



January 30, 2019

Brittany Bull  
U.S. Department of Education  
400 Maryland Avenue SW, Room 6E310  
Washington, DC 20202

*Submitted electronically through the Federal eRulemaking Portal*

Dear Brittany Bull,

We appreciate the Department's desire to provide some clarity regarding the regulatory expectations and enforcement of Title IX by the Department. However, there are several areas that could be made clearer, and there is some proposed language that would create significant challenges for higher education institutions, which are identified and discussed below.

Proposed 34 CFR §106.6(f) regarding Title VII of the Civil Rights Act of 1964 is a new paragraph that will likely create uncertainty regarding the interplay of Title VII and Title IX in situations involving employees in the educational work environment. It would be helpful for the Department to issue joint guidance with the EEOC if the intent is for Title VII and Title IX to continue to be interpreted consistently with each other.

Proposed 34 CFR §106.30 contains a definition of "sexual harassment" that is significantly narrower than the working definition that higher education has used at least since 2011. Most colleges will continue to expect more from its students and employees and will address behavior that will no longer be captured under this proposed definition through other expectations for conduct. If the Department believes it lacks the authority to utilize a broader definition without Congressional revision to the statute, we hope the Department will publicly urge Congress to make such revisions to ensure that all students across the country are provided the same protection against misconduct that was previously prohibited under the prior administration.

Proposed 34 CFR §106.30 contains a definition of "supportive measures" that includes the clause "Such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party..." While I can appreciate that whether

a measure unreasonably burdens the other party will be fact-specific, the ambiguity in this clause will create challenges for higher education institutions without additional clarity.

Proposed 34 CFR § 106.44(a) regarding a recipient's response to sexual harassment contains a reference limiting a recipient's obligation to actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States. While we understand the Department's stated rationale of mirroring the statutory scope for application to "education program or activity of the recipient ... in the United States", this narrowing will create significant challenges for higher education institutions that will face situations where alleged conduct that was previously prohibited by the prior administration that occurred outside an education program or activity of the recipient and/or occurred while studying abroad will no longer be prohibited by Title IX. Most colleges will continue to expect more from its students and employees and will address behavior that will no longer be captured under this proposed definition through other expectations for conduct. If the Department believes it lacks the authority to utilize a broader scope without Congressional revision to the statute, we hope the Department will publicly urge Congress to make such revisions to ensure that all students across the country are provided the same protection against misconduct that was previously prohibited under the prior administration.

Proposed 34 CFR § 106.44(c) regarding emergency removal contains the following sentence: "This provision shall not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or title II of the Americans with Disabilities Act." Like the earlier comment about the interplay between Title VII and Title IX, this new language will likely create uncertainty regarding the interplay of Title IX and these disabilities laws, which will further exacerbate the uncertainty regarding involuntary removal of students who pose a threat to self.

Proposed 34 CFR § 106.45(b)(3)(vii) is a new section that requires a live hearing for higher education institutions, requires cross-examination by the party's advisor of choice, which will likely mean an attorney, and requires that any statement made by a party or witness who refuses to submit to cross-examination be disregarded. This proposed live hearing requirement is a one-size-fits-all approach that will create significant challenges for higher education institutions of all sizes. Less-well resources institutions will face challenges of being forced to shift resources away from other educational functions to build an infrastructure that will more closely mirror the court

system, which is something that no higher education institution seeks to mirror. The likely involvement of attorneys who will be conducting cross-examination will force institutions to hire attorneys to run these conduct proceedings out of reasonable concern that non-attorneys may be unable to adequately conduct these proceedings when the parties have attorneys involved. Lastly, many survivors of sexual assault will be revictimized by participating in a process that includes a live hearing and cross-examination by an attorney, which will lead many to choose to not bring complaints forward. This would be a huge step in the wrong direction. We strongly urge the Department to reconsider this new section and continue to provide higher education institutions with the flexibility to determine for themselves the best way to ensure that they have a prompt and equitable process that ensures due process for all.

Proposed 34 CFR § 106.45(b)(3)(viii) is a new section that requires the sending of evidence to the parties and their advisors in an electronic format that restricts the ability to download or copy the evidence. This proposed requirement raises significant concerns about confidentiality and could also be easily foiled by the taking a picture of the evidence.

Thank you,

A handwritten signature in black ink, appearing to read 'Guilherme Costa', with a long horizontal line extending to the right.

Guilherme Costa  
Vice President, General Counsel and  
Secretary to the Board of Trustees  
Ithaca College