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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
87 FR 41390

Comment submitted by:

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

September 10, 2022

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TABLE OF CONTENTS

TABLE OF CONTENTS – *Continued*

Page

TABLE OF CONTENTS – *Continued*

Page

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I. INTRODUCTION

The American Association of University Professors (AAUP) submits these comments in response to the U.S. Department of Education's proposed amended regulations implementing Title IX of the Education Amendments of 1972. The AAUP is the oldest organization of its kind, representing faculty and graduate employees in institutions of higher education. 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. The AAUP is also committed to abolishing all forms of systemic discrimination on campus. We thus caution against the extraction of gender equity from more comprehensive assessments of the bases for inequality–including race, class, disability, citizenship status, and other dimensions of social difference–both on and off

campus. Legal rules and standards aimed at addressing gender and sexual inequities must be considered and evaluated for their impact on all forms of systemic discrimination. While the NPRM includes several positive changes in Title IX policies and procedures—including the welcome clarification that Title IX's prohibition on discrimination based on sex applies to discrimination based on sexual orientation and gender identity—we must emphasize that agreement on a legal rule or standard is not indicative of agreement on what counts as inequity.

The AAUP encourages the Department of Education (ED) as well as colleges and universities to take note of the recommendations in our 2016 Title IX report aimed at improving the working and learning conditions of all campus constituents.[1] 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, disability, class, caste, gender identity, geographic location, and sexual orientation. Without this commitment, Title IX fails.

Our recommendations respond to the specific provisions of the proposed regulations, the sum of their parts, and the methods of their institutional enactment. Specifically, the AAUP finds that the proposed changes do not adequately guard against the many forms of bias—in perceptions, in reporting, in investigating, and in determining whether sex discrimination occurred —that can arise in Title IX cases. Any policy or procedure that does not actively work to mitigate bias will, in effect, reinforce bias and discrimination. In cases of sexual misconduct in particular, the risks of bias and

[1] See, *The History, Uses, and Abuses of Title IX* (2016), https://www.aaup.org/file/TitleIXreport.pdf

discrimination are well documented. Those who are stereotyped as hypersexual, aggressive or threatening (especially Black and Latinx men or masculine-identified people) or perceived as sexually available or otherwise sexually compliant (including LGBTQ people, Asian American and Black women/feminine presenting people) will be much more likely to face bias in such cases.

In addition, whereas the ED's proposed regulations emphasize students, the AAUP's comments relate to faculty and other academic professionals (including all teaching and research faculty, librarians, and graduate student employees), as well as staff, because Title IX affects them in multiple ways. Beyond protected categories like race and gender, the proposed changes must be responsive to how job categories and rank can also create vulnerabilities to sex discrimination. Many, if not most, discussions of Title IX, cast faculty as perpetrators of sex discrimination with students as their inevitable targets, and staff on campus are treated, at best, as afterthoughts. This unidimensional perspective ignores the multiple ways in which faculty are affected by the goals of Title IX and its enforcement. Faculty are central to educating students and to promoting students' equal access to educational environments free from sex discrimination or sexual misconduct. Faculty may be subject to complaints filed against them by students, colleagues, or other employees. Faculty may also file Title IX complaints against administrators, colleagues, employees, or students. Accordingly, the AAUP recommends not only robust protections for all students, but equally robust protections for all faculty, academic professionals, or other employees as part of the Title IX mission. The AAUP further recommends that the ED affirm that all efforts to implement, apply, and enforce Title IX must proceed with sensitivity to differences among and between faculty (adjunct

or tenure-track; tenured or untenured; faculty or staff; graduate student or staff; etc.) that affect sex discrimination claims and adjudications.

Each of the major proposed changes in Title IX must be assessed in these ways for their impact on broader equity goals in postsecondary education. The comments below address how specific provisions of the proposed Title IX regulations might better enact those goals. It is the AAUP's position that the interpretation and implementation of Title IX must occur alongside careful and increased consideration of all forms of systemic discrimination and inequity in academia and that such consideration would be best accomplished through a robust commitment to shared governance and academic freedom.

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

A. RECOMMENDATION: *Section 106.6(d) should be amended to provide positive protections for freedom of speech and academic freedom.*

The Title IX regulations do not adequately protect faculty academic freedom. Although the commentary in the NPRM discusses academic freedom, the proposed Title IX regulations do not make any reference to academic freedom. In institutions of higher education, academic freedom is essential to protect faculty speech inside and outside the classroom, which enables faculty to carry out the public mission of colleges and universities. As the US Supreme Court has recognized, "[t]he Nation's future depends upon leaders trained through wide exposure to th[e] robust exchange of ideas" that takes place in higher education. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603

(1967). Thus, academic freedom is "of transcendent value to all of us," and is "a special concern of the First Amendment." *Id.*

Overly broad applications of sex-based harassment definitions may be applied to censor or punish faculty for presenting provocative ideas and language that are well within the scope of academic freedom. Gender studies departments and other disciplines that have long worked to improve campus culture by teaching about issues of systemic inequity are likely to be disproportionately affected by Title IX, particularly where definitions of sex-based harassment are not clearly limited by rights of academic freedom. Such concerns also apply to speech outside the classroom. Academic freedom protects faculty members' right to comment on practices and policies that are relevant to, but also extend beyond, the walls of the university. Clarifying that sex-based harassment policies and their implementation must not restrict academic freedom is essential to avoid a chilling effect on faculty willingness to experiment and take risks in their teaching, research, and in expressions of opinion in other venues. It is also necessary to ensure that established, although sensitive, subjects – from rape law to global histories of sexuality – continue to be researched, discussed, and taught.

The AAUP recommends that §106.6(d) be amended to include provisions contained in the Office for Civil Rights (OCR) 2001 *Revised Sexual Harassment Guidance*, which clarifies that "all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that are not directly subject to the First Amendment." The OCR 2001 *Guidance* explains:

> Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to

> establish a sexually hostile environment under Title IX. In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program.
>
> Moreover, 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 school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights* [emphasis added].

The 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 ED 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, 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. RECOMMENDATION: ***Section 106.8(d)(4) of the NPRM should be amended to clarify that Title IX Coordinators must be knowledgeable about the workings of the university and experienced in dealing with relationships among students, faculty, and other employees. They should not be simply agents of the administration, instead they should be responsible to a committee that includes at least one faculty member.***

The proposed regulations include training for the Title IX Coordinator's responsibilities but make no mention of the special training that should be required at educational institutions, including colleges and universities. This is a serious oversight.

Title IX Coordinators are too often administrators – including lawyers or risk assessment experts – with little insight into the complexities of campus life. They are often perceived to be responsible only to the administration, when in fact they should have input from those who have experience dealing with relationships among students, faculty, and other employees. We recommend the Title IX Coordinator be responsible to a committee whose membership includes at least one faculty member. In this way, the Coordinator will gain insight into teaching, as well as local knowledge of racial, class, and other campus social dynamics. 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 experience and training received by such Coordinators requires not just knowledge of Title IX regulations, or of matters of risk and liability, but also insight into how universities and shared governance work, how the university curriculum is decided, and what counts as serious academic inquiry. A Title IX committee would provide an important supplement to this experience and training.

C. RECOMMENDATION: ***Section 106.12(b) should be amended to reinstate the requirement that an educational institution controlled by a religious organization seeking an exemption shall submit a written statement to the Department of Education identifying the Title IX regulations that "conflict with a specific tenet of the religious organization."***

In the current regulations, §106.12(a) restates 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 current Title IX regulations also reflect a 2020 amendment by the ED eliminating the §106.12(b) requirement that an educational institution seeking an exemption shall submit a written statement to the ED identifying the Title IX regulations that "conflict with a specific tenet of the religious organization."

The AAUP continues to object to the 2020 amendment to §106.12(b), as it eliminated 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 sex discrimination such as sexual assault and other forms of sex-based harassment. At the very least, it is certainly reasonable to require an educational institution to identify how regulatory requirements for adopting and enforcing policies against sex discrimination are in conflict with specific religious tenets.

D. RECOMMENDATION: ***The AAUP recommends amending proposed §106.44(c)(2)(ii), (iii), to prohibit institutions of higher education from adopting policies that make all faculty members mandatory reporters. Instead, we recommend adopting the current University of Oregon reporting system as a model. Institutions of higher education should restrict mandatory reporting to "designated reporters," with that group being defined in consultation with faculty governance processes, collective bargaining, and collaborative engagement with students and others invested in addressing campus inequities.***

The current Title IX regulations permit, but do not require, postsecondary institutions to require all faculty to be mandatory reporters – that is, to report to the Title IX Coordinator any information the faculty hear about that may constitute sex-based harassment. The current regulations have led university administrators to adopt broad mandatory reporting requirements that carry with them potential disciplinary measures for faculty who fail to report information – including information that the student has asked faculty to keep confidential. The proposed §106.44(c)(2)(ii) goes even further by mandating that postsecondary institutions adopt such blanket reporting policies. The proposed regulation would require, at a minimum, that "any employee…who has responsibility for administrative leadership, teaching, or advising…notify the Title IX Coordinator when the employee has information about a student being subject to conduct that many constitute sex discrimination under Title IX."

While we understand that mandatory reporting is seen as a way to prevent the well-documented deliberate neglect of complaints of sexual harassment by faculty, staff, and administrators (who are often protecting colleagues or the reputation of the institution), we find that the proposed broad mandate is an ill-advised over-correction.

Policies requiring all faculty to serve as mandatory reporters violate the autonomy of the complainant and their ability to get advice while requesting confidentiality. Such

an overly broad mandatory reporter policy may have a chilling effect on a complainant's willingness to share their experience and to seek advice because it takes decision-making out of their hands. Making all faculty mandatory reporters also threatens to undermine a complainant's trusting relationship with a faculty member, colleague, or supervisor. There is an important difference between a faculty advisor or colleague providing information about Title IX resources, and the requirement that they notify university authorities about what they have learned.

In the case of students, the faculty member's ability to be helpful 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. Students in postsecondary institutions are, after all, adults and deserve this respect. Further, it is common for students to discuss their experiences of discrimination with underrepresented faculty—including those who identify as women, queer, transgender, nonbinary, or are members of racial or other minorities. These faculty members often teach in disciplines related to feminist studies, sex discrimination, racial inequity or other fields dedicated to researching social injustice. Evidence suggests they are more likely to be susceptible to university discipline if they do not conform to reporting requirements.

Similar concerns pertain to mandatory reporting by faculty about disclosures made by colleagues or other employees. The proposed §160.44(c)(2)(iii) in the NPRM gives the postsecondary institution the discretion to choose the option of requiring all faculty to report information about sex discrimination experienced by employees (subsection (A)) or requiring that faculty provide employees with information about how

to report an incident (subsection (B)). Given college and university administrations' penchant for imposing blanket mandatory reporting policies, this proposed regulation makes it likely that many postsecondary institutions will simply impose the overly broad mandatory reporting option of subsection (A). Such broad mandatory reporting policies, however, do not respect employees' autonomy to choose whether to report an incident to the Title IX Coordinator. Making all faculty mandatory reporters will create a chilling effect on employees' ability to talk with a trusted colleague. Thus, the AAUP's recommendation for amending the NPRM also applies to §160.44(c)(2)(iii).

The AAUP recommends amending proposed §106.44(c)(2)(ii) and (iii) to *prohibit* institutions of higher education from adopting policies that make all faculty members mandatory reporters. Instead, we recommend that the NPRM should require that postsecondary institutions restrict mandatory reporting to "designated reporters," with the scope of that group being defined in consultation with faculty through shared governance processes, collective bargaining, and collaborative engagement with students and others invested in addressing campus inequities, and consistent with any other federal or state law reporting requirements.

The AAUP's recommendation is contained in our 2016 report, *The History, Uses and Abuses of Title IX*. It is also supported by evidence-based research revealing that mandatory reporting policies can have a strong negative impact on those (whether students, faculty or other employees) experiencing sex discrimination, increasing traumatic impacts rather than alleviating them.[2] In response to these studies and through

[2] Kathryn J. Holland, Jennifer J. Freyd, and Elizabeth A. Armstrong, *Mandatory Reporting Is Exactly Not What Victims Need*, The Chronicle of Higher Education (July 22, 2022), https://www.chronicle.com/article/mandatory-reporting-is-exactly-not-what-victims-need

consultation with faculty and students about how best to implement a reporting process, several postsecondary institutions have adopted constructive alternatives to blanket requirements that make all faculty mandatory reporters. The current University of Oregon (UO) policy, developed through shared governance consultation, ought to serve as a model for other institutions. The UO policy identifies a list of "Designated Reporters," who are "employees with authority to address prohibited conduct" and who are obligated to inform the Title IX Coordinator of what they have learned from students or employees about instances that may be prohibited discrimination.[3] Most faculty are not so designated. Presumably, designated reporters would also be required to report information not only about individuals, but about campus activities such as clubs and sports where discrimination might be a collective problem. Most university employees, including most faculty, are "Assisting Employees," who do not share information disclosed to them unless the individual requests that the information be reported, or if there is an immediate "threat to the health and safety of any person."[4] "Assisting Employees" are required to provide information about support resources to an individual who makes a disclosure, and to ask them if they want assistance in submitting a report to the Title IX office. A third category are "Confidential Employees," who are not permitted to share information confided to them, with specific exceptions related to an imminent threat to health or safety. "Confidential Employees" include attorneys, employees of university health services, and Care and Advocacy program staff. UO provides written guidelines and makes training available to all of these categories.[5] The mandatory

[3] https://investigations.uoregon.edu/employee-responsibilities.
[4] https://investigations.uoregon.edu/employee-responsibilities.
[5] https://investigations.uoregon.edu/employee-responsibilities; https://investigations.uoregon.edu/faq-about-reporting#7. Other institutions with similar policies

reporting requirements in 106.44(c)(2)(ii) and (iii) would be a real setback to these improvements that create more limited mandatory reporting policies for faculty and employees.

Postsecondary institutions can better achieve Title IX's commendable goal of remedying sex-based discrimination if they more resolutely focus on creating and implementing educational initiatives and recommending procedural models that involve faculty members in more relevant ways. These should include training for the campus community in how to identify and address instances of sex discrimination and sex-based harassment. In addition, Title IX policy development at the institutional level should support ways for faculty members to engage students who are concerned about how best to achieve gender and sex equity on campus. They could work collaboratively to address those issues without violating confidentiality, academic freedom, and due-process rights. This is critical not only for shared governance but also for the educational mission of institutions of higher education.

E. RECOMMENDATION: ***Disciplinary actions included in §106.44(g) ["support measures that burden a respondent", §106.44(h) ["emergency removal"], and §106.44(i) ["administrative leave"] should be carried out with due process protections recognized in §106.45 and §106.46.***

Section106.45(b)(3) of the NPRM establishes "a presumption that the respondent is not responsible for the alleged conduct until a determination of whether sex discrimination occurred is made at the conclusion of the recipient's grievance procedures

include Cornell and Brown. See, https://titleix.cornell.edu/reporting/staff-and-faculty-duty-to-consult; https://www.brown.edu/about/administration/title-ix/get-help/i-am-responsible-employee.

for complaints of sex discrimination." Yet, §106.44 allows the recipient to take disciplinary actions against faculty and other employees before the process has begun to determine whether sex discrimination occurred. These actions may include suspensions, which constitute serious disciplinary measures that should be carried out only with appropriate levels of due process protections prior to the decision to suspend.[6]

The "supportive measures" in §106.44(g)(1) include multiple types of non-disciplinary measures that the recipient may implement after a Title IX Coordinator is notified of conduct that may constitute sex discrimination. Such supportive measures, which include counseling, campus escort services, and voluntary changes in housing, do not implicate due process concerns prior to their implementation. However, §106.44(g)(1) also permits a recipient to take actions that include "involuntary changes in…work…or any other activity." §106.44(g)(2) goes further, permitting a recipient to impose "supportive measures that burden a respondent…during the pendency of a recipient's grievance procedures." Thus, as written, both proposed provisions could include serious disciplinary actions such as suspending a faculty member from teaching one or more courses. The provision in §106.44(g)(2) that a "recipient may not impose such measures [that burden a respondent] for punitive or disciplinary reasons" does not make the actions any less "disciplinary" in their severe impact on a faculty member.

The level of due process provided in §106.44(g) does not provide adequate protections before or after taking such disciplinary actions. A recipient's decision to take disciplinary actions that fall within either §106.44(g)(1) or (2) takes place prior to

[6] See, https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure.

providing any due process. Under §106.44(g)(4), for actions covered by §106.44(g)(1), a respondent would be able to seek modification or reversal of the recipient's decision after the measure has been instituted. Under §106.44(g)(4), for an action that "burdens the respondent," "the initial opportunity to seek modification or reversal of the recipient's decision must be provided before the measure is imposed or, if necessary under the circumstances, as soon as possible after the measure has taken effect." This does not provide adequate due process. Since it constitutes an appeal to undo a decision already made, it still permits the recipient to impose the discipline prior to any appeal, and it does not describe the due process required to "make a fact-specific inquiry" to determine whether to modify or reverse the disciplinary measure.

Similar flaws exist in §106.44(h), which allows for emergency removal of an accused harasser based on an "individualized safety and risk analysis" before the process has begun to determine whether sex discrimination occurred. What counts as safety and risk that constitutes "an immediate and serious threat to the health or safety of students, employees or other persons" is not adequately defined, nor is there a description of required due process to be used during the respondent's "opportunity to challenge the decision immediately following the removal." 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.[7] 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, there needs to be a clearer definition

[7] See, e.g., *The History, Uses, and Abuses of Title IX* (2016), p. 82, at https://www.aaup.org/file/TitleIXreport.pdf

of what counts as an emergency and what due process is required prior to and after making such a decision.

Furthermore, §106.44(i) states that "nothing in [§106.44] precludes a recipient from placing an employee respondent on administrative leave from employment during the pendency of the recipient's grievance procedures." Yet this provision, too, may constitute a punitive action based on a presumption of the guilt of an employee, including a faculty member, before an investigation has begun. In practice, administrative leave is no different from emergency removal, with both often resting 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. Both are disciplinary actions that should be taken only after adequate due process is provided.

F. RECOMMENDATION: ***The proposed amendment to 106.45(b)(2) permitting a "single-investigator model" should be rejected. Section 106.45(b)(2) should retain the existing §106.45(b)(7)(i) prohibition of the decision-maker being the same person as the Title IX Coordinator or investigator.***

Before the 2020 regulations were adopted some recipients utilized a single-investigator model to resolve complaints of sexual harassment under Title IX. In this model a single person or a single team investigates the complaint, reports relevant evidence, and makes findings of fact as to whether the evidence supports a judgment that the respondent is responsible for the alleged violation(s) of the recipient's prohibition on sexual harassment under Title IX. The single investigator model was prohibited by the 2020 amendments because the ED concluded that combining the investigative and adjudicative functions in a single entity raised a needless risk of bias that would increase the likelihood of unreliable (inaccurate) outcomes – that is false-positives in which a

respondent is *incorrectly* found responsible for prohibited sex discrimination, or false-negatives in which a respondent is *incorrectly* found not responsible. As the ED noted in 2020, grievance procedures that produce unreliable outcomes are: (1) unlikely to provide individuals with effective protection from sex discrimination prohibited by Title IX; and (2) perceived as illegitimate by parties to a complaint as well as the public.

The AAUP recommends that the ED continue to require separation of the roles of investigator(s) and decision-maker(s) in Title IX grievance procedures. We agree with the ED's 2020 judgment, incorporated in §106.45(b)(7)(i), "Single Investigator Model Prohibited," that one of the purposes of this requirement "is to ensure that independent evaluation of the evidence gathered is made prior to reaching the determination regarding responsibility." 85 FR at 30308.

As the ED recognized in 2020, combining investigative and adjudicative functions in a single individual or team is likely to decrease the accuracy of a recipient's determination of responsibility because:

- Single individuals or single teams that perform both roles may experience confirmation bias and other prejudices, particularly against persons of color, whereas a model that separates the tasks of investigation and adjudication allows for checks and balances that increase the likelihood of reliable outcomes; and

- It is unrealistic to expect a single individual or single team to see their investigative report with fresh eyes, and thus conduct a fair review of their own investigative work. [85 FR at 30366].

Another factor that promotes accuracy when the investigative and adjudicative functions are separated is the economic concept of specialization that results from a division of labor. College or university personnel involved in complaint resolution could specialize in either investigative or adjudicative tasks, thereby increasing their skill level

at the assigned role – and both their effectiveness and efficiency in achieving reliable outcomes. Specializing in one role reduces the total amount of training time any one individual must undertake to perform their duties. Even at small, rural colleges where personnel must wear many hats (e.g., Title IX Coordinator also serves as Human Resources Director or Dean of Students), dividing the tasks of investigator and decision-maker among different employees will allow those employees to focus on the specific type of formal training required for a particular task.

Investigating and adjudicating complaints of sex discrimination that are alleged to occur in a classroom or other academic setting may be complicated because higher education is supposed to challenge students' deeply held beliefs – including those related to sex as it is defined by Title IX administrative and case law. In complaints that are academic in nature it is essential to have faculty members participate as both investigators and decision-makers. Unlike personnel who perform only administrative functions, the faculty are in a position to evaluate and clarify contexts that separate expression protected by academic freedom and/or the First Amendment from expression that constitutes actual sex discrimination prohibited by Title IX. A single investigator model fails to utilize faculty expertise to reach reliable outcomes.

In the 2020 regulations and preamble the ED reported several commenters asserting that small institutions lack the human resources to comply with the prohibition of the single investigator model. 85 FR at 30562. However, in 2020, as required by the Regulatory Flexibility Act of 1980, the ED analyzed the likely costs of the Title IX regulatory changes for small Institutions of Higher Education (IHE). A small two-year IHE was defined as one with an enrollment of less than 500 full-time equivalent (FTE)

students, or a four-year IHE with an enrollment of less than 1000 FTE students. Using Integrated Post-Secondary Educated Data System (IPEDS) figures on annual revenues from fiscal year 2017 and ED forecasts of the probable number of Title IX complaints IHEs would receive per year, the ED estimated that all of the regulatory changes adopted in 2020 would generate additional costs for small IHEs equal to approximately 0.28 percent of annual revenue. Based on those calculations the ED concluded that the 2020 regulatory changes – including prohibition of the single investigator model – would not place a substantial monetary burden on small schools.

In the 2022 NPRM the ED reported that some stakeholders at listening sessions and at the June 2021 Title IX public hearing again asserted that utilizing different individuals as investigators and decision-makers was "burdensome". 87 FR at 41466-41467. Stakeholders also complained that utilizing different personnel in the complaint resolution process prolonged the process because decision-maker(s) had to first familiarize themselves with the allegations and evidence in the investigative report – thus prolonging the grievance process. However, the ED's own analysis under the Regulatory Flexibility Act estimates that the average amount of time an investigator at an IHE needs to perform their duties is between 10-18 hours per complaint and the average amount of time needed by a decision-maker is 2-8 hours. If these estimates are accurate, it is clear that decision-makers do not take inordinate amounts of time to perform their tasks, leading us to question the ED's conclusion that the prohibition of the single investigator model results in burdensome costs or elongated complaint resolution processes.

Another complaint that the ED reported in the 2022 NPRM is that some small schools would prefer to use a single investigator model because it reduces the number of

employees required to resolve a grievance and thus reduces the likelihood that parties to the complaint will have to interact with investigators or decision-makers who also serve as faculty, or who supervise campus clubs, organizations, or athletics teams. 87 FR at 41467. Stakeholders informed the ED that students had concerns about those employees knowing traumatic information about them. While the privacy concerns of any party to a Title IX complaint should be a consideration in designing a grievance procedure, the greater concern is arriving at reliable outcomes, which is a pre-condition to achieving Title IX's objective of eliminating sex discrimination and remedying its effects. Under the 2020 regulations the Title IX Coordinator may also serve as an investigator. This reduces the number of individuals needed to resolve a complaint. Thus, even at small IHEs it is possible to resolve a complaint without involving personnel who interact with parties in other contexts, while avoiding the potential for bias that the single-investigator model entails.

Reliably accurate outcomes in Title IX grievance procedures are a requisite for the law's objective of prohibiting sex discrimination in educational institutions. A single-investigator model unquestionably reduces the likelihood of such outcomes by introducing greater opportunities for: (1) bias to manifest; and (2) for errors or omissions to go unnoticed. Consequently, the AAUP supports the continued prohibition of the single-investigator model.

G. RECOMMENDATION: ***The proposed §106.44 and §106.45(i) should be amended to consider as a positive factor that a postsecondary institution engages in shared governance processes and collective bargaining to develop and implement Title IX-related policies and procedures.***

The AAUP commends the ED's expansion of the NPRM to cover all types of sex discrimination. It is the AAUP's position that the interpretation and implementation of the broad scope of Title IX would be best accomplished through a robust commitment to shared governance and collective bargaining. Thus, the AAUP recommends that the ED endorse the important role of shared governance and collective bargaining in postsecondary institutions' development and implementation of programs, policies, and procedures to implement Title IX. Through shared governance bodies, such as faculty senates, and through collective bargaining on unionized campuses, faculty can share their institutional knowledge and disciplinary expertise to develop policies and procedures designed to prevent and remedy sex-based harassment and other forms of sex discrimination, respect academic freedom, and provide due process to all parties. Several AAUP policies provide guidance for creating effective shared governance and collective bargaining.[8]

We emphasize that the scope of the role of shared governance and collective bargaining should be co-extensive with the broad scope of Title IX in addressing sex discrimination and gender inequality. We urge the ED to amend the NPRM to make explicit the positive contribution of shared governance and collective bargaining to

[8] See, e.g., https://www.aaup.org/report/statement-government-colleges-and-universities; https://www.aaup.org/report/relationship-faculty-governance-academic-freedom; https://www.aaup.org/report/statement-academic-government-institutions-engaged-collective-bargaining

implement Title IX's vision of systemic gender equality. The inclusion of these governance processes from the earliest stages of developing policies and procedures enables an institution to benefit from those with an understanding of the principles and practices of higher education, including faculty with expertise on issues such as what academic freedom means in teaching, research, and public speech; what constitutes harassment in the classroom setting and in other asymmetrical power relationships between faculty and students; and what due process means in the context of disciplinary investigations and hearings.

It should be noted that shared governance and collective bargaining are both important means to implement the NPRM's proposed §106.45(i), which reflects the ED's continued commitment to "maintain[ing] its position, as stated in the preamble to the 2020 amendments, that under Title IX, 'recipients [have] discretion to adopt rules and practices not required under §106.45.'" 87 FR at 41491. The NPRM also explains that "consistent with the principle that equal treatment does not require identical treatment, a recipient's grievance procedures may recognize that employee parties may have distinct rights in a collective bargaining agreement with the recipient or by other means that are not applicable to parties who are not employees." 87 FR at 41491. The AAUP urges the ED to recognize explicitly in the NPRM that the "other means" include the well-established role of shared governance and collective bargaining to create "distinct rights" for faculty in postsecondary institutions. For example, through shared governance and/or collective bargaining, college and universities can add to the foundation of regulatory due process requirements for grievance procedures used for "the determination of whether sex discrimination occurred." Further, after this determination stage, collective

bargaining and/or shared governance can develop subsequent procedures to be used, such as a faculty panel for determining the appropriate level of disciplinary sanctions that may be imposed.

In these comments, the AAUP highlights multiple areas where shared governance, collective bargaining, and faculty expertise would enhance the quality and effectiveness of Title IX implementation and enforcement, including: formulating policies that define sex-based harassment and other forms sex discrimination, with attention to distinguishing between speech or conduct prohibited by Title IX and speech or conduct protected by academic freedom; drafting policies to reflect the explicit provisions under the proposed Title IX regulations related to pregnancy, sexual orientation and gender identity; development of carefully tailored mandatory reporting policies; training for the Title IX Coordinator; development of robust due process protections for fair and reliable grievance procedures; and faculty participation in grievance procedures as investigators and decision-makers. Other policies and programs developed through shared governance and collective bargaining could include education, restorative justice, and alternative dispute resolution (ADR) programs to address issues of sex-based harassment and other gender-based systemic inequalities. Shared governance and collective bargaining – and the ability to tailor policies to advance Title IX goals – also allows for policies that address sex discrimination to be developed and operate together with institutional efforts to address other systemic inequities, including those involving race, ethnicity, and disability on campus.

H. RECOMMENDATION: ***§106.46 should be expanded to cover all cases of sex discrimination in post-secondary institutions.***

The AAUP supports the ED's proposed expansion of the NPRM to cover all forms of sex discrimination, rather than only covering sex-based harassment. This is consistent with the goals of Title IX to achieve broad reaching changes toward gender equality. However, the NPRM contradicts this goal by proposing two different levels of required grievance procedures, with weaker due process protections for certain types of sex discrimination cases. The first and weaker level is found in the proposed §106.45, which describes the minimum level of due process required for any sex discrimination case. The second and stronger level of due process, in the proposed §106.46, would require additional protections in grievance procedures – but these would apply only to sex-based harassment cases involving a student as complainant or respondent in postsecondary institutions.

The AAUP opposes having two sets of grievance procedures for postsecondary institutions. Instead, the AAUP recommends expanding the proposed §106.46 to cover *all* sex discrimination cases in postsecondary institutions. This would provide a consistent and more robust level of due process protections for all forms of sex discrimination in postsecondary institutions. The AAUP supports proposed §106.45(i), which would permit recipients to adopt grievance procedures that provide greater due process protections than required by the regulatory floor. However, the regulatory floor should require that postsecondary institutions provide a sufficiently robust level of due process protections to ensure fair and reliable grievance procedures concerning all forms of sex discrimination.

There are two justifications for expanding the proposed §106.46 to cover all sex discrimination cases in postsecondary institutions. First, this is consistent with the NPRM's expanded coverage to all types of sex discrimination. There may be reasons to require different types of grievance procedures in primary and secondary schools than in colleges and universities. But there is no adequate basis for lowering the required level of due process in postsecondary institutions' grievance procedures based on the type of sex discrimination alleged under Title IX. The NPRM seeks to justify limiting §160.46 to sex-based harassment cases based on the personal nature of such claims and the fact that credibility is often central to the determination of whether sex-based harassment occurred. 87 FR at 41462. However, these factors do not support the exclusion of other types of sex discrimination claims from §160.46. Surely, taking all sex discrimination seriously should entail sufficiently protective levels of due process for all allegations of sex discrimination, which may have serious consequences for complainants and respondents, and which may also entail credibility determinations.

Complainants, respondents, and postsecondary institutions all have an interest in full procedural fairness and reliability at all stages of any kind of sex discrimination case, including written notice of allegations, the right to the presence and participation of an advisor, the opportunity to review evidence and to present evidence, and a written decision on the determination of whether the sex discrimination occurred.[9] As discussed

[9] Further, the minimal level of due process in proposed §106.45 is also inadequate to provide a fair grievance procedure for any kind of sex discrimination case, whether in primary, secondary, or postsecondary institutions. Fair procedures for complainants and respondents in §106.45 should, at a minimum, require that institutions separate the functions of investigation and decision-making, and provide written notice of allegations, the right to review all relevant evidence during the investigation and prior to a final determination, a written investigation report, a hearing, a written report explaining the determination of whether the respondent engaged in sex

in the next section of these comments, the AAUP's position is that the interest in full, fair, and reliable grievance procedures also includes a live hearing where either party requests it. While there may be specific sex discrimination cases where the parties involved agree that a live hearing is not needed in a particular case, the Title IX regulations should not simply leave it to the recipient to decide whether its grievance procedures include the option of a living hearing.

Secondly, expanding §106.46 to cover all postsecondary sex discrimination cases would provide the same due process requirements for all sex-based harassment cases. The proposed §106.46 requires a more robust grievance procedure for postsecondary institutions in sex-based harassment cases involving a student complainant or respondent. However, for sex-based harassment cases where employees are the complainant and the respondent, only the reduced level of due process under §106.45 applies. The ED seeks to justify this difference in treatment based on the risks for student respondents who face potential disciplinary sanctions if there is a determination that they engaged in the alleged sex-based harassment. 87 FR at 41462. While it is appropriate that the proposed §106.46 also covers cases where a student complainant alleges that a faculty/employee respondent engaged in sex-based harassment, the NPRM commentary omits any mention that such coverage is justified by the high stakes for the faculty/employee respondent. The life altering consequences that faculty and other employees may face include suspension or discharge if they are determined to have engaged in sex-based harassment of a student. Such life altering consequences surely justify extending the due process protections of

discrimination, an appeal from the determination, a hearing on sanctions, if relevant, and an appeal on such a determination and sanctions.

§106.46 to all types of sex-based harassment cases, whether they involve only students, students and faculty/employees, or only faculty/employees.

The ED's commentary also seeks to justify the difference in procedures based on the fact that employees are covered by Title VII of the Civil Rights Act. This is irrelevant, however, as Title VII does not require that employers provide grievance procedures or any particular type of due process to employees. The US Supreme Court has held that the existence and use of an employer's grievance procedures would be relevant to the employer's affirmative defense in a Title VII hostile environment sexual harassment case. However, neither the Court nor Title VII regulations require that an employer adopt any kind of grievance procedure.[10]

The ED also seeks to explain limiting §106.46 only to sex-based harassment involving a student complainant or respondent as "uniquely accounting for the needs of postsecondary students in that setting," including their inexperience as self-advocates and their greater "need…for additional procedural protections and for someone to assist them in an advisory capacity" 87 FR at 41459. The idea that students have "unique needs" appears unobjectionable on the surface. However, the corollary that faculty members do not have "unique needs" fails to take into account the diversity of experiences of faculty members in academia. Faculty members who were first generation college students themselves, those who aren't US citizens, those who are feminine presenting or non-binary, those who identify as LGBTQ or as members of racial or religious minorities, have experiences that are vastly different from those of heterosexual, white male and

[10] See, *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

male presenting professors who come from privileged backgrounds. Yet, it is that experience that is assumed to be universal in academia. In reality, faculty from marginalized groups often do not feel as though they wield any (or much) power over their students. At the very least, their organizational power (as faculty members) is often undermined by the lack of cultural and structural power they experience as members of minoritized groups in society. To ignore this reality is to ignore the lessons of intersectionality which urge us to think of inequality along multiple dimensions of power and oppression.[11]

I. RECOMMENDATION: *Postsecondary institutions should be required to provide robust levels of due process that enhance the fairness and reliability of grievance procedures for all types of sex discrimination cases, including the use of live hearings and the "clear and convincing" evidence standard.*

As discussed in the previous section of these comments, the AAUP recommends expanding the proposed §106.46 to extend the same required grievance procedures to cover all sex discrimination cases in postsecondary institutions. The AAUP also recognizes that Title IX regulations should not be expected to provide a one-size-fits-all blueprint for grievance procedures. However, the regulations should require the hallmarks of due process that will provide all parties with fair and reliable procedures. Providing the right to a hearing is one hallmark of due process that is appropriate for postsecondary institutions. The AAUP recommends that the NPRM be amended to require that postsecondary institutions' grievance procedures include a live hearing if requested by the complainant or the respondent in all sex discrimination cases. While the

[11] See, Alicia Andrzejewski, "When Students Harass Professors," *The Chronicle of Higher Education*, August 8, 2022, https://www.chronicle.com/article/when-students-harass-professors.

burden of proof should remain on the institution, the parties should have the right to call witnesses and to have the parties' advisors question opposing witnesses.

The ED's commentary in the NPRM cites several reasons for permitting, but not requiring, postsecondary institutions to provide a live hearing. The ED notes its concern that a required hearing may place too great a burden on smaller postsecondary institutions. However, a live hearing need not be a long, elaborate trial. In most cases, it is likely that there will not be many witnesses and that providing the opportunity for the parties' advisors to question witnesses will not add significantly to the time or expense of the grievance procedure. Further, the concern that a complainant may be unwilling to move forward with the process if there is a live hearing can be addressed by putting into place a well ordered hearing and providing each party the choice to hold the hearing with the parties in different locations but connected through technology. The widespread use of Zoom meetings in postsecondary institutions would enable the parties to participate in the hearing from different physical locations, at no additional cost to the institution. The concerns expressed by the ED must be balanced, as well, with the need to provide full and fair procedures for all parties. As the ED noted in the NPRM commentary, some courts have held that postsecondary institutions' grievance procedures without a hearing or an opportunity to cross-examine witnesses violate principles of due process and fundamental fairness. Providing a live hearing as part of the grievance procedure in all sex discrimination cases would have the benefit of following principles of due process and fundamental fairness from the start.

In sex-based harassment cases where credibility is an issue, the NPRM §106.46 provides the option to postsecondary institutions to choose between using a live hearing

with cross-examination directly by the parties' advisors or through the decision-maker or using private individual interviews where a decision-maker or investigator would question each party or witness, including questions submitted by the parties. Using private interviews, however, is a significantly reduced level of due process, as complainants and respondents would be deprived of the opportunity to hear and test the evidence.

Another hallmark of due process is the use of an appropriate standard of proof. For several reasons, the AAUP recommends "clear and convincing evidence" as the best standard in all sex discrimination cases. First, the AAUP has consistently stated that regardless of the allegation, the "clear and convincing" evidence standard is appropriate to ensure fair and reliable hearings.[12] It is especially important to provide due process where a respondent faces severe disciplinary sanctions such as suspension or dismissal, given the potential life altering consequences of such penalties. Since no campus-based hearing will include the full array of procedural rights required in judicial proceedings, the "clear and convincing evidence" standard helps guard against erroneous findings of sex discrimination. Under the preponderance of evidence standard, a conclusion that "it is more likely than not" that a respondent engaged in the alleged sex discrimination means that there may be a significant level of evidence supporting the opposite conclusion – that the respondent did not engage in the alleged misconduct. The clear and convincing evidence standard requires that the decision-maker be persuaded that it is highly probable the respondent engaged in the alleged discrimination. This guards against the risk of erroneous decisions that can result in close cases under a "more likely than not" level of

[12] See, *The History, Uses, and Abuses of Title IX* (2016), pp. 93-94, at https://www.aaup.org/file/TitleIXreport.pdf

proof. Guarding against erroneous decisions is important in all cases, including hostile environment harassment complaints where academic freedom may be at issue and that may involve a complex range of racial, class, and gender issues.

Section 106.45(h)(1) of the NPRM would permit a different standard of proof to be used for complaints against students and employees. The ED explains, "Under proposed §106.45(h)(1), the use of a clear and convincing evidence standard for any allegations of sex discrimination would be permitted only if the recipient used the same standard in all other comparable proceedings, including proceedings relating to other discrimination complaints, involving a given category of respondents. For example, if a recipient is bound by a collective bargaining agreement to use the clear and convincing evidence standard for allegations that an employee engaged in race discrimination, as well as all other comparable allegations, it could elect to use the same standard for sex discrimination allegations against an employee." 87 FR at 41487. The AAUP agrees that it is appropriate for the recipient to use the clear and convincing evidence standard as provided in a collective bargaining agreement. However, the AAUP maintains its long-standing position that clear and convincing evidence is the most appropriate standard to determine any allegations of misconduct against college or university faculty that could result in severe disciplinary sanctions such as suspension or discharge. Although the AAUP's policies address the rights of faculty in colleges and universities, the rationale for using the clear and convincing evidence standard also applies to college and university staff and to students who face severe disciplinary sanctions such as suspension or expulsion. The potential life altering consequences for faculty, staff, or students

requires a standard of proof that will increase the reliability of the proceedings by guarding against erroneous decisions.

It is also important that all faculty members have equal access to the same robust due process protections. The Title IX regulations do not take into account fairness issues concerning postsecondary faculty who hold different statuses in the campus hierarchy – and therefore different procedural protections. All faculty members – those tenured, on the tenure-track, or in contingent appointments, and including graduate employees who hold positions as teaching or research assistants – should receive the same due process protections. Those faculty without the protections of tenure are usually not granted the due process and grievance procedures customarily enjoyed by tenured and tenure-track faculty. The AAUP recommends that the NPRM should explicitly require equally robust due process protections for all levels of faculty and academic staff.[13]

Providing strong due process protections in Title IX grievance procedures would also help guard against the perpetuation of the risks of bias and discrimination that are well-documented in the US civil and criminal justice systems. As in those settings, those who are stereotyped as hypersexual, aggressive or threatening (especially Black and Latinx men or masculine identified people) will be much more likely to face bias as respondents in Title IX cases. Those who are stereotyped or perceived as sexually available or otherwise sexually compliant (including LGBTQ people, Asian American and Black women/feminine presenting people) will be much more likely to face bias as

[13] See, for example, Regulations 4c, "Financial Exigency," 4d,"Discontinuance of Program of Department for Educational Reasons," and 5, "Dismissal Procedures" of the *Recommended Institutional Regulations on Academic Freedom and Tenure* (https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure).

complainants in Title IX cases. In this context, full and fair hearings and the higher standard of proof can help reduce the risk that Title IX enforcement initiatives may, even unwittingly, perpetuate such biases. Full and fair hearings are important to provide the parties with the opportunity to present and test the evidence, which can then form the basis for determining whether a claim is supported by clear and convincing evidence. This can lower the risk of a determination that is consciously or unconsciously based on presumptions derived from stereotypes that affect evaluations of credibility or the likelihood of guilt.

It should be acknowledged that neither formal legal structures nor institutional grievance procedures are adequate to address the deep systemic gender and racial inequalities in the US – including in colleges and universities. What is needed are broad-based programs and resources to carry out fundamental restructuring toward equality in all social, political, and economic systems and institutions. In postsecondary institutions, 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 educate students about all forms of inequality, including race, disability, class, caste, gender identity, geographic location, and sexual orientation. Providing due process through full, fair, and reliable Title IX grievance procedures should be viewed as a necessary part of implementing this broader vision of equality and improving the working and learning conditions of all campus constituents.

An inclusive method for developing Title IX grievance procedures would make them more meaningful and effective. In postsecondary institutions, this entails bringing shared governance into the process of drafting such procedures, including faculty and

staff unions, faculty senates and other faculty and staff governing bodies, and student assemblies. Broadening the discussion through the active engagement of shared governance can increase the likelihood that full and fair grievance procedures will be developed in ways that are attuned to the complex atmospheres of bias, discrimination, and inequities at postsecondary institutions along with careful attention to speech and academic freedom.