



National Association  
of Independent  
Colleges and Universities

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June 10, 2021

Suzanne B. Goldberg  
Acting Assistant Secretary for Civil Rights  
Office for Civil Rights  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202-1100

**Re: Written Comment: Title IX Public Hearing (2020 amendments to the Title IX regulations)**

Dear Acting Assistant Secretary Goldberg:

On behalf of the National Association of Independent Colleges and Universities (NAICU), I write to provide comments for the public hearing on improving enforcement of Title IX of the Education Amendments of 1972.

NAICU represents the private, nonprofit sector of higher education, which includes more than 1,700 colleges and universities in the United States. The private, nonprofit sector is extraordinarily diverse, and institutions vary significantly in terms of size, mission, and resources. Our sector includes major research universities, faith-based colleges, Historically Black Colleges and Universities, Minority-Serving Institutions, Tribal Colleges and Universities, art and design colleges, traditional liberal arts institutions, science institutions, women's colleges, work colleges, two-year colleges and schools of law, medicine, engineering, business and other professions.

Private, nonprofit colleges and universities are deeply supportive of Title IX's promise that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." We share the Department of Education's commitment to Title IX and are dedicated to ensuring that all students have a safe, supportive, and fair educational environment.

NAICU is appreciative of the Department's willingness to reevaluate the 2020 sexual assault regulations and hopes our comments will help illustrate the specific impact they are having on private, nonprofit colleges and universities. We also wish to reiterate the shared concerns of the entire higher education community as reflected in the comments submitted by the American Council on Education (ACE). NAICU was actively engaged in drafting the ACE comments and we have separately endorsed them.

As part of our effort to respond to the Department's request for comments that are "as specific and detailed as possible" about regulatory changes that should be considered, NAICU sought information from member institutions to provide additional insight into the impact of federal



Title IX policies on their college campuses. These institutional comments are included in the attached appendix.

In general, NAICU has significant concerns about the 2020 regulations. These concerns, which are broadly shared across the higher education community, include the following:

- The current regulations are antithetical to the fundamental educational nature and objectives of campus student disciplinary processes.
- The current regulations force campuses to turn their disciplinary proceedings into legal tribunals with highly prescriptive, court-like processes. Colleges and universities are not courts, nor should they be.
- The current regulations mandate that every campus must provide a “live hearing” with direct cross-examination by the party’s advisor of choice or an advisor supplied by the institution. Such a process is not necessary to ensure fairness, yet it creates a chilling effect on survivors and other witnesses, potentially re-traumatizes survivors, and raises serious equity concerns.
- The current regulations inappropriately extend these court-like and prescriptive processes to sexual harassment allegations involving employees.
- The current regulations fail to recognize the myriad other federal, state and local laws, judicial precedent, and institutional commitments and values regarding the handling of sexual harassment with which campuses must also comply.
- The current regulations provide insufficient flexibility to allow campuses to choose between using a “preponderance of evidence” or the “clear and convincing” evidentiary standard.
- The current regulations require colleges and universities to adopt a new Title IX-specific definition of “sexual harassment” that is inconsistent with Title VII’s definition, and also with definitions contained in campus sexual misconduct policies. The regulations also raise questions about precisely what conduct will be considered to have occurred within a “program or activity.”
- The current regulations have driven up the costs and burden of compliance.

On a positive note, we appreciate that the current regulations allow campuses to use informal resolution processes when both parties are fully informed of this option and voluntarily consent.

It is important to note that the concerns articulated above weigh particularly heavily on many institutions in the private, nonprofit sector. Many of these institutions have struggled to implement the 2020 regulations, due in large part to a lack of personnel and budgetary resources to handle the highly legalistic and prescriptive requirements in the current regulations. Despite the common misperception that the sector consists primarily of wealthy, elite institutions, most private, nonprofit colleges and universities are very small and thinly resourced. For example, 332 private, nonprofit colleges and universities have fewer than 250 students and the majority do not have general counsel on staff.

Given the broad diversity of the private, nonprofit sector, NAICU urges the Department to avoid a one-size-fits-all model when revising the Title IX regulations. What works well on one campus may not work well on another. Private, nonprofit colleges and universities are hopeful that the Department will adopt a more balanced approach that sets forth broad principles for ensuring a safe and equitable educational environment for all students while providing flexibility for



institutions to tailor policies in a way that best fits their campus, mission, and culture. The Clery Act offers a possible model in this regard.

A more flexible approach would also have the benefit of facilitating an institution's ability to comply with state and local laws and judicial precedents that are applicable in its jurisdictions. Additionally, a more flexible approach is more likely to withstand shifts in political control. In recent years, both institutions and students alike have been whipsawed by the dramatic changes in federal policy regarding sexual harassment on campus. These shifts have been costly and confusing for all involved. A more stable approach that works better for all stakeholders would bring welcome relief.

Thank you for the opportunity to submit Title IX comments on behalf of private, nonprofit colleges and universities. Our member institutions are absolutely committed to ensuring a safe, supportive, and equitable educational environment for all of our students and are hopeful that they will be viewed as partners in your effort to improve Title IX enforcement for all stakeholders. We look forward to working with you as the regulatory process moves ahead.

Sincerely,

A handwritten signature in cursive script that reads "Barbara K. Distler".

President  
National Association of Independent Colleges and Universities

Enclosure

*ADDENDUM to NAICU Written Comments: Title IX Public Hearing (2020 amendments to the Title IX regulations*

Comments from NAICU member institutions on the impact of federal Title IX policies on their campuses. Institutional comments have been lightly edited to protect the anonymity of the institution.

**A small liberal arts college in the South**

*The most recent changes to Title IX have proved to be challenging for our small college located in a very rural area. Not having an attorney on staff, when an issue arose shortly after the new regulations went into effect we acquired the services of a firm that specializes in Title IX-related issues. To ensure that we are in compliance, we have now spent over \$15,000 in consultation fees. The efforts to protect all parties involved in a sexual harassment situation are commendable, but there must be a way to achieve this without requiring colleges to undertake and manage complex activities for which we are not trained and do not have adequate staff.*

**A research university in the South**

*We appreciate the flexibilities for informal resolution when all parties agree and the university determines it would be appropriate. Informal resolution has been a useful tool to address behavior that fits the Title IX definition of “sexual harassment,” but all the complainant really wants, for instance, is an apology. We hope informal resolution is preserved. The emphasis on providing supportive measures to respondents, not just complainants, has also been positive. We’ve found the requirement for a formal complaint is helpful because it requires intentionality by the complainant and it helps to build the record.*

*One of our biggest challenges has been the inclusion of employees under the new Title IX regulations – particularly with how that requirement interacts with collective bargaining agreements, other employment contracts, and the interplay with Title VII – especially the different definitions under Title IX vs. Title VII. We would recommend that employees be removed from the regulations except when there is a case where the complainant is an employee and the respondent is a student.*

*As we expected, we find conducting an investigation and hearing consistent with the regulations to be very prescriptive and court-like. At its core, the role of universities in responding to complaints of Title IX violations should be consistent with universities’ relationships with students: an educational process and an opportunity for learning. That is not the case in the current construct. We have also found that the prospect of cross examination is chilling participation in the Title IX process – both by potential complainants and by witnesses. It also becomes problematic if a witness is not willing to submit to cross-examination, and under the regulation we have to pull their statement from the investigative report and no evidence they provided can be considered in reaching a determination.*

*We have run into some HIPAA (and to a lesser extent FERPA) issues where health care providers are identified as witnesses, or a party seeks to enter medical records as evidence. If a medical provider who is not employed by the university is not willing to testify (and submit to cross-examination), we cannot compel them to participate and can't include the medical record. Needless to say, getting a doctor to testify can be challenging – and often they would prefer to just let the medical record stand as the evidence.*

*Educating students about the various processes has also proven to be challenging – particularly the Title IX process versus the process if behavior doesn't fall within the Title IX definition of "sexual harassment" but is still prohibited under our code of conduct.*

*Finally, the expenses have been significant. The rate to hire trained hearing officers can run \$300-\$350/hour; a pretty straightforward case recently cost the university \$7,500 just for the hearing officer (excluding the expected appeal and costs to hire a separate trained appellate officer). To keep the process on track in terms of timing, we have found it necessary to prepay for an appellate officer so they can be prepared in the event of an appeal. We also have a pool of external outside advisors (all lawyers) who the university makes available to parties, at a cost of \$150/hour paid by the university. The staff time to coordinate the various logistics associated with holding a hearing is also sizeable; we are considering hiring a hearing manager.*

#### **A small, Christian liberal arts college on the West Coast**

*I honestly felt the Obama rules were too one-sided. Under his guidelines, we never had a single male found innocent. Although flawed, the guidelines developed under Secretary DeVos weren't perfect but brought the process into closer alignment with a legal process, which I found fair.*

#### **A small liberal arts college in the Midwest**

*Our institution would be particularly interested in revisions to the 2020 regulations that would allow us the option to return to a single-investigator model. Prior to the current regulations, our small liberal arts college operated under a single-investigator model to resolve allegations of discrimination and harassment, including sexual harassment. We had selected this model as being singularly well-suited to a small, residential college in the rural Midwest with approximately 1,100 residential students (95% of the student body lives in residence halls) and 100 faculty members.*

*The selection came in part in response to the concerns raised by student-advocates for survivors of sexual assault about our earlier model of grievance panel hearings staffed by faculty, staff, and students who had received training on how to resolve complaints equitably and promptly. Despite this training, advocates noted that on a small campus, resolving complaints using internal panels exposed reporting and responding parties and witnesses to what could be as much as 4 years of ongoing interactions with panel members who had learned painful and traumatic details about them. We heard from students who had changed majors or avoided courses, clubs and organizations, and athletic opportunities because the interactions with previous panel members were too painful. Advocates described these interactions as creating lasting traumatic effects for those involved.*

*We also found that, even when trained, faculty and staff were often reluctant to serve as panelists for both personal and professional reasons. We had difficulty building panels, and this caused delays, resulting in extended time periods to complete the resolution process. In other words, in a small campus community, participants and grievance panel members having subsequent interactions as part of the institution's programs and activities was a near certainty. In our view, this undermined the very educational experience that Title IX was intended to protect. We did consider hiring outside consultants to staff the grievance panels, but on a small, under-resourced campus, the cost of paying grievance panels and training them in our institutional culture was prohibitive, especially since we have been highly successful in encouraging students to report allegations of sexual assault.*

*Utilizing the single-investigator model (for both the investigation and finding) permitted us to move quickly once a report was received, drawing from a small pool of trained experts, previously vetted by the institution. We could then deliver the highest level of expertise required by the facts of the allegation and conduct the investigation in a trauma-informed manner for all parties. Through the use of outside experts as single investigators, the parties involved in these matters were allowed to continue their educational experience and fully realize the benefits of the institution's programs and activities, without the fear (and/or re-traumatization) of interactions with members of a grievance panel during the resolution process and/or at some time in the future.*

*Employing a single investigator, under the guidance of a Title IX coordinator, afforded us the opportunity to provide a working knowledge of institutional culture to a highly trained expert, who was then able to conduct a timely, thorough, equitable, and fair investigative process without actual or perceived institutional bias. From this process, we saw barriers to reporting diminish, allowing lower-level concerns to be addressed sooner and more effectively. More students sought institutional support and resolution, thus reducing harmful mental health consequences, and increasing institutional trust.*

### **A comprehensive university in the Midwest**

*The current regulations practically permit an informal resolution. However, unless a dismissal occurs, an investigation is conducted followed by a live hearing at postsecondary institutions. Even if the Respondent accepts responsibility for the policy violation, the Complainant must still agree to enter into an informal resolution. It would be beneficial if regulations allowed the parties to admit responsibility along with the recommended findings of the investigation without procedural complexity.*

*The current regulations require a 20-day review period for the parties to analyze the investigation report in two 10-day periods. The first 10-day review happens after the investigation and prior to the finalization of the investigation report. The second is prior to the hearing. It is believed that a 10-day process (business days) is sufficient time to review the investigation report by the parties as the change in regulation has extended investigations from 2-3 months to 3-6 months and created an immense amount of time for resolution.*

*The current regulations have turned postsecondary institutions' disciplinary process into criminal courts including cross-examination that is conducted by an advisor. The institution is*



*responsible for providing a trained advisor at no cost to the parties if they do not have an advisor. The ability to revise and adopt different formal processes that still ensure a fair and equitable process is warranted.*

### **An association of private, nonprofit colleges and universities in the Midwest**

- The majority of our member institutions have reported that people are really struggling with the way the regulations established the role of the Advisor as the person who has to issue cross examination. Many internal personnel feel it's an inappropriate role for them to hold with students or employees. Additionally, the equity issue comes up over and over, especially in situations when one party is able to afford an attorney. While most of us would like to see the government back away from such strict mandates around how we do the work, the specific detail around advisors in hearings is probably one of the most contentious.*

### **A small, Christian liberal arts college in the Midwest**

*The hearing structure is complicated in the way it is regulated, especially for small schools, forcing most institutions to have to outsource the role of hearing chair, which has had a significant impact on budgets (see example below). Having "enough" people to fill all of the roles required for the hearing is one challenge for small institutions. Having someone trained to understand rules of evidence is a totally separate challenge and has forced us to move to a system that is clearly more judicial in focus.*

*I have been under budget at year end every year until this one. This year I was over budget by mid-fall (and that is without normal on campus programming items and/or travel for professional development.) Here is a snapshot of legal fees paid out of my office, primarily for Title IX (though one case was race based, so it's not 100% attributed to the changes, but the impact has been significant):*

- 20-21 (through April, by year end it will be higher): \$75,000*
- 19-20: \$4,769*
- 18-19: \$1,948*
- 17-18: \$0*
- 16-17: \$24,024 (this was the year before we hired an internal investigator, which explains why the shift from 16-17 to the following year)*

*The amount for 20-21 doesn't include the amount we paid for professional development either to verify everyone had the training they needed for the year. We were over budget on that line item this year as well at \$6,500, which is more than any of the previous years (which all included travel unlike this year.)*

## A small liberal arts college in the Northeast

*Since the implementation of the new Title IX regulations on August 14, 2020, individuals coming forward to disclose an instance of sexual harassment have been left feeling confused by the fact that their complaint would not fall under Title IX policy, either due to the location of the incident or due to the complaint not rising to the level of severe, pervasive, and objectively offensive needed.*

*When students hear that their complaint does not fall under the Title IX policy, they are left feeling like the institution does not care about them or want to help them, even if accommodations are provided and the alleged behavior is addressed through another policy. In one particular instance this past year, a student chose not to participate in an investigation due to the fact that she would not have the entitlements and protections of the Title IX policy. She expressed that she was worried that by utilizing another policy, the College did not think that her experience was “serious” enough, despite multiple efforts to explain the constraints of the federal law and the College’s desire and ability to provide her with a fair and equitable adjudication process.*

*The new Title IX regulations introduced under the Trump Administration changed what was once an educational disciplinary process into a “college court,” where cross-examination of participants, and evaluation of relevancy are part of the process. Due to the legal liability and complexity of cases, it is in institutions’ best interests to hire individuals such as attorneys or outside contractors who are well trained and have these particular skill sets to fulfill the roles of advisors and decision-makers. However, doing so presents a significant financial burden to institutions.*

*As is the case with many higher education institutions, ours enlists the help of faculty and staff to serve as advisors and hearing board members for Title IX cases. The 2020 regulations present a barrier in recruiting and retaining individuals to serve in these vital roles due to individuals’ perceptions of their own capabilities, and the responsibilities placed on them by the Department’s ruling.*

*Additionally, in order to alleviate the financial burden of hiring external decision-makers and advisors, training for current faculty and staff has to focus on how to cross-examine a participant and witness, along with how to evaluate questions for relevancy. This training must be conducted by experts, usually with a legal background, and requires more training time dedicated to learning these new skills. Both of which are still burdensome for the College in terms of financial and administrative resources. Even after providing robust training on the new regulations and responsibilities of hearing board members this past year, faculty and staff are still expressing feelings of inadequacy and uneasiness in being able to cross examine individuals and evaluate questions for relevancy.*

*The new Title IX regulations outlining the need for cross examination were unnecessary for many higher education institutions which were already providing an opportunity to question participants and witnesses through previously established procedures. Rather than having a neutral decision-maker or chair of a hearing board ask questions of all individuals, the Department’s rule now provides the opportunity for biased or adversarial questions and tone to be introduced into the hearing. While the regulations call for the decision-maker to determine the relevancy of a question before an answer is provided, there is nothing preventing an*



*inappropriate question being asked, which ultimately, cannot be unheard by all of the individuals involved in the hearing. This could create a chilling effect not just for complainants in determining if they want to move forward with an adjudication process, but also, for respondents who have no recourse once they are in the hearing.*

*Other concerning issues include the timeline for investigations, inclusion of employees in the Title IX regs, the use of FBI crime definitions for policy, etc.*

### **A comprehensive university in the Midwest**

*The 2020 Title IX regulations brought about many changes to our policy and process, and there are several provisions that we hope to see rescinded by the new administration. First and foremost, we hope to see the live hearing and cross-examination requirements rescinded. We are concerned that the live hearing requirement has had a chilling effect on the reporting of sexual misconduct.*

*Those who have reported this year have expressed reluctance to move forward with formal investigations because of concerns about being cross-examined by an attorney in the presence of the accused. And, based on our experience, live questioning at the hearing isn't necessary, good, or productive for either party. For victims, live questioning is likely to retraumatize them. And for respondents, live cross-examination is not the best way to make a credibility determination. The individual may be nervous, upset, agitated, or stressed at the hearing, and all of these emotions could be interpreted as signs of untruthfulness or callousness, neither of which may be accurate. Additionally, witnesses have been reluctant to participate in recent investigations because they have expressed feelings of fear and intimidation due to the cross-examination requirements.*

*The 2020 Title IX Regulations have also brought about an increased administrative and financial burden, as the investigation process now requires additional staffing and personnel. For example, the University is currently conducting two Title IX investigations. We are utilizing all three full time-staff members, four trained faculty/staff volunteers from our campus, and we have hired two external attorneys to assist with additional roles in these cases. Prior to the regulations, we would have used half of this number. We have plans to add three additional staff members to our office so that we can manage the increased workload.*

*As the process has become more adversarial, we believe that the emotional toll of participating in the Title IX process has also increased, not only for parties but also for staff members. It has always been difficult to hear from parties who have been impacted by sexual misconduct and equally difficult to support individuals dealing with the stress of being accused. But the additional administrative burdens and the adversarial nature of the process have magnified the problem.*

*Recently, a faculty member who volunteers as an advisor to parties shared with us that she was so upset and disturbed by the information shared during an interview, that she needed to sit in a quiet room and couldn't interact with her family for hours afterwards. Staff members in Title IX offices process this information daily. And when you add the additional strain of redacting documents (like discovery in a lawsuit), overseeing a live hearing process, and managing attorneys, professional burnout is inevitable. Burnout and turnover is high in the Title IX field generally, and the 2020 Title IX Regulations will only increase this problem. And with frequent*

*turnover comes the burden and expense of frequent hiring, the loss of institutional knowledge, and inconsistency for students, faculty, and staff.*

*While the 2020 Title IX regulations brought about many negative changes, there have been a few positive outcomes. First, the addition of advisors to the investigation process has been a good one. Even if the live hearing and cross-examination requirements are rescinded, the University likely will keep the option for parties to have an advisor appointed to them. The appointed advisors in our current cases have been very helpful to the parties because they understand the University's process and they are able to help the parties navigate through a difficult situation.*

*Additionally, another positive change is the increased flexibility to address Title IX matters through informal resolution practices. Guidance issued under the Obama administration provided less flexibility for institutions to resolve reports of sexual misconduct using informal resolution. It is our opinion that impacted individuals should be able to decide for themselves whether informal practices, such as restorative justice, would be the best way to resolve their reports. The more power and choices we can provide to impacted individuals, the better the outcome will be.*

#### **A small, Christian liberal arts college in the Southwest**

*Our policy worked best when the Title IX investigators investigated and did the fact-finding in an effort to provide an assessment of credibility, triangulation of witnesses and evidence, and then provided the Title IX Coordinator with an investigative report along with statements from the complainant, respondent, and witnesses. At which point, the Title IX Coordinator reviewed the investigative report and statements and made the determination of whether a policy violation occurred through a written analysis in the Notification of Findings. The new regulations have removed the Title IX Coordinator from the decision-making process and put this in hands of those who do not have the experience, discernment to make these types of decisions, or expertise needed to provide the legal analysis in the Notification of Findings.*

*I would like to see the Obama policy regarding Title IX Jurisdiction be retained. Our policy also worked best when Title IX jurisdiction was both on and off campus without the requirement that it be related to an education purpose or activity. The majority of sexual assaults and dating violence incidents happen off campus and are not related to educational purposes and activities. This really silenced complainants and dramatically reduced the number of complainants coming forward this academic year.*

*I would like to see the Trump policy regarding live hearings and allowing cross-examination of witnesses be rescinded. The Obama policy did not prohibit live hearings and cross-examination, instead they discouraged the accused from personally cross-examining their accuser. This should be left up to the institution. I strongly believe cross-examination threatens to re-traumatize complainants, discourages the reporting of misconduct, makes the process unnecessarily adversarial, and gives an unfair advantage to those who can hire lawyers.*

*The administrative impact [of the 2020 regulations] is significant. We have been forced to add 3 faculty/staff as hearing officers. We are stretched thin at this point and we open ourselves up to liability and lawsuits as we are putting student's lives and futures in the hands of individuals who had no formal training in analyzing policy and rendering Title IX decisions/sanctions. While*

*they are required to receive hearing officer training, this is simply not enough for training for what we are asking them to do.*

### **A Catholic research university in the Midwest**

*The Obama administration was responsible for the 2011 “Dear Colleague letter” that put institutions on notice that Title IX would be enforced to include alleged sexual violence in addition to its prior focus upon equity in scholarships, research, athletics, etc. It mandated that institutions take on investigations into sexual harassment and violence, including those who had no budget or staffing whatsoever for doing so previously, and dictated that schools use the lowest evidentiary standard, “preponderance,” to assess whether an accused party would be held responsible.*

*The Trump administration’s May 2020 regulations were highly prescriptive, likely in response to its belief that the “Dear Colleague letter” went too far relative to weighing testimony and evidence from survivors without the mechanisms that a criminal process would require. Some of the notable areas of these regulations that we would judge as weaknesses are those that diminish the concept of being trauma-informed toward survivors.*

*Examples are the requirement that all participants in a hearing be subject to cross-examination by an advisor that can be an attorney and that require questions about prior sexual history be allowed in some circumstances. Hearing procedures seek to closely mirror a criminal process, requiring hearing officers to rule on the relevancy of each question asked, which can minimize the intention that University hearings be educational processes rather than contentious, litigious ones. Allowing attorneys to dominate in a non-legal, educational process shifts the process from a focus on education, growth, health and safety to one focused solely on the result. This will have a chilling effect upon parties considering moving forward to participate in University investigations. The Trump administration likely would have contended that in such cases, the criminal process is a better suited mechanism for a fair outcome when the stakes are so high (e.g., potential for suspension, dismissal, termination of employment).*

*As to financial impact, the regulations’ insistence upon involved parties being represented by an advisor is significant in that it puts institutions who rely upon volunteers in advisory and other roles at risk when they are asked to go toe to toe with seasoned defense attorneys who will be hired by accused students, faculty and staff. Even at Universities like ours where these volunteers are well-trained and committed to their important roles, this creates a strong disincentive to participate and a risk that parties who may feel they were not given a fair hearing would then turn their grievance toward the institution and the process itself.*

*The 2020 regulations either assume schools have more money to throw at Title IX than they do or that a legal process is better than an educational one, or they aren’t appreciating the inequities that come with attorney participation in the education process. Our prior process – accepting questions from both parties ahead of time and in real time and then having our panel or adjudicator manage those questions – is more trauma-informed, but also provides due process protections for both sides.*

*The other notable weakness is that the Trump regulations require hearings for cases involving faculty and staff when the party making the allegation is a student. An employee being forced to*

*be part of a hearing is unheard of in any other conduct context, including instances of allegations of harassment or discrimination based upon other protected categories. Creating this procedural disparity may convey that misconduct tied to sex and gender is somehow more deserving of protection than that involving race, disability, or other categories that our institution also holds dear. Further, it's likely that this too will have a chilling effect as to student reporting of serious sex-based employee misconduct.*

*Lastly, the requirement that the outcome of a hearing involving a faculty respondent be provided in the decision letter is evidence of a broad lack of understanding of faculty grievance processes and standards. At most institutions, an actual outcome from a finding of a policy violation will be months in the future based upon the detailed requirements and appellate avenues dictated by Faculty grievance processes. This will be unfulfilling and in fact, causing of more harm, for survivors who participate in the administrative hearing process and would reasonably want to learn of an outcome in a short period of time.*

### **A small, liberal arts college in the Mid-Atlantic**

*We have found certain provisions in the current Title IX regulations (34 CFR §§106.30; 106.45 (2020)) promulgated by the Department of Education (“the Department”) to be helpful:*

- ***The regulations allow schools to permit the parties to pursue informal resolution.*** *We have found that if the parties are able to agree to a resolution that eliminates a hostile environment, complainants and respondents express a higher satisfaction with the process itself. Since facilitating an informal resolution process is a highly technical skill, the Department should also offer grant opportunities for technical assistance and staff training in this area.*
- ***Separating the availability of supportive measures from the investigative process.*** *The current Title IX regulations require schools to provide supportive services to both parties, regardless if a formal complaint is filed. 34 CFR 106.30(a). This shift helps the parties better understand that help is not tied to participating in a grievance process. This framework has shifted the conversations during intake so that the reporting party better understands these measures as designed to assist in the healing process (e.g., counseling, academic accommodations). When a supportive measure involves a respondent, like a no-contact order, it also provides us with the opportunity to engage with them as well. For instance, as part of this process, we have had respondents ask the Title IX Office to assist them with scheduling confidential counseling.*
- ***Initiating an investigation with a complaint.*** *The procedural clarity offered by having an investigation initiated with a complaint is also helpful. However, we do not think having the complainant submit a complaint document in writing is necessary. For instance, prior to the current amendments to the Title IX regulations, we would confirm the complainant's wishes verbally. We would then provide the responding party with a complaint confirmation letter that contained notice of the allegations along with an initial meeting to answer their questions about the grievance process. This system was significantly more streamlined than the current regime.*



*Here are some of the current regulatory provisions which we have found difficult:*

- The current Title IX regulations require schools to post their training materials on their websites. Our training partners have expressed intellectual property concerns about this requirement.*
- The regulations require schools to provide drafts of the evidence and investigative report directly to the parties and their advisors. Given the sensitive nature of the records and their status as a student record under FERPA, we have dedicated significant time and resources to securing electronic versions of these documents to the best of our technological capability. Prior to the regulations, we allowed the parties a five-day window of access to view a copy of the draft report in the Title IX Office and had a process where they could submit comments on the report to the Title IX Office, including requests to reopen the report to collect further evidence/witness interviews. Each party was able to have a support person and an attorney-advisor accompany them at any time to view the report and to assist them with their comments, though no electronic or recording devices were permitted. The parties could also request to see copies of each other's comments to the report and to respond to those comments if they wished. This allowed the parties to have the information they needed to prepare for any grievance hearing and to respond to the information in the report while ensuring that the records themselves were protected from distribution to third parties who are not parties to the investigation.*
- The current regulations only allow for emergency removal if there is an imminent threat to physical safety. This provision is too restrictive. For instance, under the current rules, a school cannot remove a student, who, for instance, is engaging in serial verbal sexual harassment or stalking of the complainant or other community members while an investigation is ongoing so long as that student does not physically threaten any student. We have had several students express distress at this provision. This provision should be amended to allow schools the flexibility to remove students who, in the school's judgment, may impair the physical or mental health or safety of any student or of the campus.*
- The grievance procedure's requirement of a hearing featuring live, in-person cross-examination by an advisor who is a mandatory party creates a heavy administrative burden on schools. Cross-examination is a skill that takes litigators years to develop, to say nothing of conducting cross-examination in hearings involving allegations of sexual violence. It has been quite difficult for us to locate a person who is skilled both in cross-examination and with experience in sexual violence cases to retain as an advisor for these hearings to have on standby should a party opt to forgo an advisor. Additionally, requiring a party to have an advisor for this purpose can cause another layer of trauma for a participant in the grievance proceedings. We have had students express distress at the thought of a mandatory advisor, with one student emphatically expressing that they would not have an advisor until it was "legally required." In line with the recommendations of the [the 2014 Questions and Answers on Title IX and Sexual Violence](#), our prior process featured a hearing process where the parties were sequestered and had the ability to submit written questions to the factfinder to pose to one another and to witnesses through the factfinder. The factfinder was also able to screen the questions submitted by the parties and only ask those it deems appropriate and*

*relevant to the case. Though the parties had the option to have an advisor with them, they were not required to have one if they did not want to. This worked well.*

- *The current narrow regulatory definition of “sexual harassment” for purposes of Title IX has caused confusion amongst our students and made the grievance process longer. Although we appreciate that the current regulations allow schools to continue to respond to other forms of sexual violence under their own conduct policies, our students are having trouble understanding this distinction. This dual system has caused confusion at our intake meetings, respondent meetings, and at Title IX trainings. The jurisdictional evaluation required by the rules to determine if a complaint should be “dismissed” for purposes of Title IX has added another layer of procedure to our process and delays the initiation of the investigation until this is completed and any right of appeal exhausted. Students, both complainants and respondents, have told us that this makes the process feel unnecessarily long. We think that returning to the definitions of sexual violence/hostile environment set forth by [the 2001 OCR Revised Sexual Harassment Guidance \(Title IX\)](#); [2011 Dear Colleague Letter](#); and [the 2014 Questions and Answers on Title IX and Sexual Violence](#) will solve this problem.*

*Training and rehabilitation:*

- *Our campus participated in a consortium grant administered by the U.S. Department of Justice, Office on Violence Against Women Campus Program. The program provided technical assistance and allowed us to build connections with member schools within the consortium, which we found very helpful. The Department should consider setting up a similar consortium program for schools to obtain technical assistance and connections specific to the complex, technical issues related to setting up a Title IX grievance process, including specialized training on serving as a factfinder, facilitating an informal resolution process, and conducting Title IX investigations. Not only would this help schools build better Title IX programs, but it would be helpful in fostering connections between schools to facilitate resource sharing and program connections.*
- *The Department should amend the regulations to allow schools to implement programs that focus on offender rehabilitation in certain instances of sexual violence to increase safety for everyone involved and to reduce the likelihood of re-offense. This could be formalized in the regulations as an option to explore in informal resolution agreements. Alternately/additionally, the regulations could permit this option as an alternative in response to certain reports of sexual violence where the respondent consents to a risk assessment and then based on that risk assessment, the school determines that a rehabilitative program could eliminate a hostile environment. This option could look to the [STARRSA \(Science-Based Treatment and Risk Reduction for Sexual Assault\) Project](#)<sup>1</sup> or to [drug courts](#) and [veterans courts](#) as potential models, all of which focus on rehabilitation.*
- *In addition to the training requirements of 34 C.F.R. 106.45, the Department should provide for prevention programming and training as set forth in questions J-1 through J-5 in the [the 2014 Questions and Answers on Title IX and Sexual Violence](#) and specifically note that the Title IX Coordinator is a person who might be able to facilitate such trainings. The Department should also require that all trainings approach sexual violence from an intersectional perspective so that participants have an understanding of why factors such*



*race, disability, sexual orientation, or gender identity may impact a person's desire to report sexual violence as well as their increased risk of same. The required training for responsible employees and those involved in the grievance system should also cover accessibility issues for both complainants and respondents with disabilities in the grievance process.*

### **A small liberal arts college in the Mid-Atlantic**

*For over ten years, our institution has had a robust culture of reporting sexual harassment/violence and consistent use of our campus Advocates. Since the implementation of the new federal regulations on August 14, 2020, the College (including our campus advocates) has received no reports of sexual harassment/violence that fall within the definitions of 106.30 of the new regulations or require a 106.45 process. While the pandemic and lack of physical contact among members of our community is certainly one factor in this decline, we remain concerned that reporting may have been stifled by the Trump-era regulations (we have still had incidents reported outside the scope of the regulations that have required follow up). Students and employees have expressed concern with the narrowed regulations/protections and confusion over the complicated process.*

*The process itself is considerably more cumbersome and complicated than in the past, placing a great deal of responsibility on a larger number of individuals to appropriately execute. As our campus already employed a team of per diem investigators and continued to hold live hearings for students, we struggled less than many of our peers to create separation of duties and develop appropriate hearing procedures. Yet, these items still remain a concern, particularly with infrequent use/practice and high cost of training and salaries.*

*The areas of greatest concern about the process include the requirements for 1) live hearings for employees (this is not a best practice in any workplace), 2) direct cross-examination by advisors (we previously had cross examination built into both our investigative and hearing processes but managed the degree of adversity through indirect means), and 3) institutional appointment trained advisors (concern about their training and institutional liability).*

*There are also challenges with having a process that is so prescriptive and adversarial, that a second process that is less so is needed for complaints outside 106.30. This puts a very high burden for jurisdictional determination and dismissal on the Title IX Coordinator.*

*The areas of the regulations that are useful include the transparency of evidence, equitable rights for parties in the process, and minimization of bias/conflict of interest of investigators, Title IX Coordinator, decision makers, etc.*

*If the requirement for presumption of innocence of the accused is maintained, it would be helpful to balance this with a required presumption that the complainant has made a true report in good faith. Additionally, the desirable standard of proof should remain preponderance of the evidence to preserve the equity inherent to any civil matter or civil rights process.*

*The overall greatest need (particularly small for institutions like us) is to make the regulations workable is for less prescription in the process so that institutions can work within established structures, existing or reasonably available resources, and within the best practices of professional organizations like ATIXA, ASCA, NACUA, and others deeply involved in this work.*

## A small women's college on the West Coast

### ***Policies that have worked best for our campus include:***

- *New timeline for completion of the investigation.*
- *Emphasis on training of the participants in the Title IX process.*

### ***Policies that do not work on our campus include:***

- *Attorneys as Advisors. Created inequities for students (those who could afford could, those who couldn't were at a disadvantage).*
- *Cross examination requirement. Instead of fact-finding with intent to get to a fair proceeding, turns it into, in tenor and tone, to be more akin to a legal proceeding.*
- *Staffing necessary to conduct virtual hearings & cross examinations (especially burdensome for a small university such as ours).*
- *Choice on application of responsible employees, could have the effect of cases not being reported properly or to the correct individuals.*

### ***We would like to see certain Obama policies retained, including:***

- *No cross examination.*
- *Advisors serving as support role, and chosen by the student.*
- *All are responsible employees and reporting requirements.*
- *Emphasis on Title IX prevention education.*

### ***There is a large financial and administrative impact for small universities especially:***

- *Cost of administering the TIX process under Trump policy is enormous burden, especially for small institutions due to the need to rely on external agencies for training and implementation since unable to staff the process due to small workforce who would be qualified to participate.*
- *Possible need to provide access to attorneys to students who are unable secure one as an advisor. Also a need to provide translators (ASL, Spanish and other languages)*
- *Rough estimate in cost can be upwards of \$50,000 depending on the complexity of the case.*
- *Small institutions such as ours are unable to provide adequate staffing of Title IX Offices with Deputies, Investigators, and attorneys for advisors. Everything needs to be contracted out.*

### ***Comment/Conclusion:***

- *Cross examination places a chilling effect on student reporting and their ability to talk about the report at a small institution is also very troubling. Students have to face the person who may have assaulted them, and the trauma to those students can be harmful. This requirement needs to be eliminated.*

- *The concerns are not so much from our position as a women's institution, but the challenges of being a smaller institution vs. larger institution.*

***Example:***

*As an example: In a smaller university such as ours, most people know each other, and are aware of what is happening within the community. We need care and concern for individuals, and giving them as much privacy as possible which is compromised without the ability to invoke privacy requirements of the participants during the investigation process. Student 1 says she is afraid to move forward, because the person she is complaining about, Student 2, who is a part of her friend group. Student 1 is fearful, because Student 2 has been known to stalk her or talk about her on social media. So Student 1 decides not to tell the whole story, and her story becomes inconsistent. The analysis then can come to an incorrect conclusion. In this type of a case, Student 1 will not likely come forward again. Others who know what happened will be hesitant to come forward in the future. The institution's ability to come to a decision based on accurate facts is impaired. And ultimately, the policy has failed those it was intended to protect.*

**A liberal arts university in the South**

*Following the U.S. Department of Education's release of its Title IX Final Rule in May 2020, administrators and staff at our university worked diligently to align its Title IX and Sexual Misconduct Policy with the requirements of the Final Rule by the August 14, 2020 effective date.*

*Nearly one year later, while the University is compliant with and operating under the new regulations, we have encountered an undeniable financial impact as a result of the procedural requirements related to live hearings. The short amount of time between the release and effective date of the Final Rule, accompanied with the heightened procedural requirements for live hearings, left a very narrow window of time to restructure and appropriately retrain investigators and adjudicators and created the need to retain third-party contractors to assist in facilitating these processes.*

*As the Biden Administration explores further changes to this area, we hope the outcome is one that provides stability and consistency for all educational institutions with a primary focus on prevention. We also hope that any regulatory or implementation changes are announced in a manner that will allow sufficient time for colleges and universities to implement any new requirements, including an opportunity to budget for any additional resources that may need to be directed towards the Title IX process.*

*Regardless of how the Title IX regulatory scheme continues to evolve, our university will remain committed to providing resources and supportive measures to anyone who has been impacted by sexual misconduct or involved in our policy process within the campus community while also providing a fair and equitable accountability process to all who are involved.*

## A research university in the Northeast

*Our university opposes the Department's mandate for any continued direct, adversarial cross examination. This introduces a feature of the justice system into our community conduct proceedings that has propelled an escalation of adversarial legalities in sexual misconduct proceedings. College campuses are not courts, and in addition to the chilling effect this has had on Complainants moving forward with formal processes, it has also made our adjudication proceedings far more legalistic and adversarial. Additionally, coupled with the mandated relevancy determinations by adjudicators, this requirement has made proceedings longer and has not seemingly yielded fairer or better outcomes than our previous adjudication systems.*

*We also urge the Department to revise the regulations to recognize existing state statutes that have proven effective in terms of addressing sexual assault by clarifying how universities should reconcile the regulations with competing state legal mandates. Conflicts include a definition of harassment at odds with local laws and requirements for dismissal of formal complaints for off-campus incidents. We would prefer more discretion in these areas, and greater flexibility in the implementation of relevant procedures.*

*We wish to echo concerns previously made that applying the proposed procedural requirements in the employee context is unworkable, particularly the requirement of a live hearing and prohibition of the single-investigator model. The process required before a school can take action is extraordinarily unusual with respect to at-will employees and is otherwise be difficult to implement and reconcile with existing collective bargaining agreements and faculty handbooks. Notably, workplace harassment is already amply covered by Title VII and state anti-discrimination laws. Particularly in the context of complaints of misconduct made by students against employees, the requirement of a live hearing with adversarial participation by advisors will likely chill the reporting and participation of students. This will hinder the ability of schools to discover and appropriately respond to instances of harassment.*

*Finally, we wish to note the following concerns:*

- 1. The requirement to issue a dismissal of formal complaints that fall outside the defined scope of the Title IX regulations even if the school nevertheless handles such complaints under the same procedures used for Title IX complaints (e.g., complaints against students for incidents occurring outside the United States), is confusing and serves little practical purpose.*
- 2. The requirement to provide the parties with access to "directly related" evidence even if investigators determine that that evidence is not relevant to the incident under investigation is also confusing. The standard for what investigators should share with the parties should be one of basic relevance, which is more straightforward and gives investigators appropriate flexibility to exclude evidence from a hearing that does not go toward whether a policy violation occurred.*
- 3. The requirement that schools cannot rely on statements by a party or witness who does not appear for cross-examination at a hearing is too restrictive and has the potential to make schools less safe to the extent that it presents an impediment to taking action warranted by the overall evidence in a given case. While the inability or unwillingness of a party or witness to appear at a hearing certainly goes to the weight that should be given their testimony, a lack of*



*appearance should not mean that a university must completely ignore testimony that has previously been given to investigators and it is impractical to require the appearance of witnesses whose testimony is not disputed by either party.*