



Submitted by: Association for Student Conduct Administration

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The Association for Student Conduct Administration (ASCA) is proud to serve almost 2200 members at over 1200 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 and should not be expected to mirror such processes. They are administrative processes designed to resolve complaints within the institution's community. 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” (District Court, W.D. Mo, 1968).

Student conduct processes, including those addressing policy 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 that the institution adjudicates to determine if a policy has been violated, but it is important to note that the institution is not making a decision that has legal consequences in these instances. They are making a determination as to whether a student remains qualified to continue as a member of the educational community in light of a violation of the institution's policies.

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 and not adversarial.

In line with our verbal comments, we would like to address the regulations and the Department of Education's review of such from three different perspectives: access, equity, and education.

First, the goal of any regulation should be to ensure equal access to the process and provide clear guidance for those responsible for administration and compliance. Yet, since the inception of these

new regulations, many of our members have reported that students are experiencing even more difficulty accessing the Title IX process.

Second, these regulations have a disparate impact on our students and have created an inequity within our disciplinary procedures by requiring two very different processes for behaviors that violate institutional policy. For example, the role and use of the advisor and cross-examination for Title IX policy violations is not the same for non-Title IX policy violations. Furthermore, when advisors for both parties are not both attorneys or do not have the same training or experience, they cannot equitably advise the student and engage in cross-examination. These unfunded mandates create an inherent imbalance to the students, to the process, and among colleges and universities.

Third, ASCA strongly supports student-centered conduct processes that provide equal rights and fairness to all parties involved. We seek policies and processes that treat all students with care, concern, honor, and dignity and we want processes that are fundamentally rooted in education.

We respectfully submit the following comments regarding specific regulations in the 2020 *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* regulations.

#### **106.8 Designation of a coordinator, dissemination of policy, and adoption of grievance procedures**

- 106.8(d) Application outside the United States. The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States. **Comment:** *Incidents of sexual harassment/misconduct that occur outside the geographic borders of the United States can and do have an effect on students when they return to the United States, if the alleged respondent is a student, and the conduct occurred during a school-sponsored trip/activity. Setting this standard creates a confusing bifurcated system. We recommend that institutions be able to hold their students accountable for sexual harassment in the same way that they can hold students accountable for all other policy violations regardless of where they occur. When sexual harassment occurs outside of the United States, all of the involved students return to our institutions. When all students return and if the alleged sexual harassment or violence that happened abroad is not addressed more conflict will arise. That added conflict often leads to disruptions for the complainant's or the alleged respondent's educational experience. Failing to address the complaint through the Title IX process implies that we don't place any value on someone who experiences sexual harassment or violence if it happened outside of the country. Excluding these types of complaints from the Title IX process is harmful for our college and university communities as a whole. Furthermore, complainant's and respondents are even more vulnerable by being away from support systems and legal options they are most familiar with. Institutions have a duty to support and protect their students that are participating in their education program or activity, regardless of the location of such program or activity.*

#### **106.30 Definitions**

- 106.30(a) As used in this part: Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual

knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient... Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

**Comment:** *Institutions need to be allowed to investigate with constructive notice, not just actual notice. Institutions are responsible for providing an educational environment that is free from discrimination. When the institution has constructive notice, but not actual notice, it could be seen as deliberately indifferent for the institution to take no action to protect the members in its community from continued discrimination. Additionally, requiring a signed formal complaint places a barrier to reporting and a barrier for the institution to take action. Oftentimes, complainants are willing to speak about their experiences, but requiring them to write the experience in a document and sign it presents a difficult challenge for them. In these instances, the institution can take measures to ensure that the complainant is making a report to the college and requesting an investigation without requiring a formal signature. While a Title IX Coordinator can sign a formal complaint in lieu of the complainant, the ability to investigate without the complainant’s statement is severely diminished and makes it almost impossible for the institution to move forward with a fair process.*

106.30(b)(iii)(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity

**Comment:** *The change to the definition to be so severe, pervasive, AND objectively offensive creates a conflict with existing laws, such as Title VII surrounding sexual harassment that require behavior to be severe, pervasive, or objectively offensive. Additionally, many state laws have attempted to fill the gap left by inadequate Title IX regulations and require the latter standard of sexual harassment leaving institutions conflicted in complying with both federal and state law. Often this results in a bifurcated grievance process to handle “non-Title IX Sexual Harassment” and created a confusing process for all parties involved.*

#### **106.44 Response to Sexual Harassment**

- 106.44(a) “For the purposes of this section, §§ 106.30, and 106.45, “education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

**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 an impact on the complainant's ability to participate fully in that program. In addition, most institutions have off-campus jurisdiction over student misconduct that negatively reflects on the institution or threatens the safety of the community. A student's responsibility to an institution cannot end at the door of the institution. The text of the law 20 U.S.C 1681 et. seq, clearly identifies a broad jurisdiction of the application of the law. The Department's own guidance ([Equal Opportunity in Intercollegiate Athletics \(1991\)](#)) states that the regulation 34 CFR Part 106 "It also permits individual institutions considerable flexibility in achieving compliance with the law." This guidance was not rescinded. While guidance is different than regulation, it is still published on the Department's website and provides contradictory information regarding the interpretation of section.

#### **106.45 Grievance process for formal complaints of sexual harassment**

- 106.45(b)(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"

**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. Requiring this statement as part of the notice of allegations is unnecessary and confusing, but if required should read instead that "no determination as to responsibility will be made until after the conclusion of the grievance process or, if applicable, other informal resolution process."*

- 106.45(b)(1)(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

**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. Preponderance is the only standard that allows institutions to be as equally fair as possible when there are students involved on both sides of a case. When both students have so much to lose, depending on the outcome of the hearing, preponderance is the appropriate standard. Much is often made of the life-changing consequence of being found responsible for sexual assault or sexual misconduct and being expelled from an institution of higher learning. However, the expelled student can make a new beginning at another institution. It is also important to keep in mind the life-changing consequences for the victim of sexual assault. Preponderance is the standard used in civil rights investigations for other types of discrimination and harassment and sex/gender-based harassment should not be held to a different standard than discrimination of race, national origin, and other protected classes.*

- 106.45(b)(5)(iv) "Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient

may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties”

**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. We support parties’ choice of advisor, but also see the need for institutions to put reasonable restrictions in place to not unfairly prolong the investigation and grievance process.*

- 106.45(b)(5) (vi) “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. 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”

**Comment:** *Regarding the opportunity to inspect and review all evidence obtained, even if it’s not relevant remains unclear as to why this needs to be shared. By the nature of sharing it with all parties, it becomes part of the investigation and therefore, part of the decision-making process. Investigators can be trained to review for relevancy and determine whether or not this should be included for review. Irrelevant evidence has the possibility of confusing the parties, creating additional delays in timelines if a substantial amount exists, and can be omitted from the investigation report with no impact on the final outcome, if in fact it is irrelevant. If parties submit evidence and it is deemed irrelevant, the investigators should notify that specific party why that information is irrelevant and that it will not be considered. In regard to the requirement to share evidence in a way that restricts what the parties and their advisors do with such evidence, 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 regulation forces institutions to pay for additional platforms that may or may not accomplish these objectives, and such an unfunded mandate puts a strain on institutional resources. Additionally, 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 that are reasonable and appropriate for their individual grievance processes.*

- 106.45(b)(5)(vii) “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.”

**Comment:** *While we agree that all parties should have an opportunity to review the investigation report in order to adequately prepare for a hearing, our concern is with the mandated ten days. Institutions should determine the appropriate timelines for their processes.*

- 106.45(6) Hearings. (i) For postsecondary institutions, the recipient’s grievance process must provide for a live hearing.
  - At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions,

including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

**Comment:** *Student conduct processes are not akin to criminal court processes. Allowing for advisors to cross-examine creates an adversarial process that mirrors a criminal process. In addition, it has a chilling effect that causes many complainants to refrain from participating in the process thus perpetuating barriers to access. 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. For example, many institutions' previous procedures allowed for parties to submit questions to the hearing chair to assess for relevancy, and the hearing chair would then ask the question to the intended party. This ensures that questions are reviewed prior to being asked and allows the hearing chair to ask all questions, rather than having an advisor, with or without proper training, asking the questions.*

- If a party does not have an advisor present at the live hearing, the recipient must provide, without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

**Comment:** *Providing an advisor to a party places a significant burden on institutions from a staffing and financial perspective as these types of roles are not readily available at an institution. It would be unfair for an institution to provide a staff member as an advisor when the other party has an attorney or other highly trained advisor, but in many instances, that is the only choice an institution has. This also opens up an institution to liability on the basis of ineffective assistance to counsel, even if that was unintended by the regulation. In addition, this has the potential to discriminate against students due to their economic standing given that students may not be able to afford the same type of advisor regarding subject matter expertise and experience and must solely rely on the institution's chosen advisor. This regulation also conflicts with the Violence Against Women Act Amendments which requires that all parties should be allowed to have an advisor of their choosing. By assigning an advisor for the purpose of cross-examination, we are removing that party's choice.*

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.  
**Comment:** *We agree that questions and evidence about a complainant's prior sexual behavior are not relevant, except in those situations mentioned. A complainant's prior sexual history has no bearing on whether or not a respondent committed a violation of the institution's policies.*
- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the

decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

**Comment:** *It is unclear as to whether this includes statements given prior to the hearing during the investigation or in other submitted evidence. Allowing an individual to make a statement or submit to cross-examination has always been seen as a fundamental right (e.g., the 5<sup>th</sup> Amendment), however requiring them to answer all questions asked, otherwise we lose the ability to consider all other statements that person has created a standard that even criminal proceedings do not use and is in contradiction to formal rules of evidence which don't even apply in these types of processes. This has the potential to harm both the complainant and respondent's access to a fair process in which they both have a right to submit information, but also not be forced to "incriminate" themselves lest the rest of their statements be thrown out. Allowing individuals to choose whether or not to answer a single question should not have such a profound impact on the outcome of an investigation. All parties must be given the opportunity*

- 106.45(b)(9) Informal resolution. A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication

**Comment:** *Requiring a complainant to sign a formal complaint prior to engaging in an informal resolution process creates an unnecessary barrier and formalization of an informal process. The informal resolution process has been a valuable asset to institutions to resolve allegations of misconduct and to be able to address the harm done when the respondent is willing to engage is such a process. Any informal resolution process should always be voluntary, all parties should be informed of the procedures to be used, and institutions should require written consent to participate in such a process. We agree that institutions should never force or require an individual to participate in an informal process as a condition of their employment or education and that any party can, at any time, request the matter be returned to the formal grievance process.*

## Summary

As previously stated, ASCA strongly supports student-centered conduct processes that provide equal rights and fairness to all parties involved. We seek policies and processes that treat all students with care, concern, honor, and dignity and we want processes that are fundamentally rooted in education. The 2020 final rules created inconsistency and contradiction between the law (U.S.C.) and the regulations (34 CFR part 106) which unreasonably placed barriers to access our processes when students have experience sexual harassment and make the application of the law inequitable, as well as interfere with the education offered by institutions to its students. These regulations, as written and enforced, attempt to equate the process used to investigate and resolve incidents falling under the auspices of Title IX of the Education Amendments of 1972 to quasi-

criminal proceedings, while institutions are not required to do such for other types of student misconduct which may also represent criminal behavior. Institutions of higher education do not and should not have the same authority as criminal courts. This has been identified in several court decisions (Dixon v. Alabama (5th Circuit, 1961), *The General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education (W.D. Mo (1968))*). ASCA recommends that the regulations be (re)written with deliberate thought regarding the operationalizing of the regulations by different institutions, and without legislative overreach.

*We would be glad to meet with Department staff to follow up on any of our comments, if that would be helpful.*