

**Comments on Notice of Proposed Rulemaking on Title IX
of the Education Amendments of 1972, 34 CFR Part 106
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These comments are submitted by Joan Slavin, Title IX Coordinator, on behalf of Lake Forest College’s Coalition Against Sexual Misconduct, a group of faculty, staff, and students at Lake Forest College involved in the work of improving campus sexual misconduct prevention and response efforts. This group includes administrators involved in the day-to-day implementation of campus sexual misconduct policy and procedures for faculty, staff, and students; student affairs personnel; coaches; campus counseling professionals; public safety officials; faculty with subject matter expertise; and student representatives. While we do not mean to speak officially for everyone at Lake Forest College, these comments draw upon our collective experience in studying and addressing sexual misconduct matters at a small, private, liberal arts college.

Lake Forest College (“the College”) is a residential liberal arts college located in the suburban town of Lake Forest, Illinois, 30 miles north of downtown Chicago. Lake Forest College currently serves 1,477 undergraduate students, 21 master’s degree students, and 41 non-degree-seeking students.

Lake Forest College strives to provide a living, learning, and working environment that is free from sexual misconduct and discrimination. Lake Forest College’s *Policy on Sexual Discrimination and Misconduct* prohibits sexual misconduct, including sexual assault, sexual harassment, stalking, dating violence, and domestic violence. The College’s *Sexual Misconduct Complaint Resolution Procedures* set forth a comprehensive process the College uses to respond to and adjudicate reports of sexual misconduct involving members of its community. Pursuant to these procedures, the College handles complaints of sexual misconduct promptly, fairly, and equitably, using a trained Title IX investigator to conduct a thorough investigation and make findings. Another administrator determines appropriate sanctions, and any party may appeal the findings or sanctions to a trained appeal board on specified grounds.

Our comments below address several specific areas of concern with the regulations proposed by the Department of Education (“the Department”) and, where possible, suggest alternatives that would better protect the interests of the parties involved in sexual misconduct matters and that would be more workable for higher education institutions. We have presented our comments below in the order of the proposed regulations and have designated relevant section numbers and topic summary captions.

Preamble page. 61468: Jurisdiction Over Sexual Harassment Limited to Conduct Occurring in Institution’s Programs and Activities

We are concerned that the new, narrow definition of Title IX jurisdiction over sexual harassment complaints suggested by the Department will result in significantly less safe campuses. Title IX addresses discriminatory conduct that impacts an individual’s access to a school’s programs. The proposed rule, however, states that sexual harassment falls under Title IX only when the alleged

harassment occurs in connection with the school's programs and activities. This interpretation ignores the reality of college sexual misconduct, wherein many incidents of alleged sexual assault take place between students in off-campus settings, such as in bars and at parties in private houses and apartments. Sexual misconduct that takes place outside of the school's programs and activities can still greatly impact a complainant's ability to participate in their educational program, especially when the alleged perpetrator is also a member of the campus community. Creating an artificial distinction that allows colleges to decline to investigate off-campus incidents in houses, apartments, bars, or other locations would have the undesired effect of turning back the clock to an era when many schools did not address off-campus sexual assaults involving members of their campus community. It is frightening to think that some serial perpetrators could take advantage of their schools' lack of Title IX jurisdiction to plan sexual assaults in private houses and apartments.

Instead of the proposed rule, we believe that Title IX should cover sexual harassment between members of the school's community, regardless of where it occurs or whether it occurs inside or outside of the school's programs, as long as the school has control over either the context of the harassment or over the alleged harasser (*i.e.*, a student, faculty member, staff member, or contractor). Such an interpretation would better enable schools to keep members of their community safe and hold perpetrators in their community accountable regardless of the context and location of the incident.

§ 106.30: Sexual Harassment Definition

We are concerned that the Department's new definition of sexual harassment is overly restrictive and allows schools to ignore potentially damaging conduct that may impair a student's access to their education.

First, the definition should address whether dating and domestic violence and stalking based on sex are covered under Title IX, as they are under VAWA. Many schools use the same sexual misconduct policies and grievance processes for these violations as they do for sexual assault. The new definition is confusing, and will impact reporting by creating confusion about what is reportable (Dekeresedy & Schwartz, 2011)¹.

Next, the Department's proposed requirement that the conduct be severe, pervasive, *and* objectively offensive is too narrow. Some conduct, though severe, may not also be pervasive. For example, one incident of forced kissing of a student by a professor may be considered severe, but not pervasive, since it was a single incident of short duration. Such an incident would not fall within the Department's proposed definition. Additionally, who determines whether violence is "severe?" Severe violence will vary on an individual basis based on the personal background and context of the violence. Conversely, a pattern of sexual comments over many months by a colleague or fellow student could constitute pervasive behavior that arguably would not qualify as severe, and therefore, would fall outside of the proposed narrow definition. This proposed definition also conflicts with established sexual harassment law under Title VII. Therefore, we

¹ Dekeresedy & Schwartz, 2011, cited in *Sourcebook on Violence Against Women*, 2nd Ed., Chapter 1, Renzetti, C.M., Edleson, J.L., Bergen, R.K., Sage Publications, Inc. (2011).

would urge the Department to revise this definition to cover unwelcome sexual conduct that is “severe *or* pervasive, and objectively offensive.” Research on narrow definitions of assault, such as the one proposed, shows that there will be decrease in reports, though not necessarily violence, from when broad definitions are used (Koss, 1996).²

Third, the proposed rule’s definition requires that the sexually harassing behavior effectively deny a student equal access to their education before it would qualify as sexual harassment prohibited by law. This requirement, which appears to differ from current Title IX best practices and Title VII standards, is vague and needs clarification. In our experience, a number of campus sexual harassment cases are reported that do not rise to the level of effectively denying the complainant access to their education. Nonetheless, the behavior may still greatly impair the complainant’s access to their school’s programs and activities, and should be addressed by their institutions before the situation worsens and deprives the student of their education. No complainant should have to suffer ongoing unwelcome conduct of a sexual nature by an employee or another student that their school is allowed to ignore. Additionally, the short term and long term negative mental health impacts of sexual harassment might affect one’s access to education, but not be immediately recognized by a victim (Morgan & Gruber, 2011).³ As a result, we suggest that the proposed definition of sexual harassment be revised to cover situations in which the sexually harassing conduct denies a person access to or the benefits of their school’s programs and activities.

§106.44(b)(2): Obligation for Title IX Coordinator to File Formal Complaints

The proposed rule would require Title IX Coordinators to file formal complaints with their institutions when they are aware of “multiple” complainants’ reports of sexual harassment by the same respondent. Based on our experience responding to reports of sexual misconduct on a college campus, we find this provision concerning, vague, and in need of clarification as it will likely result in a futile and traumatic investigation and adjudication.

First, the requirement that a Title IX Coordinator file a complaint transforms the Title IX Coordinator’s role from a neutral administrator overseeing a resolution process and supporting all parties into a quasi-prosecutorial role. We believe this would build an inherent conflict of interest, perceived bias, and distrust of the Coordinator into the adjudication of such cases.

Second, any requirement for a Title IX Coordinator to initiate a formal grievance process against the wishes of an alleged victim should be limited to cases in which the alleged behavior creates a safety risk or threat to campus, similar to the standards schools have used since 2011 to make such a determination.

² Koss, 1996, as cited by Dekeresedy & Schwartz, 2011, cited in *Sourcebook on Violence Against Women*, 2nd Ed., Chapter 1, Renzetti, C.M., Edleson, J.L., Bergen, R.K., Sage Publications, Inc. (2011).

³ Morgan & Gruber, 2011, cited in *Sourcebook on Violence Against Women*, 2nd Ed., Chapter 4, Renzetti, C.M., Edleson, J.L., Bergen, R.K., Sage Publications, Inc. (2011).

Third, the provision should define “multiple” reports; for example, are two reports of sexual harassment sufficient to trigger this provision? In addition, what about second-hand, third-hand, or anonymous reports? Would they trigger an institution’s obligation to initiate a formal adjudication? Would the reports have to reach a certain level of severity to be included within the scope of this rule? And what about reports separated in time by many years?

It is likely that a formal adjudication process will be a dead-end exercise without the willing participation of individual complainants. Without complainants who wish to participate in a formal investigation and hearing, Title IX investigators will be in the position of attempting to gather and present evidence without the complainant’s full account of the situation and presumably without the complainants’ participation in cross examination at the hearing. Based on our experience handling these matters, the participation of a complainant is almost always needed for an institution to be able to complete an investigation and hold an alleged perpetrator accountable. Unless the investigator has access to another form of compelling evidence, such investigations would almost never lead to a finding of responsibility and would be a time-consuming exercise that would be unduly traumatizing to both complainants and respondents.

Furthermore, there is a significant risk in some cases, especially those involving potential intimate partner violence or stalking, that a Title IX Coordinator’s filing a formal complaint on the school’s behalf but without a complainant’s consent could result in physical danger to one or more of the individuals involved. Any requirement that a formal investigation be commenced by a Title IX Coordinator without a willing complainant should first involve a careful balancing of potential harms and a safety assessment. We urge the Department to reconsider whether this provision would be effective and recognize that an institution should have discretion to decline to pursue a formal complaint after a safety and risk assessment.

§ 106.45 (b)(3): Obligation to Terminate Formal Process if Regulation’s Definition of Sexual Harassment Not Met

The proposed rule would require schools to dismiss a complaint and not further investigate it under their Title IX-compliant investigation procedures if the behavior does not meet the new, narrower definition of sexual harassment. In particular, this section states that “If the conduct alleged by the complainant would not constitute sexual harassment as defined in Section 106.30 even if proved or did not occur within the recipient’s program or activity, the recipient must terminate its grievance process with regard to that conduct.” The Department states that this is to “ensure that the recipient’s resources are directed appropriately at handling complaints of sexual harassment....” {Preamble p. 61475}. Though the rule says that a school “remains free to respond to conduct... {by} investigating the allegations through the recipient’s student conduct code....” this distinction is confusing and would be difficult to implement in practice.

We are confused about whether, under this new rule, the Department envisions schools administering two separate sexual misconduct complaint resolution processes—one used when the allegations fall within the regulations’ definition (e.g. the incident took place in connection with the school’s programs and activities) and another applicable when the incident took place outside of the school’s programs and activities (e.g. at an off campus house). Similarly, sexual

misconduct cases involving some allegations that fall within the Title IX definition and other allegations that do not might have to be adjudicated using two different processes. In practice, it would be difficult and confusing to all parties involved to administer two separate processes and potentially to move matters from one process to another during an investigation if it becomes clear that the conduct does not fall within the regulations' definition of sexual harassment.

The proposed regulation would result in otherwise identical student on student sexual assault cases being handled differently based solely on the location of the assault. As written, the regulation could also result in many schools electing not to investigate sexual misconduct complaints involving alleged misconduct by members of their community when the alleged incidents took place outside of campus programs and activities, even when this could result in a perpetrator being allowed to remain on campus. Ironically, this provision could also result in adjudications of the many sexual misconduct matters that fall outside the new, narrow Title IX definition using processes that do not meet the "due process" protections for respondents that the Department has prioritized in these regulations. Further, it may result in complainants only reporting behavior that falls outside of the Title IX definition in order to use the school's conduct process instead of Title IX process.

The Department should clarify that schools would be permitted to investigate and resolve all sexual misconduct complaints under their sexual misconduct complaint resolution procedures, even in cases that would not fall within the Title IX definition.

§106.30: Actual Knowledge by Key Administrators Required to Trigger Response

The proposed rule would require that a school act on a complaint only if an official who has authority to initiate corrective measures, such as the Title IX Coordinator, has actual knowledge of the report. As a preliminary matter, we request that the Department provide clarity on what constitutes authority to initiate corrective measures and what types of corrective measures would be included, as all staff and faculty have at least some ability to initiate some types of corrective measures.

This restriction on a school's obligation to act is concerning because it would result in cases where employees may choose not to report incidents and matters to the Title IX Coordinator, thereby depriving the appropriate professionals at the school the opportunity to intervene to stop alleged sexual misconduct, prevent its recurrence, and remedy its effects.

Many cases in the national media involve campus employees who observed or were told of sexual misconduct and, instead of reporting it, kept it to themselves in order to protect the alleged perpetrators, honor a victim's confidentiality request, and/or avoid a scandal for the school. This approach allows for the continuation of patterns of alleged perpetration by the same individuals, unbeknownst to the Title IX officer and unaddressed by the institution.

For many years, it has been a best practice in the industry that faculty and staff must report sexual misconduct to the school's Title IX officer. The concept of responsible employees and imputed notice dates back to 2001 Title IX guidance. If this is no longer required under prevailing Title IX law, we are concerned that many schools will change their reporting

procedures and no longer require employees to report sexual misconduct to the Title IX Coordinator. Confusion among employees about their legal reporting obligations and among students about the confidentiality of disclosures to employees will be widespread, and schools will face litigation for their failure to respond to sexual misconduct known by their faculty and staff but not reported to their Title IX offices. This risk of litigation is compounded by the fact that courts have not interpreted notice requirements as narrowly as these proposed regulations do.

Furthermore, even at schools where the “responsible employee” reporting requirement is retained, some faculty, staff, coaches, and administrators will no longer report incidents to the Title IX offices since there would be no legal requirement to do so. We believe it is important for the Title IX office at each school to be aware of all potential sexual misconduct reports to ensure that support resources and accurate information about options are provided to complainants and to ensure that potential threats to campus safety or patterns of perpetration are addressed.

We urge the Department to maintain the status quo with respect to the interpretation that notice to any responsible employee constitutes notice to the school.

§ 106.45(b)(3)(viii): Requirement to Provide File

The proposed rule requires that colleges provide parties the opportunity to review evidence obtained as part of the investigation that is directly related to the allegations raised, including evidence upon which the school does not intend to rely in reaching a determination. We are concerned that this provision does not exempt confidential or privileged information, such as medical or counseling records or sensitive photographs or videotapes that may be provided to the investigator but would not be relied upon in the investigation and that could be damaging to provide to the parties, especially since parties may share the information with others. We also believe schools should, in some matters, especially involving employees, be permitted to redact some personally identifying information regarding witnesses.

We also urge the Department to clarify what “upon request” means for purposes of this regulation. Providing parties with access to the investigation file in the middle of ongoing fact-gathering would be disruptive to the investigator and could jeopardize the investigator’s ability to collect evidence and interview witnesses. Moreover, it is unclear whether the file the school is required to produce upon request would include notes of party and witness interviews before they are included in a report. We urge the Department to clarify that evidence and testimony summaries need not be provided to parties until the preliminary investigation report is completed. This provides the parties adequate time to review the information and prepare any needed response.

We also note the futility of the requirement that evidence be shared in an electronic format that restricts the parties from copying the evidence. Parties can easily take screenshots or photos of the evidence in whatever electronic format it is sent to them. Electronic documents are very easily sharable to a wide audience via the Internet. We recommend the Department allow schools to decide how best to provide the evidence to the parties, whether through special file-sharing platforms, email, hard copies, or physical inspection.

§106.45(b)(4)(i): Standard of Evidence

The proposed rule provides that schools may only use the preponderance of the evidence standard for sexual misconduct complaints if they use that standard for all student code violations and employee complaints; but, in contrast, they may use the clear and convincing standard for sexual misconduct complaints even if they use the preponderance standard for all other types of cases. We are concerned that allowing schools to use a clear and convincing standard for sexual misconduct complaints treats sexual misconduct complainants unfairly and is contrary to recognized legal standards. Such a standard relies on rape myth stereotypes about who is a “good victim” and often leads to poor outcomes with much aggravation and secondary trauma for victims who do not fit this model (Campbell & Townsend, 2011).⁴ The preponderance standard is based on equality, whereby both parties’ word is treated equally. This is the standard generally used in civil litigation, employee discipline, student conduct matters, and even the Office for Civil Rights’ own Title IX enforcement actions. The clear and convincing evidence standard, in contrast, automatically values the testimony of the respondent at a greater level than the testimony of the complainant since the complainant has a higher burden to prove. Moreover, use of any standard of evidence other than the preponderance standard in campus sexual misconduct matters directly conflicts with the law in some states, including our state of Illinois.

We urge that the preponderance of the evidence standard—the equality-based standard used in campus student conduct matters, human resources cases, and civil litigation, including sexual harassment cases—is the only appropriate evidentiary standard to use in campus sexual misconduct cases. Using a higher standard unfairly disadvantages complainants’ testimony and, without justification, treats campus sexual misconduct complaints differently than other types of campus misconduct or discrimination complaints.

§ 106.45(b)(4)(i): Decision-Maker Cannot Be Title IX Coordinator or Investigator

This proposed rule prohibits schools from having the individual who investigates a sexual misconduct complaint make the findings of fact and the determination. This regulation exceeds the scope of Title IX, is unduly burdensome, and is not reasonably necessary to achieve a fair process.

Title IX investigators are the highly-trained professionals most familiar with the evidence and best tasked with assessing credibility after many hours of meeting with the parties and reviewing the evidence. Requiring the investigator to generate a report that only summarizes evidence without any evaluation of it and any findings or analysis of credibility dramatically reduces the role of trained Title IX investigators and disregards the expertise and insights gained through a comprehensive investigation. This proposal is especially problematic for small colleges that rely on a process that involves a thorough investigation conducted by trained investigators who interview each party, sometimes more than once, and all witnesses.

⁴ Campbell & Townsend, 2011, cited in *Sourcebook on Violence Against Women*, 2nd Ed., Chapter 5, Renzetti, C.M., Edleson, J.L., Bergen, R.K., Sage Publications, Inc. (2011).

Requiring that a decision-maker at a live hearing issue a determination imposes a significant burden on parties and witnesses. Based on our experience handling these matters, it is often traumatic for complainants, respondents, and witnesses to share their personal experience and to respond to questions about it. An investigative model reduces the need for parties and witnesses to retell their story to various administrators at different times. The proposed rule would necessitate parties and witnesses sharing intimate details with both investigators and adjudicators at different times, which is not trauma-informed and is not a best practice.

The proposed regulations set up a highly regulated, staff-intensive mechanism that all schools, public or private, big or small, would need to follow. Such a system, requiring an investigation and an adjudication by different personnel, requires the investment in numerous trained Title IX administrators, regardless of the size of the school. Moreover, legal training, or at a minimum, training in conducting quasi-judicial proceedings, ruling on objections, and managing attorneys, would be crucial for the decision-maker, further increasing the burden on small institutions who do not employ lawyers or judges.

The Department's stated concern about the investigator-only model--that the investigator may be biased--can be addressed through less proscriptive means, including by allowing parties to assert alleged bias prior to or during an investigation and by offering an appeal to a different decision-maker to consider alleged bias during the investigation.

The regulations impose a one-size-fits-all judicial approach that is not suitable for many small colleges with limited staff and resources for handling Title IX investigations and adjudications. We urge the Department to allow schools to determine whether investigators may make findings of fact and determinations of policy violations at their schools.

§ 106.45(b)(3)(vii): Requirement of a Live Hearing

We are very concerned about the implications of the requirement that all colleges use a live hearing as a part of their sexual misconduct adjudication process. Many small private colleges, like ours, do not use a live hearing as part of their sexual misconduct complaint resolution process. Indeed, Title IX and other laws do not require private institutions use a live hearing to resolve sexual misconduct complaints. The proposed regulations impose a federally-mandated judicial approach dictating how all colleges, big and small, must adjudicate Title IX matters, which exceeds the scope of the Department's authority to regulate.

This requirement would turn college conduct proceedings into quasi-criminal trials, which are not in the best interest of any party involved. In our years of experience handling these matters, parties appreciate the discreet, private, less confrontational process that a trained investigator model utilizes. Even with a trauma-informed, non-confrontational process using a neutral investigator, we have observed that most reporting students do not wish to pursue a campus investigation out of fear of re-victimization. The requirement that parties testify in a live hearing in front of adjudicators and attorneys would have a chilling effect that would dissuade many complainants from reporting sexual misconduct. It would also require parties to share their emotional, intimate account of an alleged incident multiple times, to different administrators, and in the presence of the other party and their advisor. Statistics show that few students wish to

report sexual violence to police and pursue a criminal prosecution, and we believe the imposition of an adversarial hearing process would result in fewer students reporting sexual violence. With the Department's proposed new live, confrontational hearing requirement, we fear that very few students will report sexual misconduct and agree to participate in a campus adjudication. Consequently, a college's ability to hold individuals accused of sexual violence responsible and to keep our campus communities safe will be severely impaired.

Furthermore, the requirement that all schools use a live hearing to resolve sexual misconduct complaints treats sexual misconduct matters differently than other types of matters that schools commonly resolve through investigation, including employment discrimination cases and other issues of student misconduct, including non-sexual assaults and other behavior that could also be criminal. Schools should be permitted to use a fair, consistent, process for all claims of misconduct on their campus, and each school should be free to determine what that process should be on their campus. Treating sexual misconduct parties differently from parties to other campus investigations is not justified.

In addition, the requirement that all schools implement a live hearing process will be burdensome for small schools with limited staff available to serve in the multiple roles this new process would require. A live hearing process would necessitate that schools provide trained investigators, hearing officers, advisors, and Title IX Coordinators, all of whom would need to spend extended hours in training and working on cases. Even with extensive training, the skills involved in running a quasi-judicial hearing would be well outside the expertise for which these staff were hired. Each live hearing could easily run one full working day, perhaps more, since all witnesses would be required to testify and be cross-examined at the hearing. This hearing process would duplicate the work of investigators, and would be an unneeded drain on the already stretched resources of small colleges. Moreover, spending days to prepare for and attend live hearings would be enormously disruptive to the education and work of all complainants and respondents involved in these cases.

The Department's assumption that a fair process cannot be provided for respondents without a live hearing is flawed. In our work on a small private college campus, we have observed the success of the investigation model in providing a fair process to all parties involved. In our process, respondents are provided numerous due process protections, including: notice of the allegations against them prior to being interviewed; an opportunity to have an attorney or other advisor attend all investigation meetings; an opportunity to provide a full account of the situation and suggest and provide any additional evidence or witness names during or following the interviews; follow up interviews where any additional key information is shared; the opportunity to suggest questions that the investigator ask the complainant or witnesses; the opportunity to review and comment on a preliminary draft of the investigation report and view all relevant evidence; and the right to appeal a determination or sanctions. We urge that the Department allow each individual school discretion to determine whether an investigative model, a live hearing model, or a hybrid model will work best on their campus, so long as the process used is fair, equitable, and provides important procedural protections for both parties. Anything else exceeds the Department's authority to regulate.

§106.45(b)(3)(vii): Requirement of Live Cross Examination

The Department's *ultra vires* mandate for live, adversarial cross-examination at a hearing imposes a national cross-examination rule on schools that is not supported by Title IX or mandated by law, and is also contrary to state statutes. Allowing hostile cross-examination should not be mandated for all schools, especially private schools, by the federal government. Schools in states like Illinois, where state statutes prohibit use of live cross examination in sexual misconduct adjudications, will be faced with a difficult conflict of laws and ensuing litigation.

The imposition of a live cross-examination requirement turns campus conduct proceedings into confrontational quasi-judicial proceedings using procedures borrowed from courts of law. Such procedures are not suited for college conduct proceedings, which traditionally have been more educational and developmental in focus. The purpose of campus conduct proceedings is to determine whether a student or employee of a school has violated the school's misconduct policy, not whether they have violated the law. Unlike in courts of law, the most severe sanction a college can impose is removal of the respondent from the campus community. The Department's focus on live hearings and cross-examination wrongly blurs the line between campus misconduct matters and criminal or civil litigation, where much greater penalties are at stake, including incarceration. Live cross examination is not mandated for other campus conduct proceedings, including adjudication of other serious matters involving behavior that could also constitute crimes, and a mandate for a different process should not be in place for campus sexual misconduct matters.

Live cross-examination by an attorney or advisor aligned with the other party would be traumatic for many complainants and respondents. Being cross-examined in an adversarial proceeding is traumatic for anyone; but can be especially devastating to an individual who has experienced sexual violence. Being subjected to adversarial cross-examination at a live hearing would have a chilling effect on complainants' and witnesses' willingness to participate in the process, and would result in few cases where relevant information is able to be considered by the school.

In our experience with implementing an investigative model on a small campus, trained Title IX investigators are able to elicit information and answers to key questions during the investigation using a trauma-aware approach. Moreover, offering the opportunity for parties to review a preliminary version of the investigative report containing all evidence including the testimony of parties and witnesses, combined with the opportunity to request that the investigator ask specific questions of parties and witnesses, provides an effective opportunity for cross examination. In addition, we have successfully used follow-up interviews with parties as a means to provide the parties with detailed accounts of the other party's testimony and an opportunity to respond to additional information provided by parties and witnesses. It is has been our first-hand experience that a trained investigator is able to effectively make credibility determinations through skilled interviews and follow-up interviews.

Trained Title IX investigators have received extensive training in conducting investigations with sensitivity and respect for all parties and witnesses, including young adults; attorneys or other advisors brought in by parties will not have received this training and will exacerbate the trauma

of the process for all parties involved. It is troubling that external advisors and attorneys with no training on sexual violence, the school's policy and procedures, and experience in conducting trauma-informed questioning in sexual misconduct matters would now be an integral part of the school's internal disciplinary processes. Moreover, we are concerned that the requirement that attorneys and advisors conduct live cross-examination will result in significant delays to the resolution time period.

The regulations should also state that a live hearing may be waived by both parties. We envision that there may be many cases in which both parties would prefer to have a thorough, private investigation process with the opportunity to review evidence and pose questions through the investigator over a live hearing; thus, the regulations should allow for this option.

We strongly urge the Department not to impose a cross-examination requirement on private schools and allow each school to choose what type of process to use for adjudication of sexual misconduct complaints, so long as each party has the ability to question all testimony and evidence, directly or indirectly, prior to a determination. The procedure set forth in the proposed regulations for K-12 schools allowing for a robust indirect cross-examination should be equally available to higher education institutions.

§106.45(b)(3)(vii): Requirement that Testimony be Disallowed if No Cross-Examination

The proposed rule's provision requiring schools to disallow all testimony if the party or witness does not participate in cross examination at the live hearing is also *ultra vires* and will have significant negative consequences for the parties and schools. This proposed rule would result in situations where schools would be required to disregard important evidence gathered during a robust investigation process due to an individual's inability or unwillingness to attend the hearing and cross-examination. Some witnesses or parties may have graduated or changed their mind about participation in the process following an investigation, and schools should be permitted the discretion to consider the information those individuals provided during the investigation in making findings of fact and determinations. Any other result would force a school to ignore potentially compelling evidence in its possession.

We propose that an individual's unwillingness or unavailability to participate in any required live cross-examination or offer testimony at any required hearing should be considered as a factor in the assessing the credibility of their testimony during the investigation or at the hearing, but not as an absolute bar to considering relevant information that they have already provided.

§106.45(b)(3)(vii): Mandate that College Provide Advisors for Cross-Examination

The proposed rule's requirement that schools provide an advisor or attorney aligned with a party for purposes of conducting cross examination would impose a costly burden on small institutions. Many small colleges do not provide trained advisors or attorneys for parties, though parties are free to select and provide their own. We are concerned about the time demands on staff or faculty this rule would impose, as serving as an advisor throughout an investigation and hearing could easily take twenty hours. We are also concerned about how a school would provide adequate training for internal advisors on how to conduct adversarial cross examination

in sexual misconduct matters. We also believe that putting a staff or faculty advisor in the position where they are required to be an adversary of another student or employee and confront them with difficult cross-examination questions would be inappropriate in an educational environment. We also predict that this regulation would lead to litigation against colleges if the advisors or attorneys they provide do not meet the parties' expectations or are not equal in terms of skill, qualifications, cost, or other factors.

Furthermore, if one party can afford an attorney, and the other party cannot, we question whether the school's providing a faculty or staff member as the other party's advisor would be deemed adequate or would subject the school to legal claims for inadequate or unequal representation. Unequal resources and access to lawyers may impact either complainants or respondents. It would impose a large financial burden on small colleges to hire attorneys for a party when the other party has retained an attorney. And, as stated above, schools are not able to train outside advisors or attorneys in the schools' policies, procedures, and the subject matter area.

Finally, we question what the rule's language that the appointed advisor must be "aligned with the party" means in application. Must schools provide pools of complainant-only and respondent-only advisors, or may the same advisors be used for complainants and respondents in different cases?

We urge the Department to not mandate, but to continue to allow, schools to provide attorneys or advisors for both parties if they do not provide their own.

§106.45(b)(6): Informal Resolution

At our small, private college, the Title IX Coordinator frequently uses informal resolution--most often advisory/educational conversations with respondents and mutual no-contact orders-- as an alternative to a formal investigation process in cases where no formal resolution is sought. We have found this process to be welcomed by complainants and respondents, and effective in stopping alleged inappropriate behavior and preventing its recurrence.

The Department's proposed rule on informal resolution is unclear. We request that the Department clarify that the requirements regarding informal resolution imposed in the proposed regulation are only applicable in cases where a formal complaint has been filed with the school. We are concerned that, as written, this provision might impair the ability of colleges to respond informally to reports of harassment in cases where a formal complaint has not been filed.

Moreover, we are concerned about the use of mediation in cases of sexual violence and in cases involving a power differential between parties, such as cases involving a student's complaint of sexual harassment against a faculty member. Mediation in such cases is not a best practice, and an agreement to engage in mediation in such cases may not be fully voluntary due to power dynamics in play. Furthermore, the regulations neglect to provide for required training or minimum credentials of the mediators who may be handling these delicate cases. It is particularly important that any mediator of sexual harassment be trained in mediation skills, the dynamics of sexual misconduct and how to facilitate such a mediation, and in ascertaining whether each party has provided non-coerced consent to engage in the mediation process. We

urge the Department not to allow schools to mediate sexual violence matters and to impose qualification requirements for the individuals facilitating mediation of sexual harassment complaints.

Lack of Necessary Provision Prohibiting Retaliation

The proposed regulation omits any provision prohibiting retaliation by parties, witnesses, or others against individuals who engage in protected activity under Title IX, including those who bring forth complaints or who serve as witnesses in an investigation or adjudication. Based on our experience addressing sexual misconduct complaints on college campuses, retaliation is a serious concern of complainants in reporting sexual misconduct to their schools and of witnesses in participating in investigations. Unfortunately, retaliation is not uncommon. Comprehensive regulations on Title IX should include a clear provision prohibiting retaliatory behavior by the institution or by individuals against those who avail themselves of Title IX's protections.

Regulatory Impact Analysis

We believe that the Regulatory Impact Analysis section in the Notice of Proposed Rulemaking greatly underestimates the amount of time and dollar costs schools will need to spend in reviewing the regulations and developing new policies, procedures, brochures, websites, flow charts, and other written resources. We predict this review and revision process and the development of new materials will take many weeks of coordinator and attorney time for each school. Moreover, the hourly rates cited for attorneys and staff time are grossly underestimated for our region. Further, schools will have to expend numerous hours retraining investigators, coordinators, adjudicators, advisors, appellate panels, staff, faculty, and students on the new legal requirements, policies, and procedures, and many schools will need to hire new staff or retain external consultants, adjudicators, investigators, and attorneys in order to comply with these regulations. These additional training and staffing requirements are greatly underestimated in the Regulatory Impact Analysis.

We estimate that the costs incurred by schools if these new regulations are implemented would be several times higher than those set forth in the Regulatory Impact Analysis. The cost of these proposed regulations would be burdensome for small colleges with limited budgets, and we urge the Department to consider additional data about costs of implementation and time commitments on small colleges with limited Title IX staff and budgets in this regulatory process.

Please do not hesitate to contact the undersigned with any questions regarding these comments.

Respectfully submitted,

Lake Forest College Coalition Against Sexual Misconduct,

By:

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