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Panel: Title IX Revisited

The City University of New York Comments on Proposed Department of Education Regulations to Implement Title IX

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Interests of CUNY and Summary of Comments

The City University of New York ("CUNY" or "University") is pleased to comment on the Department of Education's proposed regulations to implement Title IX. These comments focus on how the proposed regulations would impact CUNY's disproportionately low-income students and its historic mission of enhancing access to higher education. They also consider the practical implications of the proposed regulations on less well-resourced, public institutions of higher education.

After careful analysis, CUNY concludes that the Department of Education's proposed regulations:

1) Unfairly narrow the definition of sexual harassment by requiring it to be both severe and pervasive;
2) Unreasonably constrict the circumstances in which colleges may respond to sexual harassment by requiring them to dismiss complaints regarding behavior that occurs outside their educational programs or activities;
3) Improperly reduce the responsibility of colleges to investigate and sanction sexual harassment by limiting liability to circumstances in which the Title IX coordinator or president acquires actual knowledge of a complaint;
4) Impose the unequal clear and convincing standard of proof on some students subjected to sexual harassment;
5) Mandate prohibitively costly, burdensome, and unwise grievance procedures for formal resolution of complaints of sexual harassment;
6) Undermine the due process rights of students consenting to informal resolution by allowing colleges to use any process at all; and
7) Contravene the purpose of Title IX to eliminate sex discrimination in federally funded educational programs by turning the statute on its head.

As a result, CUNY concludes that the proposed regulations would weaken needed protections for our students, impair our mission of access to higher education, drain limited public funding, erode students' due process rights, and degrade both safety and equality on our campuses.

CUNY is an institution of enormous size and scale. It is the largest urban university system in the United States, comprised of 25 institutions of higher education across New York City's five boroughs. Its eleven senior colleges, seven community colleges, and seven graduate, honors, and professional schools enroll over a half million students.

CUNY's diverse students overwhelmingly come from impoverished backgrounds. Sixty percent of CUNY students come from families making less than $30,000 per year. They are 76% students of color, 57% female, and 45% first generation in their families to attend college. Many are immigrants or the children of immigrants, and almost 40% of CUNY students experience food insecurity.

In 1961, the New York State Legislature defined CUNY's mission as an urban, public higher educational institution in the State of New York. In addition to emphasizing its commitment to academic excellence, the state legislature emphasized CUNY's mission to provide "equal access and opportunity" for students "from all ethnic and racial groups," and regardless of sex.[1] It underscored that CUNY has an educational agenda "of vital importance as a vehicle for the upward mobility of the disadvantaged in the City of New York."[2]

As a result of its mission to provide equal access to higher education for students from disadvantaged communities, CUNY has a special interest in federal and state civil rights legislation to ensure equality of educational opportunities. Title IX of the federal Education Amendments Act of 1972 states:

> No 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.[3]

This statute means that educational institutions cannot discriminate against or exclude students from educational opportunities on the basis of sex.

CUNY's own mission mirrors the civil rights purpose of Title IX. The University's promise of enhancing educational "equal access and opportunity" for students from underserved communities heightens CUNY's commitment to the gender equality mandate in Title IX.

Sexual harassment and sexual assault are both serious problems on college campuses.[4] According to research done by the Association of American Universities, 26% of senior females,

[1] N.Y.S. Educ. Law, Art. 125, § 6201.

[2] *Id*.

[3] 20 U.S.C. § 1681(a).

[4] One-fifth to one-fourth of female students are sexually victimized while in college. NIJ, *The Sexual Victimization of College Women* 10 (2000).

6.3% of senior males, and 30% of seniors identifying as transgender have experienced penetration or sexual touching by physical force or incapacitation since entering an institution of higher education.[5] About 60% of both female and male college students experience some form of sexual harassment.[6]

Sexual harassment and sexual assault deny students equal educational opportunities. They are associated with impaired academic outcomes, including "lower academic efficacy, higher stress, lower institutional commitment, and lower scholastic conscientiousness."[7] CUNY's own 2018 Sexual Violence Campus Climate Survey found that gender-based violence curtails our students' ability to remain in classes and complete their degrees.[8]

Sexual assault disproportionately harms women; 84% of sexual assault and rape victims are female.[9] Sexual assault disproportionately harms lower income individuals as well. Forty-four percent of sexual assault and rape victims come from families that make less than $25,000 per year.[10] When one compares the victimization data between the lowest and highest income individuals, the comparison is even more extreme. Indeed, people with household incomes of less than $7,500 experience 12 times the victimization rate as those with household incomes greater than $75,000.[11] Because CUNY students are disproportionately female and poor, they are at greater risk for sexual assault over the course of their lifetimes.

The Department of Education's proposed regulations would weaken Title IX review of colleges under a deliberate indifference standard, require colleges to adopt onerous and expensive grievance procedures, deter victims from reporting legitimate complaints of sexual harassment,

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[5] Assoc. Amer. Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* xiii (2015).

[6] Amer. Assoc. Univ. Women, *Drawing the Line: Sexual Harassment on Campus* 18 (2005).

[7] Victoria Banyard et al., *Academic Correlates of Unwanted Sexual Contact, Intercourse, Stalking, and Intimate Partner Violence*, J. Interper. Viol. 11 (2017). Moreover, about 31% of rape victims and 7% of sexual battery victims experienced worsened schoolwork or grades. BJS, *Campus Climate Survey Validation Study* 113-14 (2016). Eight percent of rape victims and 2% of sexual battery victims dropped classes or changed their schedules. *Id*. An additional 11% of rape victims and 4% of sexual battery victims wanted to drop classes or change their schedules. *Id*.

[8] *See* http://www1.cuny.edu/sites/title-ix/campus-websites/cunys-sexual-violence-campus-climate-survey/.

[9] FiveThirtyEight, *What We Know about Victims of Sexual Assault in America* (citing BJS, *National Crime Victimization Survey* (2017)).

[10] *Id*.

[11] *Id*. At the same time, people of color and immigrants victimized by sexual assault may be less likely to report their experiences to authorities for cultural, social, and legal reasons, including fear of entanglement in bureaucracy, cultural conditioning against questioning authority, and pressure to protect those who engage in sexual misconduct. *See*, *e.g.*, Pollard-Terry, *For African-American Rape Victims, A Culture of Silence*, L.A. Times, July 20, 2004.

deter witnesses from participating in Title IX investigations, discourage colleges from actively seeking information about sexual harassment, and erode the due process rights of both parties. In so doing, they would undermine Title IX's goal of eliminating sex discrimination in federally funded educational programs. Because they would decrease safety and equality on our campuses, CUNY opposes the proposed regulations.

COMMENTS ABOUT THE PROPOSED REGULATIONS

I. The Department of Education's Proposed Title IX Regulation § 106.44(e)(1)(ii), Adopting a Narrow Definition of Sexual Harassment, Would Decrease Safety and Equality on Our Campuses.

The proposed regulations' use of the deliberate indifference standard in defining sexual harassment would decrease our students' protection from behavior that denies them equal access to education.

Under the Department of Education's prior guidance, the definition of sexual harassment that triggered Title IX review was sexual conduct that was "sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school."[12] Unwelcome conduct on the basis of sex that was severe or pervasive would thus trigger Title IX review, as long as it denied a student access to equal education.[13]

This definition of sexual harassment in education was consistent with the definition of sexual harassment articulated by the Supreme Court in other civil rights contexts. For instance, in *Meritor Savings Bank*, the Supreme Court defined sexual harassment in the workplace under Title VII as follows: "for sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" [14]

The Department of Education now proposes regulations that would change the "or" to an "and" in the prior standard.[15] The change from a disjunctive to a conjunctive phrase would make a large difference in terms of the safety and equality of our students.

The proposed regulations would define sexual harassment as "unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it effectively denies a person

[12] U.S. Dept. of Educ., OCR, *Dear Colleague Letter: Harassment and Bullying* 2 (2010) (withdrawn).

[13] *Id*.

[14] *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986).

[15] § 106.44(e)(1)(ii).

equal access to the recipient's education program or activity."[16] The regulations would thereby change three alternatives of "severe, pervasive or persistent" into three requirements of "severe, pervasive and objectively offensive," which would unfairly limit the scope of Title IX protection. The proposed regulations would diminish institutional oversight in the educational context to an unusual degree, one that is out of step with American workplaces and comparable civil rights law.

Two examples of sexual harassment that should implicate Title IX, but would not do so under the proposed regulations, illustrate the point:

> Example 1: One day in a laboratory, a professor of chemistry whispers in a student's ear that he would like to have sex with her, and he uses profanity to describe what he would like to do. The student is alarmed and drops out of the class as a result. The behavior is "severe," and it denies the student access to equal education. Nevertheless, it happened only once, so is not "pervasive." Under the proposed regulations, even if the college had actual knowledge of the incident and chose to do nothing to restore the student's equal access to education, the student would have no claim under Title IX.
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> Example 2: A graduate assistant in a history class emails an undergraduate student multiple times a week over a period of two months, commenting each time positively and in detail on what the student wears and how she looks. The student feels uncomfortable about the unwanted attention, tries to avoid the graduate assistant, misses class, and eventually drops out of the class as a result. The persistent emails are "pervasive," and they deny the undergraduate access to an equal education. Nevertheless, they would not be sufficiently "severe," so under the proposed regulations, even if the college had actual knowledge of the situation and chose to do nothing to restore the student's equal access to education, the student would have no claim under Title IX.

These two examples show how the practical result of the proposed regulations would contravene the goals of Title IX. Each would have come out differently under the Department of Education's prior guidance on Title IX.

The Department of Education now attempts to justify the change from "severe or pervasive" to "severe and pervasive" by arguing that the administrative standard for assessing colleges' actions under Title IX should align with the caselaw that limits the kind of behavior that could subject an institution of higher education to a private cause of action for money damages.[17] However, that caselaw does not suggest that severity and pervasiveness were or should both

[16] *Id*. (emphasis added).

[17] Commentary 1.A. at 19-29 (citing *Gebser v. Lago Vista Ind. Sch.*, 503 U.S. 60 (1992), and *Davis v. Monroe Cty Bd. of Educ.*, 526 U.S. 629 (1999)).

be required before the agency itself could review colleges in administrative enforcement proceedings to effectuate the equality purpose of Title IX.

There is good reason not to extend the private cause of action analysis into administrative agency review, because, as the two examples above illustrate, limiting agency oversight to those circumstances would decrease safety and increase sexual inequality on college campuses. Requiring both severity and pervasiveness would erect barriers to equal access to educational opportunities, contrary to Title IX's purpose.

The regulations should instead define sexual harassment to include severe or pervasive unwelcome sexual behavior that denies a student access to equal education, whether or not the behavior is both severe and pervasive. To ignore severe sexual harassment that denies a student equal access to education, simply because it is not pervasive, would erode safety and equality on our campuses. Likewise, to ignore pervasive sexual harassment that denies a student equal opportunity, simply because it is not severe, would also erode safety and equality on our campuses.

II. The Department of Education's Proposed Title IX Regulation § 106.44(a), Adopting a Deliberate Indifference Standard for Recipient Responsibility Only When Prohibited Conduct Occurs within Its Education Program or Activity, Would Decrease Safety and Equality on Our Campuses.

The Department of Education's proposed regulations would impose a new requirement that the college is only responsible for responding to sexual harassment that occurs within its own "education program or activity."[18] An "education program or activity" includes "any academic, extracurricular, research, [or] occupational training."[19] The commentary to this proposed regulation suggests that a college may be responsible for some of what happens off campus;[20] however, because the vast majority of educational programs and activities happen on campus, the proposed regulation would primarily limit Title IX coverage to behavior that occurs on campus.

The majority of sexual victimizations of college students across the country occur off campus in residential spaces.[21] CUNY is no exception. CUNY serves more than half a million students, including more than 270,000 degree-seeking students, but only about 3,000 of them reside in CUNY-owned or operated residential housing. Because CUNY is made up of commuter institutions, the vast majority of CUNY students live off campus and most social interactions

[18] § 106.44(a).

[19] 34 C.F.R. § 106.31.

[20] Commentary 1.A, at 19-29 (*citing Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 n.1 (10th Cir. 2008)).

[21] NIJ, *The Sexual Victimization of College Women* 20 (2000).

among students occur off campus. CUNY's recent Climate Survey indicates that the vast majority of CUNY students who experience sexual misconduct while enrolled at CUNY experience it off campus.[22]

New York State's "Enough is Enough" law, which applies to New York State institutions of higher education, sets forth uniform policy and reporting requirements when there are allegations of sexual violence. This law appropriately applies to conduct that occurs both on and off campus.[23]

By contrast, the proposed Department of Education regulations would eliminate colleges' responsibility for responding to sexual harassment and sexual assault that limit students' educational opportunities when they occur outside colleges' education programs or activities, the very place where college students experience the majority of sexual assault.

The following example reveals a common result of the "education program or activity" limitation in the proposed regulations:

> Example: A male student goes to the private apartment of a classmate to study together for an upcoming mathematics exam. At the apartment, the classmate plies the student with alcohol and, when the student becomes incapacitated, the classmate sexually assaults him. As a result of the trauma from that experience, the student retreats from the math class and earns a failing grade. Under the proposed regulations, even if the college had actual knowledge of the sexual assault by a classmate and its negative educational consequences, and chose to do nothing to restore the student's equal access to education, because the incident occurred off campus and not within an educational program or activity, the student would have no claim under Title IX.

The example would have come out differently under the Department of Education's prior guidance on Title IX and under New York State's "Enough Is Enough" law.

The mere fact that an assault occurred off campus does not insulate a student from suffering the continued effects of a hostile environment while on campus, especially when the assailant is a member of the college community. The proposed regulations are blind to the effects of this harmful, off campus behavior and its impact on the educational environment, which contravenes Title IX.

Under the proposed regulations, the college would not be able to hold the student's classmate responsible for having sexually assaulted the student under Title IX, even though both students are members of the same academic community, and even though the classmate's sexual

[22] *See* http://www1.cuny.edu/sites/title-ix/campus-websites/cunys-sexual-violence-campus-climate-survey/.

[23] Article 129-B § 6440(6) ("The provisions of this article shall apply regardless of whether the violation occurs on campus, off campus, or while studying abroad").

assault denied the student access to an equal education. As the proposed regulations mandate, "If the conduct alleged by the complainant ... did not occur within the recipient's program or activity, the recipient must dismiss the formal complaint with regard to that conduct."[24]

To ensure students' safety, CUNY has to be able to take appropriate disciplinary action against sexual assailants who live, work, or study on its campuses. The proposed regulations arbitrarily and unreasonably hobble schools' ability to take necessary action when misconduct occurs off campus or otherwise outside of its educational programs or activities.

In its interpretation of its proposed regulations, however, the Department of Education asserts, "nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students who report sexual harassment that occurs outside the recipient's education program or activity."[25] But the proposed regulation itself would prevent a college from initiating disciplinary proceedings under Title IX against the respondent for behavior that occurred off campus by mandating dismissal of the complaint.[26]

Pursuing such disciplinary proceedings against a respondent for behavior that did not occur in an education program or activity may even subject a college to potential Title IX liability for failure to dismiss the complaint under § 106.45(b)(3). The safe harbor provision in the regulations states that following a process "consistent with § 106.45" in response to allegations of sexual assault "does not otherwise constitute discrimination under title IX."[27] It thereby implies that a failure to follow the process mandated by § 106.45—by, for instance, refusing to dismiss a complaint that involves off campus behavior—could itself constitute discrimination under Title IX.

The proposed regulations would place colleges in an impossible situation. They would require colleges to close their eyes to a discriminatory educational environment, if it were caused by sexual assault that happened outside an educational program or activity, or face the prospect of significant liability for attempting to take remedial action in such a case.

Even if such institutional liability were not a threat, and colleges could discipline students for off campus sexual assault outside of Title IX but through a process dictated by a general code of conduct, discrepancies in how colleges adjudicate these complaints would erupt. For example, under the proposed regulations, adjudicators who hear disciplinary cases of sexual misconduct

[24] § 106.45(b)(3).

[25] Commentary I.A, at 26.

[26] § 106.45(b)(3).

[27] § 106.44(b)(1).

under Title IX must be appropriately trained.[28] Most colleges do not provide training on sexual stereotypes, implicit bias, and sexual trauma to adjudicators who hear cases under a general code of conduct, such as academic dishonesty or the underage consumption of alcohol. Forcing colleges to process complaints of off campus sexual assault not under Title IX, but under a general code of conduct, would increase the likelihood that these complaints would be heard by adjudicators who have not received appropriate training.

If a sexual assault occurred on campus, the college would have to adjudicate the complaint through the extensive and complex procedures mandated by the proposed regulations, including training of the officials involved. If the same sexual assault occurred just one block off campus, however, the college would have to adjudicate the complaint through a different process dictated by a general code of conduct.

The Title IX protections for parties involved in allegations of sexual misconduct should attach if the conduct denies equal educational opportunity, not depending on its location, nor whether it happened within an educational program or activity.

If they identically deny students equal access to education, treating off campus sexual assault differently from on campus sexual assault is arbitrary. It would create inconsistent outcomes for indistinguishable conduct, deprive parties of due process protections under the regulations, foster confusion regarding the rights and responsibilities of the parties involved, and occasion unfairness to all. Treating off campus sexual assault differently from on campus sexual assault is also contrary to longstanding caselaw in this area, which makes clear that it is not about where the assault took place but rather about whether the assault denied the victim equal access to education.[29]

The regulations should indicate that Title IX covers sexual harassment that denies equal access to educational opportunities, regardless of whether the harassment occurs on or off campus.

[28] § 106.45(b)(1)(iii).

[29] *See, e.g., Crandell v. N.Y. College of Osteopathic Medicine*, 87 F. Supp. 2d 304, 316 (S.D.N.Y. 2000) (off campus nature of conduct was not a bar to sexual harassment claim, where the off campus incidents "made her feel frightened and uncomfortable and consequently caused her to miss her anatomy class"); *Kelly v. Yale Univ.*, No. Civ.A. 3:01–CV–1591, 2003 WL 1563424, at *3 (finding that even the mere *potential* for an encounter, between a student raped off campus and her attacker "could create an environment sufficiently hostile to deprive the victim of access to educational opportunities"); *Doe ex rel. Doe v. Derby Bd. Of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006) ("Thus, even absent actual post-assault harassment by [off campus rapist], the fact that he and plaintiff attended school together can be found to constitute . . . harassment.").

III. The Department of Education's Proposed Title IX Regulation §§ 106.44(a) & (e)(6), Requiring Actual Knowledge for Recipient Responsibility, Would Decrease Safety and Equality on Our Campuses.

Previous guidance from the Department of Education indicated, "A school is responsible for addressing harassment incidents about which it knows or reasonably should have known."[30] This "knew or should have known" standard has been applied by the Department of Education in administrative enforcement proceedings under Title IX for at least twenty years. It is the same standard that the Equal Employment Opportunity Commission ("EEOC") uses when analyzing a range of harassment under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990.[31]

The proposed regulations, however, would change the standard from "knew or should have known" to require "actual knowledge" of allegations of harassment reported to a "Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures."[32] The incentives created by these two rules directly conflict. In order to avoid liability, a "knew or should have known" standard encourages colleges to acquire knowledge of sexual harassment on their campuses from every institutional actor who "should have known." By contrast, an "actual knowledge" standard discourages colleges from acquiring actual knowledge of sexual harassment on their campuses, in order to avoid liability.

The proposed regulations would thereby discourage colleges from identifying and training responsible employees who have a duty to report harassment to the Title IX coordinator, which is a proven and effective strategy for discovering, handling, and preventing sexual harassment and discrimination. Higher education in general, and CUNY in particular, has undergone a culture shift in how it addresses sexual harassment by designating responsible employees in our policies, training them about their obligations to report to their campus Title IX coordinators, and creating accountability structures to reinforce those expectations. The assignment of responsible employees is woven into the fabric of New York State's "Enough Is Enough" law. These investments have paid off. Across CUNY, Title IX coordinators report that the designation of responsible employees has helped develop a shared sense of responsibility for the campus climate among faculty and staff, and a broader sense of student safety.

When CUNY's responsible employees fulfill their obligations to report, they provide our institutions with valuable information about issues on our campuses, enabling our colleges to investigate and address those issues promptly and equitably. This source of information is

[30] U.S. Dept. of Educ., OCR, *Dear Colleague Letter: Harassment and Bullying* 2 (2010) (withdrawn).

[31] *See* https://www.eeoc.gov/laws/types/harassment.cfm ("The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action").

[32] §§ 106.44(a) & 106.44(e)(6).

particularly vital to our prevention efforts, given the vast body of research showing that the "least common response" to experiencing harassment is to take formal action to report the harassment internally or to file a legal complaint.[33]

In our experience, mandatory reporting by responsible employees has been a critical part of our efforts to create productive learning and working environments on our campuses that fulfill our educational mission. The proposed regulations would contravene Title IX's statutory purpose by discouraging institutions from making use of this proven best practice for identifying and preventing harassment and discrimination. A system of clear expectations and accountability is key to creating an inclusive culture and preventing harassment.[34] Indeed, in a 2016 report, the EEOC found that workplace culture, reinforced through systems of expectations and accountability, "has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment."[35]

By discouraging institutions from acquiring "actual knowledge" of sexual harassment, and thus from using a responsible employee framework, the proposed regulations would inhibit colleges from using a proven tool for creating inclusive teaching, learning, and working environments. The proposed regulations would thereby significantly undermine Title IX's goal of eliminating discrimination in federally funded education programs.

The risk that an "actual notice" standard would undermine Title IX's intent is particularly acute at large institutions such as CUNY. The proposed regulations would so narrowly define those employees whose actual knowledge triggers an institution's Title IX obligations that the vast majority of students at large campuses would never even come into contact with those few individuals who must receive reports of sexual harassment.

Comparing the list of CUNY employees who are responsible employees (and thus mandatory reporters of sexual misconduct to their Title IX coordinators) under current law and policy, to the list of employees whose knowledge would trigger Title IX obligations under the proposed regulations vividly illustrates the problem. Under current CUNY policy, consistent with New York State's "Enough Is Enough" law, responsible employees include the following diverse set of faculty and staff members who are involved in all aspects of academic and student life:

- Title IX Coordinator and her/his staff;
- Office of Public Safety employees;
- Vice President for Student Affairs and Dean of Students and staff in those offices;

[33] *See* U.S. Equal Employment Opportunity Commission, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* v & 3-25(2016) (available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf) (hereinafter "EEOC Select Task Force Report").

[34] *Id*.

[35] *Id*. at v & 31-37.

- Residence Life staff in CUNY owned or operated housing, including Resident Assistants;
- Human Resources staff;
- College President, Vice Presidents, and Deans;
- Athletics Staff;
- Faculty Athletics Representatives;
- Department Chairpersons/Executive officers;
- University Office of the General Counsel employees;
- College attorney and her/his staff;
- College labor designee and her/his staff;
- International Education Liaisons/Study Abroad Campus Directors and Field Directors;
- Faculty and staff members when they are leading or supervising off campus trips;
- Faculty or staff advisors to student groups;
- Employees who are managers or supervisors;
- SEEK/College Discovery staff;
- College Childcare Center staff;
- Directors of "Educational Opportunity Centers" affiliated with CUNY colleges; and
- Faculty or staff academic advisors.

By contrast, under the proposed regulations, the only CUNY employees who would trigger the institution's Title IX obligations are:

- The Title IX Coordinator; and
- The College President (the only "official of the recipient who has authority to institute corrective measures" in response to sexual harassment).[36]

Importantly, the proposed regulations omit the very faculty and staff members who work daily and directly with students in the normal course of their college experiences, as well as the CUNY responsible employees who are mandatory reporters. As the Commentary to the proposed regulations indicates, "the mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient."[37]

Not even the Chief Diversity Officer on campus has the authority to institute corrective measures independent of the college president. Only two eligible officials, the Title IX Coordinator and the President, who generally do not work daily and directly with students, would need "actual knowledge" of a specific allegation of sexual harassment before an institution had any obligation to act to protect a student under Title IX. This approach would

[36] § 106.44(e)(6). This language would include the highest academic officer of a freestanding school, such as the Dean of a law school or other professional school.

[37] Commentary I.A, at 18. *See also id.* at 22.

result in less effective prevention efforts, less timely information given to the institution's Title IX office, and less safe campuses.

Two examples illustrate the "actual knowledge" problem:

> Example 1: A student reports to her physics professor that she is being sexually harassed by her biology professor, a star researcher and the largest grant recipient at the college. The student explains that she works in the biology professor's lab as an assistant and the harassment happens after hours in that lab. The physics professor reports the situation to the dean of the school of sciences. The dean replies that no one else must know about the situation because the star biology professor is too valuable to the school. Neither the dean nor the physics professor informs the Title IX coordinator or the college president. The student drops both her biology and physics classes as a result. Despite the fact that the student experienced sexual harassment by a faculty member, told another professor about the harassment, experienced unequal access to educational opportunities as a result, and despite the fact that the dean should have informed the college Title IX coordinator but chose to silence the information instead, the student would have no claim under Title IX.
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> Example 2: A college student tells his tennis coach that he was raped by a teammate when they were on the road together travelling to an away game. The student is so traumatized by the experience that he drops the tennis team and his grades suffer. The coach tells the student that he must have sent mixed signals to his teammate, and then encourages him to tell no one else but to forget that it ever happened. Despite the fact that the student experienced rape as a member of a college sports team, told his coach about the rape, experienced unequal access to educational opportunities as a result, and despite the fact that the college should have known about the situation but the coach silenced the complaint, the student would have no claim under Title IX.

These examples would have come out differently under the Department of Education's prior guidance on Title IX and under current CUNY policy. They show how the practical result of the proposed regulations would contravene the goals of Title IX. Under proposed regulations, the Department of Education would find that, despite their willful blindness to the students harassed by a biology professor or raped by a teammate, as well as their willful blindness to the ongoing risk that the biology professor and teammate posed to others, the colleges had fulfilled their Title IX obligations.

Under the proposed regulations, even if a high-level college employee directly observed sexual assault, that employee would not be obligated to tell the college and the college would be under no obligation to investigate.

Such counter-intuitive results would undermine the trust and confidence of students, faculty, and staff in their colleges. These groups would no longer be assured that notifying one of the many authority figures who work with students on a daily basis (and are perceived to have the

duty to report sexual harassment and assault) would facilitate an appropriate investigation and institutional response.

Rather than creating incentives for institutions of higher education to establish organizational expectations and accountability structures that promote information-sharing and enable them promptly to investigate and address sexual misconduct, the proposed regulations would create incentives for institutions of higher education to practice willful blindness, evading potential liability by avoiding acquiring information about sexual misconduct on their campuses. These incentives would dramatically reduce the scope of protections available to students who have experienced sexual harassment and assault, contrary to the goal of Title IX.

Instead of requiring actual knowledge, the regulations should focus on whether a college "knew or should have known" about an allegation of unwelcome sexual behavior that denies a student access to equal education. A "knew or should have known" standard would encourage reporting, keep Title IX in line with other civil rights statutes, such as Title VII, and enhance safety and equality on college campuses.

IV. Department of Education's Proposed Title IX Regulation § 106.45(b)(4)(i), Requiring That a Recipient Apply the Same Standard of Evidence for Complaints against Students as It Does for Complaints against Employees, Including Faculty, Would Undermine Equality on Our Campuses.

CUNY believes that the standard of proof in campus disciplinary proceedings adjudicating sexual misconduct claims should be preponderance of the evidence—exactly the standard that is used for sexual harassment claims in civil court, and exactly the standard of proof that has been used in most college campus disciplinary proceedings for non-sexual claims of misconduct.[38] Prior Department of Education guidance mandated that colleges apply the preponderance of the evidence standard in disciplinary proceedings adjudicating sexual misconduct,[39] with good reason.

Preponderance of the evidence is the standard that addresses the parties equally in relation to one another. Whoever has a superiority in weight of evidence (the "preponderance" of the evidence) can prevail in the disciplinary proceeding. This standard has no preconceived assumption about the responsibility of either party for the incident, and no greater burden on either party.

[38] Historically, of those campuses that identified a standard of proof in their student disciplinary codes, 80% identified preponderance of evidence. Heather Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond*, U.S. Dep't Just. 120 (2002). The exception to the preponderance standard appears to have been in the Ivy League, which tended to use a clear and convincing standard.

[39] U.S. Dept. Educ. OCR, *Dear Colleague Letter* 11 (2011) (withdrawn).

By contrast, the proposed regulations allow colleges to use either a "preponderance of evidence" standard or a "clear and convincing" standard in hearings under Title IX. To meet the higher "clear and convincing" standard of proof, one must prove that something is highly and substantially more probable than not to be true.

Not only do the proposed regulations allow colleges to adopt the clear and convincing standard of proof, they also mandate a "presumption that the respondent is not responsible for the alleged conduct,"[40] creating a presumption in favor of (predominately male) respondents, which places a greater burden for proving the allegations on colleges, and implicitly, on (predominately female) complainants.

The proposed regulations also mandate that colleges "must apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty."[41] Prior Department of Education guidance had no such mandate.

The Department of Education explains that this proposed regulation is required "to avoid the specially disfavored treatment of student respondents in comparison to respondents who are employees such as faculty members, who often have superior leverage as a group in extracting guarantees of protection under a recipient's disciplinary procedures."[42]

Public institutions of higher education are more likely to have unionized employees, including tenured faculty, who have engaged in collective bargaining.[43] Collective bargaining agreements between colleges and employees regarding the standard of evidence to be used in employee disciplinary proceedings often adopt a "clear and convincing" standard. Colleges who have agreed to collective bargaining on this matter cannot force employees or unions to renegotiate or change their agreements. Obviously, negotiating a change to a college's collective bargaining agreement would be costly and time-consuming, and there would be no guarantee of the outcome. Certain provisions of the collective bargaining agreement may also be required by state statute, such as tenure.

Under the proposed regulations, therefore, if a college's collective bargaining agreement includes the clear and convincing standard of evidence for employee disciplinary proceedings, and the student evidentiary standard for disciplinary proceedings is preponderance of the evidence, a college would be forced to change the student standard to clear and convincing as well, even when doing so would be inappropriate in the academic judgment of college leadership, considering the unique needs of the community.

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[40] § 106.45(b)(1)(iv).

[41] § 106.45(4)(i).

[42] Commentary II.C, at 63.

[43] Nick Gier, *An Update on Unions in Higher Education*, Idaho St. J., Sept. 2, 2018 (unions represent 35% of public universities and 21% of private universities).

The proposed regulations conflate student disciplinary proceedings with employee disciplinary proceedings. However, the relationship that a student has with a college is not symmetrical to the relationship between an employee and a college.

Students pay tuition to enroll in college to acquire the knowledge, skills, and social and personal development that will allow them to obtain jobs and become thoughtful, well-informed contributors to society. Colleges have an affirmative obligation to create educational environments conducive to those goals.

A college's employees, by contrast, provide services to the college, principally for the benefit of the students who attend, and the college pays employees for their services. Many fulltime faculty members enjoy protective life tenure, and many fulltime staff members at public and/or unionized colleges hold administrative permanency.

In light of colleges' obligation to students, the purpose of student misconduct proceedings must be both disciplinary and educational, unlike such proceedings for employees. While all employees have the right to a workplace free from discrimination, the college has no affirmative obligation to encourage an employee's social and personal development. As a result, the evidentiary standard applied in employee disciplinary matters should have no bearing on student sexual misconduct adjudications.

Moreover, the proposed regulations would often require campuses to bring campus sexual harassment cases out of line with the standard of proof used in other student disciplinary proceedings. Singling out sexual harms against students for a higher standard of proof is itself in conflict with Title IX: It would create special burdens on students who experience sexual misconduct (disproportionately female and poor) as compared with students who face misconduct that is not sexual. By favoring higher standards of proof for sexual harassment cases, the proposed regulations would establish gendered barriers to equal access to education.

Instead of allowing campuses to use either a preponderance of the evidence or a clear and convincing standard, and mandating the latter on some, unionized campuses, the proposed regulations should require the preponderance of the evidence standard as the most equitable to students in disciplinary proceedings resolving allegations of sexual harassment.

V. The Department of Education's Proposed Title IX Regulations § 106.45(a)-(b), Mandating Prohibitively Complex and Expensive Grievance Procedures, Would Decrease Equality on Our Campuses.

Some aspects of the required grievance procedures in the proposed regulations are fair, equitable, and essential to due process. CUNY agrees in principle with requirements for published procedures, notice of allegations, equitable treatment of complainant and respondent, equal opportunity to present witnesses and evidence, an objective assessment of

the facts, a prohibition on conflicts of interest, the training of decision-makers and other employees involved, and reasonably prompt timeframes.[44]

However, the proposed grievance procedures are prohibitively complex and burdensome. Their innumerable requirements are unfair, both to complainants and to institutions of higher education. Myriad, minute requirements would dictate college behavior, overwhelmingly in ways that favor (predominately male) respondents over (predominately female) complainants.

Many of the ideas for heightened process in grievance procedures in favor of respondents came from professors teaching in resource-rich law schools.[45] Underfunded, public colleges and universities across the country, the vast majority of which have no law schools attached to them, will not have the resources to carry out the regulations' complex mandates, which would unfairly expose them to heightened Title IX liability compared to their better-funded counterparts.

To call the proposed regulations' grievance procedures onerous would be an understatement. There are more than 100 requirements imposed upon institutions of higher education for the process of investigations and formal hearings.[46] Instead of relying on the academic judgment of educational institutions, the proposed regulations impose multipart, impracticable obligations.

CUNY strongly objects to the sheer volume and detail of the many added requirements in the proposed grievance procedures. Many of these requirements do little to nothing to enhance fairness or due process; at the same time, they add substantial complexity and cost, making compliance practically impossible for under-resourced institutions.

For example, why should the written disposition in a student disciplinary proceeding resolving an allegation of sexual harassment recite every procedural step that the Title IX officer took throughout the entire investigation, before the hearing was even held: "from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather evidence, and hearings held"?[47] This is a level of detail in written dispositions not required of federal judges.

The proposed regulations go on to require additionally that decision-makers' written dispositions include: "findings of fact supporting the determination," "conclusions regarding the

[44] *See*, *e.g.*, §§ 106.45(b)(1)(i), (ii), (iii), (v), & (b)(3)(ii).

[45] *See*, *e.g.*, Yale Law Prof. Jed Rubenfeld, *Mishandling Rape*, N.Y.T., Nov. 15, 2014; Eugene Volokh, *Open Letter by 16 Penn Law School Professors about Title IX and Sexual Assault Complaints*, Wash Post, Feb. 19, 2015; Jamie Halper, *Harvard Law School Faculty Call for Title IX Sexual Assault Policy Changes*, Harvard Crimson, Sept. 1, 2017.

[46] *See* §§ 106.8(b)(2)(ii)(c); 106.45(a)-(b)(7)(ii).

[47] § 106.45(b)(4)(ii)(B).

application of the recipient's policy to the facts," "a statement of, and rationale for, the result as to each allegation, including the determination regarding responsibility, any sanction the recipient imposes on the respondent, and any remedies provided by the recipient to the complainant designed to restore or preserve access to the recipient's education program or activity;" the procedures for appeal, and the permissible bases for appeal.[48] None of these possible features of written dispositions in disciplinary proceedings is objectionable on its own, to be sure. They are standard fare for lawyers and judges. But they should not each be required of a layperson, a college employee in student affairs, for instance, drafted to the role of decision-maker to adjudicate one case, especially when most sitting trial court judges do not issue written decisions with this level of detail, and no one claims that due process was compromised. To impose these kinds of detailed requirements on colleges is arbitrary and unduly burdensome.

These detailed requirements are also not required under the Violence Against Women Act or the Clery Act for determinations of equally or more serious student misconduct, such as assault, arson, or kidnaping. Many of the proposed requirements in the grievance procedures would not meaningfully advance the core fairness of the proceedings or the due process of the parties, but they would create an enormous administrative burden. They would be unwieldy, especially for public colleges and other lesser resourced institutions

In short, many of the myriad requirements in the proposed grievance procedures are all cost and no benefit. They substantially increase administrative burdens, while altogether failing to advance the core fairness of the proceedings or the due process of the parties.

In addition to objecting to the overall number and complexity of the requirements in the proposed regulations, CUNY will discuss in detail its objections to five specific requirements in the grievance procedures.

1) **Attorneys or Advisors**: Colleges must provide both the complainant and the respondent with attorneys or advisors.[49]

The proposed regulations require colleges to provide both the complainant and the respondent with attorneys or advisors who are able to function as attorneys for the mandated live hearing and mandated cross-examination process.[50] Low- and moderate-income students, like those at

[48] § 106.45(b)(4)(ii)(C)-(F).

[49] § 106.45(b)(3)(vii).

[50] § 106.45(b)(3)(vii). For higher educational institutions in New York, the proposed regulations on the need to provide both parties with advocates may initially appear to mirror the state law "Enough Is Enough" requirement that, if requested, both parties must be provided an advisor. (State of New York. *Article 129-B.* 14 June 2015). However, the proposed regulation is different because the advocate's role would not be limited to providing information to the student on the technical aspects of the disciplinary process, as it is in New York State law. (§ 106.45(b)(3) (iv) & (vii)). Rather the proposed process is adversarial, as described above.

CUNY, will ordinarily not have the financial resources to hire their own attorneys or advisors for these proceedings.

It will be difficult for colleges to fulfill this mandate. In our experience, it is already difficult to find college employees willing to work as volunteer advisors in Title IX cases. It would be extremely difficult for colleges to find employees who would be willing to function as actual attorneys in these cases, required to, for instance, cross-examine alleged sexual assault victims during live disciplinary proceedings. Colleges would instead be compelled to incur considerable expense to hire outside advocates for the hearings.

Under the proposed regulations, colleges would need either to hire actual attorneys or to hire lay advisors and train them on techniques for casting doubt on a student's credibility, which is the function of cross-examination. Such hiring and training would be costly. Lesser endowed public colleges, like those at CUNY, do not have the financial resources to hire attorneys or to hire and train advisors who would function as attorneys for both of the parties in each of these disputes.

If one party has hired an attorney, the college may also be required to hire a licensed attorney for the opposing party to ensure parity between them. Otherwise, if a lawyer questions one student and a non-lawyer advisor questions the opposing party, the financial disparity between them would result in inequality in the proceedings.

Instead of requiring colleges to hire attorneys or to hire and train advisors to function as attorneys in live hearings, colleges should be required to appoint advisors, if requested by either party, whose role is limited to providing information to the student on the technical aspects of the disciplinary process, as is required in New York State's "Enough Is Enough" law.[51] In New York public colleges, this arrangement works well.

2) **Cross-Examination**: Colleges must provide for cross-examination of the parties and witnesses by attorneys or advisors in a live hearing.[52]

Under prior Department of Education guidance, direct cross-examination by attorneys or advocates was impermissible because it was understood to threaten complainants and to deter accurate reports of sexual harassment.[53] Under previous guidance, parties were permitted to submit questions to a neutral hearing officer who then would ask the questions of the parties.[54]

[51] N.Y.S. Educ. Law, Art. 129-B (2015).

[52] § 106.45(b)(3)(vii).

[53] U.S. Dept. Educ. OCR, *Dear Colleague Letter* 31 (2011); U.S. Dept. Educ. OCR, *Questions & Answers on Title IX & Sexual Violence* § F-6 (2014) (both withdrawn).

[54] U.S. Dept. Educ. OCR, *Questions & Answers on Title IX & Sexual Violence* § F-6 (2014) (withdrawn).

Many courts have found that the parties received fairness and due process through questioning by a neutral hearing officer.[55]

Under the proposed regulations, however, the questioning process would become direct and adversarial, involving the actual cross-examination of witnesses and parties.[56] The complainant would be questioned not by a neutral hearing officer or a neutral investigator, but directly by an attorney or a trained advocate for the respondent. The attorney or trained advocate would question parties and witnesses with the intent of undermining their stories or painting them as biased or responsible for wrongdoing. This kind of probing by advocates would intimidate student witnesses, revictimize complainants, and deter them both from participating in investigations, perversely undermining the very search for truth that the regulations purport to advance.

Moreover, under the proposed regulations, colleges may "not limit the choice of advisor."[57] Parties may therefore choose to have a parent or a classmate function as an advisor. The parent of a complainant or respondent would then have the regulation-sanctioned authority to question their child's accuser or alleged assailant. The best friend of the respondent could directly cross-examine the complainant, or vice versa. A legitimate fear of being questioned by the parent or best friend of the opposing party, or another individual partial to the opposing side, would deter victims from filing formal complaints and discourage witnesses from participating in hearings.

Instead of mandating direct cross-examination in a live hearing, the regulations should allow parties to submit their questions to neutral hearing officers.

3) **All Evidence Review**: Colleges must "provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility."[58]

Under the proposed regulations, all evidence related to an incident that the investigator ever receives or obtains as part of the investigation must be turned over to both parties, no matter how irrelevant, inflammatory, distracting, or prejudicial. This kind of all evidence review would even include evidence related to the prior sexual history of the complainant or other witnesses that could not be relied upon in reaching a determination.

[55] *See*, *e.g.*, *Haidak v. U. Mass. Amherst*, 299 F. Supp. 3d 242, 262 (D. Mass. 2018).

[56] U.S. Dept. Educ. OCR, *Dear Colleague Letter* 31 (2011) (withdrawn); U.S. Dept. Educ. OCR, *Questions & Answers on Title IX & Sexual Violence* § F-6 (2014) (withdrawn).

[57] § 106.45(b)(3)(iv).

[58] § 106.45(b)(3)(viii).

The proposed regulations are clear that the complainant's prior sexual history would be excluded from the hearing itself.[59] However, if information about the prior sexual history of the parties or witnesses were somewhere in the evidence that the Title IX coordinator received during an investigation, as it often is, it would have to be disclosed to both parties as part of the all evidence review.

The disclosure of this kind of evidence could lead to the publication of sensitive and private materials of either party or non-parties, the public disparagement or harassment of either party or non-parties, and retaliation against either party or non-parties. The requirement that all evidence must be turned over to both parties would dissuade both witnesses and complainants from providing evidence to investigators, as they would recognize that evidence would be turned over to respondents, regardless of how the investigators assessed the evidence. The resultant withholding of information would decrease the accuracy of investigations.

The negative effects of an all evidence review would most commonly befall complainants. The scope of the mandated disclosure in an all evidence review would be experienced as harassing itself, and would deter complainants from pursuing formal charges.

The proposed regulations mandate an unprecedented amount of evidence disclosure. They are broader that the scope of discovery in a civil case, which limits discovery to nonprivileged and relevant information, and allows for nondisclosure when the burden of discovery outweighs its benefits.[60] The proposed regulations mandating disclosure of evidence are also broader than the disclosure required in criminal cases, when life and liberty are at stake, which requires the prosecution to provide the defendant with only exculpatory evidence,[61] rather than all the evidence ever collected in a case. The proposed regulations are therefore arbitrary and unprecedented.

Instead of requiring an all evidence review by both parties, the proposed regulations should require that colleges provide both parties with an equal opportunity to inspect the evidence presented in the investigative report or hearing.

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[59] § 106.45(b)(3)(vii).

[60] Fed.R.Civ.P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.").

[61] *Brady v. Maryland*, 373 U.S. 83 (1963) (disallowing "suppression by the prosecution of evidence favorable to an accused" because it violates due process "where the evidence is material either to guilt or to punishment").

4) **Digital Evidence Review**: Prior to the completion of an investigative report, a college "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 parties and advisors from downloading or copying the evidence."[62]

The proposed regulations require that colleges must deliver all gathered evidence in digital format to both parties. Nothing of the sort has ever been required by the Department of Education under Title IX, and the Federal Rules of Civil Procedure do not require digital discovery in civil cases. CUNY objects to this unprecedented requirement.

Underfunded institutions of higher education do not have the resources to digitize all the evidence in each case and share it with the parties in an electronic format. A lot of the evidence in disciplinary cases is collected in hard copy, in printed form. A lot of evidence is digital already, but not in a consistent format for sharing on a group platform. It would be costly to digitize all physical documents and systematize the digital format of all disparate digital materials and then upload them all to a system to share with the parties. There would be no benefit to such an arrangement, while the financial costs to colleges would be substantial.

Moreover, the potential psychological costs of mandated digital review would be extreme. If all evidence in a case were provided to the parties in digital form, it could be easily and widely shared. Often in cases involving sexual harassment or sexual assault, the email and text communication between parties is charged, unusual, or sexualized. If colleges must provide all evidence to both parties, there is no way for the college to ensure that it would not be shared with others, for instance, on social media.

Sharing personal text messages or communications on social media can be traumatic, and it may expose sensitive information about the parties or non-parties. Once parties are made aware that all evidence collected will be provided to both parties in digital form, and there is a risk that one of the parties may have it leaked, publish in a newspaper, print it on flyers, email it, or post it on social media, complainants will be much less likely to file Title IX complaints. Potential leaks of sensitive information related to the case can also harm respondents, as well as non-parties, including witnesses who will be less likely to agree to participate in investigations. Digital transmission of all evidence collected in a case is a tool of potential harassment and mischief.

The regulations assert that institutions will somehow provide all the digital evidence "in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence."[63] The notion that there is a format that allows someone to view information digitally, but not copy it, is utterly fanciful. A cell phone can photograph a computer screen of evidence in less than a second for a ready, public post to social media.

[62] § 106.45(b)(3)(viii).

[63] *Id*.

Instead of requiring that all evidence be sent to the parties in digital format, the proposed regulations should require that colleges provide both parties with an equal opportunity to inspect the evidence presented in the investigative report or hearing, when such inspection is supervised by a college official to ensure that evidence is not copied for public distribution.

5) **Rules of Evidence Training**: "The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant."[64]

The proposed regulations require the decision-maker to explain the exclusion of certain evidence from the hearing to the party's advisor or attorney. This requirement raises concerns regarding the training of both the decision-makers and the advisors.

In order to make the decision to exclude evidence, a decision-maker would have to be trained sufficiently in the rules of evidence for exclusion. The college would have a very hard time finding a layperson with sufficient knowledge of evidence law to provide real time responses and decisions to questions in a live, formal hearing. Based on our experience at CUNY, outside of the law school, almost no college employees would be appropriate for that duty. Most colleges would have to hire outside counsel or retired judges to serve as decision-makers in these hearings. Most public colleges, and many private colleges, simply will not have the resources to hire outside counsel or judges to conduct live hearings, nor will they have the resources to hire and train laypersons to function as judges in live hearings. These proposed regulations would be cost-prohibitive to lesser-resourced, public institutions.

The regulations should not require that the decision-maker in a hearing function as a judge and explain to the party's advisor any decision to exclude a question or other evidence; this level of micro-management in disciplinary hearings is not required for due process.

6) Overall Negative Effect of Proposed Grievance Procedures

Overall, the grievance procedures in the proposed regulation are cumbersome, challenging, and cost-prohibitive. Public colleges cannot afford to hire attorneys for both parties or to hire and train advisors who function as attorneys for both parties or to hire and train decision-makers who function as judges in each one of these disciplinary proceedings. Public colleges cannot afford to digitize all evidence and deliver it to the parties, and the risks of doing so are too great. These detailed requirements are not contained in New York State's "Enough Is Enough" law, and would impose new and unprecedented burdens on colleges throughout New York.

The requirements of direct cross-examination by attorneys or trained advisors for the opposing parties, all-evidence review by both parties that includes evidence of the parties' and non-parties' prior sexual history, and digital evidence review that is easily copied and shared would

[64] § 106.45(b)(3)(vii).

open the door to alarming harassment. The proposed regulations would engender fear, especially on the part of complainants: fear of retaliation by the respondent or his friends, fear of being questioned by the respondent's attorney or trained advisor, and fear of embarrassment or trauma because all evidence would be shared electronically and could not be shielded from being exposed on social media. These regulations would deter victims of sexual harassment from lodging formal complaints, discourage witnesses from participating in investigations, erode confidence in the disciplinary system, imperil the privacy rights of all involved, and degrade the educational mission of enhancing equal access to higher education.

For colleges, the grievance procedures would be prohibitively costly to implement, in terms of financial investment, training, and time. The financial burden placed on colleges to provide trained advocates and trained decision-makers for live hearings and the need to collect and send all evidence digitally would drain limited time and financial resources.

Nevertheless, a safe harbor provision in the proposed regulations underscores the mandatory nature of the detailed, innumerable requirements mapped out in the grievance procedures:

> A recipient must follow procedures consistent with [the grievance procedures defined in] section 106.45 in response to a formal complaint. If the recipient follows procedures…consistent with section 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent and it does not otherwise constitute discrimination under title IX.[65]

This key provision implies that a failure to follow the grievance procedures mandated in the proposed regulations *could or would itself constitute discrimination under Title IX*. This startling provision appears to imply colleges' automatic liability if they fail to follow the detailed procedures required. Because the grievance procedures are so cumbersome, complex, and technically precise, they will be hard not to violate. The grievance procedures would thereby open colleges up to substantial liability.

Perversely, the complexity and cost of the grievance procedures in the proposed regulations would encourage many colleges to do everything in their powers to avoid formal disciplinary hearings. The proposed regulations thereby create powerful incentives for institutional actors to persuade the parties to agree to informal resolution instead.

VI. The Department of Education's Proposed Title IX Regulation § 106.45(b)(6), Providing for Informal Resolution of Complaints, Would Decrease Due Process for Both Parties and Erode Equality on Our Campuses.

In contrast to the proposed regulations' complex, technical, and costly formal grievance procedures, the proposed regulations' informal procedures lack detail. They simply require

[65] § 106.44(b)(1).

notice of the allegations and the consequences of agreeing to informal process, and the parties' written consent.[66] If a college provides the required notice and obtains the parties' written consent, its actions in an informal process would fall within the safe harbor provision of the regulations, which ensures, "the recipient's response to the formal complaint is not deliberately indifferent and it does not otherwise constitute discrimination under title IX."[67] So while the formal grievance procedures open colleges up to considerable liability under Title IX due to the potential for technical violations of protocol, the informal resolution process insulates campuses from liability.

This insulation from potential liability creates a robust incentive for colleges to persuade the parties to agree to an informal resolution process. The problem is that the informal resolution process may be unfair to either complainants or respondents, and it may deny due process to either or both sides.

Under the proposed regulations, informal resolution can happen:

- Without any conflicts check to prevent bias on the part of mediators or institutional actors drafted to resolve the complaint informally,
- Without any training on sexual harassment of the institutional actors involved,
- Without any investigation by a neutral investigator of facts surrounding the allegation,
- Without any hearing by a neutral arbiter to determine those facts,
- With any possible informal process or outcome for either party as a result, and
- With a prohibition on returning to the formal adjudication process.

This kind of informal resolution would potentially expose students on either side to a range of due process violations or unfairness, at the whim of the institution. Two examples suffice:

> Example 1: A first-year student claims to have been sexually assaulted on campus by the quarterback of the college's celebrated football team. The first-year student lodges a formal complaint against the quarterback with the Title IX coordinator. College staff members are uncomfortable with the complaint and its potential for bad publicity, so they lean on the complainant and respondent to agree to an informal resolution of the situation. The parties agree, and the college president then asks the football coach to mediate. The coach takes the parties to a private room, yells at them that they are equally responsible for the situation, and demands that they apologize to each another. The complainant runs out of the room, highly distraught, and drops out of college as a result.
>
> Example 2: A first-year student claims to have been sexually assaulted on campus by the quarterback of the college's celebrated football team. The first-year student lodges a

[66] § 106.45(b)(6)(i)-(ii).

[67] § 106.44(b)(1).

> formal complaint against the quarterback with the Title IX coordinator. College staff members are uncomfortable with the complaint and its potential for bad publicity, so they lean on the complainant and respondent to agree to an informal resolution of the situation. The parties agree, and the college president hires the complainant's aunt, an employee in the department of student affairs, to mediate. The aunt takes the parties to a private room, does not listen to either side, tells the football player he is a horrible person, and simply boots him from the football team. The respondent runs out of the room, highly distraught, and drops out of college as a result.

These examples would have come out differently under the Department of Education's prior guidance on Title IX, which did not allow for this kind of informal resolution. They show how the practical result of establishing an informal resolution option with no requirements to protect the rights of the parties could erode the due process rights of either side. The proposed regulations delineate complex requirements in formal grievance procedures, which will powerfully encourage informal resolution of complaints, and which will, ironically, eliminate all the process protections mandated in the formal grievance procedures.

VII. Department of Education's Proposed Title IX Regulations Turn Title IX on Its Head.

The proposed regulations repeatedly articulate a false equivalence under Title IX between the complainant and respondent in a manner contrary to the text and purpose of Title IX.[68] For example, the beginning of the grievance procedures section states:

> A recipient's treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX. A recipient's treatment of the respondent may also constitute discrimination on the basis of sex under title IX.[69]

While it is true that a school's treatment of a respondent *could* constitute sex discrimination under Title IX, under prior Department of Education guidance and caselaw, it would require unusual evidence of unfairness for a school to be found to violate a respondent's Title IX rights

[68] Title IX was designed to benefit those who are excluded from educational opportunities, not turn a blind eye to historic discrimination. *See*, *e.g.*, *Davis v. Monroe,* 526 U.S. 629 (1999) ("It is Title IX's 'unmistakable focus on the benefited class,' rather than the perpetrator, that, in petitioner's view, compels the conclusion that the statute works to protect students from the discriminatory misconduct of their peers"); *Cohen v. Brown Univ.*, 101 F.3d 155, 176 (1st Cir. 1996) ("Title IX and its implementing regulations protect the class for whose special benefit the statute was enacted . . . It is women and not men who have historically and who continue to be underrepresented in sports, not only at Brown, but at universities nationwide"); *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 176 (3d Cir. 1993) ("[A]lthough [T]itle IX and the regulation apply equally to boys as well as girls, it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletics programs to the exclusion of girls' athletics programs").

[69] § 106.45(a).

in its response to a single complaint.[70] The Department of Justice now appears to disagree, however.

Its commentary to the proposed grievance procedures contends, "a respondent can be unjustifiably separated from his or her education on the basis of sex, in violation of Title IX, if the recipient does not investigate and adjudicate using fair procedures before imposing discipline."[71] This language once again suggests that a failure to follow the grievance procedures in the proposed regulations would itself constitute a per se violation of Title IX.

On the one hand, the proposed regulations impose a deliberate indifference standard on institutional actions toward the complainant. The complainant has no right to an investigation of sexual harassment that happens outside an education program or activity,[72] no right to an investigation if the complaint is not lodged with the Title IX coordinator or the president of the college,[73] no right to any particular "determination of responsibility,"[74] and no right to "any particular sanction against the respondent."[75] None of those things constitute even a potential violation of Title IX under the proposed regulations.

On the other hand, the proposed regulations do not impose a deliberate indifference standard on institutional actions toward the respondent. Indeed, any deviation from a strict and onerous set of grievance procedures designed to protect respondents may violate Title IX itself. The safe harbor provisions likewise clarify that, under the proposed regulations, the Title IX review by the Department of Education would focus on grievance process violations in favor of respondents rather than on substantive outcomes for victims of sexual harassment.

The proposed regulations radically change the civil rights statute, turning Title IX on its head. They would both reduce liability, with respect to how campuses respond to complaints of sexual harassment and sexual assault, and expand liability, with respect to how campuses carry out a set of mandatory, detailed grievance procedures in favor of respondents. The proposed regulations would unreasonably diminish institutional liability for sex discrimination, which is the purpose of Title IX, while exposing institutions to unprecedented liability from accused students. The proposed regulations would undermine the very statute they are purportedly designed to carry out.

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[70] *See*, *e.g.*, OCR, Students Accused of Sexual Misconduct Had Title IX Rights Violated by Wesley College, Says U.S. Department of Education (October 12, 2016) (finding "an interim suspension … imposed the same day as the college received the report against the student" and failure to ever interview the respondent violated Title IX).

[71] Commentary II, at 40.

[72] § 106.44(a).

[73] § 106.44(a) and § 106.44(e)(6).

[74] Commentary II, at 37.

[75] *Id*. at 68.

Conclusion

CUNY is a unique institution, with an important mission and a diverse, striving student body. A core part of our mission is to protect and expand our disproportionately impoverished students' equal access to educational opportunities. The civil rights statute Title IX should be of great help to CUNY in that effort. Unfortunately, the Department of Education's proposed regulations would undermine the statute and arbitrarily hinder our efforts.

The proposed regulations would unnecessarily deter CUNY students from lodging legitimate complaints of sexual harassment, deter them from coming forward as witnesses in the investigations of such complaints, and decrease our ability to protect our students from sex discrimination. If the proposed regulations were implemented, college campuses across the country would become less safe and less equal.

At the same time, the proposed regulations would create incentives for colleges across the country to try to avoid the cumbersome and expensive procedures mandated by the formal grievance process and instead urge students to agree to undergo informal resolution, where they would be guaranteed neither due process nor basic fairness.