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January 30, 2019

Secretary Betsy DeVos
c/o Brittany Bull
U.S. Department of Education
400 Maryland Ave., SW
Room 6E310
Washington, D.C. 20202

Re: **Docket ID ED-2018-OCR-0064-0001**

Dear Secretary DeVos:

On behalf of the higher education associations listed below, I write to provide comments in response to the Department's November 29, 2018, notice of proposed rulemaking ("NPRM" or "proposed rule") amending regulations implementing Title IX of the Education Amendments of 1972 ("Title IX"), Docket ID ED-2018-OCR-0064.

INTRODUCTION

Colleges and universities have a clear, unambiguous responsibility under Title IX to respond to allegations of sexual harassment, including sexual assault.[1] Equally important to their compliance obligations, higher education institutions want to do the right thing. Colleges and universities are committed to upholding civil rights and to creating and maintaining campus environments that are safe, supportive, and responsive for all students so that they can benefit from the widest possible array of educational opportunities.[2]

[1] Our use of the term "sexual harassment" should be read to encompass both sexual harassment and sexual assault. Throughout the document, we specifically reference "sexual assault" when making points or raising concerns specific to those cases.

[2] Our comments presume the NPRM is intended to address primarily sexual harassment, and specifically sexual assault, involving students because sexual harassment in the student context has been a significant focus of colleges, universities, and policymakers in recent years. The NPRM's justifications and reasoning focus mainly on sexual harassment in the context of students, as well. For example, the NPRM's "Purpose of this regulatory action" section makes no reference to employees and cites specifically "the rights of … ***students*** to access education free from sex discrimination" (emphasis added). As we discuss below, we believe the NPRM's provisions should be limited to matters involving student-respondents. Applying NPRM processes to employee-respondents will prove

In recent years, institutions have continued to make important strides in addressing sexual assault on campus, and they have invested significant resources in their commitment to this goal. Expanded and innovative sexual assault awareness and prevention programming is one important example. Educational courses and training are the most critical component of prevention, ideally starting during the K-12 years and continuing in college, with consent and bystander intervention education being core elements of such initiatives.[3] Improved disciplinary processes and enhanced training for campus staff and community members are other examples of ways that institutions are addressing this issue.

Unfortunately, by their very nature, sexual assault cases can be extremely difficult to resolve. They often involve differing accounts about what happened; few, if any, witnesses; little or no physical evidence; conduct and recollections impaired by alcohol use; and, perhaps, a significant time lapse between the event and the filing of a report. For these and other reasons, law enforcement authorities can and often do decline to pursue these cases through the criminal justice system. Title IX, as well as campus disciplinary codes, requires institutions to act. This means that federal regulations that set forth a framework for institutions and all affected parties are critically important.

The overarching goal of our comments is to (1) note where we believe the proposed rule would help institutions better support survivors,[4] have processes that are fair and equitable to both parties, and understand the responsibilities Title IX imposes on institutions; and (2) identify and describe where changes are needed to help achieve these objectives. Our comments align with what we have said since the Obama administration issued its Dear Colleague Letter in 2011 and are consistent with the goals of the NPRM.

Most importantly, we ask that the final rule reflect this fundamental premise: Colleges and universities are educational institutions, not arms of or alternatives

unworkable and be at odds with employer obligations under Title VII of the Civil Rights Act of 1964, state laws, and sound human resource policies.

[3] We urge the Department to dedicate resources to helping support institutions with these preventative and educational efforts as a way to make significant progress on these issues in the long term.

[4] Our use of the terms “survivor” (rather than “victim” or “accuser”) and “accused” is not intended to suggest any particular characterization of the veracity of claims brought by those who report allegations of sexual misconduct. Where appropriate, we also use the terms “complainant” and “respondent.”

to the criminal justice system. They should not be expected to mimic civil court systems with trial-like forums that enable one person to seek a quasi-judicial judgment against another individual. Attempts to graft formal legal procedures onto internal college and university disciplinary systems conflict with a longstanding body of case law that distinguishes college disciplinary processes from judicial systems.

Federal courts have repeatedly questioned the assumption that colleges should act as judicial bodies. As the court observed in *Gomes v. University of Maine System,* "A university is not a court of law, and it is neither practical nor desirable it be one."[5]

The presumption underlying the NPRM that every institution can and should provide a court-like forum for one individual to press a case against another one also is problematic and antithetical to the educational environment. Campus disciplinary hearings are a means of institutionally reviewing the conduct of a student in light of institutional expectations, and taking appropriate action within the context of the educational setting. It is not the duty of a victimized student or that student's attorney to prove that a fellow student violated campus rules, or even to prove any part of the issues in controversy, including credibility. It is the institution's responsibility. The Department should respect and preserve the ability of colleges and universities to sensibly review and discipline conduct by their students.[6]

There is no easy or quick solution to the very serious problem of sexual harassment, on campuses or elsewhere in our society. Colleges and universities

[5] 365 F.Supp.2d 6, 16 (D. Me. 2005). *See also*, *Schaer v. Brandeis Univ.*, 735 N.E.2nd 373 (Mass. 2000)(in private college disciplinary hearing for sexual assault, "[a] university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts"); *Fellheimer v. Middlebury College*, 869 F.Supp. 238, 243 (D. Vt. 1994) (rejecting plaintiff's claim that "the College promised to provide students with procedural protections equivalent to those required under Federal and State constitutions" and noting that "[s]ince the College lacks full judicial authority, such as the power to subpoena or place witnesses under oath, a student's due process rights cannot be coextensive with or identical to the rights afforded in a civil or criminal legal proceeding.").

[6] Certainly, the Department should expect that all campus community members have a clearly identified and accessible means of filing a grievance against an institution when someone perceives that any aspect of the institution's response to a sexual harassment allegation, including its disciplinary process, negatively impacts one's Title IX rights. However, these Title IX grievance procedures should not be confused with, or supplant, campus disciplinary processes. By using the term "grievance" to describe a required student versus student court-like hearing, the NPRM perpetuates that confusion.

share the Department's goal of having campus disciplinary processes that are clearly understood, based on objective evaluation of relevant facts, consistently applied, and fair to both parties. We hope these regulations will clarify federal expectations of institutions regarding their Title IX responsibilities. However, meaningful and effective federal policies require that institutions maintain the ability to handle sexual harassment cases carefully, effectively, compassionately, and equitably in the context in which these cases arise, and using reasoned judgment. The fair and equitable resolution of sexual harassment cases is rarely accomplished through a one-size-fits-all, factory-like process. Institutions require and should be granted the flexibility to treat different cases differently, adjusting their approaches as needed to address the distinct circumstances of individual cases, so long as principles of accuracy, equity, and fairness are upheld.

The government should recognize when schools are acting in good faith to comply with Title IX. The Department of Education and higher education institutions must continue to work together on preventing campus sexual harassment, including sexual assault. And institutions seek a clear regulatory framework that sets out their responsibilities under Title IX and allows them to fairly, effectively, and compassionately investigate and resolve allegations of sexual harassment on their campuses. When institutions fail to live up to their obligations under Title IX, and clearly err, they should be held accountable. But when institutions act in good faith, after a careful and deliberative process, they should not be second-guessed by the Department.

In some ways, we believe that these proposed regulations will help institutions more effectively address sexual harassment. In other important respects, they are a step in the wrong direction. There are also several areas in the proposed regulations where the Department's intention is confusing or internally inconsistent and clarification is essential before the regulations are finalized.

The three sections below detail where we believe the proposed rules are helpful, where we have major concerns, and where clarification is necessary.

Federal policy initiatives, especially under Title IX, have an important impact on campuses. But Title IX is not the only source of law, guidance, and philosophy driving the efforts by higher education institutions: A wide array of other federal

and state[7] laws, judicial precedent, policies and commitments, and institutional values shape the nature and extent of our responses. Federal policy needs to give institutions enough flexibility to ensure that all legal and other obligations—no matter their source—are properly addressed when resolving sexual harassment allegations.

Provisions of the NPRM That Will Help Institutions Address Sexual Harassment

Several provisions in the NPRM would advance college and university efforts to support the survivor, enhance fairness for both parties, and clarify federal expectations of institutions. Some of these provisions would accomplish more than one of these goals.

1. The NPRM would provide survivors more flexibility to determine how they wish to proceed—for example, through formal Title IX grievance procedures, supportive measures, or informal resolution, including mediation. The proposed rule clarifies that supportive measures can be provided even if the survivor decides not to file a formal Title IX complaint. While many, if not most, institutions are already providing support under these circumstances, the clarification is welcome and helpful. The NPRM also makes clear that mediation as well as other forms of alternative resolution, which were prohibited in certain circumstances under prior guidance, may be used, provided both parties make an informed and voluntary decision to pursue these options, and doing so is appropriate for the particular case at hand.

2. The NPRM also clarifies that an institution may immediately remove a respondent from campus if it determines an immediate threat to health or safety exists. It is critical that institutions have the ability to take immediate action when individuals pose a serious risk to members of the campus

[7] In several places, our comments raise concerns about the proposed rule's interaction with existing state laws addressing sexual harassment and assault, and the potential for confusion or conflicts between these differing legal obligations. Similar concerns may also be present in the case of tribal laws on sexual harassment and assault occurring on tribal lands. When crafting a final rule, we urge the Department to pay careful attention to the unique and important legal issues and obligations affecting tribal colleges and the application of tribal criminal and civil laws.

community. Institutional obligations in this regard go well beyond the requirements of Title IX.

3. The proposed regulations eliminate the arbitrary and inflexible "60-day rule" from prior guidance and replace it with a requirement that institutions complete the grievance process within "a reasonably prompt timeframe." Institutions should resolve Title IX allegations promptly, but not at the expense of a thorough and equitable process. Evidence that could be determinative should not be excluded from consideration simply because it became available outside an arbitrary timeframe. In addition, eliminating the "60-day" rule will provide institutions additional flexibility to work more cooperatively with law enforcement agencies that may be conducting a parallel criminal investigation.

   We strongly support the removal of the "60-day" rule, but caution that the highly detailed and legalistic requirements envisioned by the NPRM, as detailed elsewhere in these comments, may undermine the desire for a prompt resolution. Just as we should not favor speed over a complete and thorough determination, neither should we create a process-heavy system that prevents cases from being resolved in a reasonable amount of time. In short, we are concerned that the procedures set forth in the NPRM may unreasonably delay the resolution of these cases.

4. The NPRM requires an objective evaluation of evidence. This underscores what should always be clear: there can be no "thumb on the scale" in favor of one party or the other. We support language in the NPRM that presumptions about credibility may not be based on one's status as a complainant, respondent, or witness.

5. The proposed rule also requires institutions to provide both parties with reasonable time to prepare for any interview or disciplinary hearing. Most institutions already do this as a matter of course, but it is important to have the point clarified. Providing a reasonable amount of time to prepare in advance of an interview or hearing is critical to ensuring a fair process for both parties. No respondent facing a disciplinary hearing that could have serious consequences should be subjected to a hasty investigation or

resolution, and complainants also should be afforded sufficient time to prepare themselves for important steps in the process.

6. The NPRM explicitly allows for an appeal of a decision by either party, if appeals are permitted. Such a provision is consistent with Clery Act regulations on the same topic. An opportunity to appeal should be provided to both complainants and respondents and we appreciate the Department's decision to leave institutions the flexibility to determine whether appeals will be offered.

7. The "actual knowledge" language makes clear the circumstances under which Title IX requires institutions to take action. We believe this is helpful. Clarity about when an institution is required to act by Title IX is important. However, institutions will also continue to act upon sexual harassment outside of or beyond the regulation's specific requirements. The regulations should be equally clear that they do not prohibit or inhibit such institutional response.

8. Finally, understanding what the Department will consider to be sexual harassment for purposes of Title IX is helpful. Recognizing that many institutions consider, define, and discipline sexual harassment more broadly, our acceptance of the Department including a definition in the proposed rule is predicated on a final rule that assures institutions have clear and unambiguous authority to address sexual harassment that violates their own codes of conduct even if it falls outside the Title IX regulatory definition.

Provisions of the NPRM That Undermine Institutions' Efforts to Address Sexual Harassment

The proposed rule contains a number of provisions that raise serious concerns because they would undermine our ability to address sexual harassment on campus and to ensure prompt, equitable, and fundamentally fair resolutions of such allegations.

We focus in this section on the issues of greatest concern to our members. We also ask the Department to carefully consider the comments submitted by

individual colleges and universities and higher education associations, which will provide valuable perspectives on these and other issues not addressed in our letter.

A number of our specific concerns, such as the requirement for a live hearing with cross-examination or the mandate giving both parties the absolute right to inspect "all evidence . . . directly related" to the allegations, vividly illustrate our overarching concern that the NPRM imposes highly legalistic, court-like processes that conflict with the fundamental educational missions of our institutions.

We repeat: Colleges and universities are not law enforcement agencies or courts. Unfortunately, the NPRM consistently relies on formal legal procedures and concepts, and imports courtroom terminology and procedures, to impose an approach that all schools—large and small, public and private—must follow, even if these procedures, concepts, and terms are wildly inappropriate and infeasible in an educational setting. The proposed rule assumes that institutions are a reasonable substitute for our criminal and civil legal system. They are not. As the Department considers our specific concerns about the NPRM discussed below, we urge it to correct this overarching and fundamentally flawed premise.

A legalistic, prescriptive "one-size-fits-all" judicial-like process will not work well on a college campus. Moreover, the imposition of such legalistic standards in the Title IX context is certain to have unintended and negative consequences for other campus disciplinary proceedings. Students may ask, quite reasonably, why a race discrimination case is not subject to the same court-like disciplinary procedures as a Title IX sexual harassment case. Or why a sexual assault involving two students that occurred in privately owned, off-campus housing is subject to a different set of procedures than a sexual assault that occurred in an on-campus residence hall.

Imposing a legalistic process will increase significantly the amount of time that will be required to conduct a Title IX investigation and make a determination of responsibility. Based on the process outlined by the NPRM, resolutions of sexual harassment and particularly campus sexual assault could easily take months and carry over from one semester or academic year to the next, leaving uncertainty and wariness for the parties and perhaps for the campus community. Indeed, because most college students are in two- or four-year programs, a significant number of parties or witnesses may graduate or leave before the investigation

and determination are complete, denying the parties the benefit of a fair and timely resolution of the complaint and in some cases leaving behind the ills that Title IX is meant to resolve. In short, while we oppose arbitrary 60-day deadlines, unreasonably protracted processes in response to a sexual assault allegation are in no one's interest.[8]

As an alternative to the highly prescriptive process set forth in the NPRM, we encourage the Department to consider adopting a more flexible framework within which institutions could develop policies and procedures that are adapted to the specific needs of their campus communities. For example, the Department's regulations that address student disciplinary proceedings in cases of sexual assault and certain other offenses under the Clery Act require proceedings that are "prompt, fair and impartial" and establish certain procedural safeguards related to notice, timeframe, and conduct of proceedings. (*See* 34 CFR 668.46(k).) We believe adopting the Clery Act framework or another similar set of expectations for Title IX complaints would provide appropriate flexibility to institutions while making clear to institutions and students alike that the Department takes seriously its obligations to enforce civil rights protections on campus.

1. <u>The NPRM inappropriately legalizes campus disciplinary proceedings on sexual harassment by requiring a "live hearing" with direct cross-examination by the parties' advisors</u>**.**

   The strongest example of how the NPRM legalizes campus disciplinary hearings on sexual harassment is the requirement for a "live hearing" with direct cross-examination by the parties' advisors. Such an approach–which will subject students to highly contentious, hostile, emotionally draining direct cross-examination–has obvious drawbacks.

   Under the NPRM, when a student lacks an advisor, the institution must provide one who is "aligned" with that party. If one student hires an

[8] Given the timeframes specified in the NPRM of at least 10 days for the parties' response to "directly related" evidence "obtained as part of the investigation," then at least another 10 days for an investigative report to be provided to the parties pre-hearing for their review and response, and the NPRM's detailed requirements for a written determination at the conclusion of a live hearing, the Department is virtually assuring that institutions will take longer to resolve these matters than had been the case previously. Applying the NPRM process requirements, no resolution will be likely until at least 30 additional days after the completion of any investigation.

aggressive litigator for this purpose, schools will be under great pressure to ensure that the other individual's "advisor" is comparable in experience and training. Rather than campus officials advising students in a disciplinary proceeding, a courtroom-like "trial" atmosphere will develop, with both students represented by counsel, potentially provided at the institution's expense, who appear before campus decision makers, who are not likely to be attorneys. As a result, an institution's in-house or outside counsel will also have to become immersed in the matter, and likely be present at the "trial" to provide advice on behalf of the institution to ensure that all required processes are properly followed.

We foresee the rapid emergence and expansion of a cottage industry of advisors who will bring an adversarial, legal orientation to campus disciplinary hearings. Because the NPRM requires the exclusion of any statement by a party or witness who declines to answer questions,[9] we expect extraordinarily aggressive posturing and questioning by attorneys or other advisors (including emotionally invested parents) in an attempt to intimidate the survivor, the accused, or witnesses. This dynamic increases the risk that cross-examination will re-traumatize those survivors who are willing to pursue a formal complaint and may actually discourage some survivors from reporting these incidents in the first place. It would also likely cause witnesses–regardless of whether their testimony might be interpreted as supporting the complainant or the respondent–to refuse to participate in the hearing.

In addition, the NPRM expects campus officials overseeing disciplinary hearings to assume the role of a skilled trial judge and to make nuanced decisions about what questions are permitted during cross-examination and what evidence will be admitted. It also requires decision makers to provide an on-the-spot explanation for any decision to exclude a question or evidence–something not even judges are required to do in a court of law. To hold college administrators in student conduct proceedings to a standard that is higher than that required of judges in courts of law is nonsensical. College officials who conduct campus disciplinary hearings are

[9] Obviously, colleges and universities do not have the power to force or "subpoena" witnesses to participate in their hearings. We cannot think of another example of a decision-making process in which information cannot be considered unless the source of it submits to live cross-examination, yet the decision maker has no practical ability to require that person to participate in the process.

unlikely to have, and should not be expected to have, a legal or judicial background that would enable them to make evidentiary determinations such as whether the questions comply with the complex requirements of rape shield laws outlined in the proposed rule. All of this will force some institutions to hire, at significant expense, retired judges and experienced attorneys to preside over the required hearings, and this cost will be particularly burdensome for smaller, less resourced institutions.

There are ways to provide a thorough and fair process for determining the facts of a matter and a means for the parties to test the credibility of the other party and any witnesses that do not involve a "live hearing" with cross-examination. For example, many institutions currently utilize procedures whereby neutral, experienced investigators interview the parties and witnesses, pose questions that are suggested by the parties (providing an effective substitute for direct cross-examination), and make detailed factual findings for consideration by other individuals who serve as decision makers. Other institutions allow parties to submit questions and follow up questions directly to the decision maker, who then poses relevant questions to the witness.[10]

We believe that approaches like these provide reasonable ways to accomplish the goals that the Department seeks and would, in many cases, result in better, more accurate credibility determinations. This is particularly true for the teenagers and young adults who will be parties to and witnesses in these highly emotionally charged and stressful cases and who need time to process questions and formulate their responses–time that a live hearing with cross-examination would not provide.

[10] In reviewing campus student proceedings, federal courts have recently underscored that cross-examination is not required to achieve fairness. *See, e.g., Xiaolu Peter Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 465 (S.D.N.Y. 2015) (concluding that under Title IX "any claim of unfairness due to a requirement that questions be asked through the panel Chair fails as a matter of law. Courts have found that similar policies are procedurally adequate."). *See also Doe v. Belmont Univ.*, 334 F. Supp. 3d 877, 893 (M.D. Tenn. 2018) (finding that cross-examination was not required at private universities and noting that opportunity for parties to review and respond to an investigative report, written statements, and other evidence provided adequate means for respondent to challenge veracity of complainant's claims); *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242 (D. Mass. 2018) (finding that even at a public institution, to which Constitutional due process principles apply, cross-examination is not "essential to due process in the context of school discipline hearings"); *Doe v. W. New England Univ.*, 228 F. Supp. 3d 154, 184 (D. Mass. 2017) (finding that cross-examination was not required and proceedings were not unfair when respondent "was present at the hearing with his counsel and was permitted to direct questions to" members of the decision-making panel).

The Department concedes that the use of written questions is a reasonable and sufficient alternative for testing the credibility of witnesses: the NPRM explicitly permits this approach in the elementary and secondary school context. In addition to college freshman who have yet to turn 18 years old, there are a significant number of high school-aged students who enroll in colleges and universities through dual enrollment programs. At some community colleges, high school students may make up to 20-30 percent of the total enrolled student body. Given that some students enrolled in college may be the same age or younger than many high school students, we see no reason why the Department should not permit colleges and universities to use an approach similar to the one it outlines for the K-12 setting.

Moreover, there are foreseeable circumstances in which a requirement of a live hearing with cross-examination would violate procedural fairness for respondents. Attorneys will often advise respondent clients not to testify or subject themselves to cross-examination for fear that their statements may be admitted in a future criminal or civil proceeding. Since the decision maker would be prohibited from considering any statements of the respondent who, for important reasons, is not willing to have their testimony cross-examined, the respondent is essentially being silenced. If the complainant testifies, is cross-examined, and is credible, the decision maker will likely be all but required to make a finding of responsibility against the respondent. Such an approach seems contrary to the respondent's interest in a fair process. This is one of the reasons why alternative models that do not include live cross-examination, which are already successfully employed by many institutions, are often a better approach and actually can be significantly more procedurally fair to respondents.

To be clear, we strongly support resolution procedures that are clearly understood, transparent, fair, and even-handed to both parties. However, we seek requirements that do not have the clear disadvantages of a "live hearing" with cross-examination in a judicial-like forum.

RECOMMENDATION: The Department should remove the mandate for a "live hearing" and should not require that a resolution process include direct cross-examination by the parties' advisors. The Department should provide flexibility to institutions to choose a live hearing or to use other non-hearing models that permit each party to test the credibility of the other party and witnesses. Second, as an alternative to mandatory cross-examination, the final rule should permit institutions to use a process whereby parties submit questions, follow up questions, and responses in writing to the decision-maker.

2. <u>The NPRM's requirement that institutions give both parties the absolute right to inspect "any evidence . . . directly related" to the allegations will cause more harm than good.</u>

   The provision giving both parties the absolute right to inspect "any evidence . . . directly related" to the allegations would further legalize the proceedings and, as drafted, exceed what even the judicial system demands. Such a broad standard–calling for the sharing of "any" evidence–can lead to confusion, acrimony, and further litigation.

   For example, the requirement to provide "any evidence . . . directly related" would appear to include confidential and sensitive information, such as medical information. As written, the proposed rule does not grant institutions the authority to redact portions of documents necessary to protect confidential information, such as tangential but sensitive medical information that was collected and not used, from disclosure. The Department's attempt to control the downloading or copying of information (discussed below) suggests that the Department realizes that sensitive information should be protected.

   The NPRM requires institutions to give the parties and their advisors the evidence subject to inspection and review "in an electronic format, such as a file sharing platform," that restricts downloading or copying. It is not practical, reasonable, or desirable for the Department to dictate the precise way that institutions make evidence available to the parties and their advisors. There are likely to be significant costs that the Department has not considered associated with electronic file platforms and, most

importantly, we are unaware of methods that would preclude copying as a practical matter. Indeed, anyone with an iPhone can easily photograph a document or record a document displayed on a file-sharing platform, even if the platform itself restricts copying. Moreover, new technologies may be developed that would help in managing these challenges, which the proposed rule could inadvertently preclude. We understand the Department's desire to help provide this information to both parties and their advisors, but we urge the Department to avoid specifying the means by which this is to be accomplished.

RECOMMENDATION: Both parties should have access to information that is directly related to the allegations at issue, but we believe that appropriate limitations should be imposed. Institutions should have the authority to redact confidential and other sensitive information, such as medical or counseling records. Under existing law, the Department's regulations implementing the Clery Act require an institution in cases of sexual assault allegations to provide both parties with "timely and equal access . . . to any information that will be used during informal and formal disciplinary meetings and hearings." (34 CFR 668.46 (k)(3)(i) (B)(3)). We think this provides an appropriate framework to ensure that both parties have an opportunity to inspect, review, and respond to the relevant evidence, and we recommend that the Department adopt the same standard under Title IX. We also ask the Department to provide institutions with flexibility to determine the precise information sharing method they will use.

3. <u>The NPRM's use of the phrase "due process" is inappropriate and likely to cause confusion.</u>

The campus disciplinary process for sexual harassment is further legalized by the use of the words "due process" in more than 30 places in the NPRM. "Due process" is most commonly associated with protections provided by law enforcement and the judicial system for criminal defendants where an accused individual's life or liberty is at risk. Indeed, Black's Law Dictionary defines "due process" in the context of criminal law: "Embodied in the due process concept are *the basic rights of a defendant in criminal proceedings and the requisites for a fair trial*"[11] (emphasis added). While public

[11] "Due Process of Law," Black's Law Dictionary, Sixth Ed. (p. 500).

institutions are required to provide certain due process protections under the Fourteenth amendment to the U.S. Constitution, the type and amount of process required of colleges in these situations is far less than the process due in a criminal trial.[12] Campus disciplinary hearings are neither "criminal proceedings," nor "trials."

Words matter. We believe that the repeated use of the phrase "due process" encourages a faulty perception that Title IX requires that federal criminal trial-like constitutional due process protections must be provided on all campuses, public and private, for all Title IX sexual harassment proceedings, and is likely to lead to substantially more civil litigation.

RECOMMENDATION: We strongly support a process that is fair to both respondents and complainants, that is carefully designed to be even-handed and that does not disadvantage either party. However, we ask the Department to replace the phrase "due process" with a phrase like "fair process" that better captures the evenhandedness and equitable treatment that the Department and institutions both seek.

If the Department insists upon using the phrase "due process," we ask that the final rule clarify that this use is not signaling an expectation that all recipients, both public and private, will be required to observe judicial protections given to criminal defendants, or that private institutions will be subject to the constitutional due process requirements that apply to student discipline cases at public colleges and universities. The Department should also explicitly state that the "due process" protections it interprets Title IX as requiring are limited to those specified in the regulations.

4. <u>The NPRM appears to force an institution to "dismiss" a complaint that falls outside of Title IX, even if that conduct would violate campus codes of conduct. The NPRM also appears to prevent an institution from taking disciplinary action without a formal Title IX complaint, even if the alleged conduct would violate Title IX and campus codes of conduct.</u>

[12] *E.g.*, <u>*Marshall v. Indiana Univ.*</u>, 170 F. Supp. 3d 1201, 1209 (S.D. Ind. 2016) ("[A] disciplinary hearing in an educational setting is neither a criminal or quasi-criminal hearing. . . . As such, the rights afforded to criminal defendants in a criminal trial do not apply.").

In order to maintain a safe and welcoming campus environment, colleges and universities must have clear and unambiguous authority to investigate and resolve sexual harassment, sexual assault, and other sexual misconduct allegations even if the conduct as alleged does not fall within the NPRM's definition of sexual harassment, or even if the complainant is unwilling to file a formal complaint. While institutions have this authority at present, it is unclear from the NPRM whether they will have this authority in the future.

Under the proposed rule, where the conduct alleged by the complainant would not meet the Title IX definition of sexual harassment, even if proved, or did not occur within the institution's program or activity, the institution "*must dismiss* the formal complaint with regard to that conduct" (emphasis added) (p. 61498). This language implies that an institution is prohibited from moving forward under its own campus disciplinary procedures to address a violation of its own code of conduct for sexual misconduct if that conduct falls outside the boundaries of the proposed rule's definition. We believe this is a serious mistake.

The NPRM's preamble actually provides an alternative view, stating that an institution "remains free to respond to conduct that does not meet the Title IX definition of sexual harassment or that did not occur within the recipient's program or activity . . . but such decisions are left to the recipient's discretion . . . ." (p. 61475). The preamble also notes, "nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding" for situations involving a report of "sexual harassment that occurs outside the recipient's education program or activity (or as to conduct that harms a person located outside the United States, such as a student participating in a study abroad program)" (p. 61468).

There are situations where allegations of sexual misconduct occur that violate campus values and codes of conduct but fall outside the boundaries of Title IX as defined in the NPRM. For example, consider a situation where an institution receives a report of a sexual assault involving two students that occurs in an off-campus house owned by a fraternity that is not recognized or sponsored by the institution. While the location of the

assault may place it outside of an institution's "program or activity," the alleged conduct may well be a serious violation of the institution's student code of conduct that the school is compelled to address in order to maintain a safe campus environment.

Likewise, the NPRM could be read to mean that a sexual assault that occurs on a school-sponsored study abroad program would not be covered by Title IX because it occurred to "a person outside the United States." This may be conduct an institution wants to prohibit through its conduct code in order to ensure the safety of its students while participating in a school-sponsored activity. We believe that when sexual misconduct violates campus community standards or codes of conduct, institutions must continue to have the right to pursue these matters in the manner institutions deem appropriate, including by instituting disciplinary procedures, regardless of whether the incident falls within the scope of Title IX.

Furthermore, under the proposed rule, a formal written, signed complaint is needed in order for the institution to initiate the NPRM's grievance procedures. Because a survivor may be unwilling to file a complaint, there may be circumstances where the institution is aware of conduct that, if it occurred as alleged, would fall within the scope of Title IX, but where the institution would be unable to initiate a Title IX grievance procedure. Obviously, in the case of a single report, the NPRM's multiple-reports requirement would not be met. While the institution may not be able to proceed with a Title IX grievance procedure in this circumstance, it should be permitted to investigate and discipline under the institution's code of conduct. The institution should also be permitted to take appropriate actions in response—for example, by increasing monitoring, supervision, or security, or providing training, education, or counseling.

RECOMMENDATION: We strongly recommend the Department drop the "must dismiss" language from the text of the rule and include language in the final rule that explicitly affirms the right of schools to address misconduct that falls outside the scope of Title IX. We believe the view expressed in the preamble is correct and is of such overwhelming

significance that it should be incorporated explicitly in the text of the final rule.

We also recommend that the Department make explicit in the final rule that an institution is permitted under Title IX to take actions to protect the campus community in response to reports of sexual harassment, even if no formal complaint is made that triggers the NPRM's formal grievance procedures.

5. <u>The proposed rule will effectively result in a single federally mandated evidentiary standard of proof across all campus disciplinary hearings.</u>

We are deeply concerned that, for many institutions, the NPRM will have the effect of establishing the evidentiary standard of proof used in all campus disciplinary hearings. The NPRM purports to offer institutions a choice: they may use either "preponderance of evidence" or "clear and convincing evidence" as the standard of proof in Title IX formal grievance proceedings. However, under the proposed rule, an institution that selects the preponderance of evidence standard must adopt it in all other campus proceedings that carry the same disciplinary penalty. Moreover, it must use the same standard for Title IX complaints involving students as it uses for Title IX complaints involving employees.

Practically, this means that collective bargaining agreements, institutional governance decisions, as well as state-law-regulated and non-Title IX disciplinary policies and procedures will need to conform to this Title IX regulatory mandate if the institution elects to use the preponderance of evidence standard for student-on-student sexual harassment cases, but currently uses clear and convincing for even a small number of other matters. Given the impracticality of such a global change across myriad campus matters, constituencies, and processes, the NPRM will force many schools to use the clear and convincing evidence standard for Title IX cases, making this a *de facto* federally prescribed standard.[13] This heavy-handed federal regulatory solution is inconsistent with the administration's promise

[13] This NPRM as a practical matter will preclude some campuses from using the preponderance of evidence standard for Title IX cases (even if they are already using that standard for all student conduct matters) and will force many schools to use the clear and convincing evidence standard for Title IX cases.

to reduce the amount of one-size-fits-all federal regulation imposed from Washington, DC.

Moreover, we believe this rule exceeds the Department's statutory authority because, as a practical effect, it would dictate the standard of proof used in non-Title IX disciplinary proceedings, such as academic dishonesty proceedings, where the Title IX statute provides no such authority.

RECOMMENDATION: The Department should not micromanage campus disciplinary proceedings, nor should it mandate a one-size-fits-all federal standard. Institutions should have the flexibility to choose between the preponderance of evidence and clear and convincing standards in Title IX grievance proceedings regardless of the standard used in other cases. The requirement to synchronize the standard with other types of institutional disciplinary proceedings should be dropped.

6. <u>The procedures outlined in the NPRM should be focused on sexual harassment allegations involving student-respondents. They should not apply to sexual harassment allegations involving employee-respondents</u>.

Directed question three indicates that the Department is considering whether the final regulations should apply to allegations of sexual harassment involving employees. The Department asks for comments about whether any parts of the rule would prove "unworkable" in the context of sexual harassment by employees and whether there are any "unique circumstances" that apply to processes involving employees that the Department should consider.

While institutions clearly have responsibilities under Title IX to address sexual harassment involving employees, applying the NPRM's grievance procedures in the employee-respondent context is both unwise and unworkable. It would require an unnecessary, costly, complex, time-consuming, and wholesale redesign of campus human resources functions.[14] For non-unionized, at-will employees, these requirements

[14] The Department should proceed cautiously when considering regulatory changes that would affect the personnel of colleges and universities. Congress was concerned about the potential for overreach when it created

would require a massive re-evaluation of how such cases have been handled, successfully, for decades, and would impose undue regulatory burdens on higher education institutions that are not imposed on any other employers. For unionized employees, disciplinary processes are often written into existing collective bargaining agreements, which may explicitly stipulate that they cannot be re-bargained for a specific period of time. At many institutions, there are multiple bargaining units, each with their own agreements. Any changes to collective bargaining agreements will also be subject to National Labor Relations Act and state labor law requirements, making the process for changing those agreements slow and arduous.

In addition, for both unionized and non-unionized faculty, disciplinary proceedings are conducted in a manner that aligns with faculty handbooks that have been developed (and often negotiated) through shared governance and in accordance with principles of academic freedom and tenure. In these cases, campus administrators have limited ability to implement unilateral changes, and attempts to do so can be expected to undermine other important institutional undertakings where administrator-faculty cooperation and respect are crucial, and may lead to legal action. Certainly, these processes cannot be changed solely at the will of an institution's administration or in a limited period of time.

There are many other laws in addition to Title IX that address sexual harassment involving employees–most notably Title VII of the Civil Rights Act of 1964 but also numerous state and local laws. The overlapping but different requirements imposed by the proposed rule, Title VII[15], and state and local anti-discrimination laws would cause confusion and create

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the Department in 1979 and included in the General Education Provisions Act a clear prohibition that the Department may not exercise any "direction, supervision, or control over the . . . administration, or personnel of any educational institution . . . ."

[15] In order to meet the second prong of the NPRM's definition of sexual harassment, conduct would need to be "severe, pervasive ***and*** objectively offensive" while under Title VII, conduct that is "severe ***or*** pervasive" is actionable (emphasis added). The proposed Title IX regulation's definition of "harassment" does not recognize the distinction between a hostile environment and harassing conduct that may create or lead to a hostile environment. Specifically, Title VII requires employers to address sexual harassment, defined as unwelcome conduct that is based on sex, ***before*** that conduct creates a hostile environment for an employer's employees. If an employer fails to cure harassment before the harassment creates a hostile environment, the employer has violated Title VII and is liable to the employee for the unlawful hostile environment. Yet the proposed regulations currently provide that institutions "must dismiss" allegations that do not meet the new Title IX definition of harassment. The Department should make clear that the NPRM's grievance procedures do not apply in the employment context.

conflicting and unworkable obligations for institutions that are committed to complying with all applicable laws. This could easily create a legal free-for-all as courts step in to sort out the ambiguities that will ensue. The Department has not identified any problem with allowing existing laws and regulations, particularly Title VII, to guide institutional attention to faculty and staff conduct. Further, in recognition of the difference in an educational institution's relationship with its employees and its students, the NPRM makes clear that nothing precludes higher education employers from placing non-student employees on administrative leave during an investigation.

We note that much of the public discussion about ensuring fair processes for respondents, and indeed the Department's own preamble, focuses on concerns about student-respondents and whether they are at a unique disadvantage in campus disciplinary proceedings. The Department has failed to identify the problem it is seeking to remedy by extending the NPRM's grievance procedures to faculty and staff.

RECOMMENDATION: As we stated above, institutions clearly have responsibilities under Title IX to address sexual harassment involving employees. However, we urge the Department to clarify that the NPRM's grievance procedures would apply solely to cases involving alleged sexual harassment by student-respondents and would not apply to alleged sexual harassment by employee-respondents.

7. <u>The NPRM requires that the formal "notice of allegations" explicitly state that the respondent is "presumed not responsible."</u>

   As in other cases of campus discipline (for example allegations of underage drinking by students or plagiarism) respondents are presumed not responsible unless and until a thorough and fair disciplinary process determines them responsible for violations of the institution's policy. While some campuses already provide statements similar to that included in the NPRM in the specific charge notices they give to an accused student, other colleges would be uncomfortable with including a federally mandated statement in the institution's notice indicating a "presumption" in favor of one party. We believe that if the Department seeks to impose the inclusion

of a federally mandated statement along these lines, a more neutral articulation is appropriate.

RECOMMENDATION: We recommend that the Department remove this requirement. If the Department believes a federal mandate is necessary, we ask that each institution be allowed to choose the wording that communicates that outcomes are not prejudged and parties will be treated equally and fairly. For example, "this notice of allegations does not imply any judgment about responsibility or lack of responsibility on behalf of either party" would, we believe, be less likely to sow uncertainty for survivors or to cause confusion than the statement that the Department has proposed.

8. <u>The proposed rule would significantly increase regulatory burden, redirecting time and resources away from efforts to support students.</u>

The thicket of requirements in the NPRM will significantly increase the number and complexity of regulations and the associated costs imposed on colleges and universities. We have identified more than 50 separately identifiable administrative requirements contained in the NPRM, which we have attached as Appendix 1. Even by the standards of the Department of Education's often-detailed approach to regulation, this represents an extensive and labor-intensive set of prerequisites. As the Department itself notes in the preamble, the previous Title IX guidance was criticized in part because it "removed reasonable options for how schools should structure their grievance processes to accommodate each school's unique pedagogical mission, resources, and educational community." We agree with this view. Unfortunately, we believe that the highly prescriptive nature of the NPRM may inadvertently raise even greater concerns than the previous guidance.

Federal regulatory mandates will increase the costs of addressing sexual harassment on campus. For example, banning the "single investigator" model would force some institutions to hire additional personnel. As noted earlier, providing advisors aligned with each party to a formal proceeding—many of whom will be attorneys in private practice—will be costly. Allowing attorneys to cross-examine participants is likely to force institutions to hire

other attorneys or professional mediators to chair the proceeding to ensure that it is handled appropriately. The possibility that the NPRM's formal Title IX grievance procedures will affect the processes and procedures used in other campus disciplinary cases is guaranteed to increase institutions' administrative costs, forcing institutions to divert resources from financial aid and academic programs.

No matter how hard colleges try to follow the rules, institutions can expect legal action from complainants and respondents alike to address uncertainties that surround evidentiary rulings, cross-examination-related decisions, the adequacy of advisors, jurisdictional issues, and the definition of "a program or activity." This too will increase college and university operating costs.

To the extent that the NPRM does this, the impact will be greatest at small, thinly staffed, less-resourced institutions like community colleges, small private liberal arts colleges, and faith-based institutions. There are 581 colleges with fewer than 500 students in the United States and, of that number, 382 institutions have fewer than 250 students. Most colleges and universities do not have a general counsel on staff.[16] These schools will have little choice but to hire additional staff, attorneys, or consultants to meet federal mandates. And, sadly, externally imposed increases in the cost of doing business are almost always passed on to the final consumers. In the case of higher education, of course, that means students and their families.

We respectfully disagree with the cost estimates that accompany the NPRM. The Department estimates that the NPRM will result in a net cost savings over 10 years because the number of Title IX investigations will decrease. We are deeply concerned that this drop could reflect the unwillingness of survivors to file a formal complaint and proceed under the NPRM's formal Title IX grievance procedures. Even assuming the number of investigations does fall, the complex and costly procedures mandated by the proposed rule means that the costs of those cases that are investigated and proceed through the formal resolution process will substantially

[16] Based on our estimates, of approximately 4,500 degree-granting colleges and universities, only 1,000 have a dedicated general counsel on campus.

increase. Indeed, we expect Title IX compliance costs to skyrocket. The primary factors driving the increase will be the costs of administering live hearings with cross-examination by advisors, as discussed above, and the increase in litigation against institutions by survivors or the accused (or both) challenging the institution's provision of services and management of the processes pursuant to these regulations.

None of this is to suggest that institutions should not devote the resources necessary to combat the scourge of sexual harassment and sexual assault. But neither should we expect that the imposition of complex and extensive regulatory requirements will not affect the cost of running colleges and universities and the price that students pay to enroll.

RECOMMENDATION: We ask that the Department actively seek ways to give institutions flexibility to achieve the federal policy goals without detailing the precise means to do so. This will enable institutions to seek effective, responsible, and cost-efficient ways to proceed that will address sexual harassment and ensure fair processes for both complainants and respondents.

NPRM Provisions that Require Clarification

1. The proposed rule requires that when an institution receives multiple reports of sexual harassment by the same individual, but none of the reporting individuals are willing to file a formal complaint, the institution's Title IX Coordinator must nonetheless file a formal complaint to initiate the Title IX grievance process, even if none of the reporting individuals are willing to serve as witnesses.

   We support the goal of this provision, which is to ensure that institutions take action when there is evidence of a serial offender on campus. However, a blanket requirement that the Title IX Coordinator initiate a formal complaint in the absence of individuals willing to participate in the

NPRM's formal grievance process (including cross-examination) will cause far more harm than good.

The ability of the institution to hold an individual responsible in this scenario is undermined dramatically because the most directly impacted witnesses will be unavailable for cross-examination. The proposed regulation makes clear that if a witness is unwilling to submit to cross-examination, their statement cannot be used in determining responsibility. Further, the NPRM's detailed formal complaint requirements will nearly certainly require the institution to identify the survivors, even if they wished to remain anonymous, when the institution initiates the NPRM's formal Title IX grievance process. Institutions will want to advise students of the potential risk that the institution may not be able to respect a wish for confidentiality, which in turn may have a chilling effect on reports of sexual harassment.

In the absence of such witnesses, an institution risks, almost by default, a determination of "not responsible" for a respondent who has been the subject of multiple reports of misconduct, which may embolden the individual. And at many institutions, a final determination of "not responsible" may negatively impact the institution's ability to use information about prior misconduct in a subsequent misconduct hearing. We recommend that the institution retain the flexibility to determine whether to pursue a campus disciplinary proceeding against an individual who has been the subject of multiple reports of sexual harassment. Again, we reiterate our strong conviction that institutions must have the authority to pursue sexual harassment cases under their own codes of conduct in cases where the NPRM's Title IX grievance process is not triggered.

2. We encourage the Department to recognize and clarify the extent to which the proposed regulations are intended to supersede and preempt state law, particularly in states that have enacted (or that may enact) campus sexual assault laws.[17] For example, the language in the draft rule that appears to direct institutions to "dismiss" sexual harassment allegations

[17] As of last fall, 20 states had state laws addressing campus sexual assault: Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Louisiana, Minnesota, New Jersey, New York, North Carolina, North Dakota, Rhode Island, South Carolina, Texas, Virginia, Washington, and Wisconsin.

that fall outside the definition of Title IX is almost surely to be in conflict with state laws requiring institutions to address sexual assault more broadly than is required by the NPRM.

We believe that the Department should tread very lightly and precisely if it is intending to preempt states' laws in this area, particularly where there is a risk of the regulations being read to preempt laws that have been developed by a state in response to the specific needs and campus settings of its colleges and universities and their students. Furthermore, such a result would be inconsistent with the administration's commitment to reduce burdensome federal regulations and to avoid unnecessary interference in matters of state law. Moreover, to the extent that federal regulations conflict or are inconsistent with state law, institutions will require significant time and effort to navigate those legal complexities– both at the outset, as the federal regulations become effective, and in the moment during the course of an investigation. We encourage the Department to clarify the extent to which the Title IX regulations preempt state law in this area in order to minimize such administrative burden and the likelihood of confusion to institutions, students, and states.

3. The proposed regulations state that when investigating a formal complaint, institutions must "[n]ot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence." While we understand the Department's desire to allow the parties to gather and present relevant evidence, many institutions implement "no contact" orders, which restrict the ability of the parties to discuss the matter with each other, as a supportive measure. We ask the Department to clarify that "no contact" orders are permissible in so far as they are necessary to comply with supportive measures and/or to prohibit the parties from engaging in any retaliatory conduct. Retaliatory conduct against a complainant or a respondent can, itself, violate Title IX. Institutions must maintain the right and the authority to prohibit such retaliation, and respond swiftly and appropriately if it occurs.

4. The Department should provide more clarity about the meaning of the phrase "in a program or activity" and whether, by using this phrase, the Department intends to create any distinction between the scope of the

proposed rule and the Title IX statutory language.[18] Without further clarification, this provision will quickly be the subject of innumerable complaints to OCR and legal challenges. Any number of hypothetical cases illustrate the likely confusion: privately owned student housing across the street from campus; "satellite" fraternities located off campus; fraternities not officially recognized by the institution; or two students participating in an off-campus program run by a private vendor or another university. (For example, in the case of students who are participating in a program run by another university, which school conducts the Title IX investigation?) The rapid-response task force that we recommend in number six below might provide one way to address the sort of highly specific and technical questions that will arise.

5. It will take a significant amount of time and resources for colleges and universities to implement the new policies and procedures envisioned by the NPRM. The Higher Education Act's Master Calendar gives institutions at least eight months to prepare for the adoption of new federal requirements and ensures that new regulations take effect at the start of a new school year. While the Master Calendar does not apply to this NPRM, we ask that the Department provide campuses a comparable amount of time to design and implement the many new policies and procedures envisioned under the NPRM and to conduct the extensive retraining that will be required. We also ask that the NPRM effective date coincide with the start of the academic year in the fall (e.g., a final rule issued sometime in 2019 might be effective July 1, 2020, in advance of the academic year in fall 2020).

6. In addition, we strongly encourage the Department to ensure that questions regarding the implementation of the final rule can be answered quickly and authoritatively by Department officials. This is important because complex regulations are never self-executing. Questions will always arise and clarification will be required. We recommend that the Department create a rapid-response Title IX regulations task force to facilitate campus implementation of the new requirements by providing a

[18] The Title IX statute states that no person 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. § 1681(a) (emphasis added).

centralized point of contact for questions and clarifications, and publicizing the questions it receives and the answers it provides.

CONCLUSION

We appreciate the opportunity to participate in a formal notice and comment regulatory process that ensures the Department considers comments from a variety of stakeholders about the impact and unintended consequences of the provisions in the NPRM. Colleges and universities remain committed to addressing sexual harassment and sexual assault on their campuses and to complying with all federal and state laws, including Title IX. We strongly urge the Department to modify the NPRM to address the serious concerns we have raised so that colleges and universities can support survivors, ensure fair processes for both parties, and have greater clarity about their obligations under the law.

Sincerely,

Ted Mitchell
President

On behalf of:

ACPA-College Student Educators International
American Association of Colleges for Teacher Education
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of Hispanics in Higher Education
American Association of State Colleges and Universities
American College Health Association
American Council on Education
American Dental Education Association

American Indian Higher Education Consortium
APPA, Leadership in Educational Facilities
Associated Colleges of the South
Association for Biblical Higher Education
Association of American Colleges and Universities
Association of American Medical Colleges
Association of American Universities
Association of Catholic Colleges and Universities
Association of Chiropractic Colleges
Association of Colleges and Universities of The Church of Jesus Christ of Latter-day Saints
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 New Jersey
Association of Independent Colleges and Universities of Pennsylvania
Association of Independent Colleges and Universities of Rhode Island
Association of Independent Kentucky Colleges & Universities
Association of Jesuit Colleges and Universities
Association of Presbyterian Colleges and Universities
Association of Public and Land-grant Universities
Association of Research Libraries
Association of Vermont Independent Colleges
College and University Professional Association for Human Resources
Commission on Independent Colleges and Universities
Conference for Mercy Higher Education
Consortium of Universities of the Washington Metropolitan Area
Council for Advancement and Support of Education
Council for Christian Colleges & Universities
Council for Higher Education Accreditation
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, Inc.
Independent Colleges of Indiana
Independent Colleges of Washington
Iowa Association of Independent Colleges and Universities
Kansas Independent College Association
Maryland Independent College & University Association
Michigan Independent Colleges & Universities
Minnesota Private College Council
NASPA - Student Affairs Administrators in Higher Education
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Collegiate Athletic Association
North Carolina Independent Colleges and Universities
South Carolina Independent Colleges and Universities
Tennessee Independent Colleges and Universities Association
Transnational Association of Christian Colleges and Schools
Wisconsin Association of Independent Colleges and Universities

APPENDIX 1

Requirements that would exist if the proposed rule is finalized without further changes[19]

Before it learns of any sexual harassment, the institution must:

1. Prominently display its Title IX non-discrimination policy on its website (if any) and in each handbook or catalog that it makes available all student, employees, applicants for admission, unions, and professional organizations.

Once the institution has actual knowledge of an allegation of sexual harassment/assault, it must:

2. Offer and provide the survivor with supportive measures. The Title IX Coordinator must coordinate the implementation of supportive measures.
3. **Follow the procedures outlined in section 106.45 for a formal complaint process (investigation, gathering evidence, live hearing with cross-examination, etc.).**
4. **If there are multiple complaints about the same individual, the Title IX coordinator must file a formal complaint.**
5. **While offering/providing supportive measures, inform the claimant <u>in writing</u> about the right to file a formal complaint now or later.**
6. **Before removing a student from campus for safety reasons, undertake a risk analysis and provide the respondent the opportunity to challenge it.**

The institution's formal grievance procedures must:

7. Require an objective evaluation of all relevant evidence, including inculpatory and exculpatory evidence.
8. **Require that anyone designated as the Title IX Coordinator, investigator, or decision maker not have a conflict of interest or a bias.**
9. Train personnel on the definition of sexual harassment and how to conduct an investigation and grievance process including hearings that protect safety, ensure due process, and promote accountability.
10. **Include a presumption that respondent is not responsible in the notice to the accused.**
11. Include reasonably prompt timeframes for the conclusion of the grievance process.
12. Describe the range of sanctions and remedies that the institution may implement.
13. Describe the standard of evidence to be used.
14. **Set one evidentiary standard to be used in Title IX cases, either "preponderance of evidence" or "clear and convincing." However, if an institution chooses "preponderance of evidence," it must apply that standard to "conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction."**
15. Include procedures and bases for claimant and respondent to appeal, if appeal is an option.

[19] Note: Some of these regulations were included in the 2001, 2011, and 2014 Title IX guidance. Many institutions already comply with these regulations, although they did not previously have the force of law. Bolded proposed regulations would be new under the Title IX NPRM.

16. Describe the range of supportive measures available to claimant and respondent.

Upon receipt of formal complaint, the institution must provide written "notice of allegations" to the parties that includes:

17. Notice of the recipient's grievance procedures.
18. Notice of the allegations, including the "who, what, where, and when."
19. Details sufficient and with sufficient time to prepare a response before any initial interview.
20. The specific section of code of conduct violated.
21. The conduct allegedly constituting sexual harassment.
22. **A statement that the respondent is deemed not responsible and that a determination will be made at conclusion of process.**
23. **Notice informing the parties that they may inspect and review evidence.**
24. **Notice of any code of conduct provisions that prohibit claimant or respondent from providing false statements or information during a grievance process.**
25. Notice requirement is ongoing–must be updated if new allegations arise.

Upon receipt of a formal complaint, the institution's formal grievance procedures must be consistent with the following requirements:

26. Ensure, when investigating the allegations, the burden of gathering evidence rests on the institution and not the parties.
27. **Prohibit the use of a "single investigator" model.**
28. Provide equal opportunity for parties to present witnesses and evidence.
29. **Prohibit any restriction on the ability of parties to discuss or gather evidence.**
30. Provide an opportunity for parties to have others present, including being accompanied by advisors of their choice in any meeting or proceeding.
31. Provide party written notice of date, time, location, participants of all hearings, investigative interviews, with sufficient time for party to prepare.
32. **Provide a live hearing.**
33. **Permit parties to cross-examine one another and witnesses through an advisor.**
34. **Provide an advisor for a student who does not have one for cross-examination.**
35. **Provide separate rooms with technology if requested.**
36. **Exclude statements from a party or witness who refused to sit for cross-examination.**
37. **Provide equal opportunity for parties to inspect and review "any evidence" obtained as part of the investigation that is "directly related" including evidence upon which that the institution does not intend to rely.**
38. **Send each party all the evidence in electronic format and give them 10 days to respond before finalizing the investigative report.**
39. **Create an investigative report that fairly summarizes all the evidence and provide a copy to parties at least 10 days prior to a hearing.**

At the conclusion of the hearing, the decision maker must issue an extensive written report regarding responsibility, which must include:

40. Section of code of conduct violated.

41. Description of all procedural steps taken from the receipt of the complaint through the determination including any notifications to the parties, interviews, site visits, methods to gather evidence, and hearings held.
42. Findings of fact supporting the determination.
43. Conclusions regarding the application of the policy to the facts.
44. A statement of and rational for the results to each allegation, including a determination of responsibility, any sanction on respondent, and remedies provided to the claimant.
45. The procedures and bases for complainant to appeal, if offered.
46. **Provide this written statement simultaneously to both parties.**

If appeals are allowed, the institution must:

47. Notify the other party in writing when an appeal is filed.
48. **Ensure a new decision maker who was not the investigator or decision maker in the previous hearing.**
49. **Ensure the appeal decision maker complies with the no conflict or bias rule.**
50. Give both parties an equal opportunity to submit a written statement in support or in challenging the outcome.
51. Issue a written decision describing the result of the appeal and the rationale.
52. **Provide the written decision simultaneously to both parties.**

If informal resolution process is used, the institution must:

53. **Provide written notice to both parties that discloses allegations, provides requirements of the informal process, whether the process is binding, and any consequences from participating, including that records could be maintained or shared.**
54. Obtain the parties' voluntary written consent to the informal process.

Institution must maintain records for three years and make available to claimant and respondent:

55. **Investigation of sexual harassment and any determination, any sanctions, any remedies.**
56. **Any appeal and the result.**
57. **Informal resolution.**
58. **All materials used to train coordinators investigators and decision makers.**