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To: T9PublicHearing
Cc: Joy Mosley; Shirley Hoogstra
Subject: Written Comment: Title IX Public Hearing (CCCU Comment on Title IX Regulations and Discrimination Based on Sexual Orientation and Gender Identity)
Attachments: CCCU Title IX Comments 2021.pdf

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Good afternoon,

Please find attached comments on behalf of the Council for Christian Colleges and Universities (CCCU) in response to the Department of Education's invitation to submit written comments on the topics for the Title IX public hearing. This comment is submitted by:

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Thank you for your consideration of this comment.

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COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES

I am writing on behalf of the Council for Christian Colleges & Universities (CCCUC) to comment on the topics addressed in the Department of Education’s public hearing to gather information for the purpose of improving enforcement of Title IX of the Education Amendments of 1972 (Title IX). The CCCUC represents 190 institutions around the world, including more than 140 in the United States that enroll approximately 445,000 students annually. The CCCUC’s mission is to advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth. We are committed to graduating students who make a difference for the common good as redemptive voices in the world.

We appreciate that the Department is reviewing the Title IX regulations and gathering information on how the regulations can be improved to provide for an educational environment free from discrimination based on sex. We are particularly pleased to hear that the Department is specifically seeking comments on changes that should be made to the 2020 amendments to the regulations. The 2020 amendments to the regulations include measures that have harmed students, increased administrative and financial burden for institutions, and prompted additional litigation. The most troubling aspect of the amendments is the general shift toward a quasi-judicial process (with the exception of the informal resolution provision). This shift is reflected throughout the regulations, such as frequent references to due process, the requirement to provide copies of all directly related evidence, and the requirement to hold live hearings with cross-examinations by advocates. Beyond the significant administrative burdens and financial costs involved, we believe this shift has had a significant chilling effect on victims of sexual harassment being willing to report—not only preventing them from accessing education equally, but also making campuses less safe. Additionally, this shift has significantly lengthened and complicated the complaint process, which burdens students—both complainants and respondents.

To help avoid such outcomes, we urge the Department to address the concerns and consider the changes we detail below:

Comment on Section 106.12(b)

Title IX provides a statutory religious exemption, which states that Title IX “shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization,” 20 U.S.C. 1681(a)(3).¹ This religious exemption is repeated in the regulations at Section 106.12(a). Prior to the 2020 amendments, Section 106.12(b) stated that an educational institution that wished to claim the religious exemption set forth in Section 106.12(a) must do so by submitting a written statement to the Assistant Secretary, identifying the provisions in the regulations that conflict with a specific tenet of the religious organization. The regulation was silent as to when such a written statement must be submitted. In 2020, Section 106.12(b) was amended to clarify that an institution may seek assurance of the religious exemption, but “[a]n institution is not required to seek assurance from the Assistant

¹ The definition of “program or activity” in 20 U.S.C. 1687 also excludes “any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.” 20 U.S.C. § 1687(4).

Secretary in order to assert such an exemption.” Section 106.12(b) continues by explaining how an institution can raise the exemption in the event that the Department opens an investigation of the institution for noncompliance, whether or not the institution has previously sought assurance of an exemption.

The amendment of Section 106.12(b) accorded with the statutory language and brought welcome clarity and flexibility to our member institutions, and we urge the Department to retain this language in the regulations as it is. Prior to the 2020 amendments to the regulations, religious educational institutions were unsure whether they needed to seek assurance of the religious exemption ahead of time in order to later raise it in response to an investigation by the Department or a Title IX lawsuit. If this clarifying language in Section 106.12(b) is simply removed or changed back to its prior wording, institutions will be confused as to whether or not they need to request an assurance letter in order to later claim the exemption. Furthermore, if the Department requires institutions to request a letter of assurance in order to claim the exemption, the Department will be acting in contradiction to the statutory language. As the preamble to the 2020 amendments states, “No part of the statute requires that recipients receive an assurance letter from OCR, and no part of the statute suggests that a recipient must be publicly on the record as a religious institution claiming a religious exemption before it may invoke a religious exemption in the context of Title IX.”

Furthermore, it is not practical for a religious institution to predict ahead of time how application of Title IX and its regulations may be inconsistent with its religious tenets. Novel issues continue to arise in the area of sex discrimination in education, and religious institutions need to retain their freedom to respond and act in ways that are consistent with their religious tenets.

Finally, in addition to being consistent with the statutory exemption, the language in Section 106.12(b) also aligns with the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 by preserving institutions’ religious freedom. For these reasons, we urge the Department to retain the language in Section 106.12(b) as it is.

Comment Regarding Discrimination Based on Sexual Orientation and Gender Identity

We appreciate that the Department is seeking comments regarding discrimination based on sexual orientation and gender identity. Our member institutions are committed to responding to, preventing, and eliminating harassment based on sexual orientation and gender identity within their communities. At the same time, our member institutions are also committed to abiding by and acting in accordance with their sincerely held religious beliefs. Our member institutions represent 35 different Christian denominations, and others are non-denominational. These institutions hold varying beliefs on many topics, including sexual orientation and gender identity. Accordingly, our different member institutions have chosen different approaches to responding to LGBTQ+ applicants, students, and employees in their communities based on their religious beliefs. While some members may want to maintain a policy of not admitting LGBTQ+ students, others may allow admission but may maintain gender-specific dorms and locker rooms. Some of our member institutions have LGBTQ+ student groups while others do not.

The freedom of religion guaranteed by the First Amendment affords our member institutions the right to exercise their sincerely held religious beliefs. In drafting Title IX, Congress recognized that there may be times when a statute prohibiting sex discrimination conflicts with the tenets of a religious educational institution. It is for this reason that it included the religious exemption in the

statutory language. And the statutory exemption is aptly drafted to address the tension that may exist between the rights of LGBTQ+ students to have access to an education free from discrimination and religious institutions' right to freedom of religion. The exemption only precludes application of those provisions of Title IX and its implementing regulations that are inconsistent with the institution's religious tenets. This allows each religious institution to adopt policies on sexual orientation and gender identity that align with their specific religious beliefs.

Furthermore, the current language of Section 106.12(b) of the regulations provides religious institutions the freedom to respond to this important issue as it continues to develop in their communities by not requiring a religious institution to seek assurance of the exemption. The issue of LGBTQ+ rights has been developing in the courts, the White House, and college campuses. Novel issues continue to arise in this area. Therefore, it is impractical to expect a religious institution to predict every way in which Title IX requirements relating to sexual orientation and gender identity may conflict with its religious beliefs.

For these reasons, the Department should leave the regulations regarding the religious exemption unchanged.

Comment on Section 106.30(a): Definition of "Formal Complaint"

Section 106.30(a) states in part, "Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." The statement that a complainant must be participating in or attempting to participate in the education program or activity of the recipient can have an adverse effect on some student respondents. The Department has taken great care to protect the rights of both complainants and respondents. However, if a complainant with no association with an institution makes a claim of sexual harassment against a student of the institution, according to the definition of "formal complaint" in Section 106.30(a), that student respondent has no right to any of the protections available under the regulations, and the institution could sanction him or her without following the process mandated by the regulations. Furthermore, an institution would be precluded by the regulations from affording some of the process outlined in the regulations because other laws—such as the Family Educational Rights and Privacy Act (FERPA)—could prohibit certain parts of the complaint procedures without the protection of provisions stating otherwise. Such a result seems inconsistent with the Department's commitment to an equal and fair process for all students.

Recommended Changes

The Department should add "or respondent" to the relevant language in Section 106.30(a) so that it states in part, "At the time of filing a formal complaint, a complainant ***or respondent*** must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." (Emphasis added.)

Comment on Section 106.45(b)(1)(vi)

Section 106.45(b)(1)(vi) states that a recipient's grievance process must "[d]escribe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility." This language is inconsistent with the requirements under the Violence Against Women Reauthorization Act of 2013 ("VAWA"), which states that an institution's disciplinary procedures for resolving allegations of dating violence, domestic violence, sexual assault, or stalking must "[l]ist all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking." 34 CFR § 668.46(k)(1)(iii). The preamble to this regulation states that this provision "does not prohibit an institution from using a sanction not listed in its most recently issued annual security report, provided the institution's list is updated in its next annual security report." 79 Fed. Reg. 62773 (Oct. 20, 2014).

While Section 106.45(b)(1)(vi) states that an institution can either describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that a recipient may impose, because of the overlap between Title IX and VAWA, institutions will still need to list all possible sanctions in their complaint procedures. Therefore, institutions do not actually have a choice of whether to list sanctions or provide a range of sanctions. Moreover, unlike VAWA, neither the Title IX regulations nor the preamble provides that institutions may impose sanctions that are not listed as long as the list of sanctions is updated. Therefore, institutions are left in the difficult position of having to list all possible sanctions because of VAWA's requirement, but not having the flexibility afforded by VAWA to impose a sanction that was not included in the list.

Recommended Changes

The Department should align Section 106.45(b)(1)(vi) with the VAWA regulations by requiring a list of sanctions but allowing an institution to impose a sanction that is not on the list as long as the institution adds the sanction to the list of possible sanctions prior to publication of its next annual security report.²

Comment to Section 106.45(b)(1)(vii)

Although the regulations purport to give recipient institutions the option to adopt either the preponderance of the evidence standard or the clear and convincing standard for resolving formal complaints of sexual harassment, in practice, they require some institutions to adopt the clear and convincing standard. Under the regulations, institutions must apply the same standard of evidence for complaints against students as they do for complaints against employees, including faculty. By requiring that complaints against students be subject to the same evidentiary standard as complaints against tenured faculty members—many of whom have a contract requiring a higher evidentiary burden for termination or other serious sanctions—the regulations foreclose the use of

² While the requirement to publish an annual security report does not fall under Title IX, the reality is that requirements under the Clery Act and VAWA overlap with Title IX and institutions generally include their sexual misconduct policy as part of their annual security report. Therefore, if institutions make updates to their sexual misconduct policies, they typically do so prior to publication of their annual security report so as to include their most recent policies and procedures.

preponderance of the evidence for many institutions. The preponderance of the evidence standard is, however, the evidentiary standard that would apply in a civil legal proceeding and is the preferred standard for many recipients.

Recommended Changes

Rather than require the same standard of evidence for complaints against students and employees, the regulations should offer institutions the flexibility to choose the appropriate standard of evidence depending on the type of conduct alleged and the position of the respondent (student, staff, tenured faculty, etc.).

Comment on Section 106.45(b)(2)(i)(B)

Section 106.45(b)(2)(i)(B) states in part that a recipient must provide a written notice to the known parties that includes “[n]otice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known.” While the requirement to provide notice of the allegations to the parties lends transparency and equity to the process, the requirement to give notice of “the conduct allegedly constituting sexual harassment” has caused confusion and hardships for institutions. The provision as written is ambiguous as to the specificity required when institutions give notice of the conduct allegedly constituting sexual harassment. This provision has already been used by respondents to demand more details about the alleged conduct before the investigation even begins, causing unnecessary conflict between the respondent and the institution very early in the process. Clarity is needed as to how much detail an institution must provide regarding the alleged conduct. While the regulations specify that the notice must include sufficient detail to prepare a response, reasonable people can differ as to how much detail is “sufficient.”

Recommended Changes

The Department should retain the requirement to provide notice of the allegations to the parties, but it should clarify that notice of “the conduct allegedly constituting sexual harassment” is satisfied by a general description of the type of conduct at issue and does not require disclosure of all of the details of the allegations of which the institution is aware.

Comment to Section 106.45(b)(5)(vi)

Under Section 106.45(b)(5)(vi) of the regulations, a recipient institution must provide “both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.” We recognize that the Department’s motivation behind this provision was to make the process more thorough and fair and to make outcomes more reliable, but the current requirements are overly broad and leave institutions susceptible to unnecessary data and privacy breaches.

In regard to overbreadth, the current regulations give both parties access to information not relevant to the sexual harassment allegations. During the course of an investigation, it is not uncommon for a party or witness to provide information about themselves or others that is irrelevant to the outcome of the complaint, highly private in nature, and/or potentially damaging to one or more persons involved. Examples of this type of oversharing of information include: prior sexual history with individuals other than the accused, medical history, information about an individual's mental health, sensitive information about an individual's past, information about an individual's education and/or employment record or performance, and alleged character evidence. Allowing this type of information to be openly shared with the other party, when it will not be considered by the decision-makers, could result in the inappropriate sharing of private and potentially prejudicial information and is likely to cause a chilling effect on reports and grievance process participation.

The regulations also create another type of potential data security risk for recipients. Section 106.45(b)(5)(vi) currently requires that evidence be provided to the parties "in an electronic format, or hard copy." Providing parties with copies of all directly related evidence places the privacy interests of the parties and witnesses at risk and will almost certainly result in extremely sensitive information being shared amongst students or others. While the regulations' preamble provides that recipients can require parties and their advisors to sign non-disclosure agreements prior to receiving a copy of the directly related evidence, it will be difficult for recipient institutions to learn of or prove a violation of such an agreement.

In addition to privacy concerns, this requirement also adds significant time to the complaint process and costs and burdens to the recipient institutions. In order to comply with this requirement, investigators must review all evidence to determine what is "directly related" to the allegations, redact information that is not directly related, prepare the evidence for review (including preparing the directly related evidence from party and witness interviews, such as in a transcript or another format), and coordinate distribution of the evidence to the parties and their advisors. Then once the parties receive the directly related evidence, the regulations require that the parties be given 10 days to submit a written response to the directly related evidence. The investigator must then review the response statement before finalizing the investigative report. This adds a minimum of 10 days to the process just for submission of the written responses, but the total number of days added to the process because of this requirement, considering the investigator's preparation of the evidence, is likely closer to 15-20 days on average. The lengthening of the process and the broad disclosure of potentially sensitive information burdens both complainants and respondents. Like the requirement for a live hearing, the added complexity, time, and privacy concerns resulting from this requirement likely lead to a chilling effect on reports and the filing of formal complaints.

Finally, this addition to the complaint resolution process has created confusion, added costs, and administrative burdens for recipient institutions. Institutions struggle to differentiate between the "directly related" standard for production of evidence and the "relevance" standard required for inclusion in the investigative report. Recipients must facilitate the distribution of the directly related evidence to the parties, including the significant amount of evidence that often comes from party and witness interviews, and must also take steps to protect privacy, such as coordinating the signing of a non-disclosure agreement by parties and advisors. Many recipients—particularly smaller institutions—do not have the resources to carry out such a complex process.

Recommended Changes

A preferable approach to Section 106.45(b)(5)(vi) would be to mirror the VAWA requirement that institutions provide, “timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings.” 34 CFR § 668.46(k)(3)(i)(B)(3). VAWA’s requirement has proved to be workable for several years, ensuring that the parties have access to any information to which the decision-makers have access and providing institutions with a straightforward requirement.

Comment to Section 106.45(b)(6)(i)

As is discussed elsewhere in this comment, the requirement that recipient institutions provide a live hearing causes concern for many recipients. In addition to increasing the length and cost of the process, live hearings raise the following issues:

Chilling Effect

Live hearings have undoubtedly had a chilling effect on complainants being willing to move forward with a grievance procedure or to even report sexual harassment. Our member institutions have reported that requiring a complainant to be cross-examined, potentially by an attorney, in a live hearing and with the respondent either in the room or watching from another room has caused complainants at their institutions to refuse to move forward with a formal complaint. Additionally, many of our member institutions have stated that they believe the live hearing and cross-examination components of the complaint procedures have led to fewer initial reports of sexual harassment. As a consequence, victims of sexual harassment, including sexual assault, are not connecting with resources on campus to get the support that they need, and more incidents of harassment are going unreported and unaddressed. This outcome is counter to the goals of the Department and recipient institutions, which is to encourage reports of sexual harassment and misconduct to promote safe and nondiscriminatory work and learning environments.

Burden on Students

The addition of live hearings has complicated and lengthened the complaint resolution process. In addition to causing a chilling effect on reports and formal complaints, this added length and complexity burdens both complainants and respondents throughout the complaint process. Parties must wait even longer to have complaints resolved, and they must understand and participate in a complex and intimidating adversarial process. Additionally, our member institutions have reported that due to the difficulty of scheduling, parties and/or witnesses have had to miss classes or work in order to participate in the live hearing (even just by being on call as a witness). Therefore, the addition of a complex, drawn-out live hearing process has placed a significant burden on all students involved.

Opportunities for Mistakes

Given the nature of live hearings, recipients are required to make on-the-spot decisions regarding many important and impactful issues, such as whether to permit certain questions, allow certain evidence, or delay the hearing if a witness is not present. Recipients are more likely to make

mistakes and regrettable decisions when forced to make real-time judgment calls, particularly if doing so without the resources to have legal counsel at every hearing.

Participation of Advisors

Another area of serious concern related to the live hearing requirement is the participation and role of advisors. The current regulations provide that, at the live hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. These questions are to be asked by the party's advisor of choice. Although the Department has indicated that requiring questions to be asked by advisors will avoid a "personal confrontation" between the parties, this is often not the case. Under the regulations, a party is entitled to an advisor of choice, including an attorney. An attorney, who has an ethical responsibility to zealously protect and pursue his or her client's legitimate interests, is likely, in many instances, to ask questions in a hearing in a manner that feels like aggressive confrontation. Likewise, cross-examination of a party conducted by a friend or family member of the other party may result in personal, unproductive, and traumatizing confrontations.

Further, allowing cross-examination to be conducted by an attorney-advisor creates severe inequities where another party to the proceeding cannot afford an attorney. Attorneys are trained to engage in cross-examination. In contrast, it is unrealistic to expect a victim-advocate, family member, or school-appointed advisor acting for another party at the hearing to provide the same level of skill and advocacy through cross-examination that an attorney will provide. The grievance procedure should be fair, equitable, and available to all parties, not only to those who can afford an attorney.

Recommended Changes

Recipient institutions should have flexibility to create an equitable grievance procedure that does not include a live hearing. While some recipients may choose a live hearing model, others may choose procedures that provide for cross-examination in other ways. For example, one version of the proposed regulations released to the public provided that the investigator should solicit questions from the parties to ask the other party and witnesses. This procedure better balances the potential benefits of cross-examination with the drawbacks of a live hearing, including the chilling effect on complainants, the significant cost to recipients, and the potential for errors and poor spur-of-the-moment judgment calls in a setting with critically high stakes. Amendments to the regulations should include an option for higher education recipients to ask relevant cross-examination questions through the grievance procedure without a live hearing.

Alternately, if the amendments to the regulations include the requirement that higher education recipients provide a live hearing, a more preferable procedure would be for a single school-appointed cross-examiner to ask questions of the parties and witnesses that are prepared by the parties ahead of time or during the live hearing. The parties would still have the right to an advisor, who could assist them in preparing questions for cross-examination, but the actual act of cross-examining parties and witnesses would be performed by a single school-appointed cross-examiner. This procedural change would retain the element of cross-examination, while removing the personal confrontation and intimidation that comes with answering questions posed by the other party's advisor. It would also remove some inequity by preventing a party with an attorney from having that attorney directly ask the cross-examination questions. Further, it would only require recipients to provide a single cross-examiner for each hearing rather than having to provide advisors to each

party that does not have an advisor at the hearing, reducing the expense to recipients. Moreover, by allowing the parties to submit questions ahead of the hearing, decision-makers could review the questions ahead of time and therefore have more time to consider whether to allow many of the questions and to consult legal counsel for assistance if necessary. Although additional questions may arise during the hearing that the recipient was not provided in advance, this procedure would still reduce the questions that a decision-maker sees for the first time at the hearing, reducing the possibility for errors by decreasing the number of on-the-spot decisions that a decision-maker would need to make at the hearing itself.

Allowing recipients to utilize a grievance procedure that includes either cross-examination questions asked by the investigator outside of a live hearing, or a live hearing where the a single school-appointed cross-examiner asks the cross-examination questions, would balance the interests of accused individuals with recipient institutions' concerns with the current live hearing language in 106.45(b)(6)(i), including the chilling effect, the increased potential for errors, inequity in the process, and the recipients' lack of resources sufficient to provide advisors for the hearings.

Comment to 106.45(b)(6)(i) and Sections 106.71(a)

Section 106.45(b)(6)(i) states in part, "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions."

Section 106.71(a) states, "No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation."

Together these provisions bind institutions' hands when a party or witness refuses to submit to cross-examination. The retaliation provision in Section 106.71(a) prohibits institutions from requiring a witness or party from participating in the complaint process. Indeed, many institutions feel that the provision is so broad that they don't even feel that they can encourage witnesses or parties to participate. Certainly, this is appropriate for parties, who should have the choice to speak or remain silent, but institutions need more flexibility to encourage or require witness participation by members of their communities in order to effectively respond to complaints of sexual harassment and sex discrimination. The concerns that apply to parties—that a complainant should not be forced to pursue his or her complaint of sexual misconduct in a particular way or that a respondent should have the right to decline to participate in a process in part or in full when allegations are made against him or her—are not applicable to witnesses.

Furthermore, Section 106.45(b)(6)(i) prohibits institutions from considering statements made by a witness or party who does not submit to cross-examination at the live hearing. Therefore, an institution's hands are tied when a witness or party refuses to submit to cross-examination. The institution cannot require or even urge the individual to submit to cross-examination, and if the individual declines to do so, it cannot consider that individual's prior statements from the complaint, the investigation, the hearing, or any other source, such as text or social media messages. Witnesses often provide key information that is of great assistance to the decision-makers and that information can be lost due to the cross-examination rules if the institution is powerless to encourage or require a witness to appear at the hearing.

Additionally, Section 106.45(b)(6)(i)'s prohibition applies even to statements against interest made by a party or witness that does not submit to cross-examination. Therefore, if a respondent admits to engaging in conduct that constitutes sexual harassment during an investigative interview or to a third-party witness and then refuses to submit to cross-examination, the institution cannot consider the respondent's admission against interest under the current regulations. The same scenario could occur with a complainant's admission made during the investigation or to a third-party witness. Indeed, such a respondent or complainant could intentionally refuse to submit to cross-examination for the very purpose of excluding his or her statements against interest from consideration by the decision-maker(s).

Recommended Changes

As stated above, the Department should remove the requirement for a live hearing with cross-examination from the regulations. However, even if the live hearing and cross-examination requirements remain, the Department should revise Section 106.45(b)(6)(i) to include an exception for institutions to be able to consider statements against interest even when the person making the statement does not submit to cross-examination.

Additionally, the Department should revise Section 106.71(a) to state that nothing in the provision shall prohibit an institution from requiring a non-party witness's participation in an investigation, proceeding, or hearing or disciplining an individual for failure to participate where such institution consistently requires participation by its students and employees who have been named as non-party witnesses in investigations, proceedings, or hearings for Title IX complaint resolution processes.

Comment to Section 106.45(b)(7)(i)

Section 106.45(b)(7)(i) states that the decision-maker cannot be the same person(s) as the Title IX Coordinator or the investigator(s). While we recognize the benefits of having different individuals conduct the investigation and decision-making phases of the complaint process, many of our member institutions that are smaller in size simply do not have the personnel to fill these separate roles. Affording institutions the option of having a single individual conduct an investigation and make a determination regarding responsibility will benefit smaller institutions who do not have the resources to hire and train individuals for both roles. Additionally, other protections exist in the regulations to ensure that an investigation and decision-making process conducted by a single individual remains fair and equitable. First, the regulations prohibit an investigator or decision-maker from having a conflict of interest. Second, parties would still be afforded the opportunity to respond to the investigative report. Third, the regulations require institutions to provide an appeal process with a decision-maker(s) who is not the decision-maker(s) that reached the determination

regarding responsibility, the investigator, or the Title IX Coordinator. Furthermore, the mandatory bases for appeal—that the Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias or that there was a procedural irregularity that affected the outcome of the matter—specifically provide a way for parties to address an improper investigation or decision by a single individual.

Recommended Changes

The Department should remove the language in Section 106.45(b)(7)(i) prohibiting a decision-maker(s) from being the same person(s) as the investigator(s).

Comment to Section 106.45(b)(7)(ii)(B)

Section 106.45(b)(7)(ii)(B) requires that the written notice of determination include “[a] description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.”

The requirement to include “methods used to gather other evidence” is vague and therefore confusing for recipients. The list of procedural items to include in the notice of determination is already quite extensive, and if an institution gathers evidence using a different method, there is nothing prohibiting it from describing that method in the notice. However, having this requirement in the regulations opens institutions up to claims that they did not describe every possible method an investigator used to gather evidence. For example, an investigator may receive information in follow-up emails from witnesses that get included in the investigative report, but if the institution fails to state in the notice of determination that the investigator gathered information using email, it will be in violation of Section 106.45(b)(7)(ii)(B).

The requirement to include “any notifications to the parties” is likewise overbroad. Parties receive formal and informal notifications of allegations, of various meetings (their own and the other party’s), of the right to review and respond to evidence, of the right to review and respond to the report, of the close of evidence, of the hearing, etc. Furthermore, the regulations do not differentiate between an official written notification required under the regulations and an email notifying the party of a change in a meeting time or similar informal notification. Requiring an institution to document every single notice in the notice of determination is unnecessarily onerous and, again, opens the institution up to claims that would be based on a technical oversight.

Recommended Changes

The Department should remove the language “methods used to gather other evidence” from Section 106.45(b)(7)(ii)(B). The Department should also either remove the language “any notifications to the parties” or specify which official written notifications must be included.

Comment on Section 106.45(b)(7)(iii)

Section 106.45(b)(7)(iii) states that “[t]he determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer

be considered timely.” This provision thereby prohibits an institution from implementing sanctions immediately after the provision of the written determination to the parties. For the reasons below, the regulations should not limit an institution’s ability to immediately impose sanctions upon a finding of responsibility.

By the time an institution issues the written determination, it will, under the current regulations, have provided the parties a lengthy process with multiple opportunities to be heard, including an investigation, two opportunities to provide written responses, and a live hearing. And even if the Department makes some changes to that required process, due to the requirements under VAWA as well as Title IX, a determination regarding responsibility only follows a process that provides the parties with sufficient opportunity to be heard and requires the decision-makers to come to a reasoned decision, providing detailed rationale to the parties. If, after that process, an institution’s decision-maker has determined that there is sufficient evidence of a policy violation, the institution should have the flexibility to immediately impose a sanction. In circumstances where a student has been found responsible for sexual assault, it will be difficult for an institution to maintain the safety of its campus and provide a nondiscriminatory environment without the ability to remove the respondent from campus. For example, a complainant may be attending classes on campus knowing that the respondent, who has been found responsible for sexually assaulting the complainant, is still also present on campus. Further, if a respondent found responsible for sexual misconduct commits another violation against a different student, after the finding of responsibility but before the final appeal determination, has the institution met its obligations under Title IX as to that second victim? Moreover, requiring institutions to wait to impose sanctions will incentivize many respondents who are found responsible to engage in meritless appeals to delay the imposition of sanctions. Additionally, although the current regulations allow for emergency removal of a student in rare circumstances, the option of emergency removal following a finding of responsibility is not practical, because it would be difficult for an institution to support a finding that emergency removal was necessary after a finding of responsibility if the institution deemed emergency removal unnecessary throughout the entire lengthy complaint process.

This issue is especially problematic when a determination is issued when a respondent is about to graduate or about to complete a term. Under the current regulations, a recipient must award a diploma or grades to a respondent, even when the respondent has been found responsible for a sexual misconduct violation, as long as an appeal is pending or the time for appeal has not passed. While theoretically a recipient could rescind the conferral of a degree or grades following the appeal, institutions are unlikely to take such drastic measures that could open up the institution to legal claims. Accordingly, an individual who has been found responsible for sexual misconduct prior to graduation may be able to graduate and receive a diploma with little consequence for his or her actions.

Finally, considering that very few cases are overturned on appeal, the risk of sanctioning a respondent whose finding of responsibility is overturned on appeal is much lower than the risk of a violation going unpunished because the respondent dragged out the process, completed a term and then transferred, or graduated. Furthermore, institutions handling these matters are in the best position to evaluate and balance these risks and should therefore be given flexibility to choose when to make sanctions effective in each case.

Recommended Changes

The Department should allow institutions the flexibility to impose sanctions following a written determination as they determine is appropriate under the circumstances.

Comment on Section 106.45(b)(9)

Section 106.45(b)(9) provides that institutions may facilitate an informal resolution process provided that all parties and the institution consent to the process and various other requirements are met. Our member institutions have reported widespread support for the Department retaining this informal resolution option. Particularly when faced with the complex, intimidating formal process under the current regulations, parties have welcomed the opportunity to resolve complaints in an informal manner. Not only is informal resolution often the more appropriate method for resolving lower-level sexual harassment complaints, but it can also be fitting in cases of more serious conduct such as sexual assault. Some complainants of sexual assault have communicated that they are not ready or willing to face a formal investigation and adjudication, but they still want redress and protections that will enable them to move forward and continue with their education or employment. Without the option of informal resolution, complainants are faced with the option of a long, intimidating formal process or no resolution at all. Respondents likewise benefit from the opportunity to agree to a resolution rather than face an uncertain hearing and determination. In addition, the current regulations include various protective measures that ensure that parties enter into an informal resolution voluntarily and only after being fully informed of their rights and options.

Consistent with the overwhelming support for this provision generally, our member institutions have reported frustration with two provisions in Section 106.45(b)(9) that limit institutions' ability to use this valuable resource. The first is the provision in Section 106.45(b)(9)(iii) prohibiting the use of informal resolution for cases of sexual harassment brought by a student against an employee, when such provision is applied to student employees. This point is discussed below under the Comment on the Application of the Regulations to Student Employees. The second is the provision that states that a recipient "may not offer an informal resolution process unless a formal complaint is filed." Complainants are often unwilling to file formal complaints, and they understandably see a formal complaint as the start of a formal process. A complainant who wants to resolve a matter informally should not be required to take the very step that triggers the formal process. Furthermore, because the informal process requires written consent of both parties prior to commencing the process, there is already a written document required to trigger the informal process, making the formal complaint unnecessary.

Recommended Changes

The Department should remove the language "and may not offer an informal resolution process unless a formal complaint is filed" from Section 106.45(b)(9). That revision would remove the formal complaint requirement, while retaining the requirement that the parties receive a written notice disclosing the allegations, among other things, prior to the informal process. The Department should also revise Section 106.45(b)(9)(iii) to only apply to non-student employees, as detailed below in the Comment on the Application of the Regulations to Student Employees.

Comment on Section 106.45(b)(10)(i)(D)

Section 106.45(b)(10)(i)(D) requires recipients to maintain records of “[a]ll materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.” It further states that “[a] recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.” This requirement that a recipient must make all training materials publicly available burdens institutions, is likely to fuel frivolous claims, and often requires institutions to disclose proprietary information of the professionals who provide their training.

This requirement is a burden to recipients, because they must upload materials every time one of their investigators, decision-makers, coordinator, or other member of the Title IX team receives training. Because trainings are often updated with new information and may therefore be different from the training another team member attended, each team member’s training must be updated separately.

The requirement also has the potential to serve as fuel for frivolous claims against institutions. A litigious individual could look for an institution’s failure to post a training and could bring an OCR complaint or lawsuit based on this technicality. Furthermore, training materials often do not encompass everything contained in a training, but instead give a bullet-point summary that could be misunderstood or even twisted when not viewed in the context of the training itself.

Finally, Title IX trainings are often provided by third-party legal professionals, and the materials used in the trainings are proprietary information of which the Department should not require disclosure. The federal government has stressed the importance of protecting intellectual property, stating, “Intellectual property protection is critical to fostering innovation. Without protection of ideas, businesses and individuals would not reap the full benefits of their inventions and would focus less on research and development.”³ This is true in the context of Title IX trainings. Rather than requiring release of intellectual property, the Department should take steps to protect such training materials in order to encourage research and development of ideas and best practices in this area. Additionally, if this requirement remains, professionals providing these trainings will likely opt to include less information in training materials in order to protect their proprietary information. This will result in Title IX investigators, adjudicators, coordinators, and other members of Title IX teams having fewer materials to which they can refer and therefore fewer resources available to help them carry out their roles.

Recommended Changes

The Department should remove the requirement for a recipient to make training materials publicly available on its website and should instead require only that institutions make the material available upon request or through litigation discovery.

³ <https://www.stopfakes.gov/article?id=Why-is-Intellectual-Property-Important>

Comment to Section 106.45(b)(10)(ii)

Section 106.45(b)(10)(ii) requires that a recipient keep extensive records for every report of sexual harassment of which it has actual knowledge. Not only does this provision require institutions to keep records of these reports, but it also requires institutions to create records. Under the provision, records that must be created and maintained include records of any actions, including any supportive measures taken in response to a report or formal complaint of sexual harassment. Recipients are also required to document the basis for its conclusion that its response was not deliberately indifferent and that it has taken measures designed to restore or preserve equal access to the recipient's educational program or activity. If a recipient does not provide a complainant supportive measures, it must document its reasons why such a response was not clearly unreasonable.

This provision requires institutions to not only document every action they take in response to every report they receive, but it also requires institutions to draft a legal defense for these actions. This provision is clearly overbroad and unnecessarily burdensome to recipient institutions.

Recommended Changes

The Department should modify Section 106.45(b)(10)(ii) to only require that a record be kept of each response required under Section 106.44(a), including the content of the report received, a description of the institution's response, and the resolution of the matter.

Comment on the Application of the Regulations to Employees

Because Title IX's protections extend to both students and employees, the current regulations were drafted to encompass and apply to reports of sexual harassment brought by and/or against employees. The regulations' failure to distinguish between complaints involving only students and those involving employees fails to recognize that there are different dynamics at play when alleged harassment involves employees. Higher education institutions need more flexibility as to their grievance procedures for complaints of sexual harassment involving employees.

First, apart from tenured faculty or unionized employees, most institutional staff are likely to be at-will employees. Under existing federal and state law, at-will employees typically are not entitled to any due process protections, let alone the extensive grievance process and live hearing requirements of the current regulations. Imposing such requirements through the regulations both exceeded the Department's regulatory authority and ran counter to long-standing and accepted tenets of at-will employment, which provide that an employee or the employer can terminate the employment relationship at any time for any lawful reason. We are aware of a situation that occurred this past year in which an at-will subordinate employee reported that an at-will supervisor employee made sexually harassing comments on several occasions. Generally in an employment context, the employer would have been able to impose discipline (including termination) very quickly. But because of the regulations' prescriptive procedures, in order to hold the employee responsible for this prohibited conduct—to which the employee admitted—the Title IX Coordinator had to sign a complaint on behalf of the reluctant complainant, the institution had to follow the formal process, which included a hearing, and the complainant was brought through a long and difficult process that the employee would have preferred to avoid. Such a result is absurd in the context of two at-will employees.

Second, the current regulations create an arbitrary layer of extra protection for an employee accused of sexual harassment that does not exist for other types of alleged employment misconduct, including greater or less serious misconduct. While a recipient institution would have to provide an employee accused of sexual harassment with all of the process detailed in the regulations prior to that individual potentially being terminated or otherwise sanctioned, such process would not be required for an employee with tardiness or attendance problems, who has stolen from the employer, or who has garden variety poor performance. There is no sensible reason for this distinction. To the contrary, given the longstanding problem of sexual harassment in our society, institutions should have the flexibility to adopt investigation and response procedures that allow them to move quickly in sanctioning an at-will employee engaging in such conduct.

Third, the current regulations have created confusion and tension in cases of sexual harassment involving tenured faculty and unionized employees. Institutions typically have grievance procedures that must be followed to revoke tenure or discipline tenured faculty in instances of misconduct, including sexual harassment. In the same vein, union agreements in place at institutions contain their own grievance procedures. The intersection of these grievance procedures and the process required by the regulations can become complex. Institutions need flexibility to decide which procedures are most fitting for different situations—depending on the individuals involved and the conduct alleged.

Finally, application of the regulations' grievance procedures to sexual harassment claims against employees' conflicts with and/or displaces well established processes under Title VII and state employment laws. Employers usually intake and investigate most claims of employee sexual harassment pursuant to the body of law and best practices developed under Title VII and state employment laws, which typically does not involve a hearing. However, under the regulations, educational employers are now required to undertake significant additional process to resolve workplace sexual harassment reports, most of which do not involve allegations of sexual assault, domestic and/or dating violence, or stalking as in the student context. Furthermore, institutions have already begun to face OCR complaints brought by employees alleging failure by the institutions to follow the regulations' added process, and lawsuits and complaints will no doubt increase, with such employees making claims of due process violations, breach of contract, reverse gender discrimination, or other alleged violations.

Despite the many downsides to applying the regulations' complaint procedures to cases involving employees, when addressing claims of sexual harassment involving both a student(s) and an employee(s), or when addressing claims arising in the context of a student's employment with an institution, the issue becomes more complex, and institutions need flexibility to use the process that is most appropriate for the situation. Certainly, there are times when application of Title IX procedures is necessary to ensure that a student receives all the process afforded under the law. However, other times, a student may benefit from a claim they have brought against an employee being favorably resolved in a more expeditious manner. Under the changes proposed below, students would still benefit from the rights and protections of the process available in the regulations, but institutions would receive the flexibility to address employee misconduct according to well established employment law and negotiated employment contracts.

Recommended Changes

One simple change to the regulations would give institutions the necessary flexibility to address sexual harassment claims involving employees in the most appropriate manner for each situation while still protecting the rights afforded to students under the regulations. The Department should preclude an employee from bringing a private right of action or OCR complaint based on a recipient's failure to follow the procedures set forth in the regulations when disciplining the employee in the context of their employment or when terminating the employee from employment.⁴ The following hypothetical situations demonstrate how this solution could play out in different situations.

At-Will Employee Files a Claim Against Another At-Will Employee

If a subordinate employee files a sexual harassment complaint against their at-will employee supervisor, under this proposed solution, an institution would have the flexibility to investigate and resolve the complaint according to well-established procedures under Title VII and state employment law. This would benefit the subordinate employee who may find the long, complicated process under Title IX, which includes an adversarial hearing involving their superior, to be intimidating. Additionally, there is no reason to afford the at-will employee supervisor extra process beyond what they would usually receive following other types of misconduct claims.

Student Files a Claim Against an At-Will Employee

Flexibility would also be beneficial in the case of a student filing a sexual harassment claim against an at-will employee. For example, if a student files a claim against an at-will employee, the institution could begin investigating the claim according to the procedures set forth in the regulations, but if in the course of the investigation the institution believes that the claim has merit and that they would, under regular circumstances terminate the at-will employee, the institution would have the option to terminate immediately without going through the long Title IX process, including an adversarial hearing that would be intimidating for the student. As in the example above, there is no reason to afford the at-will employee more process than they would usually receive following a claim of any other type of misconduct. Furthermore, under Section 106.45(b)(3)(ii), once the respondent was no longer employed by the institution, the institution would have discretion to dismiss the complaint.

If, however, the institution was unsure of the merits of the claim, it could continue with the full procedures set forth in the regulations, thereby ensuring that the student receives all rights and protections afforded them by the regulations. Likewise, if the institution was inclined to employ a sanction lesser than termination, it would continue with the full Title IX complaint procedures.

⁴ Such a preclusion should apply to all employment contexts, including that of student employees. The Department could clarify that if discipline or termination of employment would impact a student's status as a student at the institution, the student would then still have the ability to base a private right of action or an OCR complaint on the institution's failure to follow the regulations' procedures. Ultimately, institutions need to have flexibility to address employment matters according to a process that is appropriate for each situation.

Employee Files a Claim Against a Tenured Faculty Member

If an employee—whether an at-will employee or a faculty member—files a sexual harassment complaint against a tenured faculty member, the institution could process the claim in accordance with the procedures the institution deems most appropriate, whether that is the faculty handbook, the institution’s Title IX process, or both. As noted above, the intersection of these policies can be complex and institutions should have flexibility to respond to a particular circumstance appropriately.

Employee Files a Claim Against a Student

If an employee files a sexual harassment claim against a student, the institution would follow the regulations’ procedures in full in order to ensure the respondent student receives all the rights and protections afforded them under the regulations.

While these examples do not cover every possible situation involving employees, precluding employees from filing a private right of action or OCR complaint based on a recipient’s failure to follow the complaint procedures in the regulations would provide the flexibility needed for institutions to address employee misconduct in accordance with well-established employment law principles and procedures while ensuring that students’ rights are unaffected. It would benefit student and employee complainants who would not have to unnecessarily endure a long intimidating process in certain situations, while still protecting the rights of student respondents regardless of whether a claim is made against them by an employee or student. Furthermore, such a provision in the regulations would not take away whatever existing right an employee has to a general private cause of action under Title IX for claims of sex discrimination.⁵ They simply would not be able to support such a cause with the claim that the institution did not follow the procedures in the regulations.

Comment on the Application of the Regulations to Student Employees

The situations of student employees and regular employees are quite different, and the current regulations do not always differentiate between them appropriately. Specifically, Section 106.45(b)(9)(iii) states that an institution may not “offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.” Because the regulations differentiate between a student employee and a regular employee in other places (such as Section 106.44(d)), but not in Section 106.45(b)(9)(iii), institutions have had no choice but to assume that the prohibition on informal resolution of claims against employees applies to student employees as well

⁵ There is a split in the circuit courts as to whether a Title IX cause of action by an employee is preempted when the same allegations would support a claim under Title VII. See *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995) (finding that “Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions.”); accord *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 862 (7th Cir. 1996) (abrogated in part on other grounds by *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009)); but see *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 560 (3d Cir. 2017) (finding that employment discrimination claims may be brought under both Title VII and Title IX); *Ivan v. Kent State Univ.*, No. 94-4090, 1996 WL 422496, at *2 n.10 (6th Cir. July 26, 1996) (per curiam) (unpublished table decision)(same). This circuit split further demonstrates the tension that exists between Title IX and federal and state employment laws in the context of a sexual harassment claim at an educational institution that involves one or more employees. The Department can ease some of that tension by precluding a private right of action or OCR complaint by an employee based on an institution’s failure to follow the procedures set forth in the regulations.

as regular employees. While there are understandable reasons for not allowing complaints of sexual harassment brought by a student against a regular employee to be resolved informally—such as power differentials—those reasons are not present in the case of a complaint brought by a student against another student, who happens to also work for the institution. This is true even if the harassment occurs in the course of the student’s employment with the institution. Institutions have already seen instances where relatively minor violations have occurred between students, but the informal process was precluded because one or more of the students happened to work for the institution. For example, in one case student employees engaged in lower-level sexual harassment of another student employee in the context of their employment. The employees engaging in the harassment immediately admitted to and apologized for the conduct, but because of this prohibition on informal resolution for claims brought by students against employees, the institution was required to carry out a formal process including an investigation and a hearing. Without adding flexibility to the regulations, such nonsensical results will continue to occur, hurting students, burdening institutions, and wasting resources that could be better used to accomplish the goals of Title IX.

Recommended Changes

The Department should revise Section 106.45(b)(9)(iii) to only apply to non-student employees. The Department should also take care in drafting other provisions of the regulations that address employees to differentiate between student employees and regular employees when appropriate.

Comment Regarding Application Outside the United States

Section 106.8(d) and other provisions in the regulations limit application of the regulations to sex discrimination occurring against a person in the United States. Recipients often receive complaints of sexual harassment that occurs within their education program or activity, but outside of the United States, such as through study abroad programs. In such instances, the alleged harassment has the potential—and indeed the likelihood—to significantly impact the institution’s education program or activity—even those that occur in the United States. Students or employees who travel to another country for study abroad programs generally return to the institution’s U.S. location, where the impact of the alleged harassment persists. Furthermore, institutions who receive such complaints of conduct within an education program or activity, but outside of the United States, will typically still respond to them, choosing to either use the Title IX process and run the risk of violating FERPA without the benefit of the regulations’ FERPA exception, or use a separate process, creating complexity and confusion. Institutions may also face arguments from respondents that because the conduct falls outside of Title IX, the institution has no legal obligation to respond to it and therefore is exceeding its authority in doing so. Conduct occurring within a recipient’s education program or activity—such as in a recipient’s classroom or dormitory—should not be treated any differently just because that program or activity is outside of the United States.

Recommended Changes

The Department should revise the regulations by removing any language limiting their application to conduct occurring against a person in the United States.

Comment Regarding Flexibility

Following the 2020 amendments, the regulations became incredibly prescriptive, onerous, and confusing. With the exception of cases where all parties agree to informal resolution, the same long, complicated process applies whether the complaint alleges low-level sexual harassment or sexual assault, whether it involves students or employees, and whether the responding institution is a large state university or a small private college. The regulations simply do not allow the flexibility needed to respond to different situations in different ways.

Recommended Changes

In revising the regulations, the Department should afford recipients more flexibility to respond to different types of complaints in a manner that is appropriate for each situation.

We share the Department's goal of ensuring all students can safely access the higher education that is so essential to their—and our nation's—future. We stand ready to assist the Department however we can in furthering this goal, and we appreciate the opportunity to provide comments.

Sincerely,

(b)(6)



Shirley V. Hoogstra
President
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