Hello Jeff,

We wanted to share with you the comments that ASCA has submitted to the Department of Education regarding the proposed Title IX regulations. We have limited our comments to the main points that would significantly impact our members. As ASCA’s mission "to advance the student conduct profession" is steeped in education, please watch for trainings, webinars, and workshops as the regulations are implemented.

Sincerely,
Cathy Cocks, 2018-2019 President
Seann Kalagher, 2019-2020 President
Jennifer Waller, Executive Director

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Submitted by: Association for Student Conduct Administration
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The Association for Student Conduct Administration (ASCA) is proud to serve almost 3000 members at over 1500 institutions. ASCA serves to promote the student conduct profession through educational opportunities.

ASCA strongly supports student-centered conduct processes that provide equal rights to all parties involved. Higher education student conduct processes are not criminal processes. They are administrative processes designed to resolve complaints within the institution’s community. They are not criminal court processes and should not be expected to mirror such processes. The General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education of 1968 stated, “The discipline of students in the educational community, is in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community...The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.”

Student conduct processes, including those addressing issues of sexual harassment and discrimination, exist to determine if an institution’s policy has been violated. They do not determine if a person has committed a crime. There are behaviors,
such as drug dealing, that are also crimes but it is important to note that the institution is not making a criminal law decision but a policy violation decision.

Given that our processes are educational in nature and meant to be non-adversarial, we continue to support the practice of students engaging in the process and not having representatives actively engaged. Students should be able to utilize support persons for guidance and support but those support persons should not be actively involved such as lawyers are in the criminal process. Students should also be able to provide information, respond to information, and ask questions; however, these need to be done in a manner that is appropriate to limit creating an adversarial environment.

We respectfully submit the following comments to the proposed regulations.

§ 106.6 Effect of other requirements and preservation of rights.
Comment: Public higher education institutions are obligated to comply with the Constitution of the United States. Private higher education institutions do not have that same obligation; therefore, this appears to impose an obligation on private institutions that does not exist.

§ 106.30 Definitions.
- “Actual knowledge”
  o Comment: Using “actual knowledge” instead of “constructive knowledge” could create a situation where a student reasonably expects that notification has been made when it has not because the person notified has authority. For example, a student reporting sexual harassment to the president of the institution should reasonably assume that the president is an appropriate person to notify; however, most presidents do not have the ability to issue corrective measures. This appears to allow senior leaders or departments to ignore such incidents.
- “Sexual harassment”
  o Comment: A number of states such as Connecticut, New York, and California, have developed definitions that may not be consistent with the proposed definition. Institutions will need to have clear direction as to resolve such conflicts regarding definitions.

§ 106.44 Recipient's response to sexual harassment.
- b(c) Emergency removal
  o Comment: This additional grievance process for the respondent presents a dual problem. Institutions have regularly used threat assessment models to determine if removal from campus is appropriate in light of the information gathered. However, if the respondent has the right to contest the emergency removal, the recipient then has to offer an equitable opportunity for the complainant to contest an overturned removal. Additionally, this would then create inequality throughout the rest of the conduct process when emergency removals have otherwise been upheld in the courts in response to immediate threats.

§ 106.45 Grievance procedures for formal complaints of sexual harassment.
- (1) (iv) “Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process”
  o Comment: When conducting a fair and impartial investigation, the investigator should not have a presumption of either “responsible” or “not responsible.” A presumption is a belief which would give an unfair advantage to one party over the other. The investigator should enter an investigation without bias and predetermination.
● (2) (i) (B) “Sufficient details include...the specific section of the recipient’s code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient’s code of conduct... The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.”
  o Comment: A fair and impartial investigation involves learning the facts of the incident before applying specific violations. To determine the actual violations prior to an investigation creates an unfair bias.
  o Comment: When conducting a fair and impartial investigation, the investigator should not have a presumption of either “responsible” or “not responsible.” A presumption is a belief which would give an unfair advantage to one party over the other. The investigator should enter an investigation without bias and predetermination.
● (3) Investigations of a formal complaint.
  o Comment: The expectation that the conduct occur “within the recipient’s program or activity...” prevents institutions from investigating the conduct if it occurs outside of a program or activity but still impacts a person’s participation in the recipient’s program or activity. For example, if one student allegedly rapes another student at an off-campus house and those students are in the same academic program, there will be impact on the complainant’s ability to participate fully in that program. In addition, most institutions have off-campus jurisdiction. A student’s responsibility to an institution cannot end at the door of the institution.
● (3) (iv) “...not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding”
  o Comment: Allowing for the choice of advisor without a criteria such as mandating that the student must choose an advisor that is available for the scheduled meetings and that delays cannot be made because of an advisor’s lack of availability can cause significant delays in a timely resolution of the process.
● (3) (v) “Provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate”
  o Comment: This places an administrative burden on the recipient by requiring a written notice for any interaction. In addition, providing information as to the other party’s meetings could result in security concerns where one party is engaging in retaliatory behavior.
● (3) (vii) “For institutions of higher education, the recipient’s grievance procedure must provide for a live hearing.”
  o Comment: Clarification is needed as to whether a student can request to have the matter resolved outside of a hearing.
● (3) (vii) “At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice...”
  o Comment: Student conduct processes are not akin to criminal court processes. Allowing for advisors to cross-examine creates an adversarial process. We believe students should have the right to provide information, respond to information, and to have questions asked. These issues are institution-specific and should be managed by the institution in a manner most appropriate for that institution.
● (3) (vii) “If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination.”
  o Comment: This places a significant burden on institutions from a staffing and financial resource as these types of roles are not readily available at an institution.
In addition, this has the potential to discriminate against students due to their economic standing given that students may not be able to have the same type of advisor regarding subject matter expertise and experience.

- (3) (vii) “If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility”
  
  o Comment: It is unclear as to whether this includes statements given prior to the hearing. Forcing an individual to make a statement or submit to cross-examination has always been seen as a fundamental right (e.g., the 5th Amendment). An individual refusing to answer questions is not an indication of credibility.

- (3) (vii) “Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.”
  
  o Comment: If the information is not to be used in reaching a determination, it is unclear as to why this needs to be shared. By the nature of sharing it with all parties, it then becomes part of the investigation and therefore, decision-making.

- (3) (vii) “Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report.”
  
  o Comment: First, there are limited platforms that allow for a viewing of a file without downloading and/or copying capability. Even if that is available, an individual could easily take a screenshot of the information. This will force institutions to pay for additional platforms and such an unfunded mandate puts a strain on institutional resources. Second, placing a specific timeline adds length to the investigation and engages the Federal Government in the day to day operations of an institution. Institutions should determine their own timelines.

- (3) (ix) “Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under this section) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response.”
  
  o Comment: Our concern is with the mandated ten days. Institutions should determine the appropriate timelines for their processes.

- (4) Determination regarding responsibility. “To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.”
  
  o Comment: To have truly equitable processes, the parties must be allowed equal rights and considerations. To use a standard other than the preponderance of the evidence standard creates a stance that one party enters the proceedings at an advantage when neither party should have an advantage of the other. These are not criminal matters and institutions should be held to the same standard.

Directed Questions
2. Applicability of provisions based on type of recipient or age of parties. Some aspects of our proposed regulations, for instance, the provision regarding a safe
harbor in the absence of a formal complaint in proposed § 106.44(b)(3) and the provision regarding written questions or cross-examination in proposed § 106.45(b)(3)(vi) and (vii), differ in applicability between institutions of higher education and elementary and secondary schools. We seek comment on whether our regulations should instead differentiate the applicability of these or other provisions on the basis of whether the complainant and respondent are 18 or over, in recognition of the fact that 18-year-olds are generally considered to be adults for many legal purposes.

- Comment: There should be no differentiation due to age. Once an individual is at a higher education institution they should be considered an adult and have the same rights and opportunities. This would be consistent with FERPA.

4. Training. The proposed rule would require recipients to ensure that Title IX Coordinators, investigators, and decision-makers receive training on the definition of sexual harassment, and on how to conduct an investigation and grievance process, including hearings, that protect the safety of students, ensures due process for all parties, and promotes accountability. The Department is interested in seeking comments from the public as to whether this requirement is adequate to ensure that recipients will provide necessary training to all appropriate individuals, including those at the elementary and secondary school level.

- Comment: Institutions should determine the extent of training.

6. Standard of Evidence. In § 106.45(b)(4)(i), we are proposing that the determination regarding responsibility be reached by applying either a preponderance of the evidence standard or the clear and convincing standard, and that the preponderance standard be used only if it is also used for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. We seek comment on (1) whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate; and (2) if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed.

- Comment: To have truly equitable processes, the parties must be allowed equal rights and considerations. To use a standard other than the preponderance of the evidence standard creates a stance that one party enters the proceedings at an advantage when neither party should have an advantage over the other. These are not criminal matters and institutions should be held to the same standard.

7. Potential clarification regarding “directly related to the allegations” language. Proposed § 106.45(b)(3)(viii) requires recipients to provide each party with an equal opportunity to inspect and review any evidence directly related to the allegations obtained as part of the investigation, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, and provide each party with an equal opportunity to respond to that evidence prior to completion of the investigative report. The “directly related to the allegations” language stems from requirements in FERPA, 20 U.S. Code 1232g(a) (4)(A)(i). We seek comment on whether or not to regulate further with regard to the phrase, “directly related to the allegations” in this provision.

- Comment: We do not feel there should be further regulations.

8. Appropriate time period for record retention. In § 106.45(b)(7), we are proposing that a recipient must create, make available to the complainant and respondent, and maintain records for a period of three years. We seek comments on what the appropriate time period is for this record retention.
Comment: It is unclear as to whether the proposed three years is from the time of the incident, report, or connected to the student’s status. Institutions have their own record retention policies and should be allowed to determine the appropriate amount of time in line with their policies as well as already established expectations such as in Clery.

9. **Technology needed to grant requests for parties to be in separate rooms at live hearings.** In § 106.45(b)(3)(vii) we require institutions of higher education to grant requests from parties to be in separate rooms at live hearings, with technology enabling the decision-maker and parties to see and hear each other simultaneously. We seek comments on the extent to which institutions already have and use technology that would enable the institution to fulfill this requirement without incurring new costs or whether institutions would likely incur new costs associated with this requirement.

Comment: The use of video-conferencing equipment is ideal so that neither party is disadvantaged. The resources needed (cost of equipment, space needed, staffing) could be prohibitive to institutions.