



Office of the President  
364 Henry Administration Building  
506 South Wright Street  
Urbana, IL 61801-3689

January 28, 2019

U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

Dear Secretary DeVos:

RE: Docket ID ED-2018-OCR-0064

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking outlining changes to the regulations under Title IX of the Education Amendments of 1972. The University of Illinois System is comprised of 86,000 students and 25,000 full-time equivalent faculty and staff employees across its three universities – Urbana-Champaign, Chicago and Springfield. Collectively, we are committed to providing our students and employees with a safe and welcoming campus climate that is free of sexual discrimination, harassment, and violence. Our universities maintain a zero tolerance policy for sexual misconduct of any form because it represents a direct violation of our institutional values. We strive to provide students with a safe and supportive learning environment to fully enable them to take advantage of the transformative educational experiences we offer and to become the leaders of the future. In fact, just two weeks before the notice was released, we convened a system-wide task force to examine our policies, education, prevention efforts, and response to sexual misconduct to ensure consistency, responsiveness, fairness, and effectiveness across these efforts.

Similarly, to ensure a comprehensive review of the proposed Title IX regulations, the University of Illinois System involved a diverse group of stakeholders from all three of our universities. These stakeholders have extensive experience in programs, activities, and processes designed to prevent and respond to sexual harassment. Our review does not purport to identify and address all of the proposed regulations we either support or have issues with. To do so would detract from the clear message we wish to send. Instead, we have identified certain critical issues that we believe should be addressed in order to properly reflect our institutional values and our continued commitment to promoting the reporting of sexual harassment and to addressing it in a fair and balanced way. We highlight those issues here for emphasis. We also identified certain provisions that we believe should be addressed because they contain inaccuracies or are contrary to law. Although those issues are not discussed here, they can be found in the attached comments.

### **Cross-examination and the Role of Advisors**

Our most significant concern pertains to the requirement that complainants and respondents must submit to cross-examination by the other party's advisor. Not only do we believe this approach will deter survivors from reporting sexual harassment, but it unnecessarily converts an educational disciplinary process into a quasi-courtroom where those who can afford the best advisor will have the advantage. And as research has shown, in the context of sexual harassment proceedings, the re-traumatization that many survivors experience under adversarial cross-examination can actually stymie the search for truth. At the most practical level, the proposed regulations are flawed in that they would allow a respondent who had admitted sexual assault to police or to the investigator to avoid consideration of the confession by simply refusing to submit to cross-examination at the hearing. For these and a host of policy and legal reasons explained in detail in the attached comments, we recommend allowing institutions the flexibility to implement procedures that facilitate fact-finding without deterring reporting, re-traumatizing survivors, or compromising due process.

### **Applicability of the Rule to Employees**

We do not support requiring a single grievance procedure, including evidentiary standard, for student and employee cases. Not only do the legal interests of students and employees differ, but they are subject to different legal regimes and standards under Illinois and federal law, institutional governing documents, and collective bargaining agreements. Imposing the uniformity requirement would exceed the Department's authority, and it is likely to subject recipients to unnecessary litigation detracting from recipients' ability to resolve claims of sexual harassment in a prompt, fair, and equitable manner.

### **Access to Evidence**

Although we agree both parties should be given equal access to evidence at appropriate times, recipients must be able to take privacy and relevance into account before making disclosures. For example, during the course of a Title IX investigation, the investigator may obtain sensitive and/or protected information about complainants and respondents, including medical records and information about past conduct, which is irrelevant to the determination of responsibility. There is no legitimate reason to disclose such information. The Department need only mandate that recipients provide complainants and respondents with fair and equal access to relevant evidence, and provide that recipients may redact immaterial confidential or sensitive information.

### **Scope of Sexual Harassment Definition and Required Dismissal of Complaints**

We are concerned about requiring the dismissal of formal complaints if the alleged conduct does not fall within the narrow definition of sexual harassment proposed by the Department or does not occur within recipient's education program or activity. The alleged conduct still may violate a recipient's policies, as many recipients' sexual misconduct policies are broader in scope than the proposed regulations. The Department should clarify that a recipient's response to such conduct is not subject to the proposed regulations. To do otherwise would require parallel

policies and procedures thereby adding complexity for both respondents and complainants and would give rise to the very inconsistencies the Department seeks now to avoid.

### Conclusion

Stepping back from specific issues and looking at the sum total of the proposed regulations, we are concerned that the regulations fail to adequately acknowledge the seriousness and complexity of sexual misconduct on college campuses. From transforming disciplinary proceedings into quasi-courtrooms, to mandating adversarial cross-examination that could expose survivors to re-traumatization and decrease reliability of testimony, to prescribing uniformity in grievance procedures for students, employees, and faculty without adequately considering the legal and contractual conflicts, many of the proposed regulations create complex problems that are unconnected to prohibiting discrimination on the basis of sex. We fully agree that the most important objectives of the Title IX regulations are to protect the students and employees on our college campuses and to mitigate the complexity and trauma associated with sexual misconduct. We believe our suggestions align with achieving those objectives.

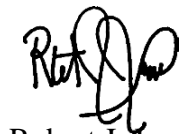
On behalf of the more than 100,000 students and employees of the University of Illinois System, we urge the Department to consider our input to shape a simpler, fairer, and more responsive approach to the issues of sexual misconduct on campus.

As a final note, we encourage the Department to consider allotting sufficient time for recipients to implement any changes before effective dates given even changes that are relatively minor in print may require significant implementation planning and resources. Once again, thank you for the opportunity to provide input on the Title IX regulations.

Sincerely,



Timothy L. Killeen  
President



Robert J. Jones  
Chancellor, Urbana-Champaign



Michael D. Amiridis  
Chancellor, Chicago



Barbara J. Wilson  
Executive Vice President & Vice  
President for Academic Affairs



Andreas C. Cangellaris  
Provost, Urbana-Champaign



Susan Poser  
Provost, Chicago



Susan J. Koch  
Chancellor, Springfield



Dennis Papini  
Provost, Springfield

## Context

The University of Illinois System respectfully submits the following comments to the Department of Education’s proposed Title IX regulations.

The University of Illinois System consists of the University of Illinois at Urbana-Champaign, the University of Illinois at Chicago, and the University of Illinois at Springfield, as well as other teaching and service facilities, including regional campuses and extension offices, located throughout the state of Illinois. Total enrollment at the three universities reached 85,960 for the fall of 2018. In support of its mission to transform lives and serve society, the System employs over 25,000 full-time equivalent employees, including faculty and staff.

These comments reflect the System’s collective experience with handling reports of sexual harassment involving students, faculty, and staff as part of a larger landscape that includes not only Title IX but also other applicable legal and internal policy standards.

## Comments

### Supplementary Information

#### 1. Background [Fed. Reg. 61464]

**Issue:** In the “Background” discussion, the Department suggests that one primary reason to favor these proposed regulations over prior guidance is that prior “guidance documents . . . removed reasonable options for how schools should structure their grievance processes to accommodate each school’s unique pedagogical mission, resources, and educational community.”<sup>1</sup> But as currently stated, these proposed regulations would suffer from the same defect.

**Recommended change:** In the comments that follow, we recommend a series of changes (most importantly, to section 106.45(b)), which are necessary to render the regulations consistent with the Department’s central justification.

**Justification:** The proposed regulations dictate rules and procedures that remove many reasonable options for how schools might structure their grievance processes to accommodate their unique pedagogical missions, resources, and educational communities. Furthermore, requiring recipients to adopt adversarial proceedings that closely resemble criminal trials is inconsistent with the aims of many recipients’ grievance systems, which are often designed as extensions of their educational missions, cultures, and values. The grievance processes are typically operated by faculty and students, who are not lawyers and are not versed in the trial-like systems these proposed regulations would require.<sup>2</sup> Courts have been reluctant to dictate such adversarial proceedings in academic settings, and the Department should be equally reluctant to do so since ample due process can be provided without fundamentally altering the educational nature of school grievance proceedings.

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<sup>1</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61464 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter Proposed Title IX Rules].

<sup>2</sup> Some of the proposed regulations, such as §106.45(b)(3)(vii) and §106.45(b)(4)(ii), require more process than is required in a criminal trial in which the defendant’s liberty—and possibly life—is at stake.

## [§106.6 – Effect of other requirements and preservation of rights](#)

### 2. [§106.6\(e\): Effect on other sections \[Fed. Reg. 61495\]](#)

**Issue:** Proposed §106.6(e) purports to override the Family Educational Rights to Privacy Act (FERPA) by stating: “The obligation to comply with this part is not obviated or alleviated by the FERPA statute or regulations.”

**Recommended change:** “Nothing in this part shall be read in derogation of the FERPA statute or regulations.”

**Justification:** The current language suggests the regulations prevail over statutory provisions, which is inconsistent with rules of interpretation. The recommended change would make this provision consistent with §106.6(f) and respect well-established rules of interpretation.

## [§106.8 – Designation of coordinator, dissemination of policy, and adoption of grievance procedures](#)

### 3. [§106.8\(d\): Application \[Fed. Reg. 61496\]](#)

**Issue:** The proposed regulations restrict application to conduct occurring against a person in the United States, which, taken with other proposed provisions such as §106.45(b)(3) requiring dismissal of formal complaints for conduct that did not occur within the recipient’s program or activity, may lead to inconsistencies with state law (e.g., Illinois’ *Preventing Sexual Violence in Higher Education Act*).<sup>3</sup>

**Recommended change:** “The Assistant Secretary intends to exercise enforcement authority only for conduct occurring against a person in the United States. Nothing herein shall prevent a recipient from enforcing institutional policies for conduct regardless of geography.”

**Justification:** While recognizing that Congress did not clearly state that Title IX has extraterritorial effect, we recommend that the Department clarify that recipients have discretion to utilize a unified system for handling allegations of sexual harassment no matter where in the world such conduct occurred.

## [§106.30 – Definitions](#)

### 4. [Actual knowledge \[Fed. Reg. 61496\]](#)

**Issue:** The actual knowledge definition contains an ambiguity regarding “authority to institute corrective measures on behalf of the recipient.”

**Recommended change:** “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any **other official designated by the recipient to officially receive such allegations**, or to a teacher in the elementary ....”

**Justification:** The ambiguity in the Department’s proposed language could lead to confusion for both recipients and potential complainants. For example, it is not clear whether an employee’s supervisor has the authority to institute corrective measures on behalf of the recipient. And if a recipient uses a hearing panel (rather than an individual) to decide responsibility and impose disciplinary sanctions, it is unclear

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<sup>3</sup> Preventing Sexual Violence in Higher Education Act, 110 Ill. Comp. Stat. § 155/10(2).

whether any individual would qualify as having the authority to institute corrective measures. Rather than trying to describe the duties, the Department should give recipients the latitude to identify a secondary office or offices to officially receive allegations consistent with the resources and structures of the recipient.

#### [§106.44 – Recipient’s response to sexual harassment](#)

##### 5. §106.44(b)(2): Specific circumstances [Fed. Reg. 61497]

**Issue:** “When a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint.”

**Recommended change:** “When a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, **the recipient must file a formal complaint if warranted by an individualized safety and risk assessment based on the strength and availability of the evidence and after consultation with the potential complainants.**”

**Justification:** Input from the complainants, together with a consideration of the facts and circumstances known at the time, must be part of the Title IX Coordinator’s decision process. Otherwise, this mandate will likely result in complaints being brought before complainants are prepared to fully participate in the process, leading to complaints being dismissed without the conduct being appropriately addressed. Furthermore, requiring the filing of a formal complaint against the wishes of the complainants could result in re-traumatizing those individuals or in evidence that, as currently proposed in §106.45(b)(3)(vii), cannot be relied upon because the complainants are unwilling to participate in any subsequent hearing.<sup>4</sup>

##### 6. §106.44(d): Administrative leave [Fed. Reg. 61497]

**Issue:** “Administrative leave. Nothing in this section precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of an investigation.”

**Recommended change:** “Administrative leave. Nothing in this section precludes a recipient from placing **an employee respondent** on administrative leave **from their employment** during the pendency of an investigation.”

**Justification:** In the Department’s reasons for this provision, the Department states that “[b]ecause placing a non-student respondent on administrative leave does not implicate access to the recipient’s education programs or activities in the same way that other respondent-focused measures might, and in light of the potentially negative impact of forcing a recipient to continue in an active agency relationship with a respondent while accusations are being investigated, the Department concludes that it is appropriate to allow recipients to temporarily put non-student employees on administrative leave pending an investigation.”<sup>5</sup> This same rationale supports our recommended change that recipients be allowed to place a student employee respondent on administrative leave from their employment. The student respondent would still have access to recipient’s education programs or activities, but the recipient would

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<sup>4</sup> Proposed Title IX Rules, *supra* note 1, at 61498.

<sup>5</sup> Proposed Title IX Rules, *supra* note 1, at 61471.

not be forced to continue an active agency relationship with the respondent during the investigation. For example, graduate students are often employed as teaching assistants. A recipient should not be compelled to allow a teaching assistant who has been accused of sexual harassment to continue teaching while the accusations are being investigated.

### [§106.45 – Grievance procedures for formal complaints of sexual harassment](#)

#### 7. [§106.45\(a\): Sex discrimination in the treatment of respondents \[Fed. Reg. 61497\]](#)

**Issue:** Proposed §106.45(a) states that “[a] recipient’s treatment of the respondent may also constitute discrimination on the basis of sex under title IX.” The reason the Department cites for this statement is that “[a] respondent can be unjustifiably separated from his or her education on the basis of sex, in violation of Title IX, if the recipient does not investigate and adjudicate using fair procedures before imposing discipline.”<sup>6</sup>

**Recommended change:** We suggest the Department change the above cited portion of §106.45(a) to read as follows: “A recipient’s treatment of the respondent may also constitute discrimination on the basis of sex under title IX, **but only if the recipient deprives a respondent of access to education based on sex stereotypes or by using procedures that discriminate on the basis of sex.**”

For parity, it may similarly help to change the earlier part of §106.45(a) to read: “A recipient’s treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX, **but only if the recipient acts with deliberate indifference or deprives a complainant of access to education based on sex stereotypes or by using procedures that discriminate on the basis of sex.**”

**Justification:** As the Department acknowledges in other sections, the Department’s jurisdiction is limited to sex discrimination that prevents access to education. Furthermore, the Department has prescribed very specific procedures (safe harbors) that protect the recipient from enforcement action on the basis of deliberate indifference and discrimination, while making it clear that the procedures must apply equally to the respondent and to the complainant. The recommended changes ensure that equal application.

While it is true that a recipient’s treatment of a respondent may constitute discrimination on the basis of sex under Title IX, the justification the Department cites for this statement is overbroad and considers factors that the Department lacks the statutory authority to consider when implementing Title IX. Specifically, the reference to a requirement of “fair procedures before imposing discipline” is ambiguous as between procedures that are fair in the sense that they are: (1) non-discriminatory on the basis of sex; (2) equitable as between complainants and respondents; and (3) consistent with due process. These three classes can overlap, but not always. Only procedures that are not fair in the first sense and deprive a student of access to an educational program or activity may genuinely constitute discrimination on the basis of sex under Title IX.

To see this, consider examples of procedures that fall into these three different categories. A procedure that falls into the first category (that is, that discriminates on the basis of sex) would be one that dismisses a student from a program based on sex stereotypes. Such procedures would constitute discrimination on

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<sup>6</sup> Proposed Title IX Rules, *supra* note 1, at 61472.



the basis of sex under Title IX, and the Department rightly prohibits the use of sex stereotypes before imposing discipline in §106.45(b)(1)(iii).

A procedure that appears to fall into the second category (that is, it treats complainants and respondents differently as classes) would be the use of any evidentiary standard higher than a preponderance of the evidence to adjudicate claims of sexual harassment. Use of a higher standard would be “unfair” in this second sense because it would hold complainants to a higher standard of proof than respondents in cases of direct evidentiary conflict. Because proposed §106.45(b)(4)(i) explicitly allows—and even arguably encourages—recipients to adopt a clear and convincing evidence standard, the Department cannot mean to deem this second type of purported unfairness a form of sex discrimination under Title IX. In other words, the Department acknowledges elsewhere that there can be reasons to treat complainants and respondents differently as classes based on considerations that have nothing to do with their sex.

A procedure that falls into the third category (that is, that violates due process) would be a one-time problem with the notice given to a party in a particular grievance proceeding or the use of facially neutral procedural rules that turn out to violate due process even though there is neither any discriminatory motive behind the rule nor any disparate impact without a substantial or legitimate reason. Procedural defects like this may lead to unfairness and can be a ground for lawsuits, but they are not forms of sex discrimination and should not threaten federal funding under Title IX.

#### 8. [§106.45\(b\): Grievance procedures \[Fed. Reg. 61497\]](#)

**Issue:** “Grievance Procedures. For the purpose of addressing formal complaints of sexual harassment, grievance procedures must comply with the requirements of this section.”

**Recommended change:** “Grievance Procedures. **In order to qualify as safe from Department enforcement as stated in the safe harbor provision of §106.44(b), recipients must adopt grievance procedures that comply with this section.**”

**Justification:** As proposed, §106.45(b) is a mandate, thus suggesting that failure to adopt such procedures is in and of itself a violation of the regulations. However, both the Executive Summary and the second sentence in §106.44(b)(1) suggest that the intent of the §106.45 process is to create a safe harbor.<sup>7</sup> Our recommended change reframes §106.45(b) as a safe harbor to align with this intent.

#### 9. [§106.45\(b\)\(1\)\(iv\): Presumption of non-responsibility \[Fed. Reg. 61497\]](#)

**Issue:** Proposed §106.45(b)(1)(iv) states that grievance procedures must “[i]nclude a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.”

**Recommended change:** The Department should either strike this provision or amend it to state there will be “no presumption of either responsibility or lack of responsibility until a determination regarding responsibility is made at the conclusion of the grievance process.”

**Justification:** Recipients should assume a position of neutrality in these proceedings and allow the facts to develop before any opinions are formed. Compelling complainants to sign formal complaints that allege certain conduct while requiring that recipients presume that the respondent did *not* engage in the

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<sup>7</sup> See Proposed Title IX Rules, *supra* note 1, at 61469.

alleged conduct creates a built-in bias against complainants. Such biases may be warranted in criminal proceedings but are inconsistent with the equitable treatment of complainants and respondents in a context in which the recipient has an ongoing legal duty to ensure equal access to education for all students.

**10. [§106.45\(b\)\(2\)\(i\)\(B\): Notice of allegations \[Fed. Reg. 61498\]](#)**

**Issue:** “Sufficient details include the identities of the parties involved in the incident, if known . . . .”

**Recommended change:** “Sufficient details include the identities of the parties involved in the incident, if known **and permitted by applicable laws and regulations** . . . .”

**Justification:** Some state laws mandate acceptance of anonymous and/or bystander complaints with the intent of protecting complainants from harassment. Since the proposed regulations may require involuntary formal complaints for repeat respondents, requiring the disclosure of the identity of reluctant parties is problematic.

**11. [§106.45\(b\)\(2\)\(i\)\(B\): Notice of allegations \[Fed. Reg. 61498\]](#)**

**Issue:** “The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.”

**Recommended change:** “The written notice must include a statement that a determination regarding responsibility will be made at the conclusion of the grievance process.” In the alternative, if the Department wants the notice to reference presumption of responsibility, we recommend the following: “The written notice must include a statement that **no presumption of either responsibility or lack of responsibility is made until** the conclusion of the grievance process.”

**Justification:** As noted above, compelling an adversarial process that is initiated by a complainant alleging a violation occurred, coupled with a statement that the respondent is presumed to not have engaged in the conduct—or that the conduct does not violate the policy—necessarily creates a bias in favor of the respondent and against the complainant. A recipient should remain neutral until the decision-maker has weighed the evidence and made a determination.

**12. [§106.45\(b\)\(3\): Dismissal of formal complaints \[Fed. Reg. 61498\]](#)**

**Issue:** “If the conduct alleged by the complainant would not constitute sexual harassment as defined in §106.30 even if proved or did not occur within the recipient’s program or activity, the recipient must dismiss the formal complaint with regard to that conduct.”

**Recommended change:** “If the conduct alleged by the complainant would not constitute sexual harassment as defined in §106.30 even if proved or did not occur within the recipient’s program or activity, **the recipient’s response to and investigation of the alleged conduct is not subject to this part.**”

**Justification:** The Department does not have the statutory authority to require the dismissal of complaints of sexual harassment that would be code of conduct or other policy violations even though they do not fall within the definition of “sexual harassment” set forth in §106.30 or do not occur within recipient’s

education program or activity. To require such a dismissal would be inconsistent with the Department’s statement that “[i]mportantly, nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students who report 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 study abroad).”<sup>8</sup> As proposed, §106.45(b)(3) would also make it difficult for recipients to develop uniform sexual harassment and sexual misconduct policies that are consistent with all applicable laws and institutional values. If recipients are required to resort to accepting separate complaints depending on whether alleged conduct falls within the ambit of Title IX or other federal law, state law, or university policies, inefficiencies will develop to the detriment of both the respondent and complainant who will have to navigate multiple policies and processes.

**13. [§106.45\(b\)\(3\)\(i\): Burden of proof \[Fed. Reg. 61498\]](#)**

**Issue:** “Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.”

**Recommended change:** Strike this provision.

**Justification:** Placing the burden of gathering evidence on the recipient suggests an adversarial rather than educational process.

**14. [§106.45\(b\)\(3\)\(iii\): Discussing allegations \[Fed. Reg. 61498\]](#)**

**Issue:** “Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.”

**Recommended change:** “Not restrict the ability of either party to discuss the allegations under investigation **in order** to gather and present relevant evidence.”

**Justification:** There may be situations in which the investigation or grievance process is served by restricting a party’s ability to discuss the allegations, and recipients should have the flexibility to develop appropriate policies. While a recipient may not restrict the parties from discussing an investigation when both parties are students, there are legitimate reasons that a recipient may wish to restrict an employee respondent from discussing the allegations including increased risk of retaliation.

**15. [§106.45\(b\)\(3\)\(vii\): Cross-examination \[Fed. Reg. 61498\]](#)**

**Issue:** Proposed §106.45(b)(3)(vii) requires a live hearing at which each party must be permitted to ask, through the party’s advisor of choice, the other party and any witnesses all relevant questions.<sup>9</sup>

**Recommended change:** The Department should either strike this requirement or, at most, offer only informal guidance on procedural alternatives to conventional cross-examination. One procedural alternative is the model identified in the Illinois’ *Preventing Sexual Violence in Higher Education Act* in which the parties may not directly cross-examine one another but may suggest questions to be posed to

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<sup>8</sup> Proposed Title IX Rules, *supra* note 1, at 61468.

<sup>9</sup> Proposed Title IX Rules, *supra* note 1, at 61498.

the other party by the decision-maker.<sup>10</sup> Other procedural alternatives can be found in the American Bar Association’s “Best Practices for Colleges and Universities in Resolving Allegations of Campus Sexual Harassment.”<sup>11</sup> Closer attention to procedural variations like these would sharpen any informal guidance that the Department wishes to offer.

**Justification:** In explanation of this proposed rule, the Department cites *California v. Green*, 399 U.S. 149, 158 (1970), for the proposition that cross-examination is the “greatest legal engine ever invented for the discovery of truth.”<sup>12</sup> However, as proposed, the rule would not promote greater reliability of outcomes and would instead make it more difficult for a recipient to address incidents of sexual harassment occurring in an education program or activity.

Research suggests the re-traumatization that many survivors of sexual harassment experience under adversarial cross-examination can subject them to momentary cognitive limitations<sup>13</sup> or other episodic “disabilities” that make them look not credible in demeanor even when they are telling the truth.<sup>14</sup> This complicates the truth-discovery function of cross-examination in the sexual harassment context because the common neurobiological reactions to trauma, often exacerbated by re-traumatization, are easily misinterpreted and can mislead decision-makers. Adversarial cross-examination in sexual harassment cases can result in inaccurate disciplinary hearing findings, which runs counter to the Department’s stated goal of “producing more reliable factual outcomes.”<sup>15</sup> Considerations like these suggest that cross-examination is not always the “greatest legal engine ever invented for the discovery of truth”—as *California v. Green* once suggested in a criminal context with Confrontation Clause implications that did not involve sexual harassment, access to education, or any of the other special considerations present in Title IX cases.

As outlined in research acknowledged by the Department, cross-examination is “adversarial [in] nature” and can result in severe instances of re-traumatization in the context of sexual harassment proceedings. Re-traumatization can catalyze and exacerbate the mental and physical harms related to a survivor’s

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<sup>10</sup>See Preventing Sexual Violence in Higher Education Act, 110 Ill. Comp. Stat. § 155/25(b)(10) (“The complainant and the respondent may not directly cross examine one another, but may, at the discretion and direction of the individual or individuals resolving the complaint, suggest questions to be posed by the individual or individuals resolving the complaint and respond to the other party.”).

<sup>11</sup>[https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/College\\_Due\\_Process.pdf](https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/College_Due_Process.pdf) (“The complainant and respondent may not question one another or the other witnesses directly, but should be given an ongoing opportunity during the proceeding to offer questions to be asked through the decision-maker(s), who will determine whether to ask them.”).

<sup>12</sup> Proposed Title IX Rules, *supra* note 1, at 61476.

<sup>13</sup> Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAVIOR 413 (explaining how trauma can lead to memory issues for crime victims); *The Neurobiology of Sexual Assault* (National Institute of Justice’s Translational Criminology Seminar Series Dec. 3, 2012), <https://nij.gov/multimedia/presenter/presenter-campbell/Pages/welcome.aspx> (discussing the neurobiological implications of trauma on memory recall and consolidation).

<sup>14</sup> Without adequate training, advisors and panelists who utilize in-person reactions to drive questions and decision-making can easily misinterpret the neurobiological reactions to trauma as evidence of misdirection, lies, or incomplete truth. Misinterpretations like these could, at worst, make cross-examination more prejudicial than probative. *See, e.g.,* Deborah Smith, *What Judges Need to Know About the Neurobiology of Sexual Assault*, NAT’L CTR. FOR ST. CTS. (2017), <https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2017/What-Judges-Need-to-Know-About-the-Neurobiology-of-Sexual-Assault.aspx>). At the very least, the use of cross-examination in this setting would require extensive and specialized training of decision-makers and those pursuing a line of questioning. The cost of this training could be significant for many recipients and needs to be added to the Department’s cost-benefit and regulatory impact analyses.

<sup>15</sup> Proposed Title IX Rules, *supra* note 1, at 61462.

experience of sexual harassment.<sup>16</sup> Though the Department recognizes these risks,<sup>17</sup> the Department suggests that the proposed method of requiring cross-examination by agents, rather than parties, will “balance[] the importance of cross-examination with any potential harm from personal confrontation between the complainant and the respondent by requiring questions to be asked by an advisor aligned with the party.”<sup>18</sup> But building on the Department’s recognition that cross-examination by the accused would cause undue trauma on the part of the survivor<sup>19</sup>, it is important to recognize that the root cause of the trauma inflicted by cross-examination lies not just in the identity of the questioner but also in the act of real-time questioning and the reliving of traumatic experiences within a live, adversarial framework that can include pointed and sometimes even abusive questioning absent appropriate supervision. Re-traumatization can make it difficult to formulate responses under time-sensitive, adversarial pressure.

While we appreciate the Department’s inclusion of rape shield protections in its proposed regulations, practical experience suggests that these restrictions are often ineffective at preventing improper or abusive questions. In addition, the current regulations do not clarify who precisely is to make evidentiary objections to impermissible lines of questioning, how they are to be trained, or how errors are to be remedied (if they can be at all). Unless questions are asked through the decision-maker or another neutral body, which could screen out impermissible questions, a respondent’s advisor could pose questions to the complainant that violate the rape shield protections. Once intrusive and illegitimate questioning has commenced, the psychological damage is often done. In fact, because the proposed regulations prevent the recipient from limiting the choice of advisor<sup>20</sup> and the recipient is unlikely to be able to sanction the advisor for unscrupulous or abusive conduct, a respondent’s advisor would be incentivized to pose abusive, damaging, or impermissible questions for the purpose of traumatizing the complainant.<sup>21</sup> If the Department decides to implement proposed §106.45(b)(3)(vii), then the predicted harms of re-traumatization must be factored into a new cost-benefit and regulatory impact analysis offered for these proposed regulations.

The Department’s current cost-benefit and regulatory impact analyses do not address the fact that some survivors who fear re-traumatization through adversarial cross-examination may choose not to testify or report sexual harassment at all. Students regularly decide not to pursue criminal complaints and instead limit themselves to internal grievance processes out of fear that they will have to go through embarrassing or re-traumatizing cross-examination in court. If cross-examination is required in recipients’ grievance proceedings, there will be a similar reduction in the number of students pursuing formal complaints of sexual harassment on campuses.

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<sup>16</sup> Proposed Title IX Rules, *supra* note 1, at 61476 (citing *Doe v. Baum*, 903 F.3d 575, 583 (6<sup>th</sup> Cir. 2018) (“Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment. And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that.”)).

<sup>17</sup> Proposed Title IX Rules, *supra* note 1, at 61476.

<sup>18</sup> Proposed Title IX Rules, *supra* note 1, at 61476 (citing *Doe v. Baum*, 903 F.3d 575 (6<sup>th</sup> Cir. 2018), for one court’s view that these risks need not make cross-examination untenable).

<sup>19</sup> The Department is under the mistaken impression that the re-traumatization is only meaningfully caused by a survivor being cross-examined by the accused (a situation that seldom happens in a court of law). The reality is that cross-examination by an advisor aligned with the respondent (and thus adverse to the complainant), can cause the same severe re-traumatization and harm to the survivor.

<sup>20</sup> Proposed Title IX Rules, *supra* note 1, at 61498.

<sup>21</sup> If the complainant is sufficiently traumatized, the complainant may refuse to submit to further cross-examination, which under the proposed regulations, would make the complainant’s statements inadmissible. If a culture of unscrupulous cross-examination develops, potential complainants may opt not to participate at all.

The Department’s proposed §106.44(b)(3)(vii) would effectively prevent some forms of sexual harassment from being addressed, thus quantifiably increasing the underlying rate of some forms of sexual harassment on campuses. If the Department wishes to implement §106.45(b)(3)(vii) as a rule instead of offering more tempered informal guidance, then it must retract its current assumption to the contrary in its regulatory impact analysis.<sup>22</sup> Before issuing §106.45(b)(3)(vii), the Department would need to do a much more exhaustive cost-benefit and regulatory impact analysis. It would need to obtain empirical estimates of the depressed rates of positive findings of actual sexual harassment resulting from a requirement of cross-examination, the rates of likely reduction of reporting, the likely effects on under-deterrence of some classes of sexual harassment, and the costs of increased occurrences of sexual harassment. The Department would also need to clarify the scope and limitations of the right to cross-examination, what training would be required of recipient-provided advisors, the circumstances under which recesses can be called, who would be able to make objections to questions or evidence as irrelevant, and how errors in application of these evidentiary rules might be remedied (if they can be at all).

Aside from the federal legal issues, there are other legal and policy reasons that support issuing guidance rather than binding regulation. For example, in Illinois, the *Preventing Sexual Violence in Higher Education Act* prohibits permitting the parties to directly cross-examine one another, but allows for the parties to suggest questions for the decision-maker to ask.<sup>23</sup> This proposed regulation would therefore create a legal conflict for institutions in Illinois.<sup>24</sup>

At the policy level, academic grievance or disciplinary matters are an extension of the educational missions of many recipients. Many systems are operated by faculty and students—non-lawyers who are not versed in the trial-like systems these proposed regulations would require. Courts have been reluctant to dictate such adversarial proceedings in academic settings, and the Department should be equally reluctant to do so. Requiring that an advisor conduct cross-examination of students fundamentally alters the nature of the student disciplinary process. Usually, the hearings are a dialogue between the students and the decision-maker(s) to evaluate the impact of the conduct on the academic community. These regulations strip this model away and turn it into an adversarial, attorney-driven process in which students do not directly engage with the decision-makers to address the alleged conduct.

#### 16. §106.45(b)(3)(vii): Cross-examination [Fed. Reg. 61498]

**Issue:** “The decision-maker must explain to the party’s advisor asking cross-examination questions any decision to exclude questions as not relevant.”

**Recommended change:** We recommend eliminating the cross-examination requirement, but if it survives rulemaking, we recommend striking this provision.

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<sup>22</sup> Proposed Title IX Rules, *supra* note 1, at 61485 (stating that the “Department does not believe it is reasonable to assume that the proposed regulations will have a quantifiable effect on the underlying rate of sexual harassment occurring in the education programs or activities of the recipients.”).

<sup>23</sup> Preventing Sexual Violence in Higher Education Act, 110 Ill. Comp. Stat. § 155/25(b)(10).

<sup>24</sup> Because the conduct subject to the Illinois law and the conduct subject to the proposed regulations does not perfectly overlap, preemption would only preempt the Illinois law for “sexual harassment in an education program or activity of the recipient against a person in the United States.” Proposed Title IX Rules, *supra* note 1, at 61497. This means that to best comply with both Illinois and federal law, an Illinois institution would have to adopt separate procedures for very similar conduct depending on whether the conduct falls within Title IX or not.

**Justification:** Even in criminal trials, where a defendant’s liberty—and possibly life—is at stake, judges are not required to explain their decision to exclude questions. Requiring such an explanation for a recipient’s grievance proceedings, where at most an individual’s ability to remain at a particular institution is at stake and where the decision-makers are unlikely to be trained in the law or rules of evidence, is not a reasonable expectation.

**17. §106.45(b)(3)(vii): Cross-examination [Fed. Reg. 61498]**

**Issue:** “If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.”

**Recommended change:** We recommend eliminating the cross-examination requirement, but if it survives rulemaking, we strongly recommend striking this provision.

**Justification:** As proposed, a respondent could refuse to submit to cross-examination in order to prevent prior incriminating statements made to law enforcement or investigators from being considered by the decision-makers. This is fundamentally unfair and cannot be what the Department intended.

A rule this broad would sometimes undermine the Department’s proposed §106.44(b)(2), which says “[w]hen a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint.”<sup>25</sup> It makes no sense to require a formal complaint when the evidence upon which it is based cannot be considered in some cases. A decision-maker should be able to evaluate any credible information and give it the weight it deserves after considering all information that is available, including the extent to which the information was tested. A blanket-rule does not serve the interests of fact-finding.

Proposed §106.45(b)(3)(vii) would also prevent the consideration of cumulative reports from many highly credible sources about a single respondent if those sources do not agree to participate in the cross-examination process. Survivors or witnesses may only be willing to report in a more private setting as opposed to the public nature of cross-examination. If no evidence from such witnesses can be relied upon, then survivor and witness avoidance of investigatory processes could have significant safety, legal, and financial consequences for many campuses by preventing recipients from being able to identify, deter, and respond appropriately to some forms of sexual harassment.<sup>26</sup>

**18. §106.45(b)(3)(viii): Access to evidence [Fed. Reg. 61498]**

**Issue:** “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 so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.”

**Recommended change:** Change the first sentence of §106.45(b)(3)(viii) to read as follows: “Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation

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<sup>25</sup> Proposed Title IX Rules, *supra* note 1, at 61497.

<sup>26</sup> W. David Allen, *The Reporting and Underreporting of Rape*, 73 SOUTHERN ECON. J. 623, 640 (“As an issue relevant to the classical economic model of crime and to the enforcement of law, the underreporting of rape matters to the extent that it weakens the connection between crime, punishment, and restitution—for the individual and for society at large.”).

that is directly related to the allegations raised in a formal complaint **and could appropriately be relied upon in reaching a determination regarding responsibility** so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. **Recipients may redact confidential or sensitive information that does not pertain to whether or not the conduct occurred.**”

**Justification:** During the course of an investigation, an investigator may obtain information that is very sensitive (e.g., medical information, mental health information, information about past conduct) and may be subject to protections from various state and federal privacy laws. Not all of the information received can be or will be relied upon in making determinations regarding specific alleged conduct. There is no legitimate reason to disclose, for example, a respondent’s past conviction for DUI or a complainant’s emergency room records listing the complainant’s medical history, when the sensitive information is not relevant to assessing whether or not the alleged sexual harassment occurred.

#### 19. [§106.45\(b\)\(3\)\(viii\): Access to evidence \[Fed. Reg. 61498\]](#)

**Issue:** “Prior to the completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report.”

**Recommended change:** Change the second sentence of §106.45(b)(3)(viii) to read as follows: “Prior to the completion of the investigative report, the recipient must **make a copy of the draft investigative report section that fairly summarizes the relevant evidence available for inspection and review by the parties**, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report.

**Justification:** Making the materials available remotely—even with controls in place—significantly increases the probability of information being disclosed outside of the grievance process given the ubiquity of smartphones. Recipients should be allowed to determine whether to grant remote access. Recipients should not be required to send evidence to advisors. In addition to concerns about whether that would be allowed under FERPA, recipients should be allowed to “establish restrictions regarding the extent to which the advisor may participate,” as the Department states in proposed §106.45(b)(3)(iv).<sup>27</sup>

#### 20. [§106.45\(b\)\(3\)\(ix\): Investigative report \[Fed. Reg. 61498\]](#)

**Issue:** Proposed §106.45(b)(4)(ii)(B) requires that the decision-maker include in the written determination “[a] description of the procedural steps taken from the receipt of the 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.”<sup>28</sup>

**Recommended change:** Change §106.45(b)(3)(ix) to read as follows: “Create an investigative report that fairly summarizes relevant evidence **and includes a description of the procedural steps taken from the receipt of the complaint up to the hearing, including any notifications to the parties, interviews with**

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<sup>27</sup> Proposed Title IX Rules, *supra* note 1, at 61498.

<sup>28</sup> Proposed Title IX Rules, *supra* note 1, at 61499.



**parties and witnesses, site visits, and methods used to gather other evidence**, and, at least ten days prior to a hearing . . .”

**Justification:** The decision-maker is unlikely to possess firsthand knowledge of all the procedural steps taken up until the time of the hearing. In the interest of efficiency, the investigator, not the decision-maker, should provide that information.

#### **21. §106.45(b)(4)(i): Evidentiary standards [Fed. Reg. 61499]**

**Issue:** Proposed §106.45(b)(4)(i) states that when determining responsibility for claims of sexual harassment, “the recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.”

**Recommended change:** Strike this provision.

**Justification:** The Department should not mandate the same standard of evidence for student respondents as for employee respondents. Title IX is about equity between sexes in access to education, not equity among students, faculty, and employee respondents as classes. Thus, equity among students, faculty, and employee respondents is inappropriate to consider when implementing Title IX.

#### **22. §106.45(b)(4)(ii)(B): Written determination [Fed. Reg. 61499]**

**Issue:** Proposed §106.45(b)(4)(ii)(B) requires that the decision-maker include in the written determination “[a] description of the procedural steps taken from the receipt of the 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.”<sup>29</sup>

**Recommended change:** Change §106.45(b)(4)(ii)(B) to read as follows: “A description of the hearings held.”

**Justification:** The decision-maker is unlikely to possess firsthand knowledge of all the procedural steps taken up until the time of the hearing. In the interest of efficiency, the investigator, not the decision-maker, should provide that information, and the decision-maker should provide the description of the hearings held.

#### **23. Directed Question 3: Applicability of the rule to employees [Fed. Reg. 61483]**

**Directed Question 3:** “Applicability of the rule to employees. Like the existing regulations, the proposed regulations would apply to sexual harassment by students, employees, and third parties. The Department seeks the public’s perspective on whether there are any parts of the proposed rule that will 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.”

**Response:** The fact that the Department appears to intend that recipients adopt specified procedures for matters involving public employees is problematic because the proposed procedures ignore existing rights and procedures that are based on state laws and regulations, institutional governing documents, and collective bargaining agreements (none of which can be changed by a recipient unilaterally).

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<sup>29</sup> Proposed Title IX Rules, *supra* note 1, at 61499.

In particular, the requirement in proposed §106.45(b)(4)(i) that when determining responsibility for claims of sexual harassment, “the recipient must . . . apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty” is problematic and unworkable. In Illinois, the *Preventing Sexual Violence in Higher Education Act* requires the preponderance of the evidence standard for adjudicating student-on-student sexual violence cases.<sup>30</sup> For faculty, however, the American Association of University Professors (AAUP) strongly supports the use of the clear and convincing evidence standard, along with special processes of faculty governance, prior to revocation of tenure.<sup>31</sup> Many universities commit to the AAUP standards and procedures as part of employment contracts with tenured faculty and through internal governing documents that require either a clear and convincing or substantial evidence standard for tenure revocation proceedings. The use of different procedures and a higher standard of evidence for tenure revocation proceedings is not, as the Department mistakenly suggests, a reflection of superior leverage held by faculty, but is instead a reflection of the university’s legitimate interests in and commitment to supporting free inquiry and protecting academic freedom in the faculty.<sup>32</sup>

The proposed grievance procedures are problematic and unworkable not only for tenured faculty but also for non-tenured employees. Grievance and disciplinary procedures for non-tenured employees, particularly at public institutions, may be subject to collective bargaining agreements or state laws that require different procedures and evidentiary standards.<sup>33</sup> Hence, recipients can be bound by contract or state law to use one set of procedures and evidentiary standards for employee respondents but required by different state law to use another set of procedures and evidentiary standards for student respondents.

There are thus many reasons why recipients may—or sometimes even legally must—treat student, employee, and faculty respondents differently with respect to the procedures and evidentiary standards used to determine consequences of sexual harassment. The unique circumstances that apply to processes involving employees should be considered by the Department in its rulemaking. A prescribed grievance process that does not consider these unique circumstances is not workable.

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<sup>30</sup> Preventing Sexual Violence in Higher Education Act, 110 Ill. Comp. Stat. § 155/25(b)(5).

<sup>31</sup> Report, AAUP, Recommended Institutional Regulations on Academic Freedom and Tenure (2018), <https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure>.

<sup>32</sup> Proposed Title IX Rules, *supra* note 1, at 61477.

<sup>33</sup> At the University of Illinois System, unionized employees make up a significant proportion of our employees in all major employment categories.