EXAMINING THE US DEPARTMENT OF EDUCATION'S DISCUSSION OF RACE IN THE NEW TITLE IX REGULATIONS

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US DEPT. OF EDUCATION OFFICE FOR CIVIL RIGHTS (OCR) ISSUED NEW TITLE IX REGULATIONS ON 5/6/2020

- Trump administration OCR desired to change the approach to Title IX regulation and oversight of Obama administration, with one of its stated goals to improve due process protections for respondents and make institutional Title IX processes more transparent.
- Secty. Devos issued Notice of Proposed Rulemaking in 2018, and received about 124,000 comments from various sectors of interested persons, institutions and organizations
- New regulations issued May 6, 2020 with an August 14, 2020 effective date.
- 34 CFR Part 106; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; amending the regulations implementing Title IX of the Education Amendments of 1972 (Title IX),
  - Preamble, pp. 30026 – 30572; Regulations/Amendments, pp. 30572 - 30579

- The Preamble to the regulations includes numerous discussions about race, Title IX and bias.
- Many have not read the Preamble in full or in detail because of its length
- Most actors in the Title IX space have overlooked the very significant comments, discussions, and changes in the new regulations regarding race
- **One significant change—*Section 106.45(1)(iii) requires educational institutions to provide training to eliminate racial bias to Title IX Coordinators, investigators, decision-makers, and any person who facilitates a resolution process.***

- This presentation highlights the commentary and requirements related to race, particularly racial bias, in the Preamble and the Regulations, as a valuable tool to learn how USED and commenters understand how race and racial bias impact Title IX processes
- I have prepared a companion presentation, "Conscious Compliance to Eliminate Racial Bias in Title IX Processes."
- Important in our implementation of Stockton University Interim Sexual Misconduct Procedure, 6940.

BIAS, DEFINED

- *noun.* “a particular tendency, trend, inclination, feeling, or opinion, especially one that is preconceived or unreasoned”
- *noun.* “unreasonably hostile feelings or opinions about a social group”
- *verb.* “to cause to hold or exhibit a particular bias; to influence, especially unfairly”

Source: Dictionary.com

OCR'S STATED GOALS & PURPOSES OF THE NEW REGULATIONS

- "The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions [recipients or schools] must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination."
- "These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities."
- "The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims."

- “The final regulations also clarify and modify Title IX regulatory requirements regarding remedies the Department may impose on recipients for Title IX violations, the intersection between Title IX, Constitutional protections, and other laws, the designation by each recipient of a Title IX Coordinator to address sex discrimination including sexual harassment, the dissemination of a recipient’s non-discrimination policy and contact information for a Title IX Coordinator, the adoption by recipients of grievance procedures and a grievance process, how a recipient may claim a religions exemption, and prohibition of retaliation for exercise of rights under Title IX.”

COMMENTS -- REPORTING DATA -- 30081

- "Some students—especially students of color, undocumented students, LGBT students, and students with disabilities—are less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence or deportation. [fn. 416] Survivors of color may not want to report to the police and add to the criminalization of men and boys of color; for these students, schools are often the only avenue for relief. Many LGBTQ students and students of color may feel mistrustful, unwelcomed, invisible, or discriminated against, which makes reporting their experience of sexual assault even more difficult [fn. 417]." -- 30082

- “Sixty-nine percent of sexual abuse survivors said that police officers discouraged them from filing a report and one-third of survivors had police refuse to take their report; 80 percent of sexual assault survivors are reluctant to seek help and 91 percent report feeling depressed after their interaction with law enforcement. [fn. 419]”
- “Native American women are reluctant to report crimes because of the belief that nothing will be done; according to a 2010 study, the government declined to prosecute 67 percent of sexual abuse, homicide, and other violent crimes against Native American women.”

ED'S DISCUSSION – P. 30082

- "We have revised the final regulations in several ways in order to provide students, employees, and third parties with clear, accessible reporting channels, predictability as to how a recipient must respond to a report, informed options on how a complainant may choose to proceed, and requirements that Title IX personnel serve impartially, free from bias."
- Addresses who may receive a report and the actual knowledge definitions as establishing "clear reporting channels" and "predictability as to the recipient's response obligations."
- "Every Title IX Coordinator must be free from conflicts of interest and bias and, under revised 106.45(b)(1)(iii), trained in how to serve impartially and avoid prejudgment of the facts at issue." -- 30083

- 106.45(1) Basic Requirements for Grievance Process
  - States that all K-12 and postsecondary institutions must follow the outlined process
  - Includes, among other things, discussion of remedies, the objective evaluation of all relevant evidence, training on the definition of sexual harassment in the final rule, how to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, how to serve impartially, including how to avoid prejudgment of the facts at issue, conflicts of interest and bias.

NEW REGULATIONS REQUIRE TRAINING TO ADDRESS AND ELIMINATE RACIAL BIAS

- Some of the most important discussions and changes as it relates to race are in 106.45(1)(III).
- 106.45(1)(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- A recipient must ensure that Title IX Coordinators, investigators, decision-makers and any person who facilitates a resolution process, receive training on the definition of sexual harassment in 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

- ”We have added 106.71 prohibiting retaliation against any individual exercising Title IX rights (including the right to refuse to participate in a grievance process).” 30083
- “We have revised §106.45(b)(1)(iii) to require that Title IX personnel be trained on how to serve impartially, without prejudgment of the facts.”
- Response from ED—
- 1) clarified to whom a person may make a complaint, 2) required training on bias, and prohibited retaliation against complainants

STEREOTYPES/PUNISHMENT FOR "LYING" DISCUSSION -- 30083

- "Some commenters asserted that the proposed rules will be particularly harmful to women and girls of color, who experience explicit and implicit bias in the investigation of claims of sexual harassment and assault. Commenters argued that due to harmful race and stereotypes that label women of color as "promiscuous," schools are more likely to ignore, blame, and punish women and girls of color who report sexual harassment. [fn. 423]"

- "Commenters stated that Black women and girls are commonly stereotyped as "Jezebels." Latina women and girls as "hot-blooded." Asian American and Asian Pacific Islander women and girls as "submissive and naturally erotic." Native American women and girls as "sexually violable as a tool of war and colonization," and multiracial women and girls as "tragic and vulnerable, historically, products of sexual and racial domination."

- “Commenters stated that schools are also more likely to punish Black women and girls by labeling them as aggressors based on stereotypes that they are “angry” and “aggressive.”
- “Commenters pointed out that the Department's 2013-14 Civil Rights Data Collection shows that Black girls are five times more likely than white girls to be suspended in K-12, and that while Black girls represented 20 percent of all preschool enrolled students, they were 54 percent of preschool students who were suspended.
- Commenters argued that schools should require all officials involved in Title IX proceedings to attend implicit bias trainings.

- “One commenter argued that the negative effects of harmful stereotypes are exacerbated by the fact that the proposed rules would allow schools to punish students whom the school believes are lying, and this could have a significant effect on survivors of color.
- “Commenters asserted that many Black girls who defend themselves against perpetrators are often misidentified as the aggressors. “
- “Similarly commenters asserted that the proposed rules would allow a school to punish any person, including a witness, who “knowingly provides false information” to the school, which makes it even easier for schools to punish girls and women of color who report sexual harassment for “lying about it, when such a conclusion by the school is often based on negative stereotypes rather than the truth.”

ED'S DISCUSSION

- *"The Department shares the concerns of commenters who asserted, and cited to data and articles showing, that some complainants, including or especially girls of color, face school-level responses to their reports of sexual harassment infected by bias, prejudice, or stereotypes. " emphasis added. [30084]*

- In response to such concerns, the Department adds to §106.45(b)(1)(iii), prohibiting Title IX Coordinators, investigators, and decision-makers, and persons who facilitate informal resolution processes from having conflicts of interest or bias against complainants or respondents generally, or against an individual complainant or respondent, training that also includes "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias."
- "No complainant reporting Title IX sexual harassment or respondent defending against allegations of sexual harassment should be ignored or be met with prejudgment, and the final regulations require recipients to meet response obligations *impartially and free from bias." emphasis added [30084]*

- “The Department will vigorously enforce the final regulations in a manner that holds recipients responsible for responding to complainants, and treating all parties during any §106.45 grievance process, impartially without prejudgment of the facts at issue or bias, including bias against an individual’s sex, race, ethnicity, sexual orientation, gender identify, disability or immigration status, financial ability, or other characteristic.

- “Any person can be complainant, and any person can be a respondent, and every individual is entitled to impartial, unbiased treatment regardless of personal characteristics.”

- “The Department declines to specify that training of Title IX personnel must include ***implicit bias training***: the nature of the training required under §106.45(b)(1)(iii) is left to the recipient’s discretion so long as it achieves the provision’s directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes. [emphasis added]

- In response to commenters' concerns that biases and stereotypes may lead a recipient to punish students reporting sexual harassment allegations, the Department adds §106.71(a) to expressly prohibit retaliation and specifically state that intimidation, threats, coercion, discrimination, or charging an individual with a code of conduct violation, arising of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation. -- 30084

ED CHANGES:

- The Department has revised 106.45(b)(1)(iii) to include in the required training how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. “
- “We have added 106.71(a), which prohibits retaliation and states that charging an individual with a code of conduct violation that does not involve sexual harassment but arises out of the same facts or circumstances as sexual harassment allegations, for the purpose of interfering with rights under Title IX, constitutes retaliation.
- The Department has also added 106.71(b)(2) to provide that charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute retaliation, provided that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a such false statement.” (sic)

GRIEVANCE SUPPORT AND OPPOSITION FOR THE GRIEVANCE PROCESS IN 106.45 -- 30095

- "A few commenters supported the due process protections in 106.45 on the ground that lack of due process in any system, whether courts of law or educational institution tribunals, often results in persons of color and persons of low socioeconomic status being wrongly or falsely convicted or punished.
- Several commenters asserted that men of color are more likely than white men to be accused of sexual misconduct and a system that lacks due process thus results in men of color being unfairly denied educational opportunities.
- One commenter asserted that due process exists not only to protect all individuals irrespective of sex, race, or ethnicity from persecution by those in power but also exists to ensure those in authority re enacting real justice, and that when due process is abandoned, it is always the most marginalized and vulnerable who suffer; other commenters echoed that theme."

ED DISCUSSION:

- “The provisions in 106.45 are grounded in principles of due process to promote equitable treatment of complainants and respondents and protect each individual involved in a grievance process without bias against an individual's sex, race, ethnicity, socioeconomic status, or other characteristics, by focusing the proceeding on unbiased, impartial determinations of fact based on relevant evidence.”

ED CHANGES:

- To clarify that the ten groups of provisions that comprise 106.45 apply as a cohesive whole to the handling of a formal complaint of sexual harassment, the Department has changed terminology throughout the final regulations to refer to "a grievance process complying with 106.45" (for example, in 106.44(a),) and uses the phrase "grievance process" rather than "grievance procedures" within 106.45. Additionally, 106.45(b)(5) now clarifies that the procedures a recipient must follow during investigation of a formal complaint also must apply throughout the entire grievance process.

- ED acknowledged that colleges have varied disciplinary procedures, but it reaffirmed its right to establish uniform grievance procedures under Title IX under its Title IX enforcement powers. --30096
- "The Department does not agree that an adversarial process runs contrary to Title IX as a civil rights mechanism. To the extent that commenters raising this concern believe that adversarial systems, historically or generally, disadvantage people already marginalized due to sex, race, ethnicity, and other characteristics, the Department will enforce all provisions of 106.45 without regard to any party's sex, race, ethnicity, or other characteristic, and expects recipients to implement 106.45 without bias of any kind.

COMMENTS -- 30102

- “Commenters asserted that a regulation concerned with avoiding violations of respondents’ due process rights ignores the way complainants are still being pushed out of school due to inadequate, unfair responses to their reports of sexual harassment. Several commenters described retaliatory, punitive school and college responses to girls and women who reported suffering sexual harassment. At least one commenter asserted that while data show that boys of color are not disciplined in elementary and secondary schools for sexual harassment at rates much higher than white boys, data show that girls of color not only suffer sexual harassment at higher rates than white girls, but also are more likely to have their reports of sexual harassment ignored or be blamed or punished for reporting.”

DISCUSSION

- “The Department disagrees that due process protections generally, and the procedures drawn from due process principles in 106.45 particularly, unfairly favor respondents over complainants or sexual harassment perpetrators over victims, or that 106.45 is biased against complainants, victims, or women.”
- “Whether or not the commenter correctly asserted that boys of color are not punished for sexual harassment at much higher rates than white boys but that girls of color are ignored and retaliated against at rates higher than white girls, the protections extended to complainants and respondents under the final regulations apply without bias against an individual’s sex, race, ethnicity, or other characteristic of the complainant or respondent.”

COMMENTS -- 30160

- "Several commenters argued that adopting a narrower definition of sexual harassment makes it easier for sexist, misogynistic, and homophobic microaggressions, including sexist hostility and crude behavior, to continue unchecked. Commenters argued that making the definition of sexual harassment less inclusive tacitly condones microaggressions, making campuses less safe and decreasing diversity because more students from underrepresented groups will perform worse in school or leave school entirely."

- "A few commenters recommended that the definition include microaggressions. Some commenters asserted that microaggressions can cause the same negative impact on victims as more severe harassment does. [fn. 696] Other commenters asserted that using a "severe, pervasive, and objectively offensive" standard fails to consider personal, cultural, and religious differences in determining what constitutes sexual harassment, ignoring the fact that especially for individuals in marginalized identity groups, microaggressions may not seem pervasive or severe to an outsider but accumulate to make marginalized students feel unwelcome and unable to continue their education."

ED DISCUSSION:

- "The Department declines to prohibit microaggressions as such, but notes that what commenters and researchers consider microaggressions [fn 704] could form part of a course of conduct reaching severity, pervasiveness, and objective offensiveness under 106.30, though a fact-specific evaluation of specific conduct is required."
- "Where harm results from behavior that does not meet the 106.30 definition of sexual harassment, nothing in these final regulations precludes recipients from addressing such behavior under a recipient's own student or employee conduct code."
- "As noted above, the fact that not every harassing or offensive remark is prohibited under Title IX in no way condones or encourages crude, insulting, demeaning behavior, which recipients may address through a variety of actions; as a commenter pointed out, a recipient's response could include providing a complainant with supportive measures, responding to the conduct in question with institutional speech *or offering programming designed to foster a more welcoming campus climate generally, including with respect to marginalized identity groups." emphasis added 30161*

COMMENTS

- On the definition in the NPRM of "education program or activity"…
- "Commenters asserted that the NPRM especially increases risks to community colleges and vocational school students because such students generally live off campus, to students of color and other already marginalized students who may not be able to afford to live on campus, to elementary and secondary school students with disabilities who may be separated from their peers and removed to off-site services, and to LGBTQ students because it may be harder for them to find adequate outside support services."

DISCUSSION

- ED relied on the Gebser/Davis framework and guidance as to what constitutes an educational program or activity
- Also, “As discussed in the “Clery Act” subsection of the “Miscellaneous” section of this preamble, the Clery Act and Title IX serve distinct purposes, and Clery Act geography is not co-extensive with the scope of a recipient’s education program or activity under Title IX.”

COMMENTS – 106.45(B)(1)(III) IMPARTIALITY AND MANDATORY TRAINING OF TITLE IX PERSONNEL; DIRECTED QUESTION 4 (TRAINING) -- 30249

- A commenter supported 106.45(b)(1)(iii) combined with other provisions in 106.45 "because while nothing can completely eliminate gender or racial bias from the system, bias can be reduced by expanding the evidence considered by decision-makers, a function served by a full investigation and hearings with cross examination. The commenter argued that decisions are most biased when they rely on less evidence and more hunches because hunches are easily tainted by subconscious racial or gender bias. [fn 1029]
- "The commenter asserted that the obligation of the law under Title IX is to treat each person as an individual, to as a member of a class subject to prejudgment and prejudice on the basis of sex, and nowhere is the problem of sex bias more pronounced than in the area of perception prejudgment, and prejudice in the matter of incidences of violence between members of the opposite sex."

- “One commenter supported this provision but noted that the Supreme Court has recognized that as a practical matter it is difficult if not impossible for an adjudicator “to free himself from the influence” of circumstances that would give rises to bias, and the private nature of motives “underscore the need for objective rules” for determining when an adjudicator is biased. [fn 1031] This commenter asserted recipients thus need to have objective rules for determining bias.”
- “A few commenters supporting this provision recommended that the Department or recipients on their own, establish a clear process or mechanism for reporting conflicts of interest or demanding recusal for bias during the investigative process.”
- “Several commenters supported this provision but urged the Department to make the training materials referred to in 106.45(b)(1)(iii) publicly available because transparency is the most effective means to eradicate the problems with biased Title IX proceedings, which problems are often rooted in biased training materials.”

- “These commenters argued that when recipients know that their training materials are subject to scrutiny, recipients will be more careful to ensure that Title IX personnel are being trained to be impartial. One commenter asserted that a lot of training is conducted via webinars and that public disclosure of training materials must include audio and video of the training as well as documents or slideshow presentations used during the training.

ED'S DISCUSSION – 30250 [VERY IMPT.]

- "The Department agrees with commenters who noted that prohibiting conflicts of interest and bias, including racial bias, on the part of people administering a grievance process is an essential part of providing both parties a fair process and increasing the accuracy and reliability of determinations reached in grievance processes. "
- "Recognizing that commenters recounted instances of experience with perceived conflicts of interest and bias that resulted in unfair treatment and biased outcomes, the Department believes that this provision [106.45(b)(iii) regarding training] provides a necessary safeguard to improve the impartiality, reliability and legitimacy of Title IX proceedings. [fn. 1032]

- “The Department agrees with a commenter who asserted that recipients should have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution process) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias, including whether a recipient whishes to provide a process for parties to assert claims of conflict of interest or bias during the investigation.
- The Department notes that 106.45(b)(8) “requires recipients to allow both parties equal right to appeal including on the basis that the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome.”

- *“The Department is persuaded by the numerous commenters who urged the Department to require training materials to be available for public inspection, to create transparency and better effectuate the requirements of 106.45(b)(1)(iii). The final regulations impose that requirement in 106.45(b)(10).” [emphasis added]*

- “Additionally, the Department will not tolerate discrimination on the basis of race, color, or national origin, which is prohibited under Title VI. If any recipient discriminates against any person involved in a Title IX proceeding on the basis of that person’s race, color, or national origin, then the Department will address such discrimination under Title VI and its implementing regulations, in addition to such discrimination potentially constituting bias prohibited under 106.45(b)(1)(iii) of these final regulations.” -- 30250

ED CHANGES:

- “The final regulations revise 106.45(b)(10)(i)(D) to require that training materials referred to tin 106.45(b)(1)(iii) must be made publicly available on a recipient’s website, or if the recipient does not have a website such materials must be made available upon request for inspection by members of the public.”

COMMENTS

- ED notes that several commenters were skeptical that recipients could be “objective, fair, unbiased, or free from conflicts of interest” because the recipient’s employees shared the recipients' interest in “protecting the recipients reputation or furthering the recipients’ financial interest.” -- 30250

ED DISCUSSION -- 30252

- "Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents), bearing in mind that the very training required by 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role."

- “In response to commenter’s concerns that the prohibition against conflicts of interest and bias is unclear, the Department revises this provision to mandate training in “how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias” in place of the proposed language for training to “protect the safety of students, ensure due process protections for all parties, and promote accountability.”
- ”This shift in language is intended to reinforce that recipients have significant control, and flexibility, to prevent conflicts of interest and bias by carefully selecting training content focused on impartiality and avoiding prejudgment of the facts at issue, conflicts of issue, and bias.”

ED CHANGES

- 106.45(b)(1)(iii) “is revised to specify that the required training include “how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias” in place of the proposed language “that protect the safety of students, ensure due process protections for all parties, and promote accountability.” [fn 1038]

COMMENTS/DISCUSSION ON ANNUAL TRAINING

- Commenters noted that 106.45(b)(1)(iii) did not state frequency of training and wondered if it had to be annually

- In Discussion, ED noted that the final regulations do not impose an annual or other frequency of training mandates. "The Department interprets [106.45(b)(1)(iii)] as requiring that any Title IX Coordinator, investigator, decision-maker, or person who facilitates an informal resolution process will, when serving in such a role, be trained to serve in that role. The Department wishes to leave recipients flexibility to decide what extent additional training is needed to ensure that Title IX personnel are trained when they serve." [fn. 1041—ED notes in this footnote that, "The Department believes that advisors in such a role do not need to be unbiased or lack conflicts of interest precisely because the role of such advisor is to conduct cross-examination on behalf of one party, and recipients can determine to what extent a recipient wishes to provide training for advisors when a recipient may need to provide a party to conduct cross-examination."]

COMMENTS – STUDENTS OF COLOR, LGBTQ STUDENTS, AND INDIVIDUALS WITH DISABILITIES -- 30259

- "Multiple commenters asserted that, because of the presumption of non-responsibility, schools may be more likely to ignore or punish survivors who are women and girls of color, pregnant and parenting students, and LGBTQ students because of harmful stereotypes. "
- "Commenters argued that the presumption would especially harm Asian Pacific Islander women who, because of social taboos about sexual activity prevalent in Asian cultures, are significantly less likely to report instances of sexual assault and will feel further deterred by a presumption favoring the respondent. Commenters argued that Black women and girls are more likely to be punished by schools who stereotype them as the aggressor when they defend themselves against their harassers or when they respond to trauma."

- “Other commenters who agreed with the proposed rules including the presumption, recounted personal stories in which family members and friends who are Black males were falsely accused of sexual assault yet the recipient seemed to treat the respondent as guilty unless proven innocent. One commenter asserted that the sexual assault grievance process has become a tool for white administrators to punish Black males as young as five years old. The commenter wished to see what they called an outdated Jim Crow-era system replaced with a system that is fair to all.”

ED DISCUSSION

- "The Department understands the commenters' concerns that students of color, LGBTQ students, students with disabilities, and other students will be adversely affected by the presumption of non-responsibility. The Department does not believe that the presumption will adversely affect the rights of any complainant, including complainants of demographic groups who may suffer sexual harassment at greater rates than members of other demographic groups. The Department believes that a presumption that protects respondents from being treated as responsible until conclusion of a grievance process furthers the recipient's obligation to fairly resolve allegations of sexual harassment and increases the likelihood that every outcome will carry greater legitimacy."
- "Further, students of color LGBTQ students, and students with disabilities may be respondents in Title IX grievance processes, in which situation the presumption of non-responsibility reinforces the recipient's obligation not to prejudge responsibility, countering negative stereotypes that may affect such respondents."

- The presumption of non-responsibility in 106.45(b)(1)(iv) does not contribute to negative stereotypes that commenters characterize as causing people to disbelieve students of color, pregnant or parenting students, LGBTQ students, or students with disabilities (or conversely, to rush to assume the responsibility of such students based on similar negative stereotypes.) The presumption protects respondents against being treated as responsible until conclusion of the grievance process but this does not entail disbelieving complainants.

COMMENTS/DISCUSSION ON ADVISOR'S OF CHOICE -- 30298

- ED Discussion: "The Department notes that the 106.45(b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias does *not* apply to party advisors (including advisors provided to a party by a postsecondary institution as required under 106.45(b)(6)(i)), and thus, the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statement as a witness does not violate the final regulations. Rather, the perceived "conflict of interest" created under that situation would be taken into account by the decision-maker in weighing the credibility and persuasiveness of the advisor-witness testimony."

COMMENTS – DEMEANOR EVALUATION IS UNRELIABLE -- 30320

- "Commenters argued that cross-examination is an opportunity to evaluate the body language and demeanor of a party under questioning for the purpose of assessing credibility [fn 1219] but that while credibility is typically based on a number of factors such as sufficient specific detail, inherent plausibility, internal consistency, corroborative evidence, and demeanor, the most unreliable factor is demeanor."

ED DISCUSSION

- “The final regulations require decision-makers to explain in writing the reasons for determinations regarding responsibility; [fn 1228] if a decision-maker inappropriately applies pre-existing assumptions that amount to bias in the process of evaluating credibility, such bias may provide a basis for a party to appeal. The Department expects that decision-makers will be well-trained in how to serve impartially, including how to avoid prejudgment of the facts at issue and avoid bias, [fn. 1230] and the Department notes that judging credibility is traditionally left in the hands of non-lawyers without specialized training, in the form of jurors who serve as fact-finders in civil and criminal trials, because assessing credibility based on factors such as witness demeanor, plausibility, and consistency are functions of common sense rather than legal expertise.”

COMMENTS - FINANCIAL INEQUITIES

- Regarding the ability to hire an attorney as an advisor.
- “Commenters argued that the financial disparity will fall hardest on students of color including children of immigrants, international students, and first-generation students, as they are more likely to come from an economically disadvantaged background and cannot afford expensive lawyers. “

ED DISCUSSION

- “Regardless of whether certain demographic groups are more less financially disadvantaged and thus more or less likely to hire an attorney as an advisor of choice, decision-makers in each case must reach determinations based on the evidence and not solely based on the skill of a party’s advisor in conducting cross-examination. The Department also notes that the final regulations require a trained investigator to prepare an investigative report summarizing relevant evidence, and permit the decision-maker on the decision-maker’s own initiative to ask questions and elicit testimony from parties and witnesses, as part of the recipient’s burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence. Thus the skill of a party’s advisor is not the only factor in bringing evidence to light for decision-maker consideration.”

COMMENTS – BENEFITS OF ENDING THE SINGLE INVESTIGATOR MODEL - 30366

- "Many commenters supported the NPRM's prohibition on the single investigator model because it would reduce the risk of bias and unfairness. Commenters argued that ending the single investigator model would decentralize power from one individual, allow for checks and balances, reduce the risk of confirmation bias, and increase the overall fairness and reliability of Title IX proceedings.
- One commenter argued that procedural protections are necessary but not sufficient to render fair outcomes; the commenter stated it is also necessary to prohibit, detect, and eliminate bias. The commenter argued that unbiased adjudicators are a bedrock principle of any disciplinary proceeding, and this principle has been well understood since the founding of this country and development of the common law.

ED DISCUSSION -- 30367

- “The Department appreciates the support from commenters for 108,45(b)(7)(i) of the final regulations which, among other things, would require the decision-maker to be different from any person who served as the Title IX Coordinator or investigator, thus foreclosing recipients from utilizing a “single investigator” or “investigator-only” model for Title IX grievance processes.

COMMENTS – SAFETY CONCERNS

- “Many commenters contended that the clear and convincing standard will make campuses less safe, chill reporting, and harm already vulnerable students. [fn. 1463]. Commenters argued that the clear and convincing evidence standard will discourage survivors, particularly students of color, LGBTQ students, and students with disabilities, from reporting because this standard unjustly favors respondents.”

ED CHANGES -- 30374

- “The Department has revised 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard and 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty.”

COMMENTS – INFORMAL RESOLUTION --30399

- "Some commenters appreciated the option of informal resolution in the proposed rules for reasons that echoed one commenter's assertions as follows: "Restrictions on informal resolution have had several problematic consequences. Would-be complainants often declined to come forward with complaints because they were offered only two roads forward: The full formal process leading to possibly severe punishment for the respondent, or counseling for themselves. The students often said: 'I don't want the respondent to be punished; I just want them to realize how bad this event was for me.' Students fully prepared to confess, apologize, and take their sanction were sometimes ground through the formal process for no good reason."

ED DISCUSSION

- “The Department appreciates the support from commenters regarding informal resolution and agrees that, subject to limitations, informal resolution may represent a beneficial outcome for both parties superior to forcing the parties to complete a formal investigation and adjudication process as the only option once a formal complaint has raised allegations of sexual harassment.”

ED CHANGES

- “The Department has made several changes to the informal resolution provision that we proposed in the NPRM. Individuals facilitating informal resolution must be free from conflicts of interest, bias, and trained to serve impartially. [fn 1504]”

COMMENTS – TERMINOLOGY CLARIFICATIONS -- 30401

- "A number of commenters expressed concerns regarding the terminology surrounding informal resolution in the NPRM. Commenters stated that calling this process "informal" can cause recipients to underestimate the training, skill, and preparation necessary to successfully execute this resolution method, and it might also lead recipients to treat sexual misconduct claims with greater skepticism than other misconduct."

ED DISCUSSION

- “Indeed, the Department acknowledges the concerns raised by some commenters regarding the training and independence of individuals who facilitate informal resolutions. In response to these well taken comments, we have extended the anti-conflict of interest, anti-bias, and training requirements of 106.45(b)(1)(iii) to these personnel in the final regulations. The same requirements that apply to Title IX Coordinators, investigators, and decision-makers now also apply to any individuals who facilitate informal resolution processes.”

COMMENTS – TRAINING REQUIREMENTS -- 30405

- “Many commenters contended that the final regulations should impose training and qualification requirements on mediators, facilitators, arbitrators, and other staff involved in formal resolution. “

ED DISCUSSION

- "The Department appreciates the well-taken concerns raised by many commenters that the NPRM did not explicitly require informal resolution personnel to be appropriately trained and qualified. As a result, as discussed above, we have revised 106.45(b)(1)(iii) of the final regulations to require recipients to ensure any individuals who facilitate an informal resolution process must receive training on the definition of sexual harassment contained in 106.30 and the scope of the recipient's education program or activity; how to conduct informal resolution processes; and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, or bias. As such, the Department believes that it is unnecessary to encourage recipients to enter MOUs with third party informal resolution providers, through the Department notes that the final regulations permit recipients to outsource informal resolutions to third parties."

COMMENTS – SECTION 106.6(D)(1) FIRST AMENDMENT

- "A number of commenters expressed support for 108.6(d) generally, including 106(d)(1) regarding the First Amendment. Other commenters argued the provision is necessary to prevent a chilling effect on free speech.
- "Commenters expressed support for the saving clause nature of this provision because of concerns that Title IX has a disproportionate impact on men of color and other disadvantaged demographic groups."

ED DISCUSSION -- 30418

- "The Department added 106.6(d)(1) to act as a saving clause. [fn 1550: "Saving Clause," Black's Law Dictionary (11th ed. 2019)("A statutory provision exempting from coverage something that would otherwise be included. A saving clause is generally used in a repealing act to preserve rights and claims that would otherwise be lost."] Its purpose is to ensure the Department is promoting non-discrimination enforcement consistent with constitutional protections, and with First Amendment protections of free speech and academic freedom in particular. "

COMMENTS

- “Several commenters raised a number of issues that did not directly relate to the provision in 106.6(f) regarding Title VII. One commenter suggested that the Department collect racial data from campuses to ensure we know how many persons of color have been expelled under Title IX “campus kangaroo courts.” This commenter expressed concern that the Department may be inadvertently encouraging racial discrimination while trying to eliminate sex discrimination.”

ED DISCUSSION

- “Students who experience racial discrimination in a proceeding under Title IX may file a complaint under Title VI with OCR, and the Department will vigorously enforce Title Vi’s racial discrimination prohibitions. With respect to concerns about the number of students of color who may be expelled from school, we believe that the grievance process in 106.45 will provide parties, including persons of color, with sufficient due process protections. Contrary to the commenter’s assertions, the Department does not have the authority to enforce Title VII.”

COMMENTS – ESES (ELEMENTARY AND SECONDARY EDUCATION SCHOOLS) -- 30483

- "Many commenters argued that the grievance procedures in the NPRM generally do not work well for ESE recipients."
- "Commenters also stated that students themselves will be confused by the proposed rules, and many will need to hire legal counsel in order to fully understand their rights. Commenters argued that sexual harassment incidents disproportionately affect Black students and transgender students, so the proposed rules would hurt them especially."

ED DISCUSSION/CHANGES

- The Department disagreed with the commenters in many ways as it relates to the new regulations, and the Department made no changes.

QUESTIONS AND CONTACT INFORMATION

- Please email me if you have any questions – Sheilah Vance, Esq., Sheilah.Vance@Stockton.edu
- Thank you!