreciate the clarification that an institution may decline to allow informal resolution under circumstances that include but are not limited to when the institution determines that the alleged conduct would present a future risk of harm to others. This clarification appropriately recognizes the prerogative that institutions must have to prioritize campus safety. The proposed rule also helpfully clarifies that an informal resolution could conclude with the parties agreeing to terms that the institution could have imposed as remedies or sanctions had the institution determined under its grievance procedures that sex-based discrimination occurred.[1]

[1] Throughout the preamble and text of the proposed rule, the Department uses the phrase "grievance procedures" in ways that are not entirely clear. While section 106.8(b)(2) requires all institutions to adopt "grievance procedures . . . that provide for the prompt and equitable resolutions of complaints made by students, employees or third parties . . . alleging any action that would be prohibited by Title IX," the use of this phrase elsewhere in the proposed rule seems far more expansive. For instance, it is not clear whether the complaint that is made must be a complaint against an actual person/respondent in order for it to be considered a "grievance" that would trigger the proposed rule's grievance procedure requirements. Indeed, section 106.45(a)(1) says that when a "complaint

We also appreciate the instances where the proposed rule provides clarity that would assist institutions in their efforts to achieve the promise of Title IX. For example, the proposed rule:

6. **Maintains current requirements that campus procedures for resolving sex-based discrimination provide equitable treatment of complainants and respondents and prohibit conflict of interest or bias among Title IX coordinators, investigators, decision makers, and informal resolution facilitators.** Campuses are committed to ensuring a fair process for all parties and protecting against conflict of interest or bias, which is critical to sustaining confidence in institutional policies and procedures.

7. **Revises provisions that have had a chilling effect on victims of sex discrimination.** Since the current regulations took effect, many institutions have reported a significant decline in reported sexual harassment cases due to Title IX requirements and procedures that may discourage such reporting. We appreciate the Department's efforts to reduce reporting barriers for survivors.

8. **Continues to make clear that nothing in the regulations prevents an institution from placing an employee respondent on administrative leave pending a resolution under the campus' applicable disciplinary process.** That said, as we explain in section III.9 below, it is important that the final regulations do not prevent or inhibit an institution's right and ability to promptly and appropriately address workplace issues within its existing faculty and staff processes.

9. **Eliminates the requirement that an institution "must dismiss" a formal Title IX complaint if the complaint does not meet the current regulation's definition of sexual harassment or occur within an education program or activity.** The "must dismiss" language has resulted in many campuses needing two separate tracks for sexual misconduct—one for alleged conduct that meets the regulation's more narrow definition of prohibited sexual harassment, and a second for conduct that falls outside the regulatory definition but that the campus nonetheless wants or is required to address. These dual-track procedures have resulted in even more confusion for students and inconsistencies in required disciplinary processes based on, for example, whether the alleged misconduct occurs "within" a program or activity. These distinctions are often difficult if not impossible to justify and undermine the perceived legitimacy of these proceedings.

10. **Clarifies that the Office for Civil Rights (OCR) will not find that an institution has violated Title IX solely because it would have reached a different determination based on an independent weighing of the evidence in a sex-based harassment complaint.** We appreciate this acknowledgment by the Department regarding its proper role. Campus decision makers are in

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alleges that a recipient's policy or practice discriminates on the basis of sex, the recipient is not considered a respondent." Furthermore, the phrase "grievance procedures" appears to capture the many disciplinary and other processes that are used to address student, faculty and staff conduct that is at odds with institutional expectations, including employee conduct that violates obligations under faculty handbooks, collective bargaining agreements and the like. Clarity would be advanced by confirming, in the preamble or elsewhere, that the term "grievance procedures" as used in the regulations, for example in the headings of 106.45 and 106.46, is not intended to refer to procedures other than the ones referred to in section 106.8(b)(2) and by refining 106.8(b)(2) to indicate that grievance procedures are intended for complaints of sex-based discrimination brought by a complainant against a respondent.

the best position to weigh the evidence and consider the credibility of the parties before them, and the federal government should not re-open or second guess these determinations.

We support the inclusion of these provisions in the final rule and thank the Department for providing greater flexibility and clarity for colleges and universities in these areas.

II. Implementation challenges

As with any major regulatory package, particularly one detailing complex legal obligations and responsibilities under major civil rights legislation, implementation is likely to bring challenges as stakeholders endeavor to come into compliance with the new regulations. This is true even when the new regulations may be preferable in many respects to current law. Below, we discuss two implementation challenges that may follow release of a final rule and provide recommendations for the Department to address or mitigate these concerns.

1. Applicability of the final rule to pending complaints

The proposed rule is silent as to retroactive application. Without greater clarity on this issue, the new regulations will cause significant confusion and frustration for our campus communities. As the Department is well aware, the 2020 final rule was also silent on this issue, and the Department issued guidance on retroactivity after publication. Campuses have been the targets of increasing litigation over what process should be used to adjudicate Title IX-covered conduct as well as OCR complaints regarding whether the proper procedural requirements were applied in a specific instance.

Clarity from the Department would greatly assist all involved—complainants, respondents, and institutions—by eliminating uncertainty about which procedures are to be used for (1) matters pending as of the final rule's effective date *and* (2) complaints made after the effective date that relate to conduct reported as occurring prior to the effective date. Similarly, the Department should be clear about which substantive rules these regulations expect institutions to apply when assessing conduct in the context of such grievance procedures. This will also help colleges and universities minimize disruptions during the implementation period and help students and employees better understand what to expect from the process.

> **Recommendation**: We recommend that the Department clearly specify that the procedures that apply to a given complaint would be the institution's procedural requirements in effect on the date a complaint is made. The substantive rules that would apply should be the rules in effect at the time of the alleged misconduct.

2. Effective date of final rule

We respectfully urge the Department to be sensitive to the significant time institutions will need to adapt their policies and procedures to conform to the final rule once it is promulgated. The proposed rule would require institutions to revise and re-train all employees across all campus functions and subdivisions, as well as plan for additional training of specific administrators with newly defined or expanded responsibilities under the rule. Ahead of or coincident with that training, modifying the varied campus grievance policies and procedures, campus websites, and written materials to comply with the proposed rule's notification requirements will be a substantial additional undertaking for staff.

Before any of this is begun, institutions will need to assess the various federal, state, and local laws; judicial precedent; and institutional commitments and values that will shape how the final rule is applied on their campus. Given the intrinsic nature of campus governance, informing and consulting with campus stakeholders, especially students, regarding these changes will be imperative. Indeed, some institutions will need to have changes approved by their governing board.[2] In addition, at some public universities, changes to the student and employee disciplinary processes and procedures will need to be codified in the state's administrative regulations and will require approval by the state legislature and/or governor, which will require additional time.

These implementation challenges will fall particularly hard on small, thinly-staffed institutions, including many Historically Black Colleges and Universities, Hispanic Serving Institutions, Tribal Colleges and Universities, Minority-Serving Institutions, and community colleges. Small and under-resourced institutions will be forced to shift staffing and other scarce resources away from serving the immediate needs of their students to comply with the regulations.[3]

Campuses have only recently completed their efforts to come into compliance with the 2020 regulations, which was a time-consuming and costly exercise made worse by a rushed timeline that provided less than three months to implement. Now, only a few years later, campus administrators will be required to change direction once again and implement a new set of procedures. Such regulatory churn breeds uncertainty and confusion and takes a toll on the campus community, even when the new policies may be preferable to those they replace.

> **Recommendation:** We strongly encourage the Department to set an effective date that will provide sufficient and necessary time for campuses to properly implement these changes. The Higher Education Act's Master Calendar provides institutions with at least eight months to prepare for the adoption of new federal regulations and mandates the regulations take effect at the start of an academic year. While the Master Calendar does not apply to Title IX, we believe a comparable amount of time would enable individuals and governing bodies to effectively assess the required modifications during their normal academic year and avoid shoe-horning those obligations into compressed, problematic periods, such as around commencement, during summer months, or while welcoming students back to campus. In addition, the Department should ensure that the final rule not take effect during the middle of an academic year.
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> We also encourage the Department to provide technical assistance to help ease the implementation burden for campuses, particularly for small, under-resourced institutions. This could include the development of sample policies and procedures, training materials, compliance check lists, and webinars. Materials that can be readily used off the shelf or easily adapted to suit individual campus needs would be valuable and widely utilized.

[2] Litigation challenging various requirements could place campuses in a legal gray area, further complicating these efforts.

[3] In recent years, we have seen an increase in the number of consultants offering to assist campuses in their Title IX compliance efforts for a fee. Campuses with limited resources and administrative staffs will be the most likely to need to pay for these outside services and/or hire additional staff. Moreover, because most colleges and universities do not have a dedicated general counsel, many will need to hire outside counsel to assist them with legal questions that will inevitably arise.

III. Provisions of the proposed rule that would benefit from additional flexibility or clarity

Below, we identify provisions in the proposed rule that would benefit from increased flexibility or clarity to help minimize unintended consequences and advance institutional efforts to address sex-based discrimination, including sex-based harassment. Following our discussion of each provision, we provide recommendations to address our concerns and/or make needed technical clarifications.

1. Conduct "subject to the institution's disciplinary authority." 106.11.

The proposed rule would expand the scope of when conduct is considered to have occurred under an institution's education program or activity to include any conduct that is "subject to a recipient's disciplinary authority." This proposed expansion will be highly problematic for campuses and difficult to administer. Further, it does not comport with the plain meaning of the terms "program" or "activity," or the terms' longstanding regulatory definition, which encompasses only the operations of the institution.

Currently, many institutions have policies that, in limited and appropriate circumstances, would enable the imposition of discipline for student misconduct occurring outside their programs and activities, such as where such conduct poses a serious threat to the safety of its community. Institutions likewise may involve themselves in out-of-program conduct in cases of involving ethical and professional licensure standards (e.g., academic dishonesty or plagiarism, or standards for medical or healthcare professions). It is not clear from the proposed rule whether any exercise of institutional authority over any form of student conduct occurring ***anywhere, at any time*** and with ***any individual*** would trigger a comprehensive institutional Title IX response obligation, even where this cannot reasonably be achieved given the facts and circumstances.

> **Recommendation**: We suggest that the Department revise the proposed rule to eliminate the "disciplinary authority" element from its definition of programs and activities. As an alternative standard, the Department could consider requiring institutions to address conduct that, while outside of the institution's program or activity, the institution has determined has the potential to cause serious harm to the health or safety of its community members.

2. Definition of a "student." 106.2.

Under the proposed rule, the Department defines a "student" as any person "who has been offered admission"—a definition inconsistent with other federal definitions of that term that is likely to result in an unwieldy expansion of institutional obligations. The definition brings a number of individuals into the ambit of Title IX before the institution has an ability to control or oversee those individuals, creating challenges for institutions seeking to comply. A plain reading of the proposed rule's definition suggests that an institution has a duty to begin a disciplinary procedure upon a complaint by an admitted high school student against another admitted high school student concerning conduct that allegedly occurred before either matriculates. This is particularly so if, in light of the examples in the preamble, the complainant decides not to enroll at the institution because the respondent intends to.

Some institutions accept many more applicants than the number of students who eventually enroll. This proposed change has the potential to result in a dramatic and unwarranted expansion of institutional obligations to investigate and address behavior occurring well before an individual has any actual association with the institution, and even if the student chooses to matriculate elsewhere. Such an

expansion of institutional responsibility would take staff attentiveness and other scarce resources away from students who are actually enrolled.

Also, many institutions reserve the right to rescind an offer of admission if the university learns information about an applicant before enrollment that would have led to a different decision. Many institutions are explicit in application materials that they reserve the right to rescind an admissions offer without providing the same procedural rights and protections afforded to an enrolled student who faces misconduct charges. We do not think that the Department intended to change the nature of the contractual relationship between an institution and admitted but not enrolled individuals, to confer new rights upon such individuals, or to limit the university's ability to rescind admission before a student enrolls.

> **Recommendation**: We recommend that the Department replace this definition with the long-accepted definition for "student" found in the Family Education Rights and Privacy Act (FERPA) regulations at 34 C.F.R. § 99.3, which defines a student as "any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records."

3. Parties who may bring a complaint of sex-based discrimination. 106.2; 106.45(a)(2).

Section 106.45(a)(2)(i)-(iv) lists the individuals[4] who have a right to bring a complaint that requires an institution to initiate the grievance procedures under 106.45, and in some cases, 106.46.

Section 106.45(a)(2)(i) grants this right to a "complainant," which is defined by section 106.2 as (1) a student or employee who alleges to have been subjected to sex-based discrimination; or (2) a person other than a student or employee who alleges to have been subjected to sex-based discrimination and who was participating or attempting to participate in the institution's program or activity at the time the alleged discrimination occurred.

However, section 106.45(a)(2)(iv) provides that, "with respect to complaints of sex discrimination other than sex-based harassment," a complaint may be brought by "any student or employee; or third party participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred." This language in 106.45(a)(2)(iv) is not clear. It appears to limit complaints from third parties to situations where (1) the complaint involves sex-based discrimination but not sex-based harassment, and (2) where the third party is "participating or attempting to participate" in the institution's program or activity, but that may not be the Department's intention. The language is also unclear because of a semicolon and repetition of the word "or," whether the "participating or attempting to participate" requirement is intended to apply to "any student or employee" (*i.e.*, "any student ***or*** employee***; or*** third party participating…" emphasis added).

Because the definition of complainant in 106.2 does not include any of the qualifications included in 106.45(a)(2)(iv), the language in (i) appears to swallow the text of (iv), which would render the verbiage in (iv) surplusage.

[4] One of the listed individuals is the Title IX Coordinator. See section 106.45(a)(2)(iii). We suspect that the Department intends that any complaint initiated by a Title IX Coordinator would not be a complaint made in their own right, but rather initiated *on behalf of* another person. Clarity that this complaint would be filed "on behalf of a complainant under 106.6(g)" would be helpful.

Recommendation: Additional clarification is needed to address this drafting ambiguity. In particular, clarification is needed regarding when complaints by a non-student, non-employee third party would trigger Title IX grievance procedures, including clarification that these complaints are limited to sex-based discrimination that is not sex-based harassment where the third party must be participating or attempting to participate in the program or activity at the time of the alleged discrimination. In addition, to avoid any confusion, the Department should clarify the language in this section regarding when an individual's student or employee status would trigger Title IX grievance procedures.

4. When non-harassment sex-based discrimination may be addressed without triggering grievance procedures under 106.45.

As it refines the proposed regulations, the Department should be attentive to the risk that the regulations could unnecessarily discourage or inhibit faculty and staff from relying on their informed sense of what is the right and best thing to do in a particular circumstance. The proposed rule is ambiguous with respect to whether an institution is obligated to initiate the grievance procedures under 106.45 in response to every single concern about non-harassment sex-based discrimination that a student, visiting student, faculty or staff member may bring to the attention of a faculty or staff member.

Institutions—many of which employ thousands of people and are highly decentralized—need their faculty and staff to have reasonable encouragement and authority to determine when some level of perceived sex-based discrimination can be immediately responded to (partially or fully) in the moment, and when it rises to a level that requires the initiation of 106.45's grievance processes. Unlike sex-based harassment, sex-based discrimination is not defined in the proposed rule. It is therefore unclear what type or level of sex-based discrimination would trigger what response. Would every claim of differential treatment require the initiation of formal grievance procedures under 106.45? Or only treatment that meets a certain standard of severity? Without greater clarity, the proposed rule could be read to require campuses to initiate grievance procedures, investigate, maintain records, and issue a written determination for every single expressed concern about sex-based discrimination, no matter how small or tangentially related to its education program. The goals of Title IX would not be well-served by effectively tying the hands of faculty and staff in this manner.

Recommendation: We recommend that the Department define in the regulations when sex-based discrimination rises to the level that would require an institutional response informed by the grievance procedures in section 106.45. We urge the Department to take a practical approach in crafting this standard to preserve flexibility and maintain significant discretion for faculty and staff to promptly and effectively address sex-based discrimination that does not meet this standard, as they are already required to do under section 106.44.

5. Sex-separated programs and the *de minimis* harm standard. 106.31(a)(2).

Subsection 106.31(a)(2) of the proposed rule provides that different treatment or separation on the basis of sex is permitted only in limited circumstances and only if it would not subject a person to more than "*de minimis*" harm. The proposed rule further instructs that not permitting a person to participate in education programs or activities consistent with their gender identity is more than "*de minimis*" harm.

The proposed rule's inclusion of this new *de minimis* harm standard, which is not defined and has no basis in the statutory text, will result in significant confusion for campuses.

For example, page 41536 of the preamble cites several court decisions which appear to suggest that the Department would view the refusal of an institution to allow students to use restrooms, locker rooms, or shower facilities consistent with their gender identity to constitute more than *de minimis* harm and therefore be prohibited by Title IX. However, because this passage is in the preamble and not in the text of the rule, it is likely to add to the legal uncertainty campuses face regarding their obligations in this area.

Second, although section 20 U.S.C. 1686 of the Title IX statute has long permitted institutions to "maintain separate living facilities for different sexes," the Department's discussion of this statutory provision in the preamble, coupled with the proposed rule's requirement that an institution allow participation consistent with that person's gender identity, could raise questions for some campuses. Specifically, on page 41536 of the preamble, the Department observes that "20 U.S.C. 1686 itself affects only one aspect of Title IX's nondiscrimination mandate, even within the context of 'living facilities,'" and then cites current regulations related to housing contained in 34 CFR 106.32(b)(2)(ii).

Based on this preamble discussion, it is unclear whether proposed subsection 106.31(a)(2) would require that student housing facilities that are currently segregated on the basis of students' sex assigned at birth be made available consistent with a person's gender identity. It is also unclear how proposed subsection 106.31(a)(2) should be applied, for example, in the context of random roommate assignment programs for first-year students, which many institutions use.

Third, it is unclear whether the Department intends the *de minimis* harm standard to be applied to any "different treatment" or "separation on the basis of sex" in any program or activity, and whether this application would lead to unintended consequences. For example, because athletic programs are typically sex segregated, would this standard apply to athletics generally, with the exception of eligibility standards for participation on a particular team[5]? Similarly, does the Department intend for this standard to apply to sex-segregated academic programs such as programs designed to encourage and support women in STEM fields?

> **Recommendation:** In light of the significant confusion and unintended consequences likely to result from this ambiguous and overly broad standard, we encourage the Department to delete the *de minimis* harm standard from the text of the final rule.
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> If the Department is unwilling to do so, we urge the Department at a minimum to provide greater clarity regarding the standard and its application in the contexts identified above. While this would be insufficient to address our concerns, the Department should (1) include in the regulatory text a list of the types of facilities that must be made accessible consistent with an individual's gender identity; (2) clarify its discussion regarding the application of proposed rule 106.31(a)(2) within the context of sex-separate living facilities and housing assignments; and (3)

[5] The Department has indicated it intends to release a second notice of proposed rulemaking to address eligibility to participate on a particular men or women's athletic team. Based on the discussion at page 41537 of the preamble, it does not appear that the *de minimis* harm standard would apply in this context at this time, although there is nothing in the text of the proposed rule to make this clear if that is, in fact, the Department's intention.

provide additional clarity about the application of this standard in other sex-segregated programs and activities

6. **Confidential employees and protections against disclosures. 106.45(b); 106.2.**

The NPRM defines "confidential employee" in proposed section 106.2 to include not just those employees whose communications are privileged under federal and state law, but also any additional employees designated by the institution as a confidential resource. Our member institutions greatly appreciate the Department's introduction of additional flexibility to designate confidential resources to provide services to affected community members. We anticipate that many institutions will take advantage of this flexibility to designate their survivors' support and services offices and corresponding offices that provide services to respondents as confidential resources.

A tension arises, however, in the context of the evidence that must be gathered by the institution as part of its investigation and the lack of a legally recognized privilege in those offices. Specifically, proposed sections 106.45(b)(6) and (7)(i)-(ii) require institutions to evaluate ***all relevant*** evidence, excluding only evidence that is protected under a legal privilege or otherwise maintained as health records. "Relevant" evidence is in turn defined by proposed section 106.2 as evidence that "may aid a decisionmaker in determining whether the alleged sex discrimination occurred."

Information provided to designated, but not legally privileged, confidential resources by complainants and respondents about the underlying facts of alleged discrimination or harassment would appear to fit squarely within the definition of relevant evidence. However, such evidence would appear to not be excluded from an investigator's burden to gather "sufficient evidence to determine whether sex discrimination occurred" (proposed section 106.45(f)(1)) nor from consideration by the decisionmaker (*see id.* at (h)(1)). It would also be difficult to explain to a party in a grievance procedure why such records pertaining to their conversation with a "confidential employee" were not in fact confidential and could be obtained by the investigator. Indeed, this risks undermining community confidence in the existence and actual availability of confidential resources.

While the context in the regulation strongly suggests that this outcome was not the Department's intent, it is difficult to square the plain language of the investigation and decision-making sections of the proposed regulation with the definition of "confidential employee." (*Accord* proposed section 106.44(d)(2) ["A recipient must require a confidential employee to explain their confidential status to any person who informs the confidential employee of conduct that may constitute sex discrimination under Title IX . . ."]). As drafted, the proposed rule is likely to lead to significant confusion for students if they are told that a resource is designated "confidential," but the practical effect is to relieve the employee of the obligation to report to Title IX Coordinator, but not the obligation to provide records to the investigator in a later grievance procedure.

Recommendation: We propose that the Department revise 106.45(b)(7)(i) as follows:

"Evidence that is protected under a privilege as recognized by Federal or State law, **or evidence provided to a resource designated as confidential by the recipient**, unless the person **to whom the privilege or confidentiality is owed** has waived the privilege voluntarily in a manner permitted in the recipient's jurisdiction.

7. **Employee reporting obligations. 106.44(c)**

As compared to the single sentence applicable to the K-12 context, the proposed rule creates an expansive and convoluted set of reporting responsibilities touching every employee and requiring them to either contact the Title IX Coordinator or provide contact information for the Title IX coordinator anytime they learn of conduct that may constitute sex-based discrimination. Moreover, under the proposed rule, a particular employee's reporting obligations would vary depending on whether the employee: (1) has responsibility for instituting corrective measures; (2) is a confidential employee; (3) has responsibility for administrative leadership, teaching, or advising roles—a category that will include the vast majority of campus employees; or (4) is an employee who does not fall into these prior three categories. Additionally, for some categories, the reporting obligations will further vary depending on whether the employee has information about a student being subjected to conduct that "may constitute sex-based discrimination," or whether an employee has been subjected to this conduct.

For many employees on campus, job duties and responsibilities may fluctuate, raising the likelihood that some employees will float between the various categories contained in the rule. Would campuses be required to constantly retrain employees every time their duties shifted? Further, while the rule notes that there are some individuals, such as graduate students, who may properly be considered "students" or "employees" in a given situation, the rule appears to require institutions to train the majority of their employees to make these types of determinations. Also, by requiring employees to report any conduct that "may constitute" sex-based discrimination while not defining what rises to that level, the framework puts employees (and the institutions who must train them) in the difficult position of trying to make determinations about what must be reported and whether they have the ability to resolve any of it without notifying the Title IX Coordinator. This will undoubtedly lead to confusion for employees about what their reporting responsibilities are, and for students who may wish to confide in a certain employee but be unclear what that employee's reporting obligations are.

Colleges and universities strongly support efforts to encourage students and employees to report all sex-based discrimination to the institution. At the same time, the reporting expectations and system must align with individual campus structures and be simple enough to be clearly understood by all community members. .[6] We urge the Department to refine and simplify this portion of the proposed rule to help ensure that faculty and staff are clear about their obligations and that community members, particularly survivors of sex-based harassment, are able to determine in advance whether confiding in a particular employee about their experience will trigger notification to their institution

As the Department reconsiders section 106.44(c), we ask that it remain attentive to providing institutions with some degree of flexibility to define who should be mandatory reporters on their campuses, given the diverse nature and settings of individual campuses. While some institutions have extended mandatory reporting requirement to all of their employees, other institutions have chosen not to do so, based on extensive consultation with their community members. Providing additional flexibility to allow individual institutions to define which employees are required to report would help campuses respond in a way that makes sense for their communities and is sensitive to the needs of survivors.

[6] While we believe the proposed rule's language requiring campuses to identify confidential employees is helpful, as is the language allowing institutions to designate additional confidential resources, there may be times when a student may want to confide in someone else. Under the current proposal, it may be impossible for a student to determine whether doing so would trigger a report to the institution.

Finally, we also note that section 106.2 of the proposed rule would grant confidential employee status to employees conducting an Institutional Review Board-approved human subjects research study designed to gather information about sex-discrimination. However, many campuses conduct research and gather survey data related to sexual discrimination, including sexual harassment climate surveys that are not subject to the IRB approval process. Under the proposed rule, employees conducting these surveys would still be subject to mandatory reporting requirements, which would completely undermine efforts to collect confidential survey responses from students.

> **Recommendation:** We urge the Department to revise this section to ensure a sensible level of simplicity and clarity for the sake of all campus community members. We recommend the Department consider succinctly and clearly designating the specific categories of employees who have responsibility for reporting to the Title IX Coordinator and then providing institutions the flexibility to designate additional employees as mandatory reporters, as many already do.
>
> Furthermore, we recommend that the Department revise its definition of confidential employees in section 106.2 to ensure that employees conducting sexual harassment climate surveys or similar research regarding sexual discrimination on campus are exempt from mandatory reporting requirements.

8. Expansion of the Title IX Coordinator role and responsibilities

Consistent with current regulations, section 106.8(a)(1) of the proposed rule clearly states the Department's expectation that each institution must designate at least one employee to serve as the Title IX Coordinator, whose role is to "coordinate [the institution's] efforts to comply with its responsibilities" under Title IX.

On top of this clear and concise statement of the Title IX Coordinator's role as a "coordinator," the proposed rule states in several places that an institution must "require the Title IX Coordinator" to undertake specific compliance actions.[7] The current expectation is that others at the institution have compliance obligations that the Title IX Coordinator then coordinates and monitors. This shift is not semantics; it is substantive and problematic. Moreover, it is unclear why the Department proposes it, or what is gained from it.

Title IX Coordinators serve a vital role for their institutions and campus community members—already, this role is viewed as one of the most challenging jobs on a campus. However, this expansion of the

[7] Among its requirements, the proposed rule requires institutions to require the Title IX Coordinator to:

- take specific actions each time they learn of a student's pregnancy or related condition. 106.40(b)(3);
- implement, coordinate and document reasonable modifications for students because of pregnancy or related conditions. 106.40(b)(4);
- monitor the recipients education program or activity "for barriers to reporting information" about conduct that may constitute sex-based discrimination. 106.44(b);
- "offer and coordinate supportive measures" for complainants and respondents.106.44(f)(3);
- in the case of an informal resolution, to take other appropriate, prompt and effective steps to ensure that sex discrimination does not continue or recur within the program or activity. 106.44(k);
- following the dismissal of a complaint, take other appropriate prompt and effective steps to ensure sex discrimination does not continue or recur in the program or activity. 106.45(d)(4)(iii); and
- provide and implement remedies to a complainant or other party after a finding that sex-discrimination occurred. 106.45(h)(3).

scope and change in the nature of the Title IX Coordinator's responsibilities is likely to result in unintended consequences.

First, by requiring the Title IX Coordinator to be responsible for—versus coordinating—certain compliance functions, the proposed rule will conflict with administrative structures on many campuses. It also runs counter to the Department's stated goal of providing greater flexibility to institutions. Institutions are better able to decide whether to place a Title IX Coordinator in a position of responsibility for carrying out specific compliance functions. The Department should refrain from micromanaging campus administrative structures or mandating a particular structure across all campuses.

Second, shifting administrative responsibility from the institution writ large, i.e., investing others with the responsibility, to the Title IX Coordinator may lessen overall feelings of responsibility for Title IX compliance across campus. Faculty and staff have a wide variety of important and often critical issues demanding their attention. Where an issue is the responsibility of one person or one office, the attention and interest of others on campus usually diminishes. Institutions are committed to fulfilling their Title IX obligations, and it is unhelpful to have these important obligations, and the ultimate responsibility for them, shifted to a single individual.

Third, the proposed rule is likely to seriously undermine an institution's ability to attract and keep talented individuals in this crucial role. The unnecessary addition of specific compliance obligations to an already highly demanding position may simply overwhelm Title IX Coordinators. Individuals performing this function often do so out of a strong sense of personal or professional commitment, but it is not an easy campus position to fill. While institutions have a significant interest in retaining and growing the expertise of their Title IX Coordinators, the NPRM's proposed expansion will make an already challenging job even less desirable, and one that many will avoid. The last thing the Department's new rules should do is encourage dedicated and competent Title IX Coordinators to simply leave the field, or to discourage them from entering it in the first place. But the proposed expansion of ultimate oversight responsibility may well do just that, with attendant harm to the recruitment and retention of experienced Title IX Coordinators and, ultimately, compliance efforts across higher education.

Finally, because the rule places significant compliance functions on the Title IX Coordinator, it would hamper institutional efforts to address an individual's concern or complaint about a particular compliance action undertaken by the Title IX Coordinator—for example, if a pregnant student had concerns about whether proposed modifications to a schedule were properly implemented. By making Title IX Coordinators responsible for implementing such a modification, they will be unable to serve as a set of "neutral" ears and eyes to hear and assess the situation and attempt to resolve it. Further, should complaints arise about decisions that are made the Title IX Coordinator's responsibility under the NPR, the role of the Coordinator as a trusted community resource and coordinator of the institution's Title IX obligations would be undermined.

> **Recommendation:** We recommend deleting language throughout the proposed rule requiring the institution to mandate that the Title IX Coordinator assume specific responsibilities beyond their coordinating role and replacing it with language clarifying that allocating these responsibilities remains the purview of the institution.

9. **Requiring specific procedures to resolve allegations of harassment involving employee-respondents. (106.45, 106.46).**

The proposed rules set forth specific requirements that institutions must include in their varied policies and procedures for addressing complaints of sex-based harassment involving employees. For sex-based harassment of an employee by another employee, the proposed rule requires institutions to comply with the grievance procedures set forth in section 106.45. For sex-based harassment involving an employee and a student, regardless of whether the employee is the complainant or the respondent, the proposed rule requires institutions to comply with the requirements of both 106.45 and 106.46. We urge the Department to reconsider this approach.

The current regulations are a substantial, unnecessary, and counterproductive incursion into the relationship between institutions and their faculty and staff. Prior to these regulations taking effect, sex-based harassment involving employees had been addressed pursuant to institutional policies and procedures informed by the requirements of Title VII and state employment law. Long-standing collective bargaining agreements (CBAs), faculty discipline and de-tenuring procedures, faculty and staff handbooks, and employment at-will policies have all been impacted negatively by the current regulations' requirements that sexual harassment matters covered by Title IX must be handled differently than matters involving harassment and discrimination on the basis of other characteristics protected by Title VII. As a result, institutions have been required to change (or attempt to change, through collective bargaining) these procedures, resulting in a confusing patchwork of policies and inconsistent treatment of various types of civil rights-related matters.

We appreciate the Department's effort to limit the procedures currently required by the Title IX regulations for addressing alleged employee-on-employee harassment. However, the relatively prescriptive nature of 106.45's requirements are still problematic and inconsistent with long-standing and effective policies and practices for resolving employee-on-employee harassment at many institutions.

The Department recognizes on page 41459 of the preamble that a range of CBAs and at-will policies apply to institutions' employees, and "also recognizes that a recipient is not necessarily required by Title VII to apply all of the requirements in current or proposed section 106.45 to sex-based harassment complaints involving employees." But the proposed rule does not explain why the perceived benefits of applying the procedural requirements of proposed section 106.45 to employee-employee cases would outweigh the clear and substantial disruption of doing so, in a context where well-established Title VII requirements provide adequate protections for complainant and respondent employees.

The procedural requirements found in proposed section 106.45 would interfere with the collectively bargained, contractual and/or at-will employment relationships that many institutions have with their employees, which already include procedures and justifications for employee discipline and termination. It is not apparent why employees who are reported to have engaged in sex-based harassment should be entitled to different procedural rights than employees who are reported to have engaged in other types of harassment or misconduct. Nor is it apparent why Title IX processes should delay discipline or termination of an employee who has violated rules under a CBA or other agreement, or employer policies designed to uphold conduct standards and prevent harassment, bullying, and retaliation.

We are also concerned with the application of section 106.46's requirements to sex-based harassment claims involving an employee-respondent and student-complainant. All of the highly concerning issues described above would be present again and exacerbated by the even more detailed and prescriptive nature of section 106.46.

Again, the procedural requirements in section 106.46 are likely to be inconsistent with the types of procedures that would otherwise be applied to misconduct complaints against employees under applicable state law, CBAs, faculty/staff handbooks, and employment at-will policies. The Department's rationale for requiring all institutions to adopt grievance procedures consistent with section 106.46 does not support the level of interference with employment relationships and the confusion over multiple harassment policies that would persist if the final regulations apply section 106.46 requirements in the student complainant/employee respondent context.

Specifically, the Department outlines at page 41459 of the preamble reasons why students may need more procedural protections than employees and would benefit more from working with an advisor. But this rationale seems focused more on the needs of student respondents than student complainants and therefore does not support adequately the need to provide proposed section 106.46 procedural rights to employee respondents.

By dictating the procedures required for resolving complaints of employees sexually harassing students or harassing other employees, the proposed rule significantly curtails institutional flexibility in a manner consistent with other applicable laws and institutional policies and that makes sense for their unique campus setting.

> **Recommendation**: We strongly encourage the Department to exempt any sex-based harassment of employee respondents against a student complainant from the requirements of 106.46. Furthermore, we recommend the Department exempt all sex-based harassment claims where an employee is the respondent, regardless of whether the complainant is a student or an employee, from the requirements of 106.45. This is critical given the fundamentally disruptive and burdensome nature these changes would impose on existing campus administrative and compliance structures across multiple campus functions tasked with administering multiple anti-sex discrimination laws.
>
> Further, if the Department does not agree with these recommendations, at a minimum, we recommend that it clarify whether it intends the procedures of 106.45 to apply to non-harassment sex-based discrimination where the person alleged responsible for the discrimination is an employee, as many of the provisions seem to envision procedural protections more appropriate for a sexual-harassment context than allegations of non-harassment sex-based discrimination. If section 106.45 is intended to apply only to sex-based harassment claims, that should be made clear.

10. Institutional obligations regarding students experiencing pregnancy or a related condition. 106.40.

Section 106.40 of the proposed rule outlines institutional responsibilities with respect to pregnant students and students experiencing a pregnancy-related condition. While the proposed rule provides additional clarity regarding institutional obligations and codifies some existing requirements, it does not fundamentally alter campus responsibilities in this area. Given the recent U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* and related state legislation, we think it would be beneficial to break off these issues from the current NPRM and consider them in a second, separate rulemaking. This would allow the Department and stakeholders to consider these proposals in light of the rapidly evolving legal environment. It would also help to ensure that any final regulations are

workable within the current legal framework and would not result in unintended consequences or legal ramifications for pregnant students or institutions.

Should the Department decide to issue final regulations regarding this issue at this time, we recommend that it assess the hoped-for benefits against the potential harm of specific requirements. For example, we urge the Department to remove the requirement that the Title IX Coordinator "document" and then retain records relating to reasonable modifications made on behalf of a student experiencing a pregnancy or related condition, given the sensitive and personal nature of this information and the potential an institution could be compelled to release this information contrary to the wishes of a student, for example, as the subject of a subpoena.

Also, we encourage the Department to remove the requirement that the Title IX Coordinator "implement" and "coordinate" all reasonable modifications, which is likely incompatible with many existing campus structures for providing these services.

Finally, we ask the Department to modify section 106.40(b)(3) which requires the Title IX Coordinator to promptly inform students of a detailed list of institutional obligations, regardless of whether the student wishes to receive this information. Given the sensitive nature of the information and the potential for some of it to be harmful to a particular student (e.g., providing lactation information for a student who has experienced a miscarriage), we believe it would be preferable for the institution to confirm that the student wants the information before it is required to provide it.

> **Recommendation:** We recommend that the Department issue a second, separate notice of proposed rulemaking addressing institutional obligations regarding parenting or pregnant students or students experiencing a pregnancy-related condition.
>
> If the Department decides to issue final rules on this topic, we recommend, at a minimum, that the Department (1) strike the word "document" from 106.40(b)(4)(ii) and remove the requirement for retaining records related a student or employee pregnancy or pregnancy related condition from 106.8(f)(4); (2) replace the words "Title IX Coordinator" with the word "recipient" in section 106.40(b)(4)(ii); and (3) revise section 106.40(b)(3) to allow the institution to provide information consistent with the student's wishes.

11. The exclusionary rule. 106.46(f)(4).

Section 106.46 of the proposed rule sets out a series of requirements for institutional grievance processes for addressing sex-based harassment involving a student, including requiring institutions to have a process for evaluating allegations and assessing credibility. Under section 106.46(f)(4), if a party to a grievance procedure does not respond to "questions related to their credibility," the decision maker is precluded from relying on ***any*** statement of that party that supports the party's position. Furthermore, the proposed rule states that the decision maker must not draw an inference about whether the harassment occurred based ***solely*** on a party's refusal to respond to questions about credibility.

This language, referred to as the "exclusionary rule," is similar to a provision included in the 2020 final rule which was subsequently vacated by a federal district court in Massachusetts. While the Department's version differs slightly from the prior rule, it remains confusing and unnecessary, and poses a real risk of reducing rather than increasing the ability of institutions to effectively respond to sex

discrimination. Like its predecessor, this rule also can be used by the parties to "further a disruptive agenda," a concern that led to the district court vacating that part of the 2020 rule.

Moreover, as drafted, the rule would be challenging to consistently apply in practice and risks the unnecessary, and perhaps unintended, exclusion of statements that could be helpful to reaching an accurate determination of responsibility. For example, it is unclear how a decision maker would determine which questions are "related to credibility." Would the rule include questions that are intended to explain seeming inconsistencies? What about questions to determine whether, based on demeanor or some other factor, a person is credible, even if the questions are only tangentially related to inconsistencies in recounting an event? There will be a myriad of questions posed about the incident, context, and motivation, but it is not the questions that are used to weigh credibility—it is ***the answer to those questions***. In this sense, every question is presumably related to credibility. The rule also seems to require that a party that refuses to answer questions must suffer the exclusion of all statements. But what if the party refuses to answer a single question? We believe these and other related ambiguities will lead to inconsistent application, administrative litigation (appeals within the institution's process), complaints to the Office for Civil Rights, and court challenges regarding the validity of the regulation.

Critically, this aspect of the proposed rule also threatens to undermine the perceived legitimacy of the grievance process for the parties and the larger campus community. For complainants who are in jurisdictions that require a live hearing with cross examination, if the complainant is unwilling to sit for cross examination, the proposed rule would bar consideration of any statement by the complainant in support of the complainant's position. For respondents, the rule would fall heaviest on those who may wish not to testify because of fear of criminal prosecution or civil suit. In such cases, the respondent's earlier statements would seemingly not be considered at all unless the respondent was willing to submit to cross examination.

> **Recommendation**: We strongly recommend that the Department eliminate section 106.46(f)(4) from the final rule. If the Department is determined to maintain a version of the exclusionary rule in the final rule, we recommend you modify the language as follows:
>
> *(4) Refusal to respond to questions related to credibility. If a party does not respond to questions related to their credibility, the decision maker must not ~~rely on any statement of that party that supports that party's position. The decisionmaker must not~~ draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond questions related to their credibility.*

Although we believe the above formulation is preferable, the Department could also consider this alternative:

> *(4) Refusal to respond to questions related to credibility. If a party does not respond to questions related to their credibility, the decision maker may~~ust~~ take into account a partial or lack of a response to questions related to the party's credibility in making a determination ~~not rely on any statement of that party that supports that party's position.~~, provided that ~~T~~the decision maker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond questions related to their credibility.*

12. Live hearings and questioning by an advisor. 106.46(f).

As mentioned earlier, we thank the Department for removing the mandate for a live hearing with cross examination by the parties' advisors. The proposed rule provides important flexibility to institutions to

allow them to test the credibility of the parties, without mandating this particular court-like procedure on every campus. This will allow institutions to develop processes that are compatible with and meet the requirements of their own state laws, the case law of their jurisdiction, and their own community standards.

While we strongly support inclusion of section 106.46(f)(1), we believe the drafting could be clarified to address some minor discrepancies.

As currently drafted, sections 106.46(f)(1)(i) and (ii) could be read as inconsistent. While (i) appears to allow a decisionmaker to ask questions during a live hearing, (ii) implies that if an institution chooses to have a live hearing, the institution is required to allow questioning by the parties' advisors. While these two pathways are helpful, the proposed rule would not take into account the law in some jurisdictions that, while requiring a live hearing, allows questioning at the hearing to be done solely through the hearing officer or decision maker rather than the parties' advisors.

> **Recommendation:** We believe that redrafting the language as follows will provide more flexibility for institutions and better clarity for all stakeholders.
>
> *(f) Evaluating allegations and assessing credibility.*
>
> *(1) Process for evaluating allegations and assessing credibility. A postsecondary institution must provide a process as specified in this subpart that enables the decision maker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment. This assessment of credibility includes either:*
>
> *(i) Allowing the decisionmaker or personnel administering the process to ask the parties and witnesses, during individual meetings with the parties ~~or at a live hearing~~, relevant and not otherwise impermissible questions under §§106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, before determining whether sex-based harassment occurred and allowing each party to propose to the decision maker, ~~or~~ investigator, or personnel administering the process relevant and not otherwise impermissible questions under §§106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, that the party wants asked of any party or witness and have those questions asked during individual meetings with the parties or at a live hearing under paragraph (g) of this section subject to the requirements in paragraph (f)(3) of this section; or*
>
> *(ii) When a postsecondary institution chooses to conduct a live hearing, either*
>
> *(A) allowing the decision maker, hearing officer, or personnel administering the process to ask the parties and witnesses at a live hearing relevant and not otherwise impermissible questions under §§106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, before determining whether sex-based harassment occurred and allowing each party to propose to the decision maker, hearing officer, or personnel administering the process relevant and not otherwise impermissible questions under §§106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, that the party wants asked of any party or witness and have those questions asked at a live hearing under paragraph (g) of this section subject to the requirements in paragraph (f)(3) of this section; or*
>
> *(B) allowing each party's advisor to ask any party and any witnesses all relevant and not otherwise impermissible questions under §§106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, subject to the requirements under paragraph (f)(3) of this section. Such questioning must never be conducted by a party personally. In addition to questioning by each party's advisor, the institution may also allow the decisionmaker, hearing officer, or personnel administering the process to*

ask relevant and not otherwise impermissible questions under §§106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility. If a postsecondary institution permits advisor-conducted questioning and a party does not have an advisor who can ask questions on their behalf, the postsecondary institution must provide the party with an advisor of the postsecondary institution's choice, without charge to the party, for the purpose of advisor- conducting questioning. The advisor may be, but is not required to be, an attorney.

13. Distinguishing "supportive measures" from other actions colleges and universities may take vis-à-vis its students. 106.2 and 106.44(g)(2) and (h)

As suggested in this letter's introduction and in section III.4 above, there are many instances where colleges and universities make informed judgments that lead to immediate near-term ramifications for students, even though fuller attention will be given to the matter later on. One simple example: most institutions would expect a staff member overseeing the boarding of buses by students going to a basketball game to take immediate action if a male student pushes a fellow male student out of a line and yells racial slurs; that student is not going to be permitted to board any of the buses heading to the game and likely will face disciplinary action. It would make no sense—and would be counterproductive in the extreme—if these regulations were to preclude the staff member from taking the same steps if a male student pushes a female student out of the line while making sexually derogatory comments to her. Yet, as written, 106.44(h) can be interpreted to prevent the staff member from taking that action absent "an individualized safety and risk analysis," and a determination of "immediate and serious threat to health or safety." The staff member might reasonably conclude that the most that can be done in the moment vis-à-vis the harassing student is to place him on a different bus to travel to the game.

Recommendation: The Department should clarify that institutional policies that broadly apply to all students (or all students in a type of category such as athletes or members of recognized student clubs) are not intended to be displaced by these Title IX regulations and can operate coextensively, absent an unambiguous conflict. And the Department should clearly state that if an institution is empowered to take action regarding racial and other kinds of observed or reported student misconduct prior to a disciplinary process determination, the regulations ought not be read to suggest or direct that the institution may or must take a ***lesser*** form of action in sex-based discrimination contexts.

14. Posting employee training materials. 106.8 (f)(3).

The proposed rule requires institutions to post materials used to train employees on a broad set of required topics. Many campuses have already invested in creating high-quality employee training materials tailored to their specific needs. These trainings are designed to address the unique setting and legal requirements applicable to that college or university and may be further customized to suit the needs of a particular school or department at the institution.

In many cases, these materials are not written documents but rather online training modules or webinars and are not appropriate for public dissemination. They may include campus community members talking about often-sensitive topics or first-person accounts from vulnerable populations. Institution may also wish to use proprietary materials prepared by third-party training providers in their training programs, but where such providers are unwilling to allow institutions to post their intellectual

property publicly, institutions are effectively deprived of the benefit of these materials.[8] This could be particularly challenging for small and under-resourced institutions that lack the resources, staff, and expertise needed to generate these materials in-house. By requiring that these materials be made public, the NPRM will likely result in institutions moving to less useful, less impactful trainings materials as they remove any sensitive, personal, or proprietary information.

> **Recommendation:** The requirement to post training materials should be eliminated from the rule.

15. Prohibition on disclosure of supportive measures. 106.44(g)(5).

Section 106.44(g)(5) of the proposed rule would prohibit institutions from disclosing information about supportive measures to persons other than the complainant or respondent or unless necessary to provide the supportive measures.

As drafted, the proposed rule appears to conflict with existing requirements for receiving federal grants programs administered by several federal science agencies and with statutory requirements recently signed into law as part of the CHIPS and Science Act, Public Law 116-283.[9] Under Subtitle D of the new law, institutions will be required to report to the science agency any "administrative action" taken in response to allegations of sexual harassment by individual personnel participating on the federal research grant.[10]

Colleges and universities strongly support efforts to address any sexual harassment occurring within any federally supported science grant and believe that the proposed rule could create uncertainty for institutions that are obligated to comply with these federal agency requirements.

> **Recommendation**: While individual grant requirements are separate from Title IX regulations, overlapping requirements in the sexual harassment context are likely to create confusion. We recommend the Department add language in the final rule that creates an exemption in 106.44(g) for applicable federal and state statutes, regulations, and agency policies that require the disclosure of misconduct, investigations, outcomes, and administrative actions.

16. Informal resolution. 106.44(k)(1).

As discussed earlier, the proposed rule helpfully continues to allow institutions to use an informal resolution process to resolve allegations of sex-based discrimination, except in cases involving sex-based harassment of a student by an employee. While we believe the changes and clarifications contained in the proposed rule are largely beneficial, we offer the following suggestions:

[8] The impact of requiring the posting of these third-party vendor materials will be particularly acute in the context of proprietary investigator training programs including, for example, training to conduct trauma-informed interviews.

[9] See Subtitle D, sections 10531-39 – Combating Sexual Harassment in Science.

[10] Under section 10536, a newly established interagency working group will develop a consistent set of policy guidelines for Federal research agencies that shall include guidelines that require the reporting of "administrative action, related to an allegation against award personnel of any such harassment…."

Recommendation: We recommend that the word "ensure" in proposed subsection 106.44(k)(1) be replaced with "designed to ensure" in the final regulation, to be more realistic about campuses' inability to guarantee absolutely that sex discrimination does not continue or recur within their education program or activity, despite their best efforts.

Further, we recommend that the specific identification of the "Title IX Coordinator" in proposed subsection 106.44(k)(1) be changed to "recipient," so that institutions will unquestionably have the discretion to designate other personnel to take appropriate and effective steps designed to ensure that sex discrimination does not continue or recur within the institution's education program or activity.

17. Prohibition on disclosure of medical treatment records and potential conflicts with HIPAA in the Academic Medical Center context. 106.45(b)(7)(ii).

Section 106.45(b)(7)(ii) of the proposed rule prohibits universities from "access[ing], consider[ing], disclos[ing], otherwise us[ing]" a party's medical, psychological, or other treatment records during Title IX investigations and adjudications without the party's voluntary, written consent. We strongly support the inclusion of this provision. However, we believe it would benefit from further clarification in the context of allegations of sexual misconduct involving university employed physicians or other patient care providers working in Academic Medical Centers ("AMCs").

When a university health care provider is alleged to have engaged in sex discrimination, treatment records often prove essential to making a determination as to whether or not a policy violation occurred. Treatment records speak directly to the medical necessity of the treatment given, a critical indicator of the appropriateness of the health care provider's conduct. If a patient-complainant is unable to consent to the use of their treatment records in the Title IX grievance process, or the patient-complainant declines to participate in the process entirely, an institution will likely be forced to close the matter without making a finding, which could adversely impact the institution's ability carry out its mandate to effectively respond to allegations of sex discrimination.

Unlike a typical university campus, AMCs are subject to the Health Insurance Portability and Accountability Act (HIPAA) and implementing regulations, a comprehensive privacy framework that is geared specifically to the patient care setting.[11] This setting differs substantially from others and requires a different approach to protect patient safety. Section 106.45(b)(7)(ii) would overly complicate and impede University efforts to respond swiftly and adequately to allegations in the patient care context, and, if implemented, will subject a single record to two different—and inconsistent—standards.

Recommendation: We strongly encourage the Department to revise this provision to state that Section 106.45(b)(7)(ii) would not apply in instances where HIPAA regulates the treatment record.

[11] In addition to HIPAA, we note that the Family Educational Rights and Privacy Act (FERPA) also provides a privacy framework governing education records that includes treatment records. The Department may wish to consider whether additional clarification is needed on records covered by FERPA.

Conclusion

We appreciate the opportunity to submit these comments and to share insights regarding the impact of the proposed changes on a diverse group of colleges and universities and campus stakeholders. Higher education institutions are committed to addressing sex-based discrimination and sex-based harassment on their campuses and to complying with all federal and state laws, including Title IX. We hope these comments will help the Department provide a final rule that will assist campuses in their efforts to address sex-based discrimination, to support survivors of sex-based harassment, and to ensure fair processes for all parties.

Sincerely,

Ted Mitchell
President

On behalf of:

American Association of State Colleges and Universities
Achieving the Dream
ACPA-College Student Educators International
Association of Jesuit Colleges and Universities
American Association of Colleges and Universities
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Council on Education
American Dental Education Association
Association of Public and Land-grant Universities
APPA, "Leadership in Educational Facilities"
Asociación de Colegios y Universidades Privadas de Puerto Rico [Association of Private Colleges and Universities of Puerto Rico]
Association of American Universities
Association of Catholic Colleges and Universities
Association of Colleges and Universities in Pennsylvania
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Independent California Colleges and Universities
Association of Independent Colleges and Universities in Massachusetts
Association of Independent Colleges and Universities of Rhode Island
Association of Independent Colleges of Art & Design
Association of Research Libraries
Association of Vermont Independent Colleges
Council for Christian Colleges & Universities
College and University Professional Association for Human Resources
Commission on Independent Colleges and Universities in New York

Connecticut Conference of Independent Colleges
Consortium of Universities of the Washington Metropolitan Area
Council of Graduate Schools
Council of Independent Colleges
EDUCAUSE
Georgia Independent College Association
Hispanic Association of Colleges and Universities
Independent Colleges and Universities of Texas
Independent Colleges of Indiana
Iowa Association of Independent Colleges and Universities
Kansas Independent College Association
Michigan Independent Colleges & Universities
Maryland Independent College and University Association
Minnesota Private College Council
National Association of Independent Colleges and Universities
NASPA: Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
National Association of Colleges and Employers
National Collegiate Athletic Association
North Carolina Independent Colleges and Universities
Oregon Alliance of Independent Colleges and Universities
Tennessee Independent Colleges and Universities Association
Wisconsin Association of Independent Colleges and Universities