Information Collection Comments

January 28, 2019

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Via electronic submission at *regulations.gov*

Re: Docket ID No. ED 2018-ED-0064, Proposed Regulations Implementing Title IX of the Education Amendments of 1972, 34 CFR Part 106

Dear Secretary DeVos,

On behalf of the 3,500+ members of the Association of Title IX Administrators (ATIXA), thank you for the opportunity to provide comments on the U.S. Department of Education's (ED) Notice of Proposed Rulemaking on Regulations Implementing Title IX (Title IX NPRM). ATIXA uses "ED" and "OCR" interchangeably in this document.

ATIXA is the primary membership association for those who oversee and implement Title IX at schools and institutions of post-secondary education. ATIXA is also the leading provider of Title IX training, certification, and professional development in the U.S., having certified more than 3,000 Title IX Coordinators and more than 8,500 Title IX investigators since 2011. ATIXA is committed to providing Title IX administrators with best practices and sound, practical advice to help meet and exceed the mandates of Title IX, including sources such as regulatory and sub-regulatory guidance, case law, and industry standards. In addition to in-person trainings, ATIXA provides on-line training as well as whitepapers, position statements, and other published materials to support the growing Title IX professional community.

ATIXA has long advocated for fair, impartial, and transparent procedures for resolving allegations of sex-based discrimination in education programs and activities. ATIXA has already

developed and promulgated model policies and procedures that encompass many of the proposed regulations' provisions as best practices in the field, including providing timely notice of charges, an equitable opportunity to review and rebut relevant evidence, equity of participation in the investigation process, opportunity to review and comment on a detailed and comprehensive investigation report, notice of outcomes and rationales, and equitable opportunities to appeal. We appreciate ED's efforts designed to increase and ensure transparency to Title IX grievance procedures through the proposed regulations.

Once implemented, ED's proposed regulations will mark a new era in Title IX implementation and enforcement as they carry the full force of the law and go well beyond previously published sub-regulatory guidance. The proposed rules seek to change fundamental paradigms of Title IX compliance that have guided most recipients since 2011, and many since 2001. Regulating Title IX in such an extensive and detailed manner presents significant potential challenges as funding recipients are subject not only to OCR's mandates, but also to Title IX and due process case law that is currently evolving at an unprecedented pace.

ATIXA respectfully submits the following comments, questions, and recommendations based on the Title IX NPRM. We have included proposals for rule modifications to align the regulations with established industry practices and relevant court decisions. Our comments are organized as follows: a) thematic categories (e.g., terminology, institutional response, investigative procedures) (pp. 2-10); b) direct responses to the proposed regulation sections (pp. 11-40); and c) comments on existing regulation sections (pp. 41-42).

We appreciate ED's commitment to respond to each of ATIXA's comments, as well as those submitted by the thousands of other concerned stakeholders who have taken the time to submit comments.

COMMENTS BY TOPIC

Terminology

- Discrimination on the basis of sex is the cornerstone of prohibited conduct under Title IX. Consistent with departmental interpretation and relevant case law, ATIXA encourages ED to take this opportunity to add language explicitly protecting "gender" as well as sex, as the two concepts are indivisible.
- The proposed regulations refer to actionable "harassment" under Title IX. Use of the term "discrimination, including harassment," would more accurately reflect the purpose and text of Title IX and case law. It would also avoid the implication that cases of sex-based discrimination are not covered unless they derive from sexual harassment, which only is one form of discrimination.
- The proposed regulations refer to "schools," an inaccurate reflection of the scope of Title IX. "Education programs or activities" better aligns with the actual text and purpose of Title IX and relevant case law.

- The proposed regulations refer to "complainant" and "respondent." The term "complainant" implies an individual is *complaining* about potential discrimination, rather than reporting it. We recommend neutral terms such as "reporting party" and "responding party." For the sake of clarity in our response to the NPRM, however, we have used the same terminology that appears in the proposed regulations.
- There is reference to "both" parties, which fails to consider situations involving more than two parties; as such, we recommend changing the descriptor to "all" when referencing parties.
- Title IX ensures "*no person…*" shall be subjected to prohibited discrimination. Use of the term "students" in the proposed regulations is too narrow, given the plain language of the statute and the Supreme Court's repeated determinations that Title IX encompasses and protects all individuals participating in education programs or activities (employees, vendors, campers, third-party contractors, etc.).
- The proposed regulations require "equal" procedural elements for, and "equal" treatment of, the parties. ED's authority to require "equal" anything is questionable; ED may only exercise authority conferred by statute.[1] The Title IX mandate is for "equitable" access, and all instances of the term "equal" should be replaced accordingly. A definition of the term "equitable" as distinguished from "equal" is advised, as equal and equitable are neither synonymous nor interchangeable.
- Although ED is attempting to "equalize" the protections of the parties, it is also worth considering whether there is a mandate to do so within the statute, given that all genders may identify as either complainants or respondents. If so, unequal processes may not necessarily invoke Title IX protections because the processes are distinct on the basis of the party's *role* in the process, not on the basis of their sex and/or gender. Congressional action (e.g., the protections of the Violence Against Women Act (VAWA) Section 304) may be the appropriate venue to address equality and/or enhanced due process protections within school or college disciplinary proceedings. Notwithstanding the above, if ED contemplates an application of disparate impact analysis to this question, ATIXA notes the necessity of supplementing these proposed regulations to address both disparate treatment and disparate impact claims under Title IX, how ED will approach them, and how recipients must as well.
- "Unwelcome conduct on the basis of sex" and "unwelcome conduct of a sexual nature" reference similar, but distinctly different forms of conduct. ATIXA notes the necessity that ED include both concepts in a definition of sexual harassment, as sex-based conduct may not be sexualized.
- There is much confusion regarding the standard "severe, pervasive, and objectively offensive" with respect to defining a hostile environment. Although this confusion may have initially been created by the Supreme Court in the *Davis* case, the current proposed regulations only exacerbate this ambiguity. The standard that undergirds Title VII – after which Title IX was modeled – is clearly that of "severe" *or* "pervasive" conduct, not "severe *and* pervasive conduct." The phrasing included in the proposed regulations' definition of

[1] *See City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013).

sexual harassment may be interpreted to require that conduct be both "severe" *and* "pervasive" to be prohibited. Clarification is needed, and the standard of "severe or pervasive, *and* objectively offensive" is recommended. Clarification is also needed to address conduct that is persistent, as pervasive and persistent are not synonymous. Failure to clarify this distinction will result in significant consternation and confusion for recipients, who must satisfy mandates of both Titles VII and IX in any case involving any employee, and who cannot do both simultaneously. Further, the proposed regulations explicitly state that "nothing about the proposed regulations is intended to diminish, restrict, or lessen any rights an employee may have against his or her school under Title VII." But applying a Title IX standard to a Title VII case could have exactly that effect, thus creating the need for OCR to clarify here. Two different standards cannot be applied to the same case.

- The proposed definition for sexual harassment articulates which actions *must* be remedied. Without further clarification, recipients may interpret the standards set forth in the proposed regulations as the outer bounds of permissible conduct, when instead they actually and legally only set a floor. ATIXA recommends that the definition articulate that it does not limit what may be remedied under the proposed regulations in the event greater protection is desired by the implementing recipient, assuming that the conduct is prohibited by a recipient's policy and other applicable laws (such as the First Amendment) permit such action.

- Please clarify what "effectively denies" means, as the term's ambiguity will create confusion as well.

Institutional Response

- The Title IX NPRM emphasizes a desire to provide greater clarity. To that end, we recommend that ED clarify that the regulations establish minimum standards for response to prohibited discrimination on the basis of sex/gender, including harassment, and that recipients may exceed those minimums.
- ED appears to be shifting from an "actual or constructive notice" standard to a "formal complaint" standard. A concrete definition of what constitutes notice to a recipient would provide additional, much-needed clarification. Adoption of the *Davis* notice-based standard, for example, would be consistent with ED's articulated approach of adopting standards established by the Supreme Court. ED's proposed approach is more restrictive than *Davis*, potentially opening the door for significant litigation involving recipients. Should ED fail to adopt the *Davis* standard for notice, ATIXA requests that ED explain on what basis ED has authority to enact a more rigorous standard for notice than that elaborated by the Supreme Court.
- The proposed regulations explicitly identify PK-12 teachers as officials whose knowledge of circumstances or allegations would constitute actual notice to the institution. Yet by focusing solely on these particular roles, the regulations essentially indemnify all other faculty in all other educational programs or activities. This is especially confusing given the

fact that minors attend and participate in programs at institutions of higher education in large numbers and in a variety of ways.

- ED has rarely held recipients responsible for a failure to respond to constructive notice; it is unlikely that the proposed change to actual notice will have much effect, in practice. ATIXA is concerned, however, that the proposed language seems to absolve recipients of the duty to remedy open and obvious hostile environments simply because no one has provided a formal, signed, written complaint of alleged discrimination. The proposed notice standard would have absolved Penn State from having to act on the predations of Sandusky, MSU from the actions of Nasser, etc. ATIXA is confident it is not ED's intention to give license to these behaviors going forward. Such a position would be in direct conflict with long-standing Supreme Court precedent that necessitates an institutional response to forms of notice other than a signed, written complaint. Further, the proposed regulations attempt to address this significant conflict by permitting the Title IX Coordinator to provide a signed, written complaint. This, however, assumes the Title IX Coordinator would have knowledge, which is less likely with OCR's proposed abolition of the "responsible employee" construct dating back to the 2001 Guidance. It is puzzling to ATIXA that in the current proposed regulations, OCR would embrace other standards elaborated by the Supreme Court under Title IX, but ignore this "responsible employee" construct, which was ratified by the Supreme Court in *Davis*. Permitting the Title IX Coordinator to provide a signed, written complaint would also potentially make the Title IX Coordinator a partial (non-neutral) party in the process, which is antithetical to the nature and purpose of the Title IX Coordinator's impartial role.
- The proposed regulatory language addressing recipients' responses based on "actual knowledge of sexual harassment in an education program or activity" misconstrues the language of the statute itself as requiring the prohibited conduct to have occurred *in* an education program or activity. Title IX addresses discriminatory conduct within such programs, but also clearly addresses discriminatory conduct that affects an individual's participation in and *access* to such programs. Surely, it is not OCR's intention to use the regulatory process to alter the plain meaning of the statute. Take the example of a male student who is subject to relationship violence off-campus, on private property by a female student who is his ex-girlfriend. If they have class together and the male student begins to avoid class because of his fear of his ex-girlfriend, a remedy is required under Title IX to address the program access, but the only behavior that has occurred which could be subject to discipline has occurred outside the program. The example clearly demonstrates an in-program discriminatory effect without in-program discriminatory conduct. Please address.
- ED indicates a presumption that recipients will often report misconduct to appropriate authorities as required by state law [106.44(e)(6)]. Currently, recipients encourage and offer to assist complainants to report to proper authorities but cannot (in most cases) mandate such action or do so independently of the complainant's wishes. Please clarify whether OCR intends to communicate that, in this instance, state law trumps Title IX "confidentiality." Specifically, if a complainant does not want a report to college officials to be shared with state law enforcement, but a state law requires such sharing, does Title IX provide any protection by which recipients may withhold details that the complainant does not want to be shared?

- Could OCR please clarify whether there are confidentiality expectations governing recipients that apply to Title IX investigations and resolutions. If so, are those expectations rooted in FERPA, or is there some source of privacy or confidentiality protections inherent in Title IX? If only FERPA is applicable, what governs privacy of Title IX records for employees, as FERPA is unlikely to apply? Specifically, may a recipient cite Title IX (and if so, how?) to refuse to disclose case specifics when those specifics are requested under a state FOIA or open records request?
- Please clarify whether campus law enforcement or school resource officers have an obligation to share what they know about an incident of alleged discrimination with the Title IX Coordinator, or whether state laws regarding limitations on sharing of investigation files by law enforcement control this question.?

Investigative Procedures

- Section 106.45 could be improved by acknowledging that recipients may investigate within one or more of three general frameworks: incident, pattern, and/or climate.
- The proposed regulations state that they explicitly adopt *Davis/Gebser* standards (though ATIXA's comments throughout this document indicate conflicts between the proposed regulations and those standards), but overlook the fact that both these cases, had they gone to a jury, would have been decided on the basis of the preponderance of the evidence standard. As OCR is clear that *Davis/Gebser* standards should apply, ATIXA asks OCR to clarify why the evidentiary standard used in those cases would not also apply.
- "Preponderance of the evidence" is not the lowest possible standard of evidence, despite OCR's assertion that it is. Only two standards exceed evidentiary requirements required by the preponderance standard. Multiple other standards, such as reasonable suspicion, probable cause, and substantial evidence, fall short of the burden of persuasion required by preponderance of the evidence. ATIXA asks OCR to clarify this misconception.
- OCR uses a preponderance of the evidence standard to investigate Title IX and other civil rights based complaints involving recipients, yet the proposed regulations appear highly skewed in favor of recipients using clear and convincing evidence as their standard of proof. This conflict is likely to create unnecessary litigation and confusion. ATIXA asks OCR to clarify why it would apply a different standard to recipients' internal proceedings than it applies to its own investigation of those recipients.
- Further, ATIXA asks OCR to clarify how the statute authorizes OCR to determine what standard of proof any recipient should use. Given that Congress declined to prescribe a standard of proof when the Campus SaVE Act was debated before being enacted as VAWA Section 304, how is it not *ultra vires* for OCR to adopt standards that Congress considered beyond its own authority?
- Additionally, given the fact that there are at least seven different standards of proof in use in the law, ATIXA asks OCR to clarify how choosing two of those standards (preponderance of the evidence and clear and convincing evidence) in these proposed regulations is not arbitrary and capricious agency action. Why these two but not a mere scintilla of evidence? Why these two but not substantial evidence? Why these two but not reasonable suspicion?

Why these two but not probable cause? Why these two but not proof beyond a reasonable doubt? How does OCR choose two of seven and contend that it is not acting arbitrarily?

- How is OCR to justify allowing recipients to use a clear and convincing evidence standard when the standard for resolution of all civil rights claims in the courts of the U.S. is the preponderance of the evidence? Why should recipients employ a higher standard to find a violation of policy than the courts would to find a violation of law?
- Title VII has used a preponderance of evidence standard to address employee sexual misconduct since 1964, and thousands of employees have been terminated on this basis. If that standard has been sufficient to protect employees, why is it not sufficient to protect students?
- Despite ED's statement in the "Background" section, that "The lack of clear regulatory standards has contributed to processes that have not been fair to all parties involved, that have lacked appropriate procedural protections, and that have undermined confidence in the reliability of the outcomes of investigations of sexual harassment allegations," to the contrary, many recipients provide evidentiary parameters within Title IX grievance proceedings pertaining to relevance, credibility, past sexual history, and character witnesses (among others). ATIXA requests that ED clarify the record or cite the basis for this statement with data.
- Section 106.45(b)(3) should clarify the process for dismissing a formal complaint or a specific allegation within a complaint without conducting a "formal" investigation.
- ED indicates cross-examination may not be appropriate for PK-12 grievance procedures. Where in the statute does it authorize OCR to determine that it may distinguish between recipients with respect to the standards it imposes? How does OCR contend that post-secondary recipients should address cross-examination of students who are minors? Given that minors exist at all educational levels of recipients, how is OCR's division between elementary/secondary education and post-secondary education to be seen as anything but arbitrary agency action, especially given the fact that there are thousands of high school students dual-enrolled in America's colleges? To what process should they be subject?
- ATIXA requests that OCR explain how allowing all parties to pose all relevant questions to investigators or through a hearing officer or investigator– often referred to in the field as indirect cross-examination - is materially different from direct cross-examination in light of the fact that OCR is mandating in the proposed regulations that cross-examination be conducted by third parties. Does OCR have any data to support the efficacy of third-party, non-attorney cross-examination? Are there other applications of this model to which OCR can cite? Can OCR offer any empirical evidence to support this approach? Further, it appears that OCR has concluded that live cross-examination is a better approach for determining truth or credibility than other approaches. On what data or scientific basis does OCR reach this conclusion? How does OCR respond to the clear lack of consensus in the legal field and scientific research about the ability to discern credibility through observation?[2]
- While Title IX grievance proceedings lack certain elements of civil litigation, they also provide many fair and transparent procedures not included in such litigation. Unlike the

[2] *See, e.g.*, https://www.psychologytoday.com/us/blog/spycatcher/201203/the-truth-about-lie-detection.

court system, which has fully trained and dedicated personnel to administer the process, this proposed system may well lead to a format with few checks and balances. Title IX applies to the internal investigation processes of funding recipients, most of which are institutions of education. Like employers, they are not courts of law. ED's proposed investigative and resolution requirements seem at times to conflate the two. ATIXA requests that ED explain why a recipient's administrative process needs to approximate the proceedings of any court, when administrative law proceedings are typically not held to such standards in most jurisdictions.

Conflicts of Law

- A number of the definitions and procedural requirements would actually treat sex differently than other protected classes, such as race, disability, or religion. The proposed regulations would do so in such materially different fashion as to create a significant conflict of law and policy. Stated another way, funding recipients would be required to discriminate on the basis of sex by regulations requiring differential treatment for sex discrimination. Further, the overlap between issues of sex and race are commonplace, which would create two different levels of protection for complainants – race would be more protected than sex, which conflicts directly with Title VI and Title VII, and also conflicts with the intent and purpose of civil rights legislation and could represent an *ultra vires* overreach by a non-legislative agency. ATIXA requests that OCR explain the legal basis for differentiating Title IX standards from the legal standards applicable to other protected classes.
- Several of the proposed regulations generally track the language of the Clery Act regulations and apply those regulations to PK-12 schools. Applying Clery Act provisions to recipients expressly excluded by Congress in the Clery Act's statutory language will create confusion and may be outside the scope of ED's authority.[3] Congressional action was required to impose these standards on colleges and universities in the form of the Clery Act. ATIXA asks OCR to explain why Congressional action is not required to impose the same standards on PK-12.
- Suggesting the proposed regulations relating to training on the definition of sexual harassment generally track the language of Clery Act regulations ignores the reality that the Clery Act specifically does not apply to sexual harassment. ED should address this disconnect.
- Does ED believe that adding due process mandates to the Clery Act language is a substantive and material re-write of that statute without Congressional mandate? If not, why not?
- ED indicates reliable outcomes will increase by allowing the parties to an investigation to review and respond to evidence, discuss the investigation with others to identify additional evidence, and introduce any additional evidence into the proceeding. While greater transparency is warranted and welcome, the unfettered right to introduce any additional

[3] The Administrative Procedure Act ("APA"), the federal statute which governs the manner in which federal administrative agencies propose and establish regulations, requires courts to hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdictions, authority, or limitations[.]" 5 U.S.C. § 706(2)(A), (C).

evidence may conflict with state rape shield laws and other relevant protective provisions. ATIXA asks ED to address this potential conflict between the proposed regulations and state law. This right to inspect evidence would conflict with law enforcement standards for interviewing witnesses and potentially harm ability to honor requests for cooperation with law enforcement. Similarly, can ED please provide guidance on other potential conflicts with state law that the proposed regulations may present (e.g., the CA Consent Law, NY Enough is Enough statute)?

- ED further indicates this language tracks Clery Act regulations and would apply to all recipients. Proper contemplation of the effects on PK-12 does not appear to have been fully explored and will have a significant, perhaps unintended, effect. ATIXA asks ED to please address these concerns in its response to comments.

Statistics

- The *Regulatory Impact Analysis* includes a statement that Title IX currently captures too wide a range of misconduct. However, to remain consistent with VAWA Section 304, ED should consider including intimate partner violence and some forms of stalking (e.g., when sex and/or gender-based). Most recipients already prohibit these behaviors within their communities and are applying the same procedures to resolve such allegations, ensuring consistency and transparency.
- The estimated average number of investigations per postsecondary institution is not reliable. Clery Act data does not represent the actual number of investigations performed because, among other reasons, Clery Act data does not include reports for most sexual harassment and discrimination because Clery Act data only reflect crimes as defined by Federal Bureau of Investigation's Uniform Crime Reporting. Clery Act data is also geographically restricted, thereby excluding an array of allegations the downstream effects of which warrant institutional investigations and interventions. ATIXA asks OCR to please explain how Clery Act data represent a reasonable baseline for its estimates.
- Sexual harassment that does not rise to the level of criminal behavior constitutes the overwhelming majority of Title IX-related allegations. Accordingly, utilizing Clery Act reports to extrapolate the number of sexual harassment incidents is inappropriate, as the Clery Act does not include sexual harassment. ATIXA asks OCR to please explain how Clery Act data represent a reasonable baseline for its estimates.
- Assumptions regarding the number of sex/gender-based discrimination complaints depend less on campus size and more on a litany of factors, such as whether the school is residential, the strength of a school's reporting, education and prevention structures, the school culture, etc. ATIXA asks OCR to please explain how its data contemplates factors beyond school size.
- ATIXA asks OCR to clarify how Clery Act reports can be accurately used by ED to estimate sexual harassment reports, given that Clery Act off-campus information is limited to its four geographic areas, but nevertheless includes some areas that are part of federally-funded educational programs covered by Title IX. Put another way, because Clery geography and Title IX jurisdiction do not match for off-campus incidents, how can one accurately inform the other?

- ED seems to associate a reduction in the number of investigations conducted at each elementary and secondary institution and postsecondary institution with the specific requirements under the proposed regulations, where a lower rate of investigations indicates success. This misunderstands both the effect and purpose of robust Title IX programs at these recipients. Increased reporting and investigation have been and continue to be positive and expected results of strengthened programs in environments where reporting had been suppressed and ignored for decades. Where ED estimates investigations will decrease, ATIXA concurs, but asks OCR to address why this decrease would not be a function of regulatory obstacles for victims and procedural changes within these proposed regulations that could chill reporting. Assuming that a decrease in investigations represents positive change is a dangerous assumption on the part of ED and institutions. Can ED please explain why this estimate does not prove that its regulatory changes will diminish the ability of Title IX to serve those who Congress has sought to protect?
- ATIXA data indicate that many elementary and secondary institutions have largely ignored Title IX guidance since 2011, and ED's estimates regarding the rate of adoption of the proposed regulations are relatively accurate.
- ATIXA believes based on extensive conversations with its members that at least 70% of postsecondary institutions will most likely retain their existing programs at the level required under the 2011 guidance.
- ATIXA believes that the estimated time and money expended by elementary and secondary and postsecondary institutions in reviewing the proposed regulations should be increased by at least 50% for both groups. Likewise, postsecondary institutions in particular will devote significant resources to analyzing, discussing, and debating the proposed regulations, adding additional time and financial expense. This also does not consider the costs of providing parties with advisors who are highly trained and skilled in cross-examination. Often the burden of recruiting and training advisors will rest with the institution. Furthermore, the proposed regulations leave open the distinct possibility that institutions will be required to hire attorney-advisors, resulting in a significant cost burden.
- The proposed estimated number of recipients that need to revise their current procedures is unrealistic; ATIXA believes that 90% of elementary and secondary institutions and 80% of postsecondary institutions will need significant procedural revisions at an expenditure rate at least three times that estimated by ED.
- ED dramatically underestimates the amount of time needed for recipients to revise policies and procedures. The nature of policy and procedure work in those environments involves committees, community engagement, task forces, senior level approval, legal counsel approval, and board-level approval. ATIXA asks ED to revise and provide more accurate assessments of the institutional costs to implement the changes proposed by the new regulations.
- ED dramatically underestimates the amount of time needed to appropriately train coordinators, investigators, and adjudicators. The estimated cost associated with appropriate training is inestimably higher, even if all training is performed in-house.
- ATIXA estimates reports will be resolved using the proposed informal procedures at a higher rate than ED proposes: at least 30% compared to ED's estimated 10%. What is OCR's basis for this estimate?

- ATIXA asks OCR to clarify and provide the basis for the estimated time and cost expenditures for policy review, revision, training, and resolution, as they appear to have no solid basis. If so, they are inaccurate and unhelpful measures. Nearly every category appears to be grossly underestimated. Further, ED neglects to consider the litigation costs recipients will incur as a result of the proposed regulations, if adopted as proposed.

COMMENTS REGARDING PROPOSED REGULATION SECTIONS

§ 106.3 Available remedies

Rule: Paragraph (a) indicates that "[i]f the Assistant Secretary finds that a recipient has violated this part, such recipient shall take such remedial action as the Assistant Secretary deems necessary to remedy the violation, which shall not include assessment of damages against the recipient."

Comments: ATIXA recommends striking the phrase "which shall not include assessment of damages against the recipient" and substituting the following: "which shall not include fines, but may include compensatory damages to the parties, as deemed necessary for remediation." This is both clearer and more consistent with the tenets and purposes of Title IX.

§ 106.6 Effect of other requirements and preservation of rights.

Rule: Paragraph (d) articulates that nothing in this part requires a recipient to… "[d]eprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution..."

Comments: ATIXA recommends this section also include an affirmation of the Equal Protection Clause.

Rule: Paragraph (e) indicates that "[t]he obligation to comply with this part is not obviated or alleviated by the FERPA statute or regulations."

Comments: This does not clarify whether all sanction information should be shared, or only sanctions that directly relate to the complainant? VAWA Section 304 does not apply to many Title IX issues. We recommend incorporating the "result" definition language from the Clery Act: "including, but not limited to, providing the parties with the written, detailed notice of the allegations and the written result, defined as any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution, as well as the rationale for such decision, and disclosing all relevant evidence to the parties." This is reasonable and clear language, inclusion of which does not flaunt Congressional intent, as it reflects existing industry standards and is only clarifying language.

Rule: Paragraph (f) indicates that "[n]othing in this part shall be read in derogation of an employee's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder."

Comments: Despite this assertion, and as noted above, the proposed definition of "sexual harassment" does, in fact, conflict with Title VII, a discord which would likely result in significant legal attempts to reconcile the disparate definitions. The procedural requirements for live hearings and direct cross-examination outlined in the proposed regulations also tacitly invalidate sixty years of case law supporting an investigator-based model for resolution of sex discrimination complaints under Title VII. ATIXA requests that OCR explain how to reconcile the disparate Title VII and IX definitions of sexual harassment, explain why it is doing away with the historical and important distinction between sexual harassment and hostile environment, and what basis it has to regulate under Title VII by requiring that employee investigations governed by Title VII be subject to live hearings. ATIXA also asks OCR to do a legal assessment of whether the live hearing requirement under Title IX, as applied to employees, would work to overcome a presumption of at-will employment in some jurisdictions, and whether OCR has the authority to do so.

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

Rule: Paragraph (a) indicates that each recipient "must designate at least one employee to coordinate its efforts to comply with its responsibilities under this part."

Comments: This is an opportune time for ED to shift industry vernacular from "Title IX Coordinator" to "Title IX Officer." The term "coordinator" is often associated, particularly in higher education, with a low- to mid-level, non-supervisory employee. "Coordinator" does not appropriately encompass the administrative and supervisory authority vested by either the existing or proposed regulations in the individual responsible for an institution's compliance with Title IX's statutory and regulatory mandates.

Rule: Paragraph (b) describes requirements for dissemination of a policy.

Comments: ED seems to conflate the terms "statement," "policy," and "procedures" in this part. ATIXA asks OCR to please clarify that the starting framework is a "non-discrimination policy," which may then be developed into a statement of the policy. Grievance procedures are not the same as policy as they delineate the recipient's practical response to allegations of violations of the non-discrimination policy.

Rule: Paragraph (b)(1) indicates recipients must "notify applicants for admission and employment, students, employees…"

Comments: ED makes frequent, but not consistent, reference to Title IX referring to employees as well as students. This paragraph is one example, where "the requirement not to discriminate in the education program or activity *extends to employment* and admission" (emphasis added). ATIXA asks OCR to make consistent references to this scope of Title IX.

Rule: Paragraph (b)(2) requires that "each recipient must prominently display a statement of the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under

paragraph (b)(1) of this section."

Comments: In addition to the conflation of "statement" and "policy", articulated above, ATIXA recommends clarifying that handbooks, catalogs, and other materials are subject to this provision regardless of whether they are made available online or in print, and that OCR should clarify if this provision applies to many irrelevant handbooks published by recipients, such as those on lab safety, local organizations, etc.

Rule: Paragraph (d) articulates "[t]he 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.

Comments: This section does not clarify non-applicability of the policies and procedures to persons who were outside the U.S. at the time of the alleged discriminatory conduct or outside the U.S. at the time of the complaint. ATIXA asks OCR to please clarify its intent.

§ 106.12 Educational institutions controlled by religious organizations.

Rule: Paragraph (b) states "[a]n educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest-ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of the exemption from the Assistant Secretary."

Comments: This paragraph ostensibly prohibits ED from imposing confusing or burdensome requirements to qualify for a religious exemption. We believe the underlying rationale for the original regulation is to provide an avenue for institutions to seek and publicly disclose their exemption. Removing any requirement to seek assurance of an exemption is an unfair practice for employees and students of the institution, who have a right to know whether their institution has requested exemption or not, prior to and/or during employment or enrollment. We suggest adding the following language to this paragraph: *A funding recipient must publicly disclose in its Title IX-related policies the specific provisions for which it asserts an exemption.*

§ 106.30 Definitions.

- "*Actual knowledge* means 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, or to a teacher in the elementary and secondary context with regard to student-on-student harassment. Imputation of knowledge based solely on *respondeat superior* or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is also the respondent. The mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient."

Comments: This paragraph needs clarification. It implies that, while *respondeat superior* or constructive notice alone are not sufficient, a combination of other factors (aside from notice to a person who can institute corrective measures) could also create notice. ATIXA requests clarification on the definition of corrective measures. Faculty at all levels of education engage in corrective measures (e.g., seat assignments, group assignments, separating students in class, enforcing no-contact directives, providing academic accommodations) and are expected to do so. Please explain why teachers in the PK-12 setting have sufficient authority to do so, but teachers in higher education do not. Working across all education settings, it seems anomalous (if not arbitrary) to ATIXA that PK-12 teachers would generally be seen as having more institutional authority than college faculty members.

Further, please clarify when OCR refers to "any official of the recipient who has authority to institute corrective measures on behalf of the recipient," does OCR generally contemplate that any supervisor or department chair would have such authority, whether faculty, staff, or administrator? Would Housing/Residence Life personnel typically have such authority, where interim actions such as a change in housing could be considered a corrective measure?

- *Complainant* means an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint. For purposes of this subsection, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the recipient's actual knowledge under section 106.44(e)(6).

Comments: Please clarify whether it is ED's expectation that a third-party report would essentially – and only - be filed by the Title IX Coordinator, as described in section 106.44(b)(2). It is common practice, and current industry standards accommodate, for a third-party to file a formal complaint and for that complaint to constitute actual notice to the recipient, as in *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005). Again, ATIXA seeks to understand whether OCR is adopting all Supreme Court standards for Title IX, or just imposing some, selectively. If it is only some, please share the selection criteria by which OCR is picking and choosing which Supreme Court standards to adopt and which to ignore. Please provide clarification as to whether the proposed regulations' requirement that the Title IX officer file a complaint on a party's behalf is consistent with the *Jackson* decision? Further, the requirement

that a complainant report being a "victim" is entirely inconsistent with victimology and industry-standard victim-services. Not only might someone choose to report being a "survivor" rather than a "victim," but they might also report being unclear if conduct they experienced is in fact a policy violation and might not know whether they are actually a "victim." They may be seeking to use the recipient's grievance process to gain clarity on whether what they have experienced does in fact cross the line. ATIXA asks OCR to clarify its definition of "complainant" accordingly.

- *Formal complaint* means a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient's grievance procedures consistent with section 106.45.

Comments: This is problematic if schools adopt it as a requirement for several reasons:

- Courts do not define actual notice as narrowly as these proposed regulations. Thus, a court could find a school is on notice without the written formality ED is trying to establish here, which would in turn subject the school to potential legal liability. In an analogous case of Title VII-based sexual harassment. For example, the court in *Kastanidis v. Pennsylvania, Dept. of Human Services*, Civil Action No. 1: 16-CV-1548 (M.D. Pa. July 26, 2018) recently indicated an institution may be held liable for not taking action despite the absence of "actual notice" when the harassment is observed or the circumstances are known by individuals with the authority to take corrective action. ATIXA asks OCR to please reconcile its proposed approach to notice with the very different standards applied by the courts.
- This rule potentially places the Title IX Coordinator in an adversarial position as the person filing the complaint. It is not clear how the Title IX Coordinator will remain free from conflict in this circumstance. Further, is it ED's intention that the Title IX Coordinator becomes a party to the matter who will be subject to cross-examination? ATIXA asks OCR to please clarify.
- It is not clear what "signed by a complainant" actually means. Most reports take some form of electronic submission. This does not appear to consider online students, students on externship or rotation experiences, work-at-home or telecommuting employees, or other circumstances where the complainant is not physically present for all or part of the time. ATIXA asks OCR to please clarify. Further, this approach appears to seek to discourage or avoid anonymous complaints in which the alleged victim is unnamed. If so, could OCR please be explicit to that effect, and if not, please guide recipients as to what expectations OCR will have as to anonymous allegations that do not identify who the alleged victim is. Also, this section does not appear to contemplate the technology age, nor the need to accommodate individuals with disabilities.
- *Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Comments: Use of the term "perpetrator" is not consistent with industry standards or the neutral tone expected of Title IX officers. We recommend: "alleged to have engaged in conduct that could constitute sexual harassment or discrimination."

- *Sexual harassment* means: 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…

Comments: "Unwelcome sexual conduct" is a much lower standard than "hostile environment sexual harassment." Removing the element of substantial harm attributable to the harassment from the definition of *quid pro quo* harassment seems to contrast with ED's assurances regarding the First Amendment in section 106.6(d)(1) and the raising of the hostile environment bar to meet the court standard. ATIXA asks OCR to please clarify.

It is also worth noting that the definition of quid pro quo harassment offered by the proposed regulations may have several legal flaws. First, it applies only to employees, but how would OCR have recipients address quid pro quo harassment by a volunteer assistant coach? Second, the definition requires unwelcomeness, but does OCR believe that ignores the way that quid pro quo behaviors can manifest? Take the example of a faculty member who offers a student an A grade in return for sexual favors. The student readily agrees. The behavior is arguably welcome, from a legal perspective, but most recipients would want to fire or otherwise discipline that faculty member for sexual harassment.

- *Sexual harassment* means: 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…

Comments: This definition, taken from the *Davis* decision, is problematic and confusing because it approximates, but does not match the definition for sexual harassment consistently used by Title IX practitioners and appearing in Title VII case law. ATIXA recommends adjusting the definition as follows to establish consistency with industry standards, best practices, and enforcement of sexual harassment prohibitions under Title VII: "Unwelcome *sexual* conduct, *or conduct* on the basis of sex, that is so severe *or* pervasive (or persistent) and objectively offensive that it *excludes* a person *from participation in, or denies a person access to or the benefits of* the recipient's education program or activity."

- *Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual

restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Comments: The language used in this section is confusing and non-specific. Why are mutual restrictions mentioned, but not unilateral restrictions? Why would a recipient automatically restrict a complainant, and for what purpose? If OCR requires individualized assessment with respect to complainants and interim actions, why is it not equitable to require an individualized assessment before a mutual restriction is imposed. Does OCR intend recipients to discipline complainants if they violate mutual restrictions? Is OCR prepared to reassure recipients that doing so is not retaliatory? Does OCR have concern that this provision might create a disincentive for reporting, if complainants believe their access to educational programs might be limited by a mutual restriction if they come forward? The purpose of supportive measures is to preserve the access, protect the safety, and deter harassment of the complainant and respondent. Use of the industry standard language "stop the discriminatory activity, prevent its recurrence, and remedy its effects" here would provide helpful clarification.

The mandate that supportive measures be non-punitive is unclear in a practical sense. Please clarify what exactly constitutes a "non-punitive" supportive measure. The language appears to anticipate, but also prohibit, that one party will sometimes be restricted more than the other. Some supportive measures will, by their very nature, preserve access for one party and not the other. The qualification that supportive measures should not "unreasonably burden" is helpful, but it does not define what is reasonable. Please clarify if OCR will show deference to a recipient's determination of what is reasonable.

Finally, this section should include a clear definition of retaliation. Moreover, ED should address gender stereotype discrimination (i.e., *Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)*) and pregnant/parenting rights and protections while updating the regulations.

§ 106.44 Recipient's response to sexual harassment

Rule: Paragraph (a) states that "A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances."

Comments: By mandating a response to discriminatory conduct in a recipient's "education program or activity," ED leaves open the question of the recipient's responsibility when a student/employee harasses a non-student/employee on campus. Per the proposed regulations, it is unclear whether a hostile environment would exist in the recipient's

educational program. Industry standards and common practices include exercising jurisdiction over such incidents – such as in the Larry Nassar or Jerry Sandusky situations. OCR opened investigations of potential violation of Title IX for each institution's responses to those situations. ATIXA asks OCR to bring much needed clarity to ensure that "all persons" are protected under the proposed regulations, as stated by the statute itself. Additionally, ATIXA asks OCR to provide further guidance, or even examples, of what it would consider to be "clearly unreasonable."

Rule: Paragraph (b)(1) mandates that a recipient "follow procedures consistent with § 106.45 in response to a formal complaint. If the recipient follows procedures (including implementing any appropriate remedy as required) consistent with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent and does not otherwise constitute discrimination under Title IX."

Comments: ATIXA recommends replacing "formal complaint" in this section with "notice," as "formal complaint" denotes a higher standard not consistent with industry standards, regulatory guidance, or case law.

This paragraph makes several important yet unclear statements regarding sufficient required action. Please clarify the term "follows procedures" and whether the language used means a) *all* of the procedures and b) requires following the procedures *fully* or whether partial compliance suffices. Please provide a definition for "any appropriate remedy" and clarify by whom. It is unclear whether ED will find a school in compliance if they offer only a single remedy that does not actually remedy fully. Please clarify if there is a difference between "any appropriate remedy" and "any appropriate remedy as required."

In both paragraphs 106.44(a) and 106.44(b), ED expressly notes the response must be in a manner that is "not deliberately indifferent." Please clarify whether ED is explicitly adopting a court's interpretation as to what constitutes deliberate indifference, and, if so, what court? If not, the proposed regulations could conflict with the courts, which generally require an effective remedy that brings an end to discriminatory conduct, or may run afoul of different interpretations by different courts.

Contrary to ED's stated intention to avoid "improperly depriv[ing] administrators of needed flexibility to make disciplinary decisions…", paragraph 106.44(b)(1) appears to leave recipients with the necessity of raising an affirmative defense to overcome a charge of deliberate indifference.

Rule: Paragraph (b)(2) states "[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. If the Title IX Coordinator files a formal complaint in response to the reports, and the recipient follows procedures (including implementing any appropriate remedy as required) consistent with

section 106.45 in response to the formal complaint, the recipient's response to the reports is not deliberately indifferent."

Comments: ATIXA disagrees with the practical effect of this paragraph. First, Title IX officers should not be mandated to file a formal complaint. It is unclear with whom the Title IX officer files such a complaint, as typically complaints are filed with a Title IX Coordinator. Second, a mandate does not contemplate the danger to the complainant of forced resolution procedures or even forced supportive measures in certain situations where they could place complainants at risk, such as in intimate partner violence cases.[4] Nor does this section contemplate situations in which it is impossible to proceed, practically, without the participation of the complainant. ATIXA strongly recommends that a threat assessment/risk analysis provision included in this section would be beneficial, such as the relevant section of the 2014 ED Q&A, or something very similar.

Another flaw in this approach is that it ignores OCR's own definition of sexual harassment proffered in the proposed regulations. This definition requires severity and pervasiveness, as noted in other comments. Assume a situation of multiple reports of pervasive but non-severe misconduct, and OCR's approach here requires a formal complaint by the Title IX officer, despite knowing that the definition of sexual harassment cannot be met by the known facts of the complaint.

Please clarify "multiple complainants" and whether two complainants suffice. Please also clarify whether there must be two distinct complainants and/or complaints, and the implications if any of these complaints were to be anonymous.

Paragraph (b)(2) states "[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, but, it does not assume that a complainant can or will participate in this mandated process. Then, OCR states in paragraph (b)(3)(vii) 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."

What is the purpose of a mandated process when the complainant neither intends nor wants to participate, and thus will not be subject to cross-examination? If ATIXA is reading this provision correctly, it would mean that even the initial statement by the complainant that led to the mandated process would not be considered by the decision-maker, begging the question of why the process was mandated in the first place. Please explain the purpose of this provision, and whether OCR has considered the absurd result that it would produce in the example ATIXA has provided.

[4] *See, e.g.*, p.7: https://atixa.org/wordpress/wp-content/uploads/2012/01/Challenge-of-TIX-with-Author-Photos.pdf.

Again, with respect to paragraph (b)(2) which states "[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." ATIXA seeks clarification as to whether this provision is time limited. For example if there are two complaints by two different students 30 years apart about the same faculty member, must this trigger a mandated filing of a formal complaint by the Title IX Coordinator? What if the complainants elect not to participate after a complaint is filed by the Title IX Coordinator, thus leaving no admissible evidence under the proposed regulations to be considered at a hearing? What does ED suggest a Title IX Coordinator do then?

In reading through the compliance requirements of the proposed regulations, ATIXA is uncertain whether Title IX Coordinators would and/or should be able to address discriminatory conduct while simultaneously failing to effectively remedy a hostile environment. For example, had the Title IX Coordinator at Michigan State University filed a formal complaint on behalf of multiple complainants against Larry Nassar and provided a single remedy of indeterminate efficacy, that may have met the threshold outlined here for "not deliberately indifferent." The regulations as set forth do not contemplate the very real potential distance between a recipient's response that is not deliberately indifferent and a response that remedies discrimination effectively. ATIXA asks OCR to address why current industry standards are far more robust than what is required here, and ATIXA is concerned that the response parameters outlined in this paragraph are likely to foster significant litigation on the basis of alleged negligence.

Rule: Paragraph (b)(3) indicates postsecondary recipients are "not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity. At the time supportive measures are offered, the recipient must in writing inform the complainant of the right to file a formal complaint at that time or a later date, consistent with other provisions of this part."

Comments: This paragraph applies only to postsecondary institutions. ED indicated elementary and secondary schools "may" need to consider filing a formal complaint despite the complainant's wishes. Please explain why the language in this section is not stronger. This paragraph should specify that supportive measures should be timely. The phrase "supportive measures *designed to* effectively restore or preserve…" indicates ED is giving credit to the intent of the recipient, not the practical effect. If a school has good intent, but the remedies are wholly without impact, the school would be in compliance with the proposed regulations, which does not seem to be a sufficiently strong protection. ATIXA asks OCR to please clarify this section.

Rule: Paragraph (b)(4) clarifies that even when the specific circumstances outlined in paragraphs (b)(1) through (b)(3) are not implicated, "a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must, consistent with paragraph (a) of this section, respond in a manner that is

not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances."

Comments: As articulated above, ATIXA is concerned with the lack of recognition that a response that is not deliberately indifferent is not necessarily the same as a response that effectively remedies the discrimination at issue.

Rule: Paragraph (b)(5) states "[t]he Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence."

Comments: By prohibiting ED from conducting a *de novo* review of the recipient's investigation and determination, ED's oversight role is reduced to a deferential procedural review. This could have a chilling effect on victim reporting to ED and could have the unintended effect of recipients rendering more determinations in favor of respondents. Certainly it cannot be ED's intent to codify a biased process. It is unclear what this provision means in light of the type of review ED conducted in the Wesley College complaint, for example.[5] ATIXA asks ED to please clarify.

Rule: Paragraph (c) notes that "[n]othing in this section precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal."

Comments: Mandating an individualized safety and risk analysis prior to interim suspension on an "emergency basis" is an extremely narrow standard. It ignores how long that kind of analysis may take and the exposure to negligence liability a recipient may face in the meantime. It also appears to have no basis in the statute, but if it does, ED is asked to clarify how. More importantly, paragraph 106.44(b)(5) clearly states that ED cannot deem a recipient's determination deliberately indifferent even if ED comes to a different determination, rendering ED's enforcement of this provision moot. ATIXA asks ED to clarify how the parameters here do not fall outside ED's authority, as they appear to constitute a single-sided procedural due process element with no basis in gender equity.[6]

Rule: Paragraph (d) indicates that "[n]othing in this section precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of an investigation."

[5] https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf.
[6] *City of Arlington, Tex., supra.*.

Comments: To justify a lower threshold for campus removal for non-student respondents, ED uses a very narrow interpretation of "education program" that may fall outside established jurisprudence. If placing a non-student employee responding on administrative leave does not implicate access to the recipient's education programs and activities in the same way, it is unclear how this falls under ED's jurisdiction. ATIXA asks ED to please clarify.

§ 106.45 Grievance procedures for formal complaints of sexual harassment.

Rule: Paragraph (a) states that "[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. A recipient's treatment of the respondent may also constitute discrimination on the basis of sex under Title IX."

Comments: This provision appears to potentially exceed ED's authority under Title IX. It is not clear how the respondent can accrue rights of such protection under Title IX when a respondent can be any sex or gender. Indeed, this paragraph makes it possible for a recipient's treatment of a complainant or respondent in a formal complaint to constitute discrimination on the basis of sex (if such treatment constitutes deliberate indifference as explained in a previous section). This appears to be a potentially improper extension of the legal underpinnings of Title IX by ED to create an equivalence where none in fact exists. It is not the recipient's actions that are on the basis of sex; rather, it is the underlying act (e.g., sexual harassment, sexual assault) that is on the basis of sex. Please provide the legal justification for this provision under Title IX.

Rule: Paragraph (b) indicates that, when addressing formal complaints of sexual harassment, grievance procedures must comply with the requirements of this section.

Comments: ATIXA urges ED to reinstate industry standard language requiring an "adequate, reliable, and impartial" resolution procedure. Please clarify if that standard is no longer required.

Rule: Paragraph (b)(1)(i) requires "grievance procedures must treat complainants and respondents equitably. An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent; such remedies must be designed to restore or preserve access to the recipient's education program or activity. An equitable resolution for a respondent must include due process protections before any disciplinary sanctions are imposed."

Comments: Nothing in the statute provides or indicates that ED has the authority to regulate due process protection within investigations of sex-based discrimination. This specific area of the proposed regulations raises concerns of potential APA violations. ED is asked to please provide the statutory authority for such proposed procedures.

This is the culmination of an increasing tendency to merge public and private postsecondary institutions for due process purposes, as if there is no distinction, and overlooks the established legal precedent that "due process is flexible and calls for such procedural protections as the particular situation demands" which involves an assessment of "time, place, and circumstances."[7] It is unclear how private postsecondary institutions will argue now that they must afford due process under Title IX but not under other conduct processes. Please explain how due process is inherent in or required by Title IX. Per court decisions, due process only attaches to separation level offenses at public institutions; ED asserts that it is mirroring the court standards for Title IX, yet this blanket application of due process extends further than the existing jurisprudence. Even if it could be argued that this provision is fairly applied to public entities, how is it not agency overreach for OCR to impose due process requirements on private recipients?

Please clarify what due process entails, how and pursuant to what authority it applies to private institutions, and how and why Title IX provides the requirements and authority implied by this paragraph. ATIXA is also concerned that the articulated due process elements included in this section may create increased and enhanced litigation risk on the basis of negligence for recipients, a burden OCR has failed to address in its anticipated costs to recipients.

Rule: Paragraph (b)(1)(ii) requires "an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness."

Comments: ED appears to be avoiding the industry standard term "impartial," substituting "objective" here instead. "Impartial" is already codified as part of the VAWA Section 304 and appears in the vast majority of recipients' Title IX resolution policies/procedures. Perhaps OCR can consider aligning the language of the proposed regulations to VAWA Section 304 to ensure consistency.

Please clarify "exculpatory evidence" as used in this paragraph. For example, please address whether it includes forensic evidence or polygraph examinations.

Because ED's authority to enforce these regulatory provisions is stripped in section 106.44(b)(4), it is not clear what compels compliance here. ATIXA asks OCR to please clarify.

The final portion of this paragraph makes sense but is, at best, awkwardly worded. Presumably the goal is to say a complainant is not automatically more credible and a respondent is not automatically less credible. ATIXA recommends that a description of appropriate elements contributing to a credibility determination and an outline of what *should* be (as opposed to a statement of what *should not* be) the basis for credibility determinations,

[7] *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal citations omitted).

would be more helpful to recipients.

Rule: Paragraph (b)(1)(iii) requires that "any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that coordinators, investigators, and decision-makers receive training on both the definition of sexual harassment and how to conduct an investigation and grievance process, including hearings, if applicable, that protect the safety of students, ensure due process protections for all parties, and promote accountability. Any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment."

Comments: Mandated training at the PK-12 level is a welcome addition, as most PK-12 schools receive no or minimal training. ATIXA encourages ED to offer greater specificity as to what kind of training, how much training, and how often training should be provided. For instance, training on the definition of sexual harassment neither clarifies whether this is a definition derived from policy or elaborated in the proposed regulations nor speaks to the reasonable person standard and how recipients should apply it. Does ED also expect training for those recipients that elect to address stalking and intimate partner violence? Should there be required training with regard to discrimination on the basis of sex in other forms, such as under disparate impact or disparate treatment theories?

Here again ED mandates due process without any meaningful clarification as to what is meant and whether there is a distinction for public and private postsecondary recipients. Please address whether due process means that the parties get to call or request expert witnesses and whether they may have assistance of counsel in framing their written statements? Please also address whether recipients have to have medical evidence interpreted if it is submitted and whether either party can insist on certain witnesses being called.

In a final note for this paragraph, "bias for or against complainants or respondents generally" does not appear to contemplate bias for or against a particular sex or gender. ATIXA asks ED for clarification on how discrimination on the basis of sex is implicated.

Rule: Paragraph (b)(1)(iv) requires grievance procedures to include "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."

Comments: ATIXA has no particular disagreement with this concept, but objects to the extent that presumptions are legal constructs that have no place in Title IX administrative proceedings. The field at large has always, even if in more tacit fashion, worked under the assumption that the respondent is not responsible unless the weight of the evidence meets the preponderance of the evidence standard for each allegation. There has never been a presumption of responsibility within the field at-large, though OCR seems intent on treating the few institutions that may have done this as the rule, and not the exception. Importing a

criminal concept like a presumption of innocence into a civil, administrative proceeding makes no substantive or functional contribution to the grievance procedures, as those who are biased are going to continue to be regardless of this rule, and bias is already actionable in civil suits. Those who are biased without knowing it (implicit bias) will not come to know it because of this rule. It does, however, beg the question of whether there should also be a presumption that the complaint is made in good faith, to preserve equity. If a respondent is entitled to a presumption, does Title IX require that the complainant be entitled to an equivalent presumption? If so, why? If not, please clarify how such a presumption equitably can only extend to one party. It would also be helpful for OCR to clarify how this presumption is supposed to work procedurally, and what due process provisions in the statute OCR invokes as authority to implement such a protection.

Rule: Paragraph (b)(1)(v) requires grievance procedures that include "reasonably prompt timeframes for conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if the recipient offers an appeal, and a process that allows for the temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities."

Comments: This paragraph does not indicate who determines "good cause" or what constitutes "good cause." Is this different than "reasonable cause?" Is good better than reasonable? Please clarify whether unavailability of an advisor would qualify as "good cause" and why? The provision also fails to contemplate that a notice of extension may be the first indication to a respondent of the allegations, which may make no sense at all. Or even whether the "accused" is a "respondent" yet at the earliest points that a delay could occur? When does an "accused" become a "respondent?" Or what happens when local law enforcement is the cause of the delay, and law enforcement instructs the recipient not to notify the respondent? Does this change the length of time that a recipient may press pause, as stated in the withdrawn 2011 Dear Colleague Letter? If so, what is a reasonable time for a recipient to defer to law enforcement and under what circumstances? Clarification in this area is needed.

Specifically, please provide more information on concurrent law enforcement activity; recipients need clarity regarding application of the proposed regulations to concurrent investigation situations. Should a lengthy criminal investigation create delay that deprives a complainant of access to a recipient's educational program, would that not conflict with Title IX?

Rule: Paragraph (b)(1)(vi) requires that grievance procedures "describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility."

Comments: Unless possible sanctions correspond to types of offenses, application of this provision will not accomplish much aside from a list of all possible sanctions, from warning through expulsion/termination. This appears to be an attempt to mirror the Clery Act as amended by VAWA.

Please clarify what "range of possible sanctions" means and whether this implies a "catch all" category. Inclusion of all possible sanctions is not possible, as many sexual harassment allegations appropriately result in unique or specifically-developed sanctions based on the nature of the case.

Rule: Paragraph (b)(1)(ix) requires that grievance procedures "describe the range of supportive measures available to complainants and respondents."

Comments: This could be read to indicate the range of available supportive measures should be the same for all parties. Please clarify that appropriate supportive measures may differ between the parties, and should be applied equitably, not equally, to restore and preserve access to and the benefits of the recipient's education or employment program or activity.

Rule: Upon receipt of a formal complaint, paragraph (b)(2)(i) requires that "a recipient must provide the following written notice to the parties who are known…"

Comments: "Upon receipt" is too prescriptive, as requiring notice at a certain stage disregards the strategic potential of such notice. Recipients should have the ability to determine when delivery of notice is appropriate, as long as it is before the initial interview, except when there is an exigent circumstance. This flexibility would benefit all parties, as there are allegations that, after a brief level of inquiry or investigation and, prior to notification to the respondent, are deemed unfounded or ungrounded, thereby never necessitating notice of investigation to a respondent. The respondent can be made aware the allegation existed, but it is unclear why the full formal process needs to be triggered when it is not necessary. Additionally, ATIXA questions the authority of OCR to issue a notice requirement more stringent than the courts have ordered in Title IX grievance proceedings,

In *Doe v. Timothy P. White, et. al.,* (2018) a California Superior Court stated:

> Fair procedure requires that the accused be afforded an opportunity to present his objections after he or she is provided with notice of the charges. This opportunity to rebut does not have to take place in the initial interview. A school is not precluded from interviewing the accused prior to providing adequate notice of the charge, and then affording him an opportunity to present objections. Goss[8] was sensibly concerned that an accused cannot reasonably respond to allegations

[8] *Goss v. Lopez*, 419 U.S. 565 (1975).

> without adequate notice of what those allegations are. Notice withheld until the end of an initial interview satisfies these principles so long as there is an opportunity for objection. The reasonably practical and well-accepted investigative technique of interviewing a subject before notifying him or her of the accusation is not inconsistent with fair procedure.

Please clarify what basis in the statute gives OCR the authority to elaborate due process notice requirements beyond even those that apply in criminal proceedings and how this is not agency overreach. Please clarify if notice is intended to be automatic, or if circumstances would allow for adjustment depending on safety concerns, preservation of evidence, etc. How soon is "Upon" and what bases for delay might be reasonable? How can a recipient be "deliberately indifferent" to a procedural protection when the courts, upon which the standard is based, do not generally view procedural deviations as evidence of deliberate indifference? If the recipient fails to give notice "Upon" but does so inadvertently, is it safe to assume that OCR cannot enforce on the failure, as it is not "deliberate?" In an allegation of intimate partner violence, for instance, formal notice to the respondent ing party upon receipt of a formal complaint would likely place the complainant at risk of further harm. The industry standard is to provide this level of notice prior to charging, not prior to interviewing, though ATIXA generally agrees with providing sufficient notice prior to interviews to effectuate the rights to an advisor guaranteed by VAWA Section 304.

Rule: Paragraph (b)(2)(i)(B) requires that written notice include the "allegations constituting a potential violation of the recipient's code of conduct, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's policy, and the date and location of the alleged incident, if known. 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. The written notice must also inform the parties that they may request to inspect and review evidence under paragraph (b)(3)(viii) of this section and inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process."

Comments: It is not completely accurate, as the proposed rule suggests, that a respondent would be unable to adequately respond to allegations without all the information required within the written notice.

Requiring notice with sufficient time to prepare a response before any initial interview is likely an over-reach by OCR. It is certainly not reflective of industry-standard practices. Asking the respondent for a narrative of what happened is the best practice. Setting up a dynamic where there is no narrative, but just a rebuttal of the allegations of the complaint or notice is not conducive to getting an accurate account of what really happened. This is not a due process

requirement of any court, and ATIXA has asked OCR above to clarify what basis there is under Title IX to provide this level of prescriptive due process. Law enforcement officers interview suspects all the time without notice in advance. Further, recipients will likely struggle with applying an appropriate interpretation of this provision, and the courts will likely have varying interpretations. A definite time frame and an ability for the respondent to waive that timeframe, if desired, would be more helpful. ATIXA asks OCR to please clarify accordingly.

Requiring a determination of responsibility be made at the conclusion of the grievance process does not appear to account for processes allowing the respondent to accept the findings without a hearing. "Conclusion" should be defined to clarify all possible outcomes.

Please clarify at what point(s) in the process evidence should be offered and provided to the parties, either here or in paragraph (b)(3)(viii) and paragraph (b)(3)(ix).

Rule: Paragraph (b)(2)(ii) indicates that in the event the investigation expands to include "allegations not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties, if known."

Comments: This notice requirement, legally, should attach to allegations, or the amended notice of allegations (sometimes also called charges), not to the investigation itself. It is a good practice to give a notice of investigation, but it is not strictly required. Further, it is not clear how this provision relates to the formal notice requirement in 106.45(b)(2)(i). Please clarify whether the complainant or Title IX officer has to file an additional signed complaint, or if the ongoing notice to the parties fulfills that requirement.

Rule: Paragraph (b)(3) indicates recipients "must investigate the allegations in a formal complaint. If the conduct alleged by the complainant would not constitute sexual harassment as defined in section 106.44(e) 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."

Comments: Please specify whether, and how, a formal complaint may be withdrawn. Also, recipients are likely to read this as a requirement to dismiss the matter, rather than dismiss it under Title IX. ATIXA asks OCR to clarify that outside of Title IX, it has no authority to determine what a recipient does or does not do with respect to an allegation of sexual misconduct or sex/gender discrimination. Recipients have every right to address these matters as formal complaints, outside the parameters of Title IX but within the scope of existing policy or law (such as the First Amendment), when it is determined that Title IX does not apply. If OCR agrees with this, please so indicate. If not, please indicate why not. Also, it is suggested that it be restated that if a recipient dismisses a complaint because it does not constitute sexual harassment, the recipient will consider what supportive measures still may be warranted and advise complainants of any other available avenues for redress. This is particularly important in light of the more narrow proposed definitions of what constitutes sexual harassment.

Rule: During an investigation, paragraph (b)(3)(i) requires that recipients "[e]nsure 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."

Comments: Please clarify what "sufficient to reach a determination" means. It presumably means "appropriately thorough," but one could construe this to read "gather just enough evidence to find someone responsible" or "not responsible," yet not sufficiently thorough to gather all relevant evidence. Please clarify if there is evidence sought by a party, does the recipient have an obligation to try to obtain it? Are there any limits to this? What if the process does not typically consider this type of evidence? Who determines what is important, the recipient or the parties?

Rule: During an investigation, paragraph (b)(3)(ii) requires that recipients "[p]rovide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence."

Comments: "Equitable" should replace "equal," but this also seems to suggest that the parties could have equally limited rights to present witnesses and other inculpatory and exculpatory evidence. Is that OCR's intent? Please clarify why this provision does not grant "a full and equitable opportunity…"?

Rule: During an investigation, paragraph (b)(3)(iii) requires that recipients "[n]ot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence."

Comments: This provision creates the potential for unintended effects on independent investigations and may conflict with rape shield laws and other relevant protective provisions. While ATIXA supports allowing the parties to discuss the issues with advisors, family, attorneys, and other support individuals, we are concerned that the absolutist nature of the language would make it difficult to address retaliatory action by one party that creates a hostile environment, as in *Paul Nungesser v. Columbia University*.[9] Additionally, please clarify whether this provision allows for the parties to garner and use expert witness testimony.

Rule: During an investigation, paragraph (b)(3)(iv) requires that recipients "[p]rovide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties."

Comments: "Others" is plural, whereas "advisor" is singular. How many advisors does OCR contemplate per party? Does OCR intend to set a floor or limit? This rule does not sufficiently contemplate conflicts of interest, such as when the advisor is also a primary material witness, or advisor availability (we have seen numerous incidents where the advisor is not available for months at a time). These possibilities should be considered and addressed.

[9] https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2015cv03216/441389/71/.

Please clarify if ED views this as identical to the rights granted under the Clery Act as amended by VAWA Section 304. It appears this provision will apply more broadly to the vast array of offenses covered by Title IX that are not covered by VAWA Section 304.

Please address whether this applies in the PK-12 arena, as advisor dynamics are very different in that environment.

Additionally, please address how this applies to unions, their members, and their representatives, and whether a required union representative is the same as an "advisor of choice."

ATIXA urges inclusion of language to ensure that restrictions regarding the extent to which the advisor may participate in the proceedings not limit the extent to which the advisor may support the party during investigation meetings and hearings.

ATIXA further raises the question of limits on advisors. Given the OCR requirement that cross-examination be conducted by advisors, if a complainant chooses a victim's advocate as their advisor throughout the investigation, will they be forced to switch advisors for the hearing if the victim's advocate is not skilled at cross-examination? Why should the complainant be forced to choose between an advisor who can advocate for a victim and an advisor who is skilled at cross-examination? Some advocates may have both skills, but that cannot be universally assumed.

Rule: During an investigation, paragraph (b)(3)(v) requires that recipients "[p]rovide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate."

Comments: This may be the subject of much litigation if not clarified. Please clarify the parameters surrounding "sufficient time," with recognition that appropriately sufficient time will vary significantly depending on the age of the parties, nature of the allegations, involvement of advisors, etc.

Rule: Paragraph (b)(3)(vi) indicates that "[f]or recipients that are elementary and secondary schools, the recipient's grievance procedure may require a live hearing. With or without a hearing, the decision-maker must, after the recipient has incorporated the parties' responses to the investigative report under paragraph (b)(3)(ix) of this section, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses. If no hearing is held, the decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, all such questioning must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's

sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant."

Comments: While allowing for feedback from the parties is certainly the industry standard, ATIXA requests clarification on the requirement of "additional, limited follow-up" questions from each party. Who determines the extent of "limited" and on what basis? Furthermore, ATIXA requests clarification that this process may be concluded after two rounds of feedback from each party. Otherwise, the proposed procedure involving feedback may loop repeatedly, using significant time and finances that elementary and secondary institutions and small colleges simply may not have. Further, it can turn hearings into multiple day events that negatively burden all parties and create logistical challenges for recipients seeking to accommodate competing schedules of hearing chairs/panelists and parties and their advisors.

Rule: Paragraph (b)(3)(vii) indicates "[f]or institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient under subsection 106.45(b)(3)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination. All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions. The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant. 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."

Comments: Mandating a live hearing at both public and private postsecondary institutions raises significant concerns that ED is overstepping its authority, as a required live hearing constitutes a significant due process element with no real basis in gender equity.[10] Please provide the statutory authority on which ED is mandating this process. While ATIXA does not and has never supported a model in which one administrator serves in all capacities, ATIXA

[10] As noted above, this mandate may well constitute a violation of the APA. 5 U.S.C. § 706(2)(A), (C).

continues to believe that a robust investigation followed by a referral to an impartial decision-maker, subject to appeal, is entirely sufficient process to satisfy the mandates of law. Additionally, the basis for the distinction between the proposed required live hearings at IHEs and discretionary live hearings at PK-12 is entirely unclear, and ATIXA requests elucidation. It is also unclear whether ED views the sixty years of employment-based determinations that have not used live hearings under Title VII as being insufficient to meet the requirements of this provision. ATIXA asks that ED please provide justification for how Title IX has such significantly higher requirements than Title VII, after which it was modeled. ED is constructively requiring that all employment-based sex and gender discrimination processes within recipients' programs include a live hearing. Please explain how ED is not usurping Congress' authority under Title VII in making this prescription Explain further why employees who work for recipients have enhanced procedural rights beyond those who work for employers who are not recipients. Further, please explain why, if a live hearing is a requirement of equity, it should not be the case that all previous decisions made without a live hearing were inherently unfair. If this is a requirement of equity, why has no court ever so held? Why does OCR get to determine what is inherent in equity, when it is the role of the courts to interpret statutes? A live hearing may be a requirement of due process in some courts under certain circumstances, but if all due process rights proposed in these rules are derivative of equity requirements within Title IX, why has no court with the power to enforce equitable standards ever held them to so require under Title IX?

For clarification, if a respondent chooses not to submit to cross-examination due to an on-going criminal investigation/criminal charges, it is permissible to dismiss any statement that individual may have provided previously? If a process allows for opening (introductory) and closing statements, should those statements also be disregarded if a party does not submit to cross-examination?

The previous paragraph ((b)(3)(vi)) describes a discretionary live hearing that leaves the final decision to the recipient. Such procedures are entirely sufficient to accomplish the end goal of allowing the parties to question one another and witnesses, but without the traumatic, antagonistic element of live questioning required by this provision. Additionally, there is no provision for allowing the parties to waive the live hearing component if requested by all parties. While disagreeing with the requirement for a live hearing in any Title IX proceeding, if ED retains it, ATIXA urges the adoption of a provision that allows a waiver of the hearing if requested by all parties.

It is unclear why ED decided to mandate advisor-only cross examination. Presumably it is to avoid having a traumatized complainant directly confronted by an alleged attacker. However, parties and witnesses being forced to answer live questions directly posed by an attorney who is highly trained in antagonistic, adversarial methods of cross-examination raises significant concerns regarding (re)traumatization of all parties involved as well as decorum and length of the process. Has OCR considered the chilling effect of this provision on the willingness of victims to seek redress through the process, and of witnesses to offer their testimony? Has OCR considered the question of what happens if a party refuses to have an advisor? Does this forfeit any right to questioning in the process? Or, may a recipient then direct questions

through the panel or decision-maker to the parties and witnesses? The proposed regulations further state that, "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." ATIXA believes that recipients are fully able – and should be vested with the authority and discretion – to determine the impact on evidence of the decision by a party or witness to opt not to participate in the hearing. ATIXA also asks OCR by what authority it may direct how any recipient conducts questioning or interprets evidence.

As with most provisions in this section, mandating direct cross-examination in a live hearing for Title IX cases may far exceed ED's authority under Title IX. Please clarify why such mandates are not reserved to Congress or the courts.

Postsecondary institutions will be unable to provide the same type of advisor a party would retain if they had significant financial resources. This requirement will create tremendous inequity when a respondent has the means to retain a skilled attorney as an advisor, and the complainant must use the advisor provided by a postsecondary education or vice-versa. It also begs the question of whether if one party has an attorney-advisor, is it equitable for a postsecondary institution to offer an advisor to the other party that is not an attorney.

The proposed regulations seem to overlook the needs or capacity of small vocational schools, which mainly operate within a highly restrictive budget. These schools are managed and operated by a small staff with limited resources for outside training or consultation. Policies, procedures, and related trainings are usually developed and delivered through existing in-house resources. To require additional expenditures would ultimately lead to an increased burden on the students through higher tuition and fees.

Please clarify the language "aligned with that party." It is unclear whether the same individual can serve as an advisor to both parties (not in the same case, but the question arises generally as to whether an advisor can serve on behalf of a respondent in one case and for the complainant in another). Stated differently, clarification is needed as to whether postsecondary institutions are expected to keep rosters of essentially "complainant" and "respondent" advisors. Also, what happens when there are cross-claims in a single case and each party may have dual roles as both complainant and respondent?

Note that the existence of multiple complainants and/or multiple respondents adds additional complexity, particularly since these parties may not have mutually aligning interests. It cannot be assumed that providing an advisor for a "set" or group of respondents (such as a fraternity alleged to have engaged in mass sexual hazing) will be sufficient. This process as written will likely generate substantial conflict of interest issues, which will only increase the longer that an advisor serves in that capacity.

Clarification is needed as to whether witnesses are entitled to advisors during a live hearing and whether the recipient must provide those advisors. It is not consistent with industry norms to allow witnesses to have advisors, and very few recipients provide such advisors or have the staffing and personnel to do so.

Whomever the individual raising and assessing the objections to questions, the hearing language raises additional questions regarding appropriate training. The hearing administrator or the party's advisor will be required to closely scrutinize all questions for relevance in real-time and raise an objection if necessary. Attorneys and judges learn to do this only after years of intensive training. It is unreasonable to expect that IHE administrative staff can provide the same level of expertise.

This places a tremendous additional burden on postsecondary institutions to identify and supply advisors trained to serve in "alignment" with a party and to provide hearing administrators essentially trained to be judges. Large postsecondary institutions may (or may not) have the resources to fund and staff the required infrastructure outlined here, but small to medium-size schools (where the vast majority of students attend) will struggle under the financial and resource burden created by this provision. Accordingly, ATIXA recommends that the requirement to justify exclusion of each question, and to virtually manage objections by parties in real time, be removed as impractical. Such complexities are anathema to the functioning of a school's internal, administrative policy resolution process.

Rule: Paragraph (b)(3)(viii) indicates recipients must "[p]rovide 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. Prior to 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. The recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination."

Comments: As Title IX's scope encompasses employees, this provision mandates sharing information, a practice that is not common among employers, particularly where unions are concerned. ATIXA supports this position but believes an explicit statement regarding its application to employees would be helpful in achieving compliance.

The section of this paragraph mandating the sharing of all evidence, regardless of its contribution to the final determination, is ill-conceived and confusingly written. Please provide the rational basis for requiring evidence *that is not relied upon in reaching a determination* be disclosed to the parties upon request? This will likely serve as a significant deterrent for complainants to come forward if everything they share can be disclosed. Please clarify whether this includes the investigation report itself, or just the evidence contained within that report.

Rule: Paragraph (b)(3)(ix) requires recipients to create an investigative report at the end of an investigation that "fairly summarizes relevant evidence and, at least ten days prior to a

hearing (if a hearing is required under section 106.45) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response."

Comments: ATIXA supports this position and believes it will contribute to greater fairness and transparency. Please clarify whether this draft report should include credibility determinations and findings? Also, please make a clear distinction between an investigation report (presumed to be a thorough, full report) and a summary. Clarification is needed. Further, please indicate why a ten-day provision is not an arbitrary duration selected by OCR, and whether a regulation should offer a broader guide to recipients, such as "with sufficient time to prepare, prior to a hearing."

Rule: Paragraph (b)(4)(i) articulates that the decision-maker "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)…." The decision-maker "must issue a written determination regarding responsibility. To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty."

Comments: This section does not specify whether the decision-maker is responsible solely for the ultimate determination of responsible/not-responsible or for other relevant issues as well, such as credibility of the parties and appropriate sanctions, but ATIXA assumes all such decisions fall within a single administrator or panel who serves as decision-maker. The language does not specify if an appeal administrator must also issue a written determination, if there are restrictions on who assumes the role of the appeal administrator, or how a determination should be reached (either by majority, supermajority, or unanimous vote).

Additionally, most PK-12 schools and many community and smaller colleges lack the staffing and personnel to have three separate positions of Title IX Coordinator, Investigator, and Decision-maker. Many colleges and schools use the same person as investigator and decision-maker (particularly in Community Colleges and PK-12, but also across all of education). Three separate individuals would create a significant burden for some recipients and create a process much more complex than other disciplinary issues addressed under a recipient's policies – particularly those involving students or at-will employees.

The standard of evidence mandate is very different than ED's April 4, 2011 Title IX Dear Colleague Letter, which simply identified preponderance of the evidence as the applicable standard. It was a recognition of the standard applicable to Title IX cases, administrative law cases, and HR decisions (as well as all other civil rights cases) in all courts, not a requirement set by any authority ED possesses. This draft takes the further step of requiring a standard, and,

again, ATIXA is unclear what language within the Title IX statute gives ED the authority to do so. If "preponderance" and "clear and convincing" are both viable, why are "substantial evidence" or "proof beyond a reasonable doubt" not being considered? ATIXA questions how choosing two of the seven evidentiary standards is not arbitrary or capricious agency action, especially when at least four of the seven were in use by recipients prior to 2011?[11]

ATIXA is concerned that the standard of evidence mandate in the proposed regulation is an invalid regulation that is unsupported in the underlying statute and therefore unlawful under the Administrative Procedures Act (APA). Section 706 of the APA states that agency action will be unlawful if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdictions, authority, or limitations[.]"[12] OCR is obliged to articulate a reasoned explanation for its exercise of administrative authority.[13] An agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[14] Furthermore, an agency action can be "arbitrary and capricious" if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[15] Similarly, the agency must not rely "on factors [that] Congress has not intended it to consider."[16]

Put simply, OCR has not satisfied the above obligations with its proffered justification for requiring specific standards of proof in Title IX adjudications.[17] For example, OCR asserts that "Title IX grievance processes are analogous to various kinds of civil administrative proceedings, which often employ a clear and convincing evidence standard…where a finding of responsibility carries particularly grave consequences for a respondent's reputation and ability to pursue a profession or career…." OCR's justification, however, is inaccurately narrow; only a small minority of analogous administrative proceedings use a clear and convincing evidence standard. Furthermore, despite OCR's assertion otherwise, the risk of "particularly grave consequences for a respondent" does *not* typically trigger a higher standard of evidence in

[11] 5 U.S.C. § 706 (2)(A).
[12] 5 U.S.C. § 706 (2).
[13] "It will not do for a court to be compelled to guess at the theory underlying the agency's action[.]" *Sec.& Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947); *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) ("[W]e insist that an agency ... articulate a satisfactory explanation for its action." (internal quotation marks and citation omitted)); *Commc'ns & Control, Inc. v. F.C.C.*, 374 F.3d 1329, 1335–36 (D.C. Cir. 2004) (holding that a conclusion accompanied by "*no* explanation" is the epitome of "arbitrary and capricious" decision-making (emphasis in original)).
[14] *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 44 (1983) (*quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).
[15] *Id.* at 43.
[16] *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.,* 265 F.3d 1028, 1034 (9th Cir.2001).
[17] *See generally* William C. Kidder, "(En)forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration's Proposed Standard of Evidence Regulation for Campus Title IX Proceedings," (Jan. 1, 2019)(unpublished manuscript).

analogous civil proceedings.[18] For example, federal research misconduct inquiries implicate important liberty interests and the risk of significant public stigma yet operate under a preponderance standard. Courts have consistently held that the preponderance of the evidence standard is appropriate in cases involving such inquiries.[19] OCR's proffered assertions are erroneous. Under the APA, OCR simply may not base its decision on incorrect legal conclusions.[20]

Furthermore, this particular proposed regulation neither is in accordance with the underlying premise nor falls within the parameters of Title IX. There is no basis in gender and sex equity for requiring any specific standard of evidence. OCR's intimation that applying the preponderance of the evidence standard to Title IX processes because clear and convincing or a higher standard of evidence applies to other processes with similar maximum penalties violates Title IX disregards the fact that there is no sex or gender basis to such a difference. Title IX simply does not govern the issue of standard of evidence at all. This is yet another example where the proposed regulation would be unlawful as it is not "otherwise in accordance with law" under the APA.

In addition to the above, OCR's proposed regulation on the standard of evidence is arguably a "new policy" that requires a more substantial justification under the APA. "[T]he APA

---

[18] *See* Kidder manuscript at 19-24. In fact, the Supreme Court has consistently held that clear and convincing evidence is required in only a very limited category of cases that present a very high threat to liberty interests and create significant stigma concerns, such as parental rights termination proceedings, involuntary commitment proceedings, deportation proceedings, and withdrawing medical life support. In contrast, administrative procedures to adjudicate civil fraud, physician misconduct, and research misconduct with federal grants all require the preponderance of the evidence. Attorney misconduct cases typically require clear and convincing evidence. The preponderance of evidence is also used by courts to adjudicate cases that arise under civil rights statues, including Title IX, Title VI, and Title VII. *See, e.g., Bazemore v. Friday*, 478 U.S. 385, 400 (1986) ("A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence."); *Desert Palace v. Costa*, 539 U.S. 90, 99 (2003) (preponderance of evidence in Title VII); *Williams ex. rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 363 (6th Cir. 2005) (school district "may be liable for the sexual abuse of a student if the [p]laintiff demonstrates by a preponderance of the evidence…"); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 360 (3d Cir. 2005) (Plaintiff "has the burden of proving by a preponderance of the evidence that a school official with the power to take action to correct the discrimination had actual notice of the discrimination"); *Ashmore v. Hilton,* 834 So.2d 1131, 1134 (La. Ct. App. 2002) (applying preponderance in civil rape case): *Jordan v. McKenna*, 573 So. 2d 1371, 1376 (Miss. 1990) (preponderance is plaintiff's burden in civil action for rape); *Dean v. Raplee*, 39 N.E. 952, 954 (N.Y. 1885) (applying preponderance in civil case alleging sexual assault).

[19] Kidder manuscript at 28-30; *Brodie v. U.S. Dept. of Health and Human Services*, 796 F. Supp.2d 145, 157 (D.D.C. 2011) ("Plaintiff, moreover, readily concedes that 'the administrative agency and this court have applied a preponderance-of-the-evidence standard [in debarment proceedings],' … and notes that 'there are no debarment cases in which the clear and convincing evidence [standard] has been applied.' … Given the paucity of authority for [Plaintiff's] position, this Court will follow other debarment cases which have held that debarment need only be supported by a preponderance of the evidence."); *Textor v. Cheney,* 757 F. Supp. 51, 57 n. 4 (D.D.C.1991) ("Plaintiff has failed to demonstrate that it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law for the ALJ to use a preponderance-of-the-evidence standard.").

[20] *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007); *Safe Air For Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007) ("Because that flawed premise is fundamental to EPA's determination . . . EPA's outcome on those statutory interpretation questions is arbitrary, capricious, or otherwise not in accordance with law.").

requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.'"[21] Because the regulation, if implemented as proposed, may well necessitate campuses to change the standard of evidence they use, particularly because of the consistency mandate, ATIXA requests OCR to more clearly state the substantial justification for this significant change from prior OCR guidance.

Finally, OCR is using legally questionable logic to require consistency across resolution processes. It is a principle that sounds fair at first blush, but ATIXA asks OCR to cite any case law or enforceable principle of legal consistency that is applicable to the use of a uniform standard of proof. In fact, the preponderance standard appropriately distributes the burden equitably across all parties, and conveys and establishes the tenet that false negative errors (the risk of allowing someone who has engaged in sex discrimination to go with remonstration), which harm current and future complainants, are of equal value and importance as the harms due to false positive errors (finding someone responsible for an offense they did not commit).[22] Some IHEs have used inconsistent standards since 2011 without any successful legal challenge to doing so.[23] And, OCR has no jurisdiction over processes outside of Title IX and no authority to require recipients to make changes in those processes.

With an ironic dose of inconsistency by OCR itself, "preponderance" is the only standard

---

[21] *Perez v. Mortgage Bankers* Ass'n, 135 S. Ct. 1199, 1209 (2015).

[22] ATIXA further emphasizes that the wide range of social science research on false positive errors should be evaluated as part of OCR's "equity" justification for its consistency mandate. In fact, when clear and convincing evidence is the applicable standard, the result is typically an increase in false negative cases, with a corresponding decrease in false positive cases. *See generally Grogan v. Garner*, 498 U.S. 279, 286 (1991) ("Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.'"), Kidder manuscript at 6-7 ; Mike Redmayne, *Standards of Proof in Civil Litigation,* 62 MOD. L. REV. 167, 171 (1999); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 827 (8th ed. 2011); Kevin M. Clermont, *Standards of Proof Revisited,* 33 VT. L. REV. 469, 476 n.14 (2009) ("Instead, requiring high confidence will greatly increase the number of false negatives, even if that strategy limits false positives; actually, low confidence, as long as the found fact is more likely than not, will minimize the expected number of errors."); Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 804 ("…it is not even true that the number of mistaken findings of liability necessarily falls as the evidence threshold is increased.").

[23] Indeed, there is scant case law supporting an argument that Title IX requires either the clear and convincing standard or the consistency mandate. Dicta in a couple of federal district court cases, as well as a brief reference in the dissent of a Fifth Circuit case hardly constitute a legal mandate. *See Plummer v. University of Houston*, 860 F. 3d 767, 783 (5th Cir. 2017) (Jones, J., dissenting); *Lee v. University of New Mexico*, No. 1:17-cv-01230-JB-LF (D. N.M. Sept. 20, 2018), https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2018/09/28133211/Lee-v.-University-of-New-Mexico.pdf; *Doe v. Brandeis University*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016). *See also* Kidder manuscript at 22 (*citing Traster v. Ohio Northern University,* 2015 U.S. Dist. LEXIS 170190 *4-24 (N.D. Ohio 2015), *aff'd* 685 F. App'x 405 (6th Cir. 2017)(rejecting professor's argument and finding that the POE standard for faculty discipline cases specified in the campus-wide faculty handbook is controlling over more vague references in the Law School's bylaws to the AAUP principles including the C&C standard of evidence); *Winter v. Penn. State University,* 172 F. Supp. 3d 756, 771-73 (M.D. Penn. 2016) (rejecting professor's claim of a substantive due process violation partly premised on the absence of C&C evidence).

that will require uniform, equitable application by OCR, and a recipient may use "clear and convincing" for Title IX resolution procedures and "preponderance" for other violations, but if a recipient uses "preponderance" for Title IX resolution, it can only do so if that is the standard for all other cases. Please clarify why and how ED allows for either standard, on what legal authority this mandate is based, and the apparent differential application requirements across resolution processes between the two standards?

Practical considerations also contradict the consistency mandate. Allowing use of the preponderance standard only if the same standard is used for students and employees is an inherently problematic requirement for institutions unable to change their faculty processes. The AAUP, and many institutions relying on the language of the AAUP, requires application of "clear and convincing" evidence standard before a tenured faculty member can be terminated. This would appear to functionally mandate the "clear and convincing" evidence standard to resolution of all Title IX cases for AAUP campuses. In contrast, ATIXA observes that recipients that elect to or are functionally required to use the clear and convincing evidence standard will face inconsistency with federal research misconduct regulations, which require use of the preponderance of the evidence standard.[24]

ATIXA can see no real merit or value in having the standard vary from recipient to recipient. Use of the clear and convincing evidence standard places an evidentiary burden on the complainant that is much higher than on the respondent; this is inequitable, will serve as a deterrent for complainants, and will result in significant litigation.

Finally, use of the clear and convincing standard has been demonstrated to be more confusing for factfinders and decision-makers to make determinations relative to the preponderance standard, an issue OCR must address.[25]

Rule: Paragraph (b)(4)(ii)(B) states that the written determination must include, *inter alia*, "[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."

Comments: This section does not seem to contemplate cases with multiple complainants, where such notices may violate FERPA regulations. We recommend ED work with FPCO and with Congress to create specific language within Title IX and FERPA to address this complex situation.

Rule: Paragraph (b)(4)(iii) requires the recipient to provide simultaneous notice of the determination.

[24] Kidder manuscript at 28.

[25] *See e.g.,* Elisabeth Stoffelmayr & Shari Seidman Diamond, *The conflict between precision and flexibility in explaining "beyond a reasonable doubt*," 6 PSYCHOL. PUBLIC POL'Y & L. 769, 774 (2000) ("Empirical research indicates that jurors may have some difficulty distinguishing the clear and convincing standard of proof.").

Comments: Please clarify that "simultaneously" means "without undue/unreasonable delay." This provision could be simplified by tracking similar language in the Clery Act as amended by VAWA. Actual simultaneity is usually physically impossible.

Rule: Paragraph (b)(6) indicates informal resolution is available to the parties "at any time prior to reaching a determination regarding responsibility."

Comments: This seems to imply restorative practices are prohibited after a final responsibility determination in a formal resolution process, though that is not likely the intent. ATIXA asks that ED please clarify.

Rule: Paragraph (b)(7)(i) requires each recipient to create, make available to the parties, and maintain certain records pertaining to the investigation of sex-based discrimination for three years.

Comments: ATIXA asks that ED please clarify if mere access or a physical copy is required for provision to the parties?

Despite general tracking with Clery Act standards throughout the proposed regulations, this section departs from Clery Act record retention standards. Three years appears arbitrarily contrived, particularly since most colleges provide four years of curriculum and most students complete in five years.[26] The industry-standard seven years of record retention should remain.

Please provide the statutory authority under Title IX that justifies ED's basis for these recordkeeping requirements. If these requirements are not grounded in law, there is an increased risk of arbitrary agency pursuant to 5 U.S.C. § 706 (2)(A).

Rule: Paragraph (b)(7)(i)(A) requires a recipient to keep records pertaining to "[e]ach sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve access to the recipient's education program or activity."

Comments: ATIXA asks that ED please clarify how this applies to employment records policies, as well as if this applies only to the resolution of the complainant's allegations, but not to any concurrent misconduct.

Rule: Paragraph (b)(7)(i)(D) requires a recipient keep "[a]ll materials used to train investigators, adjudicators, and coordinators with regard to sexual harassment."

Comments: Please clarify:

[26] https://nscresearchcenter.org/signaturereport11/

1) Whether appellate officers are included in this requirement.
2) How the plural "coordinators" is defined.
3) Whether this is merely a requirement for retention of training materials, or whether there is some expectation from OCR that these materials may be shared with advisors and/or the general public.

Rule: Paragraph (b)(8) indicates "[n]othing herein restricts a recipient's ability to take disciplinary action against a student or employee who intentionally submits a formal complaint in bad faith or a student or employee who knowingly provides false information during the investigation or adjudication or a formal complaint."

Comments: We recommend this provision be titled "False Reports or Information" as this is not the entirety of what constitutes retaliation as defined by the regulations. This does not clarify if false complaints or provision of false information is discriminatory on the basis of sex.

ED should include a clear, uniform definition of "retaliation" since it will be enforcing on that basis, and it should be consistent with retaliation definitions for other protected classes such as disability, race, and religion.

COMMENTS REGARDING EXISTING REGULATION SECTIONS

§ 106.2 Definitions

Rule: Paragraph (h)(3)(i)(B) indicates that a program or activity means all of the operations of an entire corporation, partnership, other private organization, or an entire sole proprietorship "[w]hich is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation…"

Comments: We recommend ED use this paragraph to clarify that teaching hospitals and residency programs are recipients subject to Title IX consistent with the recent Third Circuit Court decision, *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545 (3d Cir. 2017).

Rule: Paragraph (r) indicates that a "[s]tudent means a person who has gained admission."

Comments: We believe this definition presents several challenges. First, most postsecondary institutions use a narrower definition of "student," which usually requires enrollment, payment of a matriculation fee, and/or registering for and/or attending the first day of classes. Second, individuals often apply to multiple postsecondary institutions. This definition would make them students subject to the provisions contained in these regulations at every postsecondary institution to which they are accepted. If this is applied, the postsecondary institution would be required in their admission materials to put all applicants on notice that upon admission they will be subject to certain policies (even if the applicant does

not subsequently attend), and it is technically impossible to sanction a non-student. Third, PK-12 students do not "gain admission" so much as they register or are considered assigned to a particular school. This definition also has no ending point, such as "and for as long as they maintain a continuing enrollment with the institution." Otherwise, once someone gains admission, they seem to be forever considered a student regardless of whether they are still enrolled. Please clarify.

§ 106.31 Education programs or activities.

Rule: Paragraph (a) indicates that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance."

Comments: ATIXA is glad to see ED retain the phrase "be denied the benefits of…" in this paragraph. However, in many sections of the proposed regulations, reference to discriminatory conduct excludes this phrase, instead citing exclusion or access denial exclusively. ATIXA strongly encourages ED to consistently refer to the plain text of the statute as accurately referenced in this paragraph, in particular in the definitions section.

Rule: Paragraph (b) specifies that a recipient shall not discriminate "in providing any aid, benefit, or service to a student."

Comments: As noted in our opening commentary, Title IX ensures "*no person* shall..." Use of the term "student" is inappropriately narrow, given the plain language of the statute and the fact that Title IX has been repeatedly interpreted by the Supreme Court to encompass all individuals in education programs or activities (employees, vendors, third-party contractors, etc.). This is an issue throughout the proposed regulations and must be clarified and consistently referenced.

§ 106.34 Access to classes and schools.

Rule: Paragraph (b)(2) indicates "[a] recipient that provides a single-sex class or extracurricular activity, in order to comply with paragraph (b)(1)(ii) of this section, may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex."

Comments: Single-sex programs that are designed to correct potential discrimination issues should be acceptable as long as they are evaluated annually for effectiveness and necessity (e.g., female STEM programs, men in nursing/teaching programs).

§ 106.40 Marital or parental status.

Rule: Paragraph (b)(2) indicates "[a] recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician."

Comments: ATIXA suggests this paragraph would have more clarity if it read: "An institution may *not* require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation *unless* such certification is required of all students for other physical or emotional conditions requiring the attention of a physician."

Rule: Paragraph (b)(4) indicates "[a] recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity."

Comments: ATIXA has always interpreted this section to mean that funding recipients are required to provide accommodations for pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner as a temporary disability. This paragraph seems to relate to medical/hospital benefits exclusively. Please clarify whether this is intended to narrow existing protections, or whether this language is to be applied more broadly. The latter is more consistent with current industry standards. ATIXA also requests that ED include more information in the proposed regulations regarding the Title IX protections of pregnant and parenting students and employees.

These comments have been submitted to and ratified by the entire ATIXA Board of Advisors on January 28, 2019.