

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

Dear Secretary DeVos:

Thank you for the opportunity to submit comments on the recent changes included in 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.

NASPA is the leading association for the advancement, health, and sustainability of the student affairs profession and represents over 15,000 individual members and 1,100 institutions of higher education. Student affairs is a critical component of the higher education experience, and these professionals collaborate with colleagues across institutions of higher education to offer students valuable learning opportunities, safe and inclusive environments, and success pathways to credential completion. NASPA members support students at all stages of their educational journeys in a wide variety of institutional settings and contexts and is most concerned with ensuring that regulations related to Title IX allow for fair and equitable campus conduct processes for students across the diversity of institutions.

Student affairs professionals, and the institutions that employ them, recognize the importance of addressing sexual harassment¹ accusations to ensure supportive and productive educational environments for all students. Essential to ensuring such environments are campus adjudication procedures that uphold student civil rights while allowing for sensitivity to the level of ambiguity inherent in sexual harassment and assault incidents. Navigating allegations that frequently involve different personal recollections of what happened, with few or no witnesses or physical evidence, and possibly colored by alcohol use by one or both parties is complicated under the best of circumstances.

¹ For the purposes of consistency, and in keeping with the language used in Title IX, we will use the term sexual harassment to encompass the broad array of sexually-based misconduct that may occur, including sexual assault.

It is incumbent on colleges and universities to remain faithful to their missions as educational organizations in working to address conduct that violates the standards of their campus communities. Unlike in a court proceeding, where evaluation of guilt or innocence is of most import, a campus conduct process also must be learning-centered and focused on achieving “outcomes of demonstrated learning, changes in behavior, and protection for the campus community”². Explicit in this understanding of the nature of campus conduct processes is a focus on “development discussions in which a student reflects on the standards of the community, his/her own behavioral decision within that community, and the impacts of his/her actions on others”³. Striking this delicate balance requires that institutions feel confident that their actions and decisions in conduct proceedings are fair and equitable to all parties.

NASPA values the important role of the Department in the issuance of guidance, and providing oversight for how higher education institutions develop fair and equitable sexual harassment policies and processes. However, we are very concerned that the net effect of the proposed guidelines will impose a heavily legalistic and intricate process on institutions for investigating incidents of possible sexual harassment. We strongly request that this approach be reconsidered. Our comments that follow provide specific suggestions that address our major concerns.

There are aspects of the proposed rule we feel would allow institutions of higher education greater flexibility and better tools to address incidents of sexual harassment. NASPA supports both the maintenance of the right for both parties to appeal and clarity that institutions can provide supportive services to students regardless of whether a formal complaint is filed. Overall, however, NASPA finds that the Department’s NPRM would, if implemented as proposed, create a more adversarial process for adjudication of campus sexual harassment conduct incidents. Further, in attempting to establish a single, one-size-fits-all approach to campus sexual harassment adjudication, the Department introduces several new areas of ambiguity and potential liability that may not be intended. Counter to the Department’s estimation, NASPA’s student affairs lens, which accounts for additional training costs and expected staffing adjustments, finds that the burden for implementing the process described in the proposed rule could be very heavy and the opportunities for mistakes are very high, which would also leave institutions – and the individuals charged with responsibility for these processes – vulnerable. In the proposed rules, there are troubling instances where there is either not enough clear guidance and other places where the rules are overly specific and prescriptive.

NASPA objects most strongly to the many and various ways in which the proposed rule conflates campus sexual harassment adjudication with criminal justice proceedings. Campus conduct process best practices are founded on *The General Order on Judicial Standards of Procedure and*

² Bennett, L. & Gregory, D.M. (2014). ASCA Law and Policy Report No. 487: Courts or campuses? Different questions and different answers. The Association for Student Conduct Administration.

<https://www.theasca.org/Files/Publications/LPR487May12014.pdf>

³ Ibid.

*Substance in Review of Student Discipline at Tax Supported Institutions of Higher Education*⁴, published by the United States District Court for the Western District of Missouri in 1968. The General Order states clearly that “[t]he attempted analogy of student discipline to criminal proceedings ... is not sound.” In the proposed Title IX rule, however, the Department repeatedly draws parallels between court and legal proceedings and campus adjudication processes in their rationale, particularly with respect to the involvement of third-party advisors, including privately-retained legal counsel, for participants in cross-examination during live hearings. We request that these references be removed and the long-accepted distinction between campus conduct and criminal proceedings be respected throughout any final rule.

Barring the removal of such references, our comments identify several areas of the proposed rule that would require additional clarification or revision to maintain the environments of trust and responsibility institutions have worked diligently to create in recent years. Such trust is necessary to ensure that those subject to sexual harassment feel that coming forward to report an incident will be taken seriously and adjudicated fairly as well as to ensure those named in an accusation can be confident their rights will be respected.

We note where the proposed rule would place unnecessary burden on both large and small institutions and suggest alternatives that would allow for the implementation of fair and equitable campus conduct proceedings across the diversity of institutional contexts that exist in our nation.

We further identify aspects of the rule that we feel provide too little concrete guidance, such as the allowance for informal resolution. There are myriad ways in which the lack of specific clarification and guidance in the proposed rule may lead to hesitancy in the utilization of Title IX protections by students and institutions alike. NASPA recognizes the significant efforts of Title IX coordinators and student affairs professionals on our country’s college campuses to provide fair and equitable campus adjudication processes to support all their students, complainants⁵ and respondents alike. While it is certainly true that there may be campuses that continue to turn a blind eye to the needs of complainants and respondents, it is the appropriate role of the Department of Education Office of Civil Rights to provide administrative oversight specifically to address those few bad actors.

We seek to remind the Department of the historical nature of federalism and the role of Federal government in setting baseline regulations that allow states to build from. And finally, we request that the Department remove language excusing faith-based institutions from seeking affirmation of an exemption under Title IX in the interest of ensuring transparency for historically marginalized populations.

⁴ General Order on Judicial Standards of Practice and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education, 45 F.R.D. 133 C.F.R. (1968). <https://eric.ed.gov/?id=ED025805>

⁵ In keeping with the language used in the proposed rule, students who experience or report incidents of sexual harassment will be referred to as complainants and those who are the subject of such reports will be referred to as respondents.

Concerns related to the overly-legal process proscribed in the proposed rule

Requirements for adversarial processes

The proposed rule would create a more adversarial process for adjudication of campus sexual harassment conduct incidents, one that is repeatedly conflated with legal processes in the preamble to the proposed rule⁶. The formality of criminal justice proceedings risk significant retraumatization, noted by the Department itself in its allowance for cross-examination to be conducted by a third-party and in a separate room (83 FR 61476). Additionally, fear of said retraumatization by participation in these processes have been widely documented in research as contributing to low reporting rates by survivors. The stress of having more criminal-justice-like processes on campus inevitably increases the stress on respondents as well, turning campus conduct proceedings into an artificially overly-legalistic system.

Constitutional due process

In the proposed rule, the term “due process” appears over 30 times and three sub-sections are added to §106.6, one of which, subsection (d), specifically extends Constitutional Due Process rights to parties in campus conduct proceedings under Title IX. Institutions are not courts of law, and this extension of Constitutional Due Process does not correctly and appropriately equate the purpose of conduct proceedings with criminal court proceedings. The extension of Constitutional Due Process to campus conduct proceedings appears to be based on a narrow set of examples that result in an overly proscriptive process that seeks to tilt what should be fair and equitable processes in favor of respondents. The Department cites only evidence that emphasizes cases where an institution may have been overzealous in seeking to protect a complainant.

Presumption of “not responsible”

The proposed regulations add a requirement for institutions to notify respondents in writing when a formal investigation naming them is initiated. Among the information that the Department requires in the notification is a statement that the respondent is “presumed not responsible” (§106.45(b)(1)(iv) & §106.45(b)(2)). This statement, however, unnecessarily equates the “presumption of innocence” protection used in criminal proceedings with campus conduct adjudication. Criminal proceedings are, as noted by Boulder attorney John Clune⁷, “designed so that there are more rights for the accused individuals.” However, Clune continues, campus adjudication of student conduct matters, which is the purview of the Department under Title IX, “is to make sure that men and women are treated equally.” By stating at the outset of a

⁶ See for example: “The Department’s proposed regulations significantly reflect legal precedent because, while we could have chosen to regulate in a somewhat different manner, we believe that the standards articulated by the Court in these areas are the best interpretation of Title IX and that a consistent body of law will facilitate appropriate implementation.” (83 FR 61466)

⁷ Dukakis, A. Colorado Public Radio, “Do the proposed Title IX changes protect the accused, or hurt accusers? Two lawyers weigh in,” December 11, 2018. <https://www.cpr.org/news/story/do-the-proposed-title-ix-rules-protect-the-accused-or-hurt-the-accusers-two-lawyers>

formal investigation that respondents are afforded more rights than complainants violates the rights of complainants and would subsequently reduce the likelihood that students who have experienced sexual harassment would report it. It would be more appropriate for campuses to assert their commitment to neutral, fair, and equitable investigations in their first formal communication to respondents.

Campus conduct proceedings are not courts of law

As noted above, campuses are not courts of law. In the proposed Title IX rule, however, the Department repeatedly draws parallels between adversarial court and legal proceedings and campus adjudication processes in their rationale, particularly with respect to the involvement of third-party advisors, including privately-retained legal counsel, for participants in cross-examination during live hearings.

Both the informal resolution and cross-examination provisions within the proposed rule have significant repercussions in terms of the impact on students and institutional liability. The heavily proscribed process expects campus administrators to conduct work that is often performed by expert investigators and attorneys in implementing and overseeing overly legalistic procedures. In addition to existing expectations for investigators and decision-makers in formal hearings, the process proposed also adds requirements for understanding each person's role in cross-examination. Decision-makers will need training to determine appropriateness of questions immediately during a live hearing, an expectation beyond that even of trial judges, and familiarity with rape shield laws and procedures. An appropriate middle-ground would follow "gold standard" recommendations from the Association for Student Conduct Administration (ASCA)⁸ and allow for institutions to determine a process most appropriate for their campuses. NASPA feels this approach, when coupled with appropriate oversight from the Department, would address both the concerns of the parties involved as well as the need to protect against bias.

Narrower definition of harassment

The proposed rule issued by the Department also includes a narrower definition of harassment (§106.30) than previously interpreted by the Office for Civil Rights. Previously, the Department defined sexual harassment broadly as "any unwelcome conduct of a sexual nature" and instructed institutions to consider any harassment over which they had control of the complainant, the respondent, or the context of the harassment⁹. The new rule, based in part on

⁸ Bennett, L., Gregory, D.M., Loschiavo, C., & Waller, J. (2014). Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses. Association for Student Conduct Administration.
<https://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf>

⁹ U.S. Department of Education, Office for Civil Rights. (2014, April 29). Questions and answers on Title IX and sexual violence. Retrieved from <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

the decision in *Davis v. Monroe County Bd. Of Ed.* 526 U.S. 629 (1999), defines sexual harassment in §106.30 of the proposed rule as

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) Sexual assault, as defined in 34 CFR 668.46(a). (83 FR 61496)

NASPA notes concerns related to the second and third clauses of the proposed definition.

Denial of access

There are instances within the proposed rule where the Department has used the phrase "effectively denies" victims equal access to educational opportunities. The use of the word *effectively* signals a significantly higher threshold that institutions must meet when making a finding of responsibility under Title IX. Institutions can no longer make the argument that harassment could potentially impact educational access, but only that harassment that has already impacted the victim's educational access. Boulder attorney John Clune notes¹⁰:

[W]hen you have a standard that says that it has to be something that is so severe and pervasive to effectively deny somebody's educational opportunities, what you are setting up is a system where individual victims have to endure a certain level of sexual harassment and abuse before it rises to a particular level that the school has to respond.

Other attorneys agree that "the change in language would require sexual harassment to effectively drive a victim off campus or subject them to escalating levels of abuse in order to require Title IX grievance procedures"¹¹. Further, the requirement that an individual be effectively denied access ignores that even students who may be resilient enough to persevere and continue their education relatively unimpeded have still been subject to sexual harassment and deserve protection and accountability.

Despite the success of the #MeToo movement in highlighting the prevalence of sexual violence, many survivors of sexual assault choose not report their experience to officials. There are myriad reasons for why survivors may not report, including the fear of not being believed, the difficulty in prosecuting these cases, and many other reasons. Reports of survivors being told by officials that what happened to them is unfortunate, but does not meet the level of severity for

¹⁰ Dukakis, A. Colorado Public Radio, "Do the proposed Title IX changes protect the accused, or hurt accusers? Two lawyers weigh in," December 11, 2018. <https://www.cpr.org/news/story/do-the-proposed-title-ix-rules-protect-the-accused-or-hurt-the-accusers-two-lawyers>

¹¹ Schwartz, N. Education Dive, "4 questions DeVos' Title IX rules leave unanswered," December 18, 2018. <https://www.educationdive.com/news/4-questions-devos-title-ix-rules-leave-unanswered/544599/>

investigation are rife. In light of this pervasive message, telling survivors that their experience must “effectively deny their equal access” reinforces this message and will undoubtedly reduce reports and investigations of sexual harassment on campus. In fact, the Department admits this in the proposed rule, stating both: “The Department does not believe it is reasonable to assume that these regulations will have a quantifiable effect on the underlying rate of sexual harassment occurring in the educational programs or activities of [institutions]” (83 FR 61485) and that institutions would experience “a reduction in the average number of investigations per [institution] per year of 0.75” (83 FR 61487). When we know that rates of sexual violence are disturbingly and unacceptably high, we should be doing everything we can to support, and not discourage, survivors coming forward to report.

Some campus administrators admitted frustration with the broad definition used previously by the Department because any unwelcome conduct of a sexual nature, under rare circumstances, could have included one-time comments which did not inhibit the educational activities of the person who reported it. But many campus administrators would agree with the standard by which institutions have a responsibility to investigate harassment over which the institution has control over the context, the harasser, or the complainant which has the potential to impact the educational access of the victim who reports the harassment. Thus, a definition of harassment that can serve as a midpoint between the former guidance and the new rule would be welcomed by many administrators involved in adjudicating Title IX complaints.

Alignment with the Clery and Violence Against Women Acts

The Department includes sexual assault as defined in 34 CFR 668.46(a) of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act). This alignment of Title IX definitions with the Clery Act is a welcome one, but it is only a partial alignment. The Department does not include stalking or dating or domestic violence, also defined within Clery and expanded on in the Violence Against Women Act (VAWA), as sexual harassment within the proposed rule. Other requirements included in the proposed rule, such as requirements for notification of parties, would align to requirements under VAWA, and further alignment would create more certainty about institutional responses to all sex-based conduct issues.

A 2015 white paper by the Association of Title IX Administrators¹² reported that 22% of college women report physical or sexual abuse, or threats of physical violence, that 57% of college students said that it’s difficult to identify dating abuse, and 58% said that they don’t know what to do to help someone who is a victim of dating abuse. A true alignment of Title IX with the Clery Act and VAWA would serve to address the dual processes on campus that are currently used to investigate sexual harassment claims separate from dating/domestic violence and stalking cases, which can reduce confusion among student survivors about the need for different processes for power-based misconduct violations. Especially in light of the recent expiration of VAWA, NASPA

¹² Grimmett, J., Lewis, W.S., Schuster, S.K., Sokolow, B.A., Swinton, D.C., & Van Brunt, B. (2015). The Challenge of Title IX Responses to Campus Relationship and Intimate Partner Violence. ATIXA. <https://atixa.org/wordpress/wp-content/uploads/2012/01/Challenge-of-TIX-with-Author-Photos.pdf>

would advocate in favor of aligning the definitions and responsibilities for campuses in responding to incidents of sexual harassment, intimate partner violence, and stalking under Title IX.

Campus conduct violations that are not covered under the new definition of sexual harassment

We are requesting clarification about the ability of campuses to adjudicate cases as violations of a student code of conduct, separate from a formal Title IX investigation. This appears to be permissible as outlined by the Department in the preamble (83 FR 61475) to the proposed rule, although the Department also indicates within the proposed rule that institutions would be required to terminate a formal grievance proceeding if it is found not to meet Title IX definitions/criteria (§106.45(b)(3)). We would request that campuses maintain the ability to pursue student conduct cases related to sexual harassment, but which do not meet the definition under Title IX, under their campus codes of conduct.

We are also requesting clarification about how conduct that occurs within an institution's programs or activities but outside of the United States should be addressed. The Department states that conduct that harms a person outside the United States, such as a student participating in a study abroad program would not be covered under Title IX (83 FR 61468), but also specifies that a "recipient's education program or activity does not necessarily depend on the geographic location of an incident" (83 FR 61468 §106.44(a)). The Department indicates several times that the determination of institutional responsibility extends to the education program or activity's connection with the university, but in the preamble, the Department uses the definition of program or activity under United States Code Chapter 38, Discrimination Based on Sex or Blindness that specifies the geographic location to the United States. Additionally, the Department proposes that "the requirements that a recipient adopt a policy and grievance procedures as described in this section apply only to exclusion from participation, denial of benefits, or discrimination on the basis of sex occurring against a person in the United States" (§106.8(d)). It seems incongruous to exempt behavior between two students of a United States based institution that happened to occur on an institution-sponsored trip abroad from redress under Title IX simply because the incident occurred outside the physical geography of the United States.

Narrower definition of educational programs and activities

The proposed rule narrows the scope of sexual harassment to that which occurs within an institution's educational programs or activities. While this seems like a reasonable definition, the narrower definition excludes most off-campus harassment that students experience. In the preamble to the proposed rule, the Department indicates that "[w]hether conduct occurs within a recipient's education program or activity does not necessarily depend on the geographic location of an incident (e.g., on a recipient's campus versus off of a recipient's campus," (83 FR 61468) yet further clarifies that:

In determining whether a sexual harassment incident occurred within a recipient's program or activity, courts have examined factors such as whether the conduct occurred in a location or in a context where the recipient owned the premises; exercised

oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance. (83 FR 61468)

The Department has specifically referenced the inclusion of Greek chapters and houses as educational programs or activities, even if their chapter houses are not considered on-campus property, so long as the institution maintains oversight over Greek life (83 FR 61468). However, this definition leaves out a significant number of incidents that impact victims' educational access, but which the school cannot adjudicate, such as houses that are rented by groups of students, such as a sports team, that are not owned by the institution. Under the previous guidance, sexual harassment that occurred at these types of locations could be investigated, as the institution had control over both the harasser and the context (in that the harasser was a member of an institution's athletic program). This definition in the proposed rule also leaves to interpretation whether or not harassment at institution-sponsored activities (such as away-games as part of athletic travel) would be within an institution's purview to investigate.

The data on where most student experience sexual harassment indicate that this narrower scope of institutional responsibility will leave a significant number of students who are impacted by sexual harassment without protection under Title IX. According to the Association of American Universities campus climate survey results¹³:

For female graduate students, all males and all those identifying as [transgender, queer, nonconforming], incidents of nonconsensual sexual contact are more likely to occur off-campus. However for female undergraduates the location is relatively even between on campus and off campus; this is the only student group in which a significant majority of forcible penetration and forcible sexual touching victims reported that the incident happened on campus (p. xi).

For nearly all types of sexual victimization, however, off-campus locations are most common, which include student residences close to campus (Fisher, et al., 2000). Krebs and colleagues (2016) also found that about two-thirds of rape (66%) incidents and close to three-fourths of sexual battery incidents (72%) took place off campus (p. 40).

The proposed, narrower definition provides little relief to institutions who must now determine how to support the continued educational access of victims who experience sexual harassment in "off-campus" locations while being prevented from addressing its recurrence under Title IX.

¹³ Cantor, D., Fisher, B., Chibnall, S., Townsend, R., Lee, H., Bruce, C., & Thomas, G. (2017). Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct. Rockville, MD: Westat. <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>

Change to actual knowledge standard

Within the new rule, the Department introduces the definition of what constitutes actual knowledge of sexual harassment by an institution, citing the *Davis v. Monroe County Bd. Of Ed.* 526 U.S. 629 (1999) and the *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998) decisions. Within the proposed rule, “actual knowledge” is defined as “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient,” (83 FR 61466 §106.30).

Unlike under previous guidance, it would no longer be the case under this proposed rule that if a responsible employee within an institution receives a report that the institution is considered to have actual knowledge of the harassment. However, the court precedent cited by the Department relates to compensatory or monetary relief, which is not allowed under the proposed rule unless actions of an institutions required payment by a party that would need to be reimbursed. Title IX sanctions are considered injunctive relief, and, according to Naomi Shatz, an employee and students’ rights lawyer with Zalkind, Duncan, & Bernstein, LLP¹⁴, the actual knowledge standard is not necessarily required in such cases.

Further, given the terrible consequences of not reporting in cases like the Larry Nassar case¹⁵, many campus administrators are concerned by the actual knowledge standard in the proposed rule. Under the proposed rule, anyone who has similar knowledge of such violations may be required to notify the Title IX Coordinator of sexual harassment under Title IX, but even with that knowledge, the institution isn’t considered as having actual knowledge until a survivor makes an official report to the Title IX Coordinator. This narrower standard of actual knowledge could discourage current responsible employees from fulfilling their duties to report known instances of sexual harassment if the institution is no longer required to respond to such reports.

Many campus administrators have argued that overly-broad responsible employee policies implemented on some campuses have left victims with nowhere safe to discuss their options before making a formal complaint. However, expecting students to understand that there is only one person at their institution, especially at large institutions, to whom they can officially report simply creates a new set of problems. A compromise solution can be found in the work of

¹⁴ Shatz, N.R. (@NaomiShatz). “4/ This imports the standard the Supreme Court has set forth for when a student suing the school can collect monetary damages -- but is not necessarily the standard for when students can hold school accountable and obtain injunctive or declaratory relief.” November 16, 2018, 11:06 a.m.. Tweet. <https://twitter.com/NaomiShatz/status/1063448206573490177>

¹⁵ Nassar was a gymnastics team doctor at Michigan State University where, for years, he used his position to sexually assault his patients. Survivors of sexual assault said they reported the assaults to various campus administrators who did nothing to address the behavior or prevent him from continuing to assault members of the team under his care.

Holland, Cortina, and Freyd¹⁶, wherein they suggest, “Modifications to compelled disclosure procedures could also help mitigate harm. For instance, universities could require Responsible Employees to report sexual assault disclosures to well-trained and confidential advocates, rather than Title IX officials or law enforcement.” This could retain the number of individuals to whom a student could report harassment, while directing them to a confidential resource where they can discuss their options before deciding whether to make an official report to the Title IX coordinator.

Live hearings and mandatory cross-examination

In the preamble to the proposed rule, the Department repeatedly asserts that respondents have been consistently denied the ability to question their accusers in sexual misconduct proceedings, resulting in a trampling of respondents’ rights to a fair and equitable process. Citing *California v. Green*, 399 U.S. 149, 159 (1970), the Department states that “[c]ross-examination is the ‘greatest legal engine ever invented for the discovery of truth.’” (83 FR 61476). Outside of a few high profile lawsuits referenced in the preamble, however, there is little evidence to support that institutions are widely using unfair processes to adjudicate campus conduct violations. Even if there were widespread evidence of abuse, Joseph Storch, associate counsel with the State University of New York notes in an article by Inside Higher Ed¹⁷:

The Supreme Court has told us to balance the gains in truth-seeking that more process would bring to a determination against the costs and inefficiencies that additional due process would bring. The proposed regulations do not contain any analysis of the due process balance and simply seem to add additional processes, which, in total, are well beyond what any court decision or statute has ever required, without any consideration of cost, inefficiencies and the additional challenges of addressing violence through the formal process.

The change in the proposed rule is also contrary to the 2014 “gold standard” recommendations from ASCA¹⁸, which state that “proceedings should be equitable and sensitive; there should be no direct questioning of respondents and victims by each other, and the parties need not be in the same room.” Given the desire for campus conduct proceedings to be, first and foremost, learning-centered, requirements for campus conduct investigations should not include cross-examination. Many institutions are successfully able to determine responsibility in sexual harassment cases from written statements, including exchanged questions and answers

¹⁶ Holland, K. J., Cortina, L. M., & Freyd, J. J. (2018). Compelled disclosure of college sexual assault. *American Psychologist*. doi: 10.1037/amp0000186
<https://dynamic.uoregon.edu/jjf/articles/hcfaccepted2017.pdf>

¹⁷ Bauer-Wolf, J. Inside Higher Ed, “A Direct Contradiction,” December 13, 2018.

<https://www.insidehighered.com/news/2018/12/13/state-law-likely-conflicts-devoss-title-ix-proposal>

¹⁸ Bennett, L., Gregory, D.M., Loschiavo, C., & Waller, J. (2014). Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses. Association for Student Conduct Administration.

<https://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf>

between the parties. This process would be less likely to unnecessarily retraumatize either party while still allowing a decision-maker to ask follow up questions and ascertain credibility.

Should the requirement for cross-examination be included in the final rule, we request clarification regarding the level of participation necessary by parties. In §106.45(b)(3)(vii), the proposed rule states that “the decision-maker must not rely on any statement of” a party or witness that “does not submit to cross-examination at the hearing” (83 FR 61498). It is unclear what level of participation constitutes submission to cross-examination or what authority a decision-maker has in overseeing the cross-examination to determine whether questions asked are relevant. We are concerned that a party’s refusal to answer a question to the satisfaction of an advisor may be determined as non-participation and the incentive such a requirement would create for advisors to engage in high-pressure tactics in order to invalidate all statements made by a party.

Expected involvement of attorneys

The proposed rule requires institutions to allow for privately-retained lawyers to serve as advisors, consistent with regulations relating to VAWA. The requirement, however, that advisors engage in direct cross-examination on behalf of those they advise unnecessarily heightens the adversarial nature of a live hearing process. While the Department cites Court precedent in defending live cross-examination, it does so selectively. In contrast to the precedents cited in the proposed rule, the Seventh Circuit Court of Appeals held in *Osteen v. Henley*, 13 F.3d 221 (1993):

Even if a student has a constitutional right to consult counsel ... we don’t think he is entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise perform the traditional function of a trial lawyer. To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation. (13 F.3d at 225)

In the estimates of the cost for implementing the proposed rule, the Department indicates that their assumption is that both parties will retain private counsel: “Given that our estimates assume all parties obtain counsel, we do not believe that [the requirement for a third-party advisor to conduct cross-examination] would result in an increased [institutional] cost not otherwise captured by our estimates.” (83 FR 61488) When combined with the requirements for institutions to provide an advisor (but not necessarily an attorney) if either party does not (or cannot) retain their own, this provision also raises significant equity issues. If either party is unable to incur the financial costs of retaining legal counsel, they find themselves left with the advisor the institution can provide. There are also concerns around social justice and equity, as

noted by King and White¹⁹, “[w]hether a student is held accountable for their actions should not rest on who can afford access to legal counsel.”

Finally, there are concerns relating to the potential for attorneys to contribute to delays in investigations and hearing scheduling. Cases that drag out due to unavailability of either party, witnesses, legal counsel, or campus administrators will prolong the stress of involvement and the expenses associated with the process under the new rules. Some institutions may decide or be required by state law to keep the 60-day time frame²⁰ while allowing the administrators involved the added flexibility for delays as outlined in the proposed rule. Unfortunately, research shows that the length of time cases take to proceed through the criminal justice process is a major reason behind case attrition. Given the similarities between the process proposed by the Department and the criminal justice process, prolonged, time-intensive Title IX proceedings could likely have the same effect of increasing case attrition on campus.

Safe harbors

The complexity of the proscribed process is further complicated by the Department’s addition of “safe harbors”, under which institutions will not be held to have been deliberately indifferent to student complaints under Title IX if they follow the process described in the rule (§106.44(b)(1)). The heavily proscribed process may, however, set many institutions up for potential violations by expecting them to behave not only as courts of law, but also as expert investigators and attorneys in implementing and overseeing overly legalistic procedures. Failure to meet these high standards would put this safe harbor out of reach for institutions despite any best efforts to comply with the regulation.

Additionally, institutions may not be found deliberately indifferent if they have provided supportive measures to victims who come forward to report (§106.44(b)(3)). However, this new deliberate indifference standard could be seen as creating an implicit liability for institutions, as they must effectively admit that by investigating a sexual harassment case, the institution’s supportive measures were insufficient to ensure the victim’s continued educational access to the institution. This potential double-bind calls into question whether the safe harbors described in the proposed rule may in fact increase institutional risk of liability instead of decrease it.

Standards of evidence in Title IX proceedings

We appreciate the attempt in the proposed rule allows for institutions to choose between a preponderance of the evidence or the higher clear and convincing evidence as the standard of

¹⁹ King, T. & White, B. (n.d.). An attorney’s role in the conduct process. Association for Student Conduct Administration.
<https://www.theasca.org/files/Best%20Practices/Attorney%20role%20in%20conduct%20process%20%202.pdf>

²⁰ As we note later, the introduction of two separate 10-day review periods into the formal grievance process may make a 90-day timeline more achievable.

evidence they will use in adjudicating Title IX cases. However, the requirement that institutions must, under the proposed rule, use the same standard of evidence for all sexual harassment cases on campus – including those involving students, staff, and faculty – makes this flexibility unachievable for many institutions. Many faculty codes of conduct are associated with tenure policies and bound by union contract. Similarly, unionized employees may be bound by contract to a misconduct policy that utilizes the higher clear and convincing standard.

The conflation of sexual harassment proceedings in an employment setting with adjudication of student conduct draws a false equivalency between relationships between employees of an institution and students at an institution. By requiring the alignment of all sexual harassment cases, the Department is forcing institutions that might otherwise choose to implement the preponderance of evidence standard to use a clear and convincing standard instead. The preponderance standard is the standard used universally in civil rights cases²¹ and represents the most balanced standard between the parties, instead of requiring one party to reach a higher bar than the other for a finding of responsibility.

The Department indicates in the Directed Questions section of the preamble to the proposed rule, however, that they are seeking public comment specifically on the standard of evidence (83 FR 61482). Loschiavo and Waller²² note:

Considering the serious potential consequences for all parties in these cases, it is clear that preponderance [of the evidence] is the appropriate standard by which to reach a decision, since it is the only standard that treats all parties equitably. To use any other standard says to the victim/survivor, “Your word is not worth as much to the institution as the word of accused” or, even worse, that the institution prefers that the accused student remain a member of the campus community over the complainant. Such messages do not contribute to a culture that encourages victims to report sexual assault.

In alignment with NASPA’s core values and the recommendations of ASCA, we feel it is appropriate that the Department change the requirements in the proposed rule relating to the evidentiary standard to require use of the preponderance standard for all Title IX proceedings.

Concerns related to institutional staffing and capacity

Initiation of formal grievance procedures

We are requesting clarification on which employees of an institution would meet the requirements listed in the proposed rule for initiating a formal investigation under Title IX. The

²¹ Baker, K.K., Brake, D. L., & Cantalupo, N.C. (2016). Title IX & the preponderance of the evidence: A white paper. Retrieved from <http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-PreponderanceWhite-Paper-signed-8.7.16.pdf>

²² Loschiavo, C. & Waller, J. (n.d.) The preponderance of the evidence standard: Use in higher education campus conduct processes. Association for Student Conduct Administration. <https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf>

proposed rule indicates that any staff member with authority to institute corrective measures, in addition to the Title IX Coordinator, may initiate a formal investigation. Given that the Title IX Coordinator is also identified as the individual responsible for coordinating all supportive measures on a campus, the rule seems to limit the authority for initiating formal grievance procedures solely to the Title IX Coordinator. This seems to risk creation of a bottleneck around the Title IX Coordinator that may impede the ability of institutions to respond timely to student needs.

There is also a lack of clarity about instances where an institution may initiate a formal investigation on the basis of multiple cases of actual knowledge that are not separately formally investigated. The proposed rule states that institutions have a responsibility to investigate “reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment” (83 FR 61469). Unfortunately, given the requirements for notification, live hearing, and mandatory cross-examination, it’s wholly unclear how the proposed process would work. If none of the survivors are willing to stand in as a complainant, and submit to cross-examination, would any statement by them be allowed to be considered by the decision-maker, for instance? It is difficult to see how the process proposed in the rule for would be anything but inconclusive under the stated requirements.

Supportive services coordination

The proposed rule clarifies that institutions must provide supportive services to students even if a formal grievance process is not initiated (83 FR 61462 §106.30), however it also places the responsibility for coordination of supportive services in all cases on the Title IX coordinator, which can be burdensome. NASPA recognizes and appreciates that, as noted by the Department in the preamble to the proposed rule, this burden of making arrangements for accommodations should not fall on students seeking support. However, for large campuses, with a number of students who may be seeking supportive services for incidents that both fall within the institution’s scope of responsibility to investigate and those that do not, the requirement could place significant administrative work on Title IX coordinators.

There are already trained victim’s advocates at many institutions who are providing these supportive measures, and respondent support persons who provide them to respondents. In order to comply with requirements of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), many institutions either provide advocacy services for both complainants and respondents directly or contract with local agencies through Memorandums of Understanding. In a study of higher education advocacy programs, results of which were published by Klein, Dunlap, & Rizzo²³, 80% of institutional survey respondents had on-campus advocates (48% of those had 1 FTE, while another 48% had between 2 and 5 FTE); 56% of advocates provided after-hours crisis support; and 38% provided 24/7 confidential

²³ Klein, L. L., Dunlap, J., & Rizzo, A. (2016). The Role of Campus-Based Advocacy and Prevention Professionals in Campus Culture Change. In *Preventing Sexual Violence on Campus* (pp. 139-158). Routledge.

hotlines. Given the Title IX Coordinator would, under the proposed rule, also be the sole party on campus who can initiate a formal grievance, this seems an unnecessary burden to add specifically to their responsibilities and we would request that institutions be allowed to continue to allow trained advocates to coordinate these services.

Number of individuals required for formal grievance procedures

The Department expresses concern about the practice of a single person investigating and deciding the outcome of reported incidents (commonly known as the single-investigator model) used by some institutions to investigate and adjudicate campus conduct cases involving accusations of sexual harassment.

The process proposed by the Department, however, would require as many as seven separate individuals to be involved in formal grievance procedures, all of whom must be sufficiently trained on Title IX protections, the Title IX grievance process, and their role to ensure that processes are implemented fairly and equitably. The number of distinct individuals required for formal investigatory and grievance processes would have a disproportionate impact on smaller institutions²⁴, including many community colleges, which the American Association of Community Colleges notes may strain personnel resources²⁵. The heavily proscribed process may also set many institutions up for potential violations by expecting them to not only conduct proceedings in a manner similar to those in courts of law, but also conduct work that is often performed by expert investigators and attorneys in implementing and overseeing overly legalistic procedures. We recommend instead a middle-ground, which would follow “gold standard” recommendations from ASCA²⁶ and would allow institutions to determine a process most appropriate for their campus, while maintaining that the investigator and decision-maker remain separate individuals. This approach would address both the concerns of the parties involved as well as the need to protect against bias.

Increased costs for training and retraining

In the cost estimates (83 FR 61486) provided with the proposed rule, the Department addresses the costs of training for the individuals who would need to be involved in the formal grievance procedures. They estimate that the Title IX Coordinator, the investigator, and the decision-maker would receive 16 hours of training each during the first year of implementation of the proposed rule. No cost estimate for training institutionally-provided advisors for students is

²⁴ Bauer-Wolf, J. Inside Higher Ed, “A Direct Contradiction,” December 13, 2018. <https://www.insidehighered.com/news/2018/12/13/state-law-likely-conflicts-devoss-title-ix-proposal>

²⁵ American Association of Community Colleges. “AACC Summary of Proposed Title IX Regulations,” November 29, 2018. <https://www.aacc.nche.edu/2018/11/29/aacc-summary-of-proposed-title-ix-regulations/>

²⁶ Bennett, L., Gregory, D.M., Loschiavo, C., & Waller, J. (2014). Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses. Association for Student Conduct Administration. <https://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf>

included because the department assumes each party will secure outside counsel (83 FR 61488). The Department further indicates that they have included no costs for subsequent years as they assume institutions are already providing annual training. These cost estimates, however, make several assumptions which may not be true for many institutions. Specifically, they assume that 16 hours of training is sufficient to cover all the material for individuals to understand and participate in the process confidently and fairly; that institutions will only be training one individual per role, which may be unrealistic for very large institutions; and that institutions are already training at least three different individuals on these topics currently, which may not be true for institutions currently using a single-investigator model.

Training for investigators is available from a variety of sources currently, many of which require 32 to 40 hours for investigator training courses²⁷ to cover the content necessary to establish foundational knowledge and skills. Appendix C of ASCA's "gold standard" practices²⁸ for resolution of allegations of sexual misconduct on college campuses provides a recommended list of topics to be included in training for adjudicators and hearing board participants. The list includes 20 items, including many that represent a significant amount of information to be covered, e.g., student rights and procedural protections, how to evaluate credibility, and the Family Educational Rights and Privacy Act (FERPA), and privacy of information. The process proposed also adds requirements for competency by participants in the process to understand their role in cross-examination, including determining appropriateness of questions immediately during a live hearing, and familiarity with rape shield laws and procedures. Therefore, the Department's estimate of 16 hours of training in light of the length of current trainings seems unrealistic.

Also notably absent from the cost estimates provided by the Department are the costs of retraining all members of the campus community on the proposed rules changes related to responsible employees and scope of institutional responsibility for students, faculty, and staff. Students especially, having been told for the last several years that they can report incidents to anyone at their institution and expect an institutional response, the changes in the proposed rule will result in confusion and may leave students who believe they have informed a

²⁷ The Association for Title IX Administrators (ATIXA) offers a 4-day Investigator Certification training (<https://atixa.org/events/training-and-certification/investigator-certification/>) and Compliance U offers a 40 hour Investigator Training course (<https://complianceu.org/courses/title-ix-investigator-training>). Husch Blackwell offers a one-day Title IX Foundations workshop (<https://www.huschblackwell.com/newsandinsights/title-ix-foundations-october-11-2018>) and a two-day Advanced Title IX Investigator and Coordinator Workshop (<https://www.huschblackwell.com/newsandinsights/new-advanced-title-ix-investigator-and-coordinator-workshops-kc>).

²⁸ Bennett, L., Gregory, D.M., Loschiavo, C., & Waller, J. (2014). Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses. Association for Student Conduct Administration. <https://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf>

responsible employee with no response. These costs are not included in the cost accounting provided by the Department, but are costs all institutions will incur.

Training for informal resolution processes

There is no mention of training required for those who would facilitate informal processes, and no words cautioning institutions against the danger of coercing students into informal processes. Specifically, the Department states that

Informal resolution options may lead to more favorable outcomes for everyone involved, depending upon factors such as the age, developmental level, and other capabilities of the parties; the knowledge, skills, and experience level of those facilitating or conducting the informal resolution process; the severity of the misconduct alleged; and likelihood of recurrence of the misconduct. (83 FR 61479)

The proposed rule does not specify what a facilitator training or experience might entail, nor does it address whether the process must be overseen by someone formally trained in the kind of resolution agreed to by the parties. Institutions should have clear instructions regarding the appropriate training or experience that is necessary for staff who are charged with conducting informal processes.

Over-reach into campus administrative decisions

In a stated effort to ensure fair and equitable processes, the Department includes language requiring “objective evaluation” (§106.45(b)(1)(ii)) and prohibiting Title IX coordinators, investigators or decision-makers from having “a conflict of interest or bias” (§106.45(b)(1)(iii)). While these requirements appear reasonable, the language leaves questions about what the terms will mean in practice. The concern around “objective evaluation” and “conflict of interest or bias” are related in that they are, at base, hinged on how those phrases are operationally defined and how those definitions may impact institutional decisions related to hiring. When similar provisions were discussed during the negotiated rulemaking process for VAWA²⁹ in 2012, negotiators felt the subjectivity in defining bias would represent an over-reach into campus administrative decisions.

Additionally, the proposed rule seeks to set conditions on the evidentiary standard institutions select as appropriate for campus conduct cases, prohibiting campuses from using the preponderance of the evidence standard unless it is also used for all cases involving sexual harassment among students, faculty, and staff (83 CR 61477 §106.45 (b)(4)(i)). These provisions would force the Department’s will into local institutional administrative decisions that may otherwise be made differently by the leadership to best meet the needs of their institutional community.

²⁹ U.S. Department of Education. (2012-2014). Negotiated Rulemaking 203-2014 Violence Against Women Act (VAWA). <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html>

Resolution Timeline

One of the elements of the proposed rule that has received a warm welcome from some practitioners whose roles involve sexual harassment investigations is the elimination of a 60-day resolution timeline³⁰. The proposed rule does not include mention of a specific timeline for resolution of investigations, instead stating that institutions are to “designate reasonably prompt timeframes ... that may be extended for good cause” (83 FR 61472 §106.45(b)(1)(v)). In the preamble to the proposed rule, the Department states, “[s]ome recipients felt pressure in light of prior Department guidance to resolve the grievance process within 60 days regardless of the particulars of the situation, and in some instances, this resulted in hurried investigations and adjudications, which sacrificed accuracy and fairness for speed” (83 FR 61473). The Department has indicated that the previous 60-day timeline forced institutions to rush through investigations, resulting in resolutions that were unfair to respondents. There is no indication that rushed investigation processes harmed respondents at greater rates than those same processes harmed reporting parties by way of not responsible findings.

Throughout the listening sessions that NASPA conducted with members in March 2018³¹, a recurring theme was concern about the absence of a resolution time frame under the interim guidance release by the Department in September 2017³². Many members indicated that it was often difficult under a 60-day time frame to assure victims that the Title IX investigation process wouldn’t put an undue burden on their schedules, negatively impacting their academic pursuits. The lack of any time frame, however, it was almost universally agreed, would have the effect of decreased reporting by victims. If an institution can’t ensure that an investigation and resolution process will not last for an entire academic term or perhaps multiple terms, there may be little incentive for victims to engage with the process. Complicating matters, the Department has added two mandatory 10-day review periods to the formal investigation process and potentially opened the door for additional delays related to scheduling advisors and any necessary witnesses for a live hearing.

The former guidance at the very least set parameters for institutions to strive for in terms of resolving cases. Under the proposed rule, the *reasonably prompt* time frame is left so vague as to leave Title IX Coordinators, investigators, and other staff vulnerable to lawsuits or investigations by the Department if their interpretation of *reasonably prompt* is not in alignment

³⁰ The timeline originated in a Dear Colleague Letter issued by the Obama administration in 2011. The Office of Civil Rights never intended the 60-day timeline as a hard and fast rule, noting in a 2014 Q&A: “OCR does not require a school to complete investigations within 60 days; rather OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable.” But many schools felt that this was a non-negotiable deadline which they were required to meet.

³¹ Dunlap, J. NASPA – Student Affairs Administrators in Higher Education Research and Policy Institute blog, “Take-aways on Title IX: Emerging themes from NASPA’s Title IX listening sessions,” August 23, 2018. <https://www.naspa.org/rpi/posts/take-aways-on-title-ix-emerging-themes-from-naspas-title-ix-listening-sessi>

³² U.S. Department of Education, Office for Civil Rights. (2017, September). Q&A on Campus Sexual Misconduct. Retrieved from <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>

with either party's advisors or the Office of Civil Rights. While the Department is correct to try and prevent rushed investigation and resolution processes that jeopardize either party's rights to a fair and equitable investigation and adjudication process, the lack of any established timeline simply leaves campus administrators with the liability for determining what a reasonably prompt time frame entails. A 90-day timeline as a suggested time frame, to allow for the two 10-day mandatory review periods included in the proposed rule, with provisions for reasonable delays provided in writing to both parties, could still be encouraged by the Department. This would both encourage buy-in into the Title IX process by participants and reduce the liability on behalf of campus administrators who are responsible for Title IX investigations and resolutions.

Concurrent law enforcement investigations

Among the allowable exceptions for extending a resolution time frame, the Department has indicated that institutions may delay a Title IX investigation to defer to a concurrent law enforcement investigation. Specifically, the department indicates in §106.45(b)(1)(v) of the proposed rule

[...] examples of possible reasons for such a delay, such as absence of the parties or witnesses, concurrent law enforcement activity or the need for language assistance or accommodation of disabilities. For example, if a concurrent law enforcement investigation has uncovered evidence that the police plan to release on a specific timeframe and that evidence would likely be material to determining responsibility, a recipient could reasonably extend the timeframe of the grievance process in order to allow that evidence to be included in the final determination of responsibility. (83 FR 61473)

Law enforcement investigations can take a significant amount of time to conclude, which is one explanation given by survivors for the high attrition rate of survivor participation in those processes³³. One study indicated that for cases that are referred from law enforcement for prosecution, the investigations took an average of 58 days before referral to the prosecutor's office, at which point the prosecutorial process begins³⁴. In other words, a survivor who chooses to pursue both criminal justice and Title IX processes may now be looking at a minimum of 17 weeks of investigations (58 days for criminal justice on average and another potential 60 days for the Title IX investigation) which would result in more than four months' worth of appointments involved in the reporting process. In this scenario, students would be involved in more than a semester's worth or a full two quarters' worth of investigation processes given this permissible delay. These processes are long and potentially traumatizing for both complainants

³³ Lonsway, K. A., & Archambault, J. (2012). The "justice gap" for sexual assault cases: Future directions for research and reform. *Violence Against Women, 18*(2), 145-168.

³⁴ Lovell, R., Flannery, D., Overman, L., & Walker, T. (2016). What happened with the sexual assaults reports? Then vs. now. Begun Center for Violence Prevention Research and Education at Jack, Joseph and Morton Mandel School of Applied Social Sciences, Case Western Reserve University.
<https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=837>

and respondents and any additional delays that could further impact a student's access to their educational pursuits should be avoided.

Potential for Timeline Manipulation

The lack of a timeline also represents an opportunity for manipulation and delay by either party in a sexual harassment complaint. With the requirement for institutions to include supportive personnel or legal counsel in the hearing process, coordinating meetings and hearings to accommodate the schedules of so many participants alone will result in significantly longer time lines. Additionally, there is no disincentive for any party involved not to stall the process by simply making themselves unavailable for suggested meeting or hearing times. The Department states in the preamble to the proposed rule that administrative delays are still prohibited under the proposed rule (83 FR 61473). However, given that language assistance and accommodation of disabilities, presumably both administrative tasks that the institution will need to attend to, are listed as good causes for delay, it is unclear what constitutes an administrative delay.

Concerns related to informal resolution

One of the significant ways that proposed rule differs from previous Title IX guidance is the allowance of informal resolution procedures to resolve sexual harassment cases. This was a welcome shift for some campus practitioners who recognize the value in less adversarial processes. In fact, according to ASCA in their 2014 white paper³⁵, student conduct processes should be learning-centered. Many victims echo this concern and choose not to pursue an official criminal justice or campus adjudication investigation because of the adversarial nature of those processes. Additionally, according to the Association of American Universities campus climate survey report³⁶, 24% of victims surveyed listed social-related reasons for why they didn't report, including "I did not want the person to get into trouble." The inclusion of informal processes has been welcomed by some practitioners and viewed by others as the return to a time when victims could be pressured into less formal processes by well-intentioned campus administrators. A few of the more detailed concerns about informal resolution processes are outlined below.

Concerns over operationalizing informal resolution processes

While the Department has provided that informal processes are allowable under the new rule, they give very little guidance or instruction as to the specifics of how these processes should be implemented. In some areas of the rule, the Department is quite prescriptive, but the section on

³⁵ Bennett, L., Gregory, D.M., Loschiavo, C., & Waller, J. (2014). Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses. Association for Student Conduct Administration.

<https://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf>

³⁶ Cantor, D., Fisher, B., Chibnall, S., Townsend, R., Lee, H., Bruce, C., & Thomas, G. (2017). Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct. Rockville, MD: Westat.

<https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>

informal resolutions is comparatively short and provides little detail. There is only one clause of the proposed rule, §106.45(b)(6), that addresses informal resolution and it requires only that institutions provide the parties with written notice about the allegations, the requirements and limitations of informal resolution processes, and any consequences for participation, and that the institution obtains the parties' voluntary consent. (83 FR 61499). There is no guidance provided to ensure a fair and equitable informal resolution process nor does the rule address concerns that institutions may inappropriately pressure students to participate in informal resolution processes to avoid the cost, work, or potential liability of conducting a formal investigation.

Mediation and arbitration concerns

The Department does not indicate any information or guidance on the level of training, if any, those practitioners who will implement informal processes should undergo. Untrained staff members who believe that bringing the parties together to discuss what happened, so long as both parties agree, constitutes mediation as part of an informal resolution process, but could cause both parties significant harm in the process. Inasmuch as the Department has prescribed specific training required for Title IX Coordinators under the new rule, similar training requirements must be included for anyone conducting informal resolution processes in sexual harassment cases.

The lack of formal outcomes in either the mediation or arbitration processes stands in stark contrast to the increasingly legalistic and adversarial nature of the formal conduct processes outlined by the Department under the new rule. When faced with these two options, it would seem that the Department is, even if unintentionally, pushing students in the direction of informal resolution process, yet without any guidance on how to implement those processes responsibly. There is also no indication in the rule about the role of legal counsel or institution-provided advisors within informal resolution processes. And significantly, there is no guidance from the Department on ensuring that victims are protected from being coerced into participating in informal resolution processes by their institutions.

Restorative justice processes

Restorative justice (RJ) practitioners welcome the opportunity to utilize RJ processes in sexual harassment cases on college campuses (Koss, Wilgus, & Williamsen, 2014)³⁷, as previous guidance was vague about the appropriateness of restorative processes in these cases. Restorative justice is defined as a "process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible"³⁸. Many RJ practitioners dispute the inclusion

³⁷ Koss, M. P., Wilgus, J. K., & Williamsen, K. M. (2014). Campus sexual misconduct: Restorative justice approaches to enhance compliance with Title IX guidance. *Trauma, Violence, & Abuse*, 15(3), 242-257.

³⁸ Campus PRISM: Promoting Restorative Initiatives for Sexual Misconduct on College Campuses. (2016). Campus PRISM Project brief: Distinguishing campus restorative justice from mediation. Skidmore. <https://www.skidmore.edu/campusri/documents/RJ-vs-Mediation-Brief.pdf>

of restorative justice under the umbrella term “informal resolution” as restorative justice practices can be quite formal and those conducting the practice undergo significant training.

Restorative justice processes, unlike mediation or arbitration, require that the person causing harm accept responsibility for the harm caused before engaging with the restorative process. In mediation or arbitration, both parties admit wrongdoing and find a way to meet in the middle. In restorative processes, the person who causes harm does the work, with input from the harmed party or parties, of determining how to repair the harm that was caused. Restorative justice also allows for the opportunity to repair harm to the community as well as the individual. This has great potential for use in sexual harassment cases in residence halls, in the Greek community, and in athletic teams, to name a few.

Finally, restorative justice practices in community settings have resulted in reduced recidivism of offenders and better outcomes for survivors.

Daly, Bouhours, Curtis-Fawley, Weber, and Scholl (2007) concluded that RJ conferences³⁹ are viewed more favorably by victims than trials. Conferences are more likely than courts to provide victims with an admission of responsibility and raise the likelihood that the responsible person will receive counseling to reduce the likelihood of hurting others (Daly, 2006).⁴⁰

The option to use restorative justice is a welcome change in the proposed rule. But more guidance must come from the Department to protect victims against being coerced into less formal processes by institutions. Additionally, the Department should require protections in the form of required training for anyone conducting informal or alternative dispute resolution processes.

Concerns related to other aspects of the proposed rule

Challenges to the nature of federalism

In an article published in the Yale Journal of Law and Feminism, Emily Robey-Phillips, a law clerk with the Massachusetts Supreme Court, argues that “[e]ducation and safety are traditional state concerns, and states are empowered to legislate in this area”⁴¹. Emphasizing the ability of states to craft policy that is more responsive to the needs of their communities, Robey-Phillips makes a

³⁹ “Conferencing is a widely used methodology dating to the late 1980s that combines elements of the previous models and is thus considered to be the most evolved form of RJ . . . [it] involves consensual agreement by victims, responsible persons, and their family and friends to prepare for a meeting together. Weeks or months of preparation are devoted to readying all participants to experience a safe conference that is perceived as fair and imposes accountability proportional to the harm done. When the meeting is convened, it is typically guided by a trained facilitator who follows an agenda and imposes conference rules to ensure that key points are discussed, speech is nonabusive, and everyone has a chance to speak” (as cited in Koss, Wilgus, & Williamsen, 2014).

⁴⁰ Koss, M. P., Wilgus, J. K., & Williamsen, K. M. (2014). Campus sexual misconduct: Restorative justice approaches to enhance compliance with Title IX guidance. *Trauma, Violence, & Abuse*, 15(3), 242-257.

⁴¹ Robey-Phillips, E.A. (2018). Federalism in Campus Sexual Violence: How States Can Protect Their Students When a Trump Administration Will Not. *Yale Journal of Law and Feminism*, Vol. 29:376.

case for states' rights to work to provide protections above and beyond those afforded by the broad strictures of the federal government. By restricting, at the federal level, decisions that would allow for greater protection and more fair and equitable processes, the Department challenges traditional notions of federalism that are the bedrock on which our federated nation is built.

Robey-Phillips notes that, as of October 2017, 21 states have regulated campus sexual violence⁴². Not all of those states have implemented legislation that would conflict with the proposed Title IX rule, however, in a recent Inside Higher Ed article⁴³, "Brett Sokolow, president of the Association of Title IX Administrators, said he believes [laws in] Illinois, California[,] New York, [] Connecticut, New Jersey, North Carolina, North Dakota and Virginia may have conflicting provisions."

Specifically, the new actual knowledge standard has the potential to conflict with several state laws which codified all or parts of the Obama-era guidance relating to responsible employees. The same Inside Higher Ed article notes that both California and New York have definitions of sexual harassment that are broader than those included in the proposed rule. Andrea Stagg, deputy general counsel for Barnard College in New York, also noted potential confusion related to laws in New York State and City which define sexual harassment in the workplace more broadly than the proposed federal definition:

Stagg pointed out that this could create confusion if, for example, a student was employed by the university and was harassed. And under the regulations, only certain officials must report instances of sexual harassment -- but many more are obligated to do so under the New York employment laws.

Rather than seek to tilt the grounds on which campus conduct investigations of incidents of sexual assault to favor respondents, the role of the federal government should be to establish a floor below which states and institutions will be held accountable by the Department, but upon which states and institutions may build additional protections as appropriate for their communities. The proposed rule, however, seeks to limit the role of states in acting to protect students just as it limits institutions.

Changes to the religious exemption process under the Trump Administration

The list on the Department's website of schools that had requested Title IX exemptions due to conflicts with the religious tenets on which an institution is founded hasn't been updated since December 2016. The absence of this public disclosure is concerning for those who believe that students and their families have a right to know before enrolling if an institution is legally

⁴² 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.

⁴³ Bauer-Wolf, J. Inside Higher Ed, "A Direct Contradiction," December 13, 2018.

<https://www.insidehighered.com/news/2018/12/13/state-law-likely-conflicts-devoss-title-ix-proposal>

exempted from protecting their civil rights. The recently proposed Title IX rule now goes a step further by removing the requirement for institutions to submit a letter to request affirmation of an exemption under Title IX, putting the rights of pregnant students, gender non-binary students, and LGBTQ-identified students into question at exempt institutions. The Department states in the proposed rule that institutions that come under investigation for discrimination under Title IX can attest to their exemption as part of the complaint process, without having received prior affirmation from the Department of exempt status. In other words, a student can file a discrimination complaint against a school that can then use a previously unclaimed exemption in its defense. Consequently, the proposed rule provides little protection to students who face discrimination by religious institutions.

Research cited by the Human Rights Campaign⁴⁴ lays out the possible impact of the removal of the Title IX exemption request under the proposed rule. Referencing studies of the general population, they note that the 2010 National Intimate Partner and Sexual Violence Survey conducted by the National Center for Injury Prevention and Control within the Division of Violence Prevention at the Centers for Disease Control⁴⁵ found that individuals who self-identify as lesbian, gay, or bisexual reported higher incidence of rape when compared to heterosexual individuals. The Report of the 2015 U.S. Transgender Survey⁴⁶, published by the National Center for Transgender Equality, found that nearly half (47%) of respondents had been sexually assaulted and that one in ten respondents had been sexually assaulted within the past year. The 2015 Campus Climate Survey on Sexual Assault⁴⁷, conducted by the Association of American Universities(AAU), provides more data relative to college-going populations, but is limited to students attending 27 elite public and private research universities. The AAU study reports findings for transgender, genderqueer or gender non-conforming students (TGQN), a narrower group than the broader LGBTQ population referenced in other studies. They find that rates of sexual assault and misconduct are highest among women and TGQN students, with those groups also reporting less confidence that the institution would conduct a fair evaluation if they reported the incident.

Given the high rates of sexual harassment among LGBTQ students, it is imperative that our institutions of higher education provide transparency about whether their rights will be

⁴⁴ Clymer, C. Human Rights Campaign, "HRC: Proposed Rule Change to Title IX Would Harm Survivors of Sexual Assault," November 16, 2018. <https://www.hrc.org/blog/hrc-proposed-rule-change-to-title-ix-would-harm-survivors-of-assault>

⁴⁵ Centers for Disease Control. "NISVS: An Overview of 2010 Findings on Victimization by Sexual Orientation." https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_victimization_final-a.pdf

⁴⁶ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality. <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>

⁴⁷ Cantor, D., Fisher, B., Chibnall, S., Townsend, R., Lee, H., Bruce, C., & Thomas, G. (2017). Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct. Rockville, MD: Westat. <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>

protected should they enroll at a religiously-affiliated institution. Removal of the process for affirmation of religious exemptions could leave students uninformed and subject to intentional discrimination.

Request for timing of implementation for a final rule

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 at least 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.

Thank you for this opportunity to provide input on where the Department's proposed Title IX regulations may need to be modified and strengthened. We strongly urge the Department to consider maintaining regulations that provide for appropriate agency oversight and sexual harassment protections for the higher education community.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Kruger". The signature is fluid and cursive, with a large initial "K" and "K".

Dr. Kevin Kruger

President

NASPA – Student Affairs Administrators in Higher Education