



January 30, 2019

The Honorable Betsy DeVos
Secretary of Education
% Brittany Bull
United States Department of Education
400 Maryland Avenue, SW, Room 6E310
Washington, DC 20202

RE: Comments on Proposed Title IX Regulations

Dear Secretary DeVos:

The College of the Holy Cross, a Jesuit and Catholic undergraduate liberal arts college, has joined with the 54 other independent colleges and universities that comprise the Association of Independent Colleges and Universities in Massachusetts (AICUM) to outline our collective concerns with the proposed changes to the current Title IX Regulations. We respectfully submit the attached comments which explain our deep concerns with the proposed regulations.

The safety and well-being of our students, faculty and staff are our highest priority. Caring for our students and building a respectful community are at the core of our mission as an institution. We have worked to educate and support our community members and, to create, and continually review and update, our policies and procedures to prevent sexual misconduct and to respond thoroughly and fairly when misconduct occurs. We will continue to educate and to work to eradicate sexual misconduct from our campus, but when claims arise, our policies and procedures cannot serve their purpose when individuals are not comfortable coming forward to report misconduct. As a result, and as explained in the attached comments, one of our main concerns with the proposed Title IX regulations is that they may discourage community members who have experienced misconduct from coming forward or deter them from participating in the process.

As an institution, like most colleges and universities, we are committed to fairness and impartiality in all disciplinary matters, including those related to sexual misconduct. However, our community is unique. We are a small, mission-driven, purely undergraduate, diverse, and tight-knit community. We believe that the proposed prescriptive process not only removes our discretion to conduct our processes in a way that we believe is appropriate for our community, but also may compromise our ability to conduct a fair process.

We appreciate the opportunity to provide comments on the proposed regulations, and we urge you to consider the attached comments as well as the many others that have been submitted from the higher education community.

Sincerely,

Tracy Kennedy
Director of Title IX Initiatives/Title IX Coordinator

Amherst College
Anna Maria College
Assumption College
Babson College
Bay Path University
Becker College
Bentley University
Boston Architectural College
Boston Baptist College
Boston College
Boston University
Brandeis University
Cambridge College
Clark University
College of the Holy Cross
Curry College
Dean College
Elms College
Emerson College
Emmanuel College
Endicott College
Fisher College
Gordon College
Hampshire College
Harvard University
Labouré College
Lasell College
Lesley University
Massachusetts Institute of Technology
MCPHS University
Merrimack College
MGH Institute of Health Professions
Mount Holyoke College
New England College of Optometry
Newbury College
Nichols College
Northeastern University
Olin College
Pine Manor College
Regis College
Simmons University
Smith College
Springfield College
Stonehill College
Suffolk University
Tufts University
Urban College of Boston
Wellesley College
Wentworth Institute of Technology
Western New England College
Wheaton College
William James College
Williams College
Worcester Polytechnic

January 23, 2019

Secretary Betsy DeVos
c/o Brittany Bull
U.S. Department of Education
400 Maryland Avenue, SW
Room 6E310
Washington, DC 20202
Re: Docket ID ED-2018-OCR-0064

Dear Secretary DeVos:

On behalf of the Massachusetts colleges and universities who are members of the Association of Independent Colleges and Universities (AICUM), I write to provide our comments in response to the Department's November 29, 2018 Notice of Proposed Rulemaking ("NPRM") amending regulations implementing Title IX of the Education Amendments of 1972 (Title IX"), Docket ID ED-2018-OCR-0064.

INTRODUCTION

The Association of Independent Colleges and Universities in Massachusetts (AICUM) is the leading voice on public policy issues affecting independent (private) higher education in Massachusetts. AICUM comprises 55 degree-granting, accredited, nonprofit colleges and universities in Massachusetts. Collectively, these institutions educate approximately 275,000 students each year and employ more than 100,000 people. All of AICUM's member schools receive federal funding and are subject to Title IX.

There are no greater priorities for Massachusetts' independent colleges and universities than the well-being of their students, faculty, and staff and the safety of their campuses. AICUM's member institutions are dedicated to providing a learning and working environment which is free from discrimination and harassment, including on the basis of sex. This commitment arises not only as a matter of compliance with Title IX, but also as a matter of state law and, more fundamentally, the values of the institutions themselves.

These colleges and universities continually strive to create a setting where every member of their community feels safe, welcome, and empowered to fully engage in educational or professional endeavors. Over the last decade, AICUM's member institutions have developed policies, procedures, and resources designed to prevent sexual assault, and to respond promptly and fairly when an incident occurs. Through campus-wide dialogues, need assessments, student outreach, campus climate surveys, and trainings, schools have engaged in foundational efforts to shift the culture of campuses and, above all, to build trust between institutions and the individuals that they

serve. It is imperative that regulations account for the progress that stems from this commitment and allow schools to build on their essential and ongoing work in support of students.

AICUM's member institutions are guided by principles of equal access, fairness, and care for all members of their communities. These principles apply not only to complainants alleging discrimination, but also to those accused of engaging in discriminatory conduct, and the witnesses, advisors, and decision-makers who are called upon to participate in addressing issues of alleged misconduct.

AICUM's member institutions appreciate the Department's regulatory approach, including publishing the Department's proposed rules in the Federal Register and allowing for public comment. We recognize that the Department has dedicated significant efforts in an attempt to make Title IX compliance more transparent for institutions and to maintain a balance of fairness for both complainants and respondents. We value this opportunity to provide our comments, to which AICUM's member institutions also have dedicated a significant amount of thought and effort, and anticipate such work will result in broad improvements that maximize attention to the safety of our campus communities in any Final Rule. We also urge the Department to consider the full range of experiences, expertise, and perspectives voiced by the educational community during this process, including those of the many students who are deeply engaged, and providing comments to the Department.

On behalf of its members, AICUM offers the following comments in response to the Department's proposed Title IX regulations.

As detailed more fully below, AICUM's member institutions are concerned that many aspects of the proposed regulations may undermine rather than advance Title IX's very purpose – to provide legal protection against discrimination on the basis of sex in education programs or activities receiving Federal financial assistance. In particular, we are concerned that the proposed regulations may deter complainants from coming forward to seek the institution's assistance in ending discrimination, preventing its recurrence, and remedying its effects. We also are concerned that the proposed regulations otherwise may work to the detriment not only of complainants but also respondents, witnesses, and the institutions themselves: the proposed regulations may make it more difficult to maintain the privacy of both complainants and respondents; make matters more time-consuming and expensive to resolve; and eliminate key aspects of the discretion that presently enables institutions to act in the best interests of all parties. Smaller institutions in particular are concerned about the increased costs these rules will impose in connection with additional staffing, training, and technology, as well as the administrative burdens associated with bringing institutions' procedures into compliance with this highly prescriptive set of rules. Such financial costs and administrative burdens may be overwhelming.

AICUM's member institutions are particularly troubled that the Proposed Rules will effectively eliminate discretion on the part of colleges and universities. A student conduct process is not only a way to determine whether a particular policy was violated, but in many cases it is also an opportunity for learning and growth. In that regard, it is important to preserve the capacity to craft a contextually effective student conduct process, which includes having the discretion to conduct such processes in the way each institution believes best serves its communities and its pedagogical purposes.

What is more, in the preamble to the Proposed Rules, the Department is critical of previous guidance documents for being too prescriptive, infringing on academic freedom, and removing "reasonable options for how schools should structure their grievance processes to accommodate each school's unique pedagogical mission, resources, and educational community." (NPRM at 12.) Yet the

Department now is proposing to replace such previous guidance with even more prescriptive rules for handling formal complaints of sexual harassment. If adopted, these highly prescriptive rules will impinge upon institutional self-governance and academic freedom by prohibiting schools from developing flexible processes that ensure fairness and equity while comporting with each school's unique circumstances and educational goals. Although the "safe harbors" provide some clarity, a school should not be subject to sanction under Title IX if it adopts a reasonable alternative to one of the many procedural requirements the Department specifies.

Many AICUM institutions are home to various schools with diverse populations and requirements, including undergraduate, graduate, and professional training programs. Rather than prescribing highly specific, "one size fits all" rules that would be rigidly applied to large research universities, small colleges, commuter colleges, institutions that feature experiential education, and others, the Department should limit its concern to whether a school has adopted procedures that are intended to provide fundamental fairness to the rights of all parties. We also question whether the Department, in choosing to pursue such overly prescriptive processes, has exceeded its authority by reaching beyond the requirement of a grievance process into very specific procedural requirements and establishing rules directly affecting disciplinary processes unrelated to Title IX. We strongly believe that the Department could achieve its goal of promoting fairness in less prescriptive ways, which we describe below in our recommendations.

Lastly, the NPRM is silent as to how colleges and universities are expected to implement the new rules. They will need a transition period to revise policies, marshal resources, and recruit and train staff. It is unfair to the institutions or anyone involved in these processes to change the rules mid-year or without substantial lead time. Institutions take great care to consult widely with their students, faculty and staff on the development and implementation of policies and resources. An inclusive and thorough process allows colleges and universities to increase understanding, engagement, and participation among campus communities in an effort to improve student safety. Institutions also will need clarity on what happens to cases in process, and cases involving conduct that occurred under the pre-rule policy.

SPECIFIC COMMENTS

A. Live Hearings Including Cross-Examination by Advisors

Proposed Rule:

§ 106.45(b)(3)(vii). For 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. ... 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. ... 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. ...

Concerns:

1. Under the proposed regulations the Department endorses only one form of investigation: live hearings with cross-examination conducted by the parties' personal advisors. This restrictive mandate is inappropriate for many institutions and the underlying requirements may deter complainants from reporting discrimination and harassment and undermine Title IX's objective of protecting the educational environment.
 - a. For many institutions, quasi-judicial proceedings will be incongruous to their educational mission, and mandating such proceedings would improperly limit institutions' discretion and academic freedom to determine a pedagogical approach to best enforce the conduct expectations for members of their respective communities. For many years, institutions have maintained fair and effective processes in an administrative, educational setting that are not akin to quasi-judicial proceedings. Institutions of higher education should not be required to create a courtroom-like environment such as the one proposed by the NPRM, nor do most institutions have the resources or the internal expertise to do so.
 - b. Requiring a live hearing with cross-examination removes discretion from the institutions and may deprive students of the opportunity to learn from this process. For example, allowing attorneys to serve as advisors and become directly involved in the proceedings diminishes the extent to which students are directly engaging in and learning from the student conduct process.
 - c. The proposed rule incorrectly assumes that live hearings and cross-examination are necessary in order to fairly determine whether discrimination or harassment on the basis of sex has occurred.
 - Courts long have held that a fair process for students accused of violating institutional rules does not require such legalistic hearings, even at public institutions and even where sanctions can include expulsion.¹ Requiring such hearings for private institutions would contravene a well-settled body of First Circuit and Massachusetts law that governs AICUM's member institutions.²

¹ See, e.g., *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 159 (5th Cir. 1961) ("This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out.").

² See, e.g., *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988) (even a public institution need not conduct a hearing which involves the right to confront or cross-examine witnesses); *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242 (D. Mass. 2018) (same); *Schaer v. Brandeis Univ.*, 432 Mass. 474, 482, 735 N.E.2d 373, 381 (2000) (private educational institutions need not provide adversarial hearings).

- Many private educational institutions, like most employers both public and private, have a long and successful history of using investigative models – without live hearings and cross-examination – to determine whether discrimination or harassment on the basis of race, national origin, age, disability, and other protected classifications has occurred. Such cases, like those involving discrimination or harassment on the basis of sex, frequently turn on the credibility of complainants, respondents, and other witnesses, and involve high stakes for all involved, including the termination of employment. There is nothing inherently different about alleged discrimination or harassment on the basis of sex which requires a live hearing with cross-examination. To the extent that certain discriminatory conduct on campus also could give rise to criminal charges, the institutional response is limited to its own policies and procedures. No school has the authority to issue criminal sanctions.
- Courts long have looked to Title VII in interpreting Title IX.³ Applying the proposed grievance procedures to employee complainants and respondents oversteps in an area governed by Title VII, and creates ambiguity between how issues of sex discrimination will be resolved under Title IX and how such issues are addressed under Title VII and other anti-discrimination laws. Title VII contemplates that an administrative process will be conducted internally by both public and private employers to address issues of discrimination and harassment within the workplace. Similarly, Title IX is meant to guide how colleges and universities address sex discrimination within their communities. Claims of discrimination have been adequately resolved under Title VII through this administrative construct and the EEOC never has required live hearings or cross-examination to reach a fair conclusion.⁴ By looking to Title VII for guidance, courts have recognized that the resolution of Title IX matters is more analogous to the administrative processes used by Title VII than it is to a criminal process.

³ See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (“This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX.” (collecting cases)); *John Doe v. Trs. of Boston Coll.*, 892 F.3d 67, 92 n.18 (1st Cir., 2018) (citing *Frazier v. Fairhaven Sch. Cmte.*, 276 F.3d 52, 65 (1st Cir. 2002)).

⁴ See EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), available at <https://www.eeoc.gov/policy/docs/harassment.html>; EEOC, Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors, available at <https://www.eeoc.gov/policy/docs/harassment-facts.html>. The Massachusetts Commission Against Discrimination also does not require a hearing with cross-examination as part of employee grievance procedures. See MCAD, Guidelines on 151B: Sexual Harassment in the Workplace, available at <https://www.mass.gov/files/documents/2017/09/06/2112%20Guideline%20Sexual%20Harassment.pdf>.

- The proposed regulations also would supplant faculty disciplinary processes and grant new rights to at-will employees of private universities at the expense of the institutions. Providing such a prescriptive procedure for faculty impinges on principles of academic freedom where institutions may have different standards for reasons that are central to their missions and their goal of protecting faculty academic freedom (by which we include the ability of faculty members to study controversial issues without fear of experiencing an institutional sanction). Given the importance of this objective and tenure protection, institutions often purposefully have adopted a higher standard of proof in faculty cases.
 - There are many ways an investigative model can ensure that parties have voice in the process. For example, investigative models that allow the parties to proffer questions for the investigator to ask the other party and witnesses afford each party a meaningful opportunity to confront and challenge the other party's assertions. Similarly, schools using a live hearing can provide a fair procedure by allowing the parties to proffer questions to the hearing officer or other neutral person. As proposed for elementary and secondary schools, the sharing of the responses to those submitted questions provides both the transparency that the regulations appear to be looking for and an effective substitute for cross-examination.
 - The concerns regarding the investigative model seem to be focused on a situation where the fact-finder and decision-maker are one individual (i.e., one person serving as a judge and jury). There is nothing inherently unfair in having fact-finders be decision makers,⁵ and it should be permitted as one option – within a range of options – available to schools to consider. Schools have operated this way for centuries.
- d. Requiring cross-examinations by advisors may deter complainants from coming forward, making it more difficult for institutions to meet Title IX's very purpose – preventing discrimination and harassment, stopping it when it does occur, and remedying its effects.
- It is well-established that discrimination and harassment on the basis of sex, including but not limited to sexual violence, is vastly underreported, both as a general matter and on college campuses.⁶ Adding additional hurdles to

⁵ In *Withrow v. Larkin*, the Supreme Court rejected the argument that a “combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias.” 421 U.S. 35, 49 (1975); accord *Pathak v. Dep't of Veterans Affairs*, 274 F.3d 28, 33 (1st Cir. 2001). Even the Sixth Circuit has recognized that “due process is not necessarily violated when the school official who initiates, investigates, or prosecutes charges against a student plays a role in the decision to suspend the student.” *Doe v. Miami Univ.*, 882 F.3d 579, 601 (6th Cir. 2018).

⁶ See, e.g., National Academies of Sciences, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and consequences in Academic Sciences, Engineering, and Medicine* (The

initiating complaints and for formally resolving such complaints may have the effect of further discouraging reporting, which is in direct conflict with the purpose of Title IX.

- The prospect of having to participate in a live hearing with cross-examination by an advisor may deter complainants from coming forward. Such proceedings may make it more difficult to protect the privacy of complainants, respondents, and witnesses. Proceedings featuring cross-examination are widely perceived as having the purpose of intimidation and embarrassment, rather than truth-seeking, and risk re-traumatizing complainants. The risk of re-traumatization is likely to be exacerbated in cases where the parties are represented by zealous advocates.
 - An investigative model allows a trained individual to gather information in a more controlled environment where the needs of an individual witness or party can be considered and thoughtfully accommodated. An investigative model does not in any way compromise either party's ability to participate fully or to receive a fair process.
- e. Even when complainants are willing to come forward, the proposed rule will make it more difficult to address harassment and discrimination by requiring all witnesses to face live cross-examination after participating in the investigation process.
- Some, if not many, witnesses will be intimidated by the prospect of quasi-judicial proceedings which include cross-examination by lawyers. It is often difficult to get student witnesses to appear for a one-on-one interview with an investigator. And witnesses who already have told their story to an investigator who has prepared a report may simply be unwilling to take additional time away from their studies or other commitments to appear for a hearing. Institutions cannot subpoena or otherwise compel students to participate in a hearing, and the prospect of facing a full adversarial hearing increases the risk that a witness will be reluctant to appear. This means that important, relevant, and possibly exculpatory information could be excluded from the fact-finding process, making it far less likely that the process will reach a fair and accurate outcome.
 - Precluding decision-maker(s) from relying on statements by parties or witnesses who are not subject to live cross-examination may prevent institutions from adjudicating cases in which complainants or other important witnesses are unable or unwilling to appear. They may have graduated, transferred to another institution or taken a leave of absence (perhaps because of the discrimination or harassment at issue), or be studying abroad. Limiting an institution's ability to thoroughly investigate allegations in one case – an outcome directly at odds with the purpose of Title IX – could equally undermine the institution's ability to protect other students in future incidents

involving the same respondent. Such live hearings will reach conclusions without considering all known evidence, both probative and exculpatory, and undermine the community's trust in the process, which again may lead to lower reporting.

- f. Faculty and staff may be less inclined to participate as decision-makers or advisors in quasi-judicial proceedings in which they will be required to perform such tasks as conducting or refereeing the cross-examination of parties and witnesses, deciding and articulating the basis for relevance and other evidentiary decisions (an obligation not even applied to judges), and preparing detailed written findings (§106.45(b)(4)(ii)) – all tasks for which they may have fewer skills and less training and experience than attorneys who so often represent students in these matters. Faculty and staff very well may shy away from participating in a legalistic, quasi-judicial process. In addition, the increased efforts this process demands likely will take considerable time and attention away from their teaching, mentoring, research, and other academic responsibilities.
 - g. Requiring a comprehensive live hearing when a full investigation already has taken place, as well as the opportunity to review and respond in writing to a detailed investigative report, is entirely redundant and inevitably means that allegations of discrimination and harassment will take significantly longer to resolve. Such an outcome operates to the detriment of both complainants and respondents and denies them a prompt resolution. The time it will take for both an investigation and a “trial” to occur will make scheduling difficult and in some cases impossible. Our member institutions report that the primary complaint of students who go through a Title IX-related process is that it takes too long.
 - h. Under the proposed rule, it also is unclear what purpose(s) the investigation report may serve in relation to the live hearing other than to lengthen the process. The proposed regulations seem to assume that witnesses will testify both to the investigator and to the adjudicator, an assumption that seems unlikely for students at colleges and universities. Other unanswered questions include: does the report itself constitute evidence that must, or may, be admitted in the hearing, or is it intended to serve only in the nature of a charging document? May the report's account of statements by the parties or witnesses serve in the nature of “pre-filed direct” testimony, which would alleviate the need for parties and witnesses to repeat information they already have provided?
2. Requiring advisors to conduct any cross-examination, and requiring the recipients to provide an advisor “aligned with” a party who lacks an advisor, will burden many institutions with inappropriate duties and costs, and may also give rise to conflict-of-interest claims.
- a. Requiring that all cross-examination be conducted by advisors, a group that will now include skilled trial attorneys, may greatly reduce the pool of faculty and staff who are willing to serve as advisors. With rare exceptions, faculty and staff are likely to lack the skills, training, and experience necessary to conduct effective cross-examination and many – appropriately enough – will be reluctant to undertake that role, especially

if it entails trying to match the advocacy skills of an attorney who is “advising” the other party. Complainants and respondents both need all the support, and the best advisors, they can get. Requiring advisors to cross-examine students will cause many faculty and staff to reject, rather than embrace, the advisor’s role if their performance now will be measured against that of such skilled attorneys.

- b. Institutions should not be required to appoint for either party an advisor that is “aligned” (a vague and undefined standard) with that party’s interests. The proper role of an advisor is to make sure the student or employee understands the process, to help answer questions and identify resources, and otherwise to support the individual. The Department is essentially requiring advisors (often institutional employees) to “take sides” in their student and employee disciplinary cases. The institutions and their employees should not be required to take sides in highly personal and emotional disputes involving community members.
- c. Allowing advisors to play an active role in campus hearings likely will exacerbate significant inequities between students with disparate financial resources. Where one party with economic means retains a skilled lawyer as an advisor, the other party who cannot afford such representation, whether complainant or respondent, will be at a distinct disadvantage. In an effort to mitigate this unfairness, some institutions may feel compelled to engage legal counsel on behalf of the disadvantaged party, or to make funds available for that party to engage legal counsel on their own, either of which is burdensome and perilous for the institution. An institution should not be placed in the position of retaining or funding the retention of legal counsel on behalf of any party, which may create the perception of a conflict and may give rise to claims against institutions for bias or inadequate counsel.
- d. Allowing attorneys to play an active role in the hearing process, by conducting cross-examination, also will place institutional decision-makers in the difficult position of controlling overly zealous cross-examiners, making – and stating the basis for – evidentiary rulings in the moment (a task not even required of judges), and otherwise assuming a role akin to that of a federal or state court judge. In order to discharge this role, some recipients may feel compelled to retain attorneys to advise the decision-maker(s) during the proceedings, or to retain attorneys or retired judges to serve as the decision-maker(s), further formalizing and “legalizing” student conduct proceedings, adding further to compliance costs.
- e. An advisor tasked with cross-examination is not likely to confine his or her role to asking questions during the hearing. To conduct an effective cross-examination, the advisor will need to have complete command of all the evidence in the case, which in turn will require them to be actively involved throughout the process and will increase both the costs and time it will take for the parties and the institution to resolve the allegations. This again will be a detriment to those who cannot afford to retain counsel. Institutions which feel compelled by the rules to retain counsel for one or both parties may be exposed to claims in the nature of malpractice or ineffective assistance of counsel by students who feel the advisor was not sufficiently skilled or sufficiently “aligned” with their interests.

3. The scope of cross-examination allowed by the proposed rule is far too broad. By allowing parties, through their advisors, to ask “all relevant questions and follow-up questions, including those challenging credibility,” institutions may be unable to limit cumulative/harassing questions, place reasonable restrictions on the length of the proceedings, or otherwise exercise the discretion needed for the proceedings to be fair and equitable to both parties. This would further deter complainants from pursuing a case. An attorney would be encouraged to engage in lengthy and repetitive questioning if there was a chance that the complainant would rather withdraw the complaint than continue with the process. Such an outcome is not in the best interest of protecting Title IX rights.
4. Requiring separate and concurrent proceedings broadcast electronically for live cross-examination imposes burdensome and costly technical and space requirements that not all institutions are equipped to provide. Such procedural limitations seek to remedy concerns that can be addressed through far less prescriptive measures.
5. The legalistic proceedings envisioned by the proposed rule, at some institutions, may bleed over into campus proceedings involving non-Title IX complaints. Many schools may find it fundamentally inequitable to provide these process rights to students who raise sex discrimination complaints without providing them to students involved in other complaints of discrimination (e.g., race, national origin, and other bases of discrimination covered by OCR and other agencies) and some students may demand such rights even though there is no legal basis for doing so (indeed, one can expect students to argue that the regulations establish a new floor for due process requirements in other settings). However, providing this process to all individuals who raise complaints of discrimination may bring these systems to a screeching halt both in terms of cost and time.

Recommendations:

1. The Department should refrain from imposing prescriptive requirements of “due process,” a legal term of art, on private institutions that are not constitutionally required to afford “due process.” Rather, the Department should employ a less legalistic term, such as “fairness” or a “fair process,” and the Department should strike the term “due process” from §106.45(b)(1)(ii).
2. As with the proposed rules for elementary and secondary schools, the Department should not deprive post-secondary institutions of discretion to determine how best to effectively and fairly address complaints of discrimination or harassment on the basis of sex. The protections and processes prescribed for elementary and secondary schools should apply to all institutions.
3. The Department should not require a live hearing in every case, but should allow institutions to determine in what circumstances, if any, a live hearing should be held. The Department should permit institutions to employ the investigative model alone with appropriate safeguards to ensure a fair process for all parties.
4. Should the Department retain the requirement of a live hearing, it should allow institutions to determine how such hearings should be conducted in a manner that is effective and fair

to all parties and witnesses, and not require a separate, antecedent investigation in all cases.

5. Should the Department require an antecedent investigation prior to a live hearing, the Department also should allow institutions to determine how any investigative report may be used in relation to a hearing, including the option of limiting hearings to matters not fully addressed by the investigation report.
6. The Department should give institutions the discretion to determine whether to allow direct cross-examination, and whether such cross-examination should be done by advisors or otherwise. This is consistent with the contemplated procedures for elementary and secondary schools, where the Department contemplates allowing any direct questioning of parties or witnesses to be conducted by the decision-maker(s) (or another neutral person), who may consider and pose questions proposed by the parties.
7. Should the Department require direct cross-examination, it should only be required for the parties. The Department should allow decision-makers to rely on statements provided by non-party witnesses who are unable or unwilling to attend a hearing, especially when these statements are obtained by a trained investigator.
8. The Department should not require institutions to appoint advisors who are “aligned with” the parties who have not found their own advisor nor should the institutions be required to appoint a person to conduct cross-examinations.
9. The Department should leave to the discretion of the institution the best way to arrange and conduct hearings, with technology or otherwise.
10. The live hearing requirements should not apply to employee-complainants, as such procedures are more properly governed by Title VII regulations.

B. Requirement to Dismiss Certain Complaints

Proposed Rule:

§ 106.45(b)(3). 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.

Concerns:

1. Elsewhere in the NPRM, “the Department emphasizes that a recipient remains free to respond to conduct that does not meet the Title IX definition of sexual harassment, or that did not occur within the recipient’s program or activity, including by ... investigating the allegations through the recipient’s student conduct code” (NPRM at 55.) It is directly contrary to that statement to require an institution to dismiss a formal complaint if the alleged conduct does not meet the Department’s formal definition of sexual harassment or did not occur within the institution’s program or activity. Institutions should be allowed to adopt their own definitions of discrimination and harassment, which may be broader

than Title IX, because institutions have an interest in student behavior that goes beyond the requirements of Title IX. The dismissal rule appears to prevent recipients from doing so.

2. AICUM's member institutions are deeply concerned about the uncertainty of the proposed rule's application to off-campus incidents and study-abroad programs involving students or employees of the institution. Many off-campus incidents, such as at conferences, in private housing, at events held at local restaurants or bars, or during internships, create a hostile environment for students and employees on campus – in the classroom and the workplace. Similarly, preventing institutions from holding a student accountable for sexual misconduct that occurs off-campus and is directed towards a complainant from another institution heightens the vulnerability of off-campus guests/students from other institutions. Massachusetts has several areas where colleges/universities are clustered, particularly the high concentration of institutions in the small geographical area of Boston and its surrounding communities, as well as in Worcester, the greater Amherst area, and in Springfield. This geographic proximity means that students frequently come in contact with students from other campuses. Institutions should not be precluded from investigating and addressing the conduct of students and employees which may occur off-campus.
3. The required dismissal rule seems to require the Title IX Coordinator to determine whether conduct is “severe, pervasive and objectively offensive” and has resulted in a “denial of equal access” before any investigation has taken place, or while an investigation is ongoing. This essentially introduces formal pleading requirements into campus complaint procedures. However, complainants often are distraught and unable to cover every detail in their initial statement of the allegations, and additional information comes to light only after multiple conversations with the complainant or during the investigation. Viewed in this light, the dismissal rule imposes an extremely legalistic and unworkable requirement because such a conclusive determination should be made only after all the evidence has been heard.
4. Title VII guidance encourages reporting of sexual harassment before it becomes severe or pervasive.⁷ Requiring the dismissal of a complaint of harassment that is not severe and pervasive will generally discourage reporting of incidents, as students and employees will fear their grievances will be minimalized. With less reporting, recipients may be less able to provide supportive measures or otherwise remedy a discriminatory environment.

Recommendations:

1. The regulations should not require an institution to dismiss complaints that meet an institution's definition of discrimination or harassment but do not meet the specific legal definitions of discrimination or harassment under the proposed regulations or do not occur within a recipient's program or activity.

⁷ See EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), *available at* <https://www.eeoc.gov/policy/docs/harassment.html>.

2. The regulations should make it clear in the rules themselves that institutions have discretion to address in their own student conduct process misconduct that does not meet the narrow definitions set forth in the proposed regulations.
3. The regulations should make it clear that if a matter falls outside the Department's "formal complaint" construct, an institution is not required to provide the procedures set forth in the proposed regulations, but may do so if it chooses.

C. Standard of Evidence

Proposed Rule:

§ **106.45(b)(4)(i)**. To [determine responsibility], 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.

Concerns:

1. The Department has no authority under Title IX to impose requirements on campus disciplinary proceedings involving allegations other than discrimination or harassment on the basis of sex. Yet the proposed rule would do just that, by declaring that an institution must use the preponderance of the evidence standard in non-Title IX proceedings if it uses that standard in Title IX proceedings.
2. The proposed rule incorrectly assumes that recipients easily can modify the standards of evidence they use across all campus conduct proceedings to make them consistent with whichever standard the institution will apply to formal complaints of discrimination or harassment on the basis of sex. That is not the case – a student disciplinary case is fundamentally different from a faculty revocation procedure. Campus conduct proceedings involving faculty and other employees are governed by existing state laws, collective bargaining agreements, faculty by-laws, and/or other constraints, which institutions often have no power unilaterally to change.

Recommendation:

Institutions should continue to have the discretion to choose the preponderance of the evidence or clear and convincing standard for Title IX proceedings, without regard to the standards that apply to other campus conduct proceedings.

D. Review of Evidence Obtained in the Investigation

Proposed Rule:

§ **106.45(b)(3)(viii)**. [A recipient must] [p]rovide both parties an equal opportunity to inspect and review 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. ...

§ 106.45(b)(3)(ix). [A recipient must] [p]rovide a copy of the [investigative] report to the parties for their review and written response.

Concerns:

1. The obligation to provide both parties with all of the evidence that is “directly related to the allegations” could require institutions to share highly confidential information about a complainant, respondent, witness, or other third-party regardless of whether the investigator relies on it and regardless of whether access to the information is needed in order for the proceedings to be fair and equitable. Sexual misconduct cases can involve some of the parties’ most personal information and can raise significant reputational and other concerns for the individuals involved, whether or not the allegations ultimately are supported. The respondent plainly is entitled to fair notice of, and a fair opportunity to respond to, the specific allegations against him or her, as well as any evidence that may be used to prove those allegations. But fair notice and opportunity to respond does not require discovery of all evidence “directly related” to the allegations where that evidence will not be relied upon in making the determination of responsibility.
2. It is overbroad to require recipients to turn over all evidence “directly related” to the allegations, even when that evidence will not be relied upon in making the determination of responsibility. For example, evidence that may have been given to the investigator but would otherwise be protected by the rape shield provision should not be required to be turned over. Also, it is not uncommon for students to introduce hurtful opinion or other evidence that will not be appropriately relied on by an institution.
3. Requiring institutions to provide copies of the investigation report may risk compromising the privacy of information contained in the report. Investigative reports often will contain highly sensitive information, including photographs, medical records, and other information deserving the highest privacy protections. While the parties should be afforded ample opportunity to review the report, it is hard to see how Title IX mandates the provision of reports to the parties in all cases.
4. Requiring disclosure of all evidence turned over to the investigator may result in less information being shared with the investigator out of fear of public exposure, leading to an outcome that may exclude relevant evidence and resulting in a less reliable and just outcome.
5. Evidence need not be made available electronically for proceedings to be fair and equitable. Imposing this requirement will saddle institutions with additional costs and administrative burdens and is unnecessary.

6. We know of no system which enables documents to be made available electronically but completely prevents the taking of photographic images of the documents and sharing them electronically or on social media.

Recommendations:

1. Institutions should be required to allow the parties and their advisors to inspect, but not copy, the final investigative report and any relevant evidence that may be relied upon in making a determination of responsibility. If institutions are required to provide copies of the evidence and investigative reports to the parties, recipients should be permitted to do so by any appropriate method, including making redactions necessary to protect personally identifiable information, where appropriate.
2. Institutions should not be required to produce other evidence that may be “directly related” to the allegations but may not be relied upon in making the determination of responsibility. Rather, as the Department seems to be concerned that exculpatory evidence will not be disclosed to respondents, the rule should require the inspection of relevant evidence that may be relied upon in making a determination of responsibility or that may be exculpatory or inculpatory.

E. Restricting Discussion of the Allegations Under Investigation

Proposed Rule:

§ 106.45(b)(3)(iii). [A recipient must] [n]ot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

Concerns:

1. While the parties should be free to gather relevant evidence, identify witnesses, and otherwise prepare to participate in an investigation or hearing process, institutions should be permitted to place reasonable restrictions on the parties’ discussion of the allegations. For example, institutions have a legitimate interest in preventing the parties from needlessly violating the privacy rights of the other party, from retaliating against the other party or the other party’s supporters, from harassing or intimidating witnesses, and the like. Without any restrictions on the parties to “discuss the allegations” while the investigatory process is ongoing, the fairness of that process is jeopardized for both parties.
2. Forbidding any restrictions on discussing the allegations is inconsistent with Title VII guidance. The EEOC states that employers should protect the confidentiality of harassment complaints to the extent possible.⁸

⁸ See EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), available at <https://www.eeoc.gov/policy/docs/harassment.html>; EEOC, Special Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R.

Recommendation:

Institutions should be able to formulate their own appropriately measured rules to protect confidentiality. The proposed rule should provide only that the institution must not restrict the ability of either party to gather and present relevant evidence.

F. Requiring Title IX Coordinators to Bring Complaints

Proposed Rule:

§ 106.45(b)(1)(iii). [Grievance procedures must] [r]equire that any individual designated by a recipient as a coordinator ... not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

§ 106.44(b)(2). When a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint. ...

§ 106.45(b)(2)(i). ... Upon receipt of a formal complaint, a recipient must provide ... written notice to the parties who are known [including] ... the identities of the parties involved in the incident, if known. ...

Concerns:

1. Requiring Title IX Coordinators to file complaints will expose complainants who wish to remain anonymous. This risk will further deter complainants from coming forward, and undermine Title IX's purpose – to deter harassment and discrimination, stop it from occurring, and remedying its effects.
 - a. The proposed rule contains no exception in the event complainants wish to remain anonymous and do not wish to pursue a formal complaint. By forcing Title IX Coordinators to reveal the identity of such complainants, the rule may deter complainants from coming forward to seek assistance and support. Fewer disclosures could very well mean fewer opportunities to provide supportive measures, identify patterns of harassment, and implement remedies to prevent future harassment.
 - b. Many institutions report that they receive many more disclosures of inappropriate conduct than they receive formal complaints. In many of those cases, the student is seeking supportive measures and feels satisfied and well-served when those personalized supports (extensions of time, opportunities to change housing, escorts, etc.) are put in place.
 - c. Because the proposed rule provides that statements of a complainant cannot be relied on by the decision-maker(s) unless the complainant is subject to cross-examination (NPRM § 106.45(b)(3)(vii)), requiring the Title IX Coordinator to file a complaint when the complainant does not want to participate in a formal hearing will serve no

purpose except to needlessly expose the identity of the complainant. In a case where the complainant is unwilling to participate, the Title IX Coordinator will have to initiate an investigation into conduct that the respondent will not ultimately be held responsible for. Complainants will quickly lose faith in such a futile process and the institution will be unable to fulfil its obligation to respond effectively.

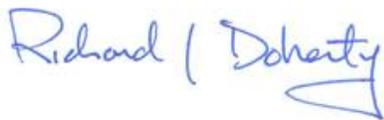
- d. The Department's January 19, 2001 Guidance correctly recognized that institutions should have discretion to "evaluate the confidentiality request" of a complainant "in the context of its responsibility to provide a safe and nondiscriminatory environment," taking into account factors including the severity of the alleged conduct. The 2001 Guidance correctly recognizes that "[t]here are steps a recipient can take to limit the effects of the alleged harassment and prevent its recurrence without initiating formal action against the alleged harasser or revealing the identity of the complainant."
2. Requiring Title IX Coordinators to file complaints can create conflicts of interest, or the appearance of bias, on the part of the Coordinator, contrary to the admonition in NPRM § 106.45(b)(1)(iii). The Coordinator's role in relation to conduct proceedings should be limited to ensuring that the institution meets its obligation to provide a fair and equitable process and should not include assuming the role of complainant.

Recommendations:

1. Consistent with the 2001 Guidance, institutions should continue to have discretion in determining whether or how to address multiple reports involving a single respondent in cases where complainants wish to remain anonymous or otherwise are unwilling to participate in formal proceedings.
2. In the event institutions will be required to bring formal complaints, institutional officials other than the Title IX Coordinator should be permitted to bring them on behalf of the institution.

Thank you for your consideration of these comments,

Sincerely,



Richard Doherty,
President