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**Comment on the Department of Education Proposed Rule: Nondiscrimination on the Basis  
of Sex in Education Programs or Activities Receiving Federal Financial Assistance  
34 CFR 106**

**Comment submitted by:**

**AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS**

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**I. INTRODUCTION**

The American Association of University Professors (AAUP) submits these comments in response to the Department of Education’s (DOE) proposed amended regulations implementing Title IX of the Education Amendments of 1972 and the DOE’s Directed Question 3, on “the applicability of the rule to employees...The Department seeks the public’s perspective on whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider.” These comments by the AAUP concern employees who are faculty—a category whose “unique circumstances” are not adequately considered in the draft regulations. The category of faculty is broadly inclusive of all teaching and research faculty, librarians, and graduate student employees.

<https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure>

The AAUP is the oldest organization of its kind. Since its founding in 1915, the AAUP has been an active and influential voice in higher education. The AAUP defines and develops fundamental professional values, standards, and procedures for higher education; advances the rights of academics, particularly as those rights pertain to academic freedom and shared governance; and promotes the interests of higher education teaching and research.

In 2016, the AAUP published a report on "The History, Uses, and Abuses of Title IX." <https://www.aaup.org/report/history-uses-and-abuses-title-ix> The report urges universities to address and prevent problems of sexual harassment in ways that also fully protect academic freedom and due process, and in ways that enhance shared governance of faculty and students. It does not argue that speech can never create a hostile environment, nor that all speech is protected, only that matters of speech in the university always require attention to academic freedom and that academic freedom is best secured through robust shared governance and due process.

Building on this work, our comments are limited to the field of higher education. In what follows we offer recommendations based on the specific content of the DOE's proposed regulations. But first we contextualize these technical debates within the AAUP's overarching commitments to a campus life where faculty and students enjoy academic freedom, due process, and shared governance.

While some of the DOE's proposed regulations technically comport with recommendations made in the AAUP's 2016 report, we want to emphasize that narrow agreement on a legal rule or standard is not indicative of what counts as inequality and how to redress it. The AAUP is committed to abolishing all forms of systemic discrimination on campus while securing and promoting academic freedom, due process and shared governance. The DOE proposed regulations ultimately fail to specify the importance of academic freedom and shared governance for Title IX proceedings. Moreover, we object to proposed regulations that unduly narrow the scope of protections against sexual harassment.

As our 2016 report notes, while colleges, universities, and the DOE focus on the sexual dimensions of sex discrimination, the plain language of Title IX is meant to protect those on campus from unequal access to educational resources, wage disparities, and inequitable representation across the university system. To these ends, we again caution against the extraction of gender equity from more comprehensive assessments of the bases for inequality—including race, class, sexuality, gender identity, disability, and other dimensions of social difference—both on and off campus. As a result, we make our recommendations on the specific provisions of the proposed regulations, the sum of their parts, and the methods of their institutional enactments.

The AAUP encourages the DOE as well as colleges and universities, to take note of the recommendations in our 2016 Title IX report and improve the working and learning conditions of all campus constituents. This includes fully committing to interdisciplinary learning on campus by adequately funding gender, feminist, and sexuality studies, as well as allied disciplines, as part of an effort to teach about all forms of inequality, including inequalities of race, gender identity, disability, class, geographic location, and sexual orientation.

## II. AAUP's COMMENTS ON SPECIFIC PROVISIONS OF THE PROPOSED REGULATIONS

### A. *§106.6(d) protections for freedom of speech, academic freedom, and due process should be strengthened.*

1. *The proposed regulations should recognize that academic freedom is central to faculty speech.* Constitutional protections are addressed in §106.6(d). There we find only a gesture to the First Amendment of the Constitution, but no real resolution of the “significant confusion” between individual rights and the obligations of Title IX that the proposal declares to be a problem with the existing regulations. The question of speech as it pertains to faculty is not just a matter of the First Amendment, but also—and here is a “unique circumstance” that the new regulations fail to consider—of academic freedom. Academic freedom is the right, recognized by the courts as “a special concern of the First Amendment” that protects faculty as producers and transmitters of the knowledge that advances the common good. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). Academic freedom, both inside and outside the classroom in public and private universities, pertains to the proposed regulations.

a. **Speech inside the classroom.** Faculty are responsible for the contents and conduct of teaching. Their faculty peers are in the best position to judge whether or not their classroom speech and course content are protected by academic freedom. In several cases (e.g. Teresa Buchanan/LSU; Patti Adler/University of Colorado-Boulder), university administrators have taken disciplinary action against faculty based on student objections that a teacher's use of language or examples were sexual harassment when they patently were not. Nor did their words constitute discrimination based on sex. The student complaints have had to do with religious or ideological objections to what was being taught, not to its purported sexual content. Gender studies departments and other disciplines that have long worked to improve campus culture by teaching about issues of systemic inequity—including those of sex, sexuality, race, class, and gender identity, among others—are likely to be disproportionately affected by Title IX

complaints. While such topics may be offensive or uncomfortable to some students, their content is serious and scholarly and rests on the expertise of the teacher, whose judgments on scholarly matters are protected by academic freedom.

**b. Speech outside the classroom.** Faculty expressions of opinion outside classroom venues have also been labeled “sexual harassment” by students and/or administrators disagreeing with the opinion being expressed (e.g. Laura Kipnis/Northwestern University; Alice Dreger/Northwestern University). The claim of “sexual harassment” (having to do neither with sex nor discrimination) then led to unwarranted investigations or punitive actions by administrators. The expression of opinion is not only a First Amendment right, but one that has to do with academic freedom in public and private colleges and universities —the right of a faculty member to comment on practices and policies that are relevant to, but also extend beyond, the walls of the university. These kinds of cases point to the need for Title IX coordinators with experience in the workings of the university as an academic institution.

2. ***The proposed §106.6(d) should be amended to provide positive protection of free speech, academic freedom, and due process.*** The amended regulation should retain provisions to this effect that were contained in the OCR 2001 Revised Sexual Harassment Guidance. AAUP recommends the following amended proposed §106.6(d) [AAUP recommendations in italics]:

§106.6(d) *Protections of free speech, academic freedom, and due process.*

Nothing in this part *permits* a recipient to:

- (1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;
- (2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or
- (3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

AAUP further recommends that the DOE regulations should add the following requirement to §106.6(d):

*In regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), a recipient, whether public*

*or private, must formulate, interpret, and apply its rules so as to protect academic freedom, free speech, and due process.*

***B. §106.8(a) should be amended to clarify that Title IX Coordinators should be knowledgeable about the workings of the university and experienced in dealing with relationships among students, faculty, and other employees.***

Academic freedom requires the intimate knowledge of the principles and practices of the university as experienced by faculty as well as other members of the community—indeed, in our view, faculty are appropriate candidates for the position of Title IX coordinator. Their knowledge of the workings of the university gives them the insight to distinguish between “sufficiently serious” claims of discrimination and ones that do not merit further scrutiny under Title IX—especially as they pertain to the teaching function of the faculty. This is a position that rather than being confined to a single administrator, should be shared by several members of the university community with experience dealing with relationships among students, faculty, and other employees. These people should possess insight into teaching as well as local knowledge of racial, class, and other campus social dynamics.

There is a need in the new regulations for sensitivity to power differentials beyond the obvious faculty/student ones. In some cases, Title IX has given disproportionate power to student accusations, especially on matters of speech. And in these circumstances, those teaching courses on gender, sexuality, and ethnic studies have been accused of “sexual harassment,” when the charges have ultimately proven to be about political or religious differences, not instances of discrimination or the creation of a “chilly climate.” There is a difference between the unacceptable misogynist comments (irrelevant to the course material at hand) of some professors and the comments about gender difference (based on scientific findings and lived experience) of a teacher in a course devoted to that issue. Title IX coordinators, in the position to make the very first assessments of the validity of an accusation, need to be sensitive to these matters. The training received by such coordinators requires not just matters of risk and liability, but insight into how universities and shared governance work, how university curriculum is decided, and what counts as serious academic inquiry.

***C. The proposed amendment to §106.12(b) regarding exemptions for religious institutions should be rejected.***

§106.12(a) of the current regulations restate the statutory provision that Title IX “shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.” The proposed amendment would eliminate the current §106.12(b)

requirement that an educational institution seeking an exemption shall submit a written statement to the DOE identifying the Title IX regulations that “conflict with a specific tenet of the religious organization.” **This proposed amendment to §106.12(b) should be rejected.** The current provision is a reasonable requirement to ensure that any claimed religious exemption is sufficiently supported by a specific tenet of the religion. It is difficult to conceive of a religious tenet that is inconsistent with prohibiting sexual assault and other forms of sexual harassment. At the very least, it is certainly reasonable to require an educational institution to identify how adopting and enforcing policies against sexual assault and other forms of sexual harassment is in conflict with specific religious tenets.

***D. The proposed §106.30 provides an overly narrow definition of “sexual harassment” and does not adequately distinguish speech and conduct.***

The proposed definition of “sexual harassment” unnecessarily limits the original mandate of Title IX to address discrimination based on sex. Although sexual harassment may be one form that discrimination takes, it is not the only one. Figures on hiring and promotion, salary, and other indices of gender inequality demonstrate the existence of explicit and implicit biases. Data on faculty and students in math, science and engineering programs show that these fields still do not practice gender equity. The over-emphasis on the sexual aspects of sexual harassment has distorted Title IX’s mission which was meant to address discrimination based on sex by supplementing Title VII in the field of education.

That said, the definition of sexual harassment does not resolve the “significant confusion,” as noted in our comments on §106.6(d) between constitutional rights of free speech and academic freedom, on the one hand, and accusations and investigations of sexual harassment, on the other. Although sexual harassment falls along a wide spectrum, the DOE’s failure to adequately distinguish between speech and conduct risks both punishing speech that falls within protections of academic freedom, and failing to punish conduct that would likely fall within Title VII’s definition of a hostile environment that constitutes sex discrimination. This issue is discussed below, as are other problems with the proposed definition of sexual harassment under §106.30.

1. ***Speech and conduct raise different issues.*** The AAUP recognizes that what constitutes a hostile environment has been contentious under both Title VII and Title IX. Nonetheless, the higher education context raises distinctive issues, particularly when speech rather than conduct is in question. DOE regulations must recognize the different issues at stake between complaints about speech and conduct. The regulations must be careful to strike the right balance between

preventing or punishing hostile-environment sexual harassment and protecting academic freedom and free speech. In cases involving speech, the proposed regulations must ensure that speech and conduct are not conflated and that enforcement of Title IX accommodates protections for academic freedom and free speech. It must be made clear that rights of free speech and academic freedom continue to apply in cases that do not involve assault or other forms of conduct, but are otherwise alleged to constitute hostile environment. In an amicus brief filed in a case in which a public university teacher was accused of sexual harassment because she occasionally used profanity or sexual references in class, the AAUP argued: “The use of provocative ideas and language to engage students, and to enliven the learning process, is well within the scope of academic freedom protected by the First Amendment. Many things a professor says to his or her students may ‘offend’ or even ‘intimidate’ some among them. If every such statement could lead to formal sanctions, and possibly even loss of employment, the pursuit of knowledge and the testing of ideas in the college classroom would be profoundly ‘chilled’ .... Overly broad or vague restrictions of speech in the university infringe academic freedom by creating a chilling effect on faculty willingness to experiment and take risks in their teaching and research.” As noted in our earlier comments on §106.6(d), protection of academic freedom is essential for faculty in both public and private universities.

2. ***The proposed regulations place a disproportionate emphasis on student-on-student conduct.*** The definition of sexual harassment in §106.30 includes sexual harassment that constitutes quid pro quo (Subsection 1), hostile environment (Subsection 2), and sexual assault (Subsection 3). The proposed regulations, however, pay little attention to the different issues and power dynamics involved in cases of alleged faculty-on-faculty, faculty-on-student, student-on-faculty, and student-on-student harassment. The emphasis of the proposed regulations is placed on student-on-student sexual assault, which may raise issues that are not found in cases involving faculty speech for example. See our earlier comments on §106.6(d).
3. ***A standard of “severe or pervasive” should be used rather than “severe, pervasive, and objectively offensive.”***  
§106.30, Subsection 2 states that sexual harassment includes, “unwelcome conduct on the basis of sex that is so severe, pervasive, *and objectively offensive* that it effectively denies a person equal access to the recipient’s education program or activity.” (emphasis added). The provision of “unwelcome conduct” appropriately considers a complainant’s subjective response to speech or conduct alleged to constitute sexual harassment. To prove the objective factor of a hostile

environment claim, however, we recommend that “severe or pervasive” is more appropriate than a standard of “severe, pervasive, and objectively offensive.” “Severe or pervasive” is an objective standard to determine whether a person in the position of the complainant would reasonably have found that speech or conduct created a hostile environment. The “severe or pervasive” standard provides protections against allegations based on the potentially idiosyncratic beliefs of a complainant about what constitutes appropriate speech. As we have already noted, special attention must be given to allegations involving faculty free speech and academic freedom.

The Supreme Court has recognized that though offhand comments of a sexual nature might not rise to the level of harassing behavior prohibited by Title VII, there is no requirement that in order for the behavior to be considered harassing it has to be both severe and pervasive. One serious incident of sexual misconduct may indeed constitute sexual harassment, such as the rape of a student by another student at a fraternity party, or the quid pro quo demand of a professor to a student for sex in return for a grade.

4. **“Effectively denies” is unduly narrow.** The DOE defines sexual harassment as “[u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.” Using “effectively denies” instead of “limits” unduly narrows the scope of protections by introducing a lower standard of judgment about what counts as harassment. **We thus recommend substituting “limits” for “effectively denies.”**

5. ***A standard of “knew or should have known” should be used rather than the proposed “actual knowledge” standard under §106.30. A “knew or should have known” standard under §106.30 should be defined in a way that accurately reflects the institutional structures in higher education.*** The DOE’s proposed “actual knowledge” standard is inappropriate, as it creates an incentive for the educational institution to look the other way to avoid liability rather than addressing problems of sexual harassment or other forms of gender inequality. The AAUP recommends that the DOE amend its proposed regulations to use a “knew or should have known” standard to define an educational institution’s responsibility to respond to reports or complaints, whether formal or informal, alleging sexual harassment.

The AAUP recommends, further, that the proposed regulations should clarify that the DOE will find that institutions of higher education “knew or should have

known” of reports made to employees and officials whose job duties are directly related to recommending or instituting corrective measures on behalf of the college or university. This would include all employees in the Title IX office who report to the Title IX Coordinator or other employees whose duties or responsibilities are directly related to recommending or instituting corrective measures. For example, Title IX complaint investigators, hearing panel members, or college deans may not have authority to institute corrective measures, but may recommend that such corrective measures be instituted.

**6. *Shared governance should play an important role in institutional planning for Title IX compliance.*** Colleges or universities may choose different types of institutional structures to address issues of sex discrimination, including Title IX compliance. As discussed more fully below, the AAUP urges the DOE to endorse the important role of shared governance in college and university development of policies in compliance with Title IX. This would enable faculty governance bodies, such as Faculty Senates, to share their institutional knowledge and disciplinary expertise through participation in institutional planning of structures that address sex discrimination and Title IX compliance. Part of that planning process would involve issues about which employees and officials have duties or responsibilities that are directly related to recommending or instituting corrective measures.

**7. *The proposed §106.30 should be amended to prohibit college or university policies that make it mandatory for all faculty to report any information of possible sexual harassment to the Title IX coordinator or other university official.*** The DOE’s proposed definition of “actual knowledge” alludes to educational institutions’ mandatory reporting policies by stating, “[t]he 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.” Thus, under the proposed §106.30, the college or university administration may still require faculty to report information that they may hear about incidents involving sexual harassment. The college or university administration may adopt broad mandatory reporting requirements and discipline faculty for failing to report information that the faculty member considers confidential. This is the case in many colleges and universities.

Mandatory reporting policies have a strong and negative impact on college and university faculty members, given their teaching and advising relationships with students. After having had a disturbing experience that may constitute sexual harassment, a student often goes to a trusted faculty member to discuss the

experience and to seek advice. It is also common that students discuss these issues with underrepresented faculty—including those who identify as women, queer, transgender, nonbinary, or are members of racial or other minorities. These faculty often teach in disciplines related to feminist studies, sex discrimination, or other fields dedicated to researching social injustice. The faculty member’s ability to be helpful to the student depends on the trusting nature of the relationship, where the faculty member is able to be a sounding board, to help the student think through various options, and to respect the student’s choices about whether and how to respond to the situation.

The AAUP report, “The History, Uses, and Abuses of Title IX” (2016), addresses this problem, explaining that “[s]uch overly broad policies compel faculty members to violate confidentiality in their relationships with students.” The AAUP report recommends that “[c]ollege and university policies should not require all faculty members to serve as mandatory reporters under Title IX.” Additionally, “[i]f many students view faculty members as ‘first responders’ in their advising and pedagogical capacities, they should be explicitly classified by institutional policies as ‘confidential’ rather than ‘mandatory’ reporters.”

***E. The proposed §106.44 should not use a “deliberately indifferent” standard to evaluate “Recipients’ response to sexual harassment.”***

1. ***The DOE should substitute a “reasonableness” standard for the proposed “deliberately indifferent” standard to determine recipients’ liability in compliance processes.*** Since there are important differences between federal agency compliance actions and private damage lawsuits, wholesale adoption of the Supreme Court’s legal liability standards in private damage suits (*Gebser* and *Davis*) may not adequately further the DOE’s broader enforcement goals. The DOE has a broad mandate under Title IX to ensure that students and employees are not limited in their access to benefits of the educational institution nor subject to sex discrimination. The ability of private plaintiffs to seek civil redress for damages caused by an educational institution’s response to alleged sexual misconduct does not necessarily address the structures of discrimination that make such conduct possible.

Indeed, the DOE “[r]ecogniz[es] that [it] has broad authority under the Title IX statute to issue regulations that effectuate the provisions of Title IX” by “retaining and propos[ing] to add in the proposed regulation provisions that would clarify that...schools must take other actions that courts do not require in private litigation under Title IX (e.g., requiring a designated Title IX Coordinator, requiring written grievance procedures, describing the supportive measures that a

non-deliberatively indifferent response may require, requiring a school to investigate and adjudicate formal complaints, and other requirements found in proposed §§106.8, 106.44, and 106.45).” Requiring educational institutions to take positive actions to create due process structures and to provide support measures is more appropriately described as requiring the institutions to take reasonable actions to comply with Title IX. A properly defined standard of “reasonableness”—one with deference to the standpoint of the complainant—is consistent with the DOE’s role as an administrative agency enforcing Title IX in the public interest. The Supreme Court defines a reasonable person from the perspective of the complainant [*Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998)]—not the reasonable perspective of the administrator. Such a “reasonableness” standard could easily provide an appropriate level of deference to decisions that an institution reaches in compliance with DOE due process requirements and other supportive measures required by the DOE.

***2. The DOE should consider shared governance as a factor in determining whether a college or university has met a reasonableness standard under Title IX.*** The DOE explains its proposal to apply a “deliberate indifference” standard as a way to “[hold] recipients accountable without depriving them of legitimate and necessary flexibility to make disciplinary decisions and to provide supportive measures that might be necessary in response to sexual harassment.” The DOE continues: “Moreover, the Department believes that teachers and local school leaders with unique knowledge of the school culture and student body are best positioned to make disciplinary decisions....”

The AAUP urges the DOE to further amend proposed §106.44 to consider as a positive factor that a higher education institution engaged in shared governance processes to develop and implement policies in compliance with Title IX. Shared governance is a well-recognized norm in higher education that brings the unique knowledge and expertise of the faculty into the educational institution’s policy-making and decision process. In the context of Title IX, the shared governance process provides flexibility for faculty governance bodies to work with the administration and students to create systems and structures that fit best in the particular culture and conditions of the college or university. Shared governance can build on existing institutional structures, such as disciplinary hearing boards by faculty peers. [See, AAUP Statement on Due Process in Sexual Harassment Complaints (1994)]. Shared governance may also be used to develop new policies that address sexual harassment, such as the University of Oregon’s “Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy,” which was developed by the Faculty Senate. Other policies and programs developed through shared governance could include education, restorative justice

and alternative dispute resolution (ADR) programs to address issues of sexual harassment and other sex-based systemic inequalities.

**F. §106.45 *Grievance procedures for formal complaints of sexual harassment should provide due process, including the use of the “clear and convincing” evidence standard.***

1. ***The “clear and convincing” evidence standard should be used as the appropriate level of proof.*** The AAUP has consistently stated that regardless of the allegation, the “clear and convincing” evidence standard (substantially more likely to be true than untrue; highly probable) is appropriate in cases against faculty members facing disciplinary sanctions including dismissal. In cases alleging sexual harassment or sexual assault against a faculty member, the risk to livelihood and reputation is substantial. The clear and convincing standard is appropriate in cases involving a substantial risk of loss (money, property, reputation, fundamental liberty interests) and is needed to enhance due process protections. Adjudication of serious life-altering allegations requires this more stringent standard. In its letter to the Office for Civil Rights (OCR) in June 2011, the AAUP explained that, “[s]ince charges of sexual harassment against faculty members often lead to disciplinary sanctions, including dismissal, a preponderance of the evidence standard could result in a faculty member’s being dismissed for cause based on a lower standard of proof than what we consider necessary to protect academic freedom and tenure. We believe that the widespread adoption of the preponderance of the evidence standard for dismissal in cases involving charges of sexual harassment would tend to erode the due-process protection for academic freedom.” [June 27, 2011, from Gregory F. Scholtz, Director of the AAUP’s Department of Academic Freedom, Tenure, and Governance to former Assistant Secretary for Civil Rights Russlynn Ali. <https://d28htnjz2elwuj.cloudfront.net/pdfs/7ea041e49156306ba76cb62a4f8c6c65.pdf> ]

The “clear and convincing” standard will also guard against well-documented racial bias in sexual harassment cases for students and faculty alike. This higher standard of proof can help ensure that Title IX enforcement initiatives do not, even unwittingly, perpetuate race-based biases in the criminal justice system, which disproportionately affect men who are identified as racial minorities.

2. ***Shared governance is essential to providing due process.*** The provisions on due process in §106.45 neglect any mention of long-established procedures for faculty governance, as, for example, those articulated by AAUP and included in faculty handbooks at most institutions of higher education:

<https://www.aaup.org/report/relationship-faculty-governance-academic-freedom> and <https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure>

a. ***Faculty governance should be part of all stages of developing and implementing Title IX-related processes.*** The crucial guarantee of due process—the “unique circumstance” that the proposed regulations fail to consider—is the need for faculty involvement in the determination of responsibility for actions of which a faculty member is accused. Of course, there is nothing in these established processes to prevent a jury of one’s peers from acting protectively rather than objectively—as cases of the protection of celebrity faculty (e.g., G. Marcy at UC Berkeley) by colleagues and administrators have demonstrated. Still, the inclusion of other faculty at the earliest stages of an accusation against a faculty member provides for those with an understanding of how the university operates to bring that knowledge to bear on the case (what academic freedom means; what constitutes harassment in the classroom setting and in other asymmetrical power relationships between faculty and students). In many instances we examined, non-faculty administrators or attorneys specializing in the management of liability were the only people consulted in cases that required knowledge of the practices and principles of the university—knowledge these administrators or attorneys did not have. Shared governance is central to developing and implementing Title IX policies and procedures. The AAUP recommends that any Title IX investigation of faculty begin with referral to established faculty governance committees or, absent their existence, that such committees be mandated as part of Title IX requirements. See, AAUP - Sexual Harassment: Suggested Policy and Procedures for Handling Complaints, <https://www.aaup.org/report/sexual-harassment-suggested-policy-and-procedures-handling-complaints>

b. ***All faculty members should receive the same due process protections.*** The proposed regulations do not take into account that college and university faculty “employees” hold different statuses (tenured, tenure track, non-tenure track, contingent). All faculty members should receive the same due process protections, no matter what their status, but they usually do not. Those without the protections of tenure are usually not granted the due process and grievance procedures customarily enjoyed by tenured and tenure-track faculty. The DOE’s proposed regulations should explicitly require equal treatment in due process protections for all levels of faculty employees.

c. **“Emergency removal” [§106.44(c)] and “administrative leave” [§106.44(d)] are disciplinary actions that should be carried out with due process protections recognized in §106.45 (b)(1)(iv).** §106.45(b)(1)(iv) adds to Title IX provisions for grievance procedures. This includes “a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.”

Yet, §106.44(c) allows for emergency removal of an accused harasser based on “safety and risk analysis” before the process of determination of responsibility has begun. What counts as safety and risk is not adequately defined. In a number of cases in which a faculty member’s speech are the grounds for the accusation, the university has, upon receiving the complaint, removed them from the classroom and the campus (e.g., Buchanan and Adler). In such cases, the only apparent threat is the one to the university’s reputation; there is no imminent danger to students or colleagues. When speech is the issue, we think there needs to be a clearer definition of what counts as an emergency.

Furthermore, §106.44(d) states that “nothing in §106.44 precludes a recipient from placing a non-student employee on administrative leave during the pendency of an investigation.” Yet this provision, too, may constitute a punitive action, a conclusion about the guilt of the faculty member before an investigation has begun. In practice, administrative leave is no different from emergency removal; both most often rest on the university’s desire to protect its reputation rather than to offer protection to students or due process guarantees to an accused faculty member. The proposed regulations need to be more specific about the conditions under which administrative leave and emergency removal are appropriate. Further, given the serious harm that suspensions, even with pay, have on a faculty member’s position and reputation, appropriate due process protections should apply prior to the decision to suspend.

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