



September 12, 2022

The Honorable Miguel Cardona  
Secretary of Education  
Care of: Alejandro Reyes, PCP-6125  
United States Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202

**Re: Docket ID ED-2021-OCR-0166**

Dear Secretary Cardona:

On behalf of the State University of New York (“SUNY”), I write to offer comments in support of the vast majority of the above-referenced Proposed Regulations under Title IX of the Education Amendments of 1972, while respectfully seeking reconsideration and clarity regarding other remaining provisions as addressed herein.

Throughout SUNY’s history, we have routinely expressed concerns and advocated policy changes regarding the differential impact that sexual harassment has on different genders and gender identities. As we proudly near our 75<sup>th</sup> anniversary, I am reminded how our founding occurred at a time when many individuals – especially women, people of color, religious minorities, and others were denied access to higher education. Today we are as committed as then to the ideals of creating opportunity and equity.

We believe the flexibility embedded throughout the proposed regulations may indeed facilitate increased student and employee engagement in reporting any potential sex discrimination by mitigating the potential chilling impact of overly cumbersome or onerous procedures associated with the current Title IX grievance process. Furthermore, institutions will be able to more accurately and effectively comply with these regulations and New York State Education Law Article 129-B. Nonetheless, there are some areas of the proposed regulations to which we respectfully request further assessment, revision, and clarification to help ensure that the underlying intent of the Department is appropriately realized and implemented in the best interest of students, employees, institutions, and the broader community alike.

The comments noted herein will address each of those accordingly and, pursuant to the Administrative Procedure Act,<sup>1</sup> I ask that each comment be carefully considered and responded to before Final Regulations are issued.

SUNY is the largest comprehensive system of higher education in the United States, with 64 college and university campuses located within 30 miles of every home, school, and business

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<sup>1</sup> 5 U.S.C.A § 706.

in the state. SUNY oversees nearly a quarter of all academic research in the state of New York. And SUNY's students and faculty make significant contributions to research and discovery, contributing to a \$1.6 billion research portfolio. There are three million SUNY alumni worldwide, and one in three New Yorkers with a college degree counts themselves as a SUNY alumnus.

We are invested in and deeply committed to ongoing implementation of sexual and interpersonal violence prevention and response training, as well as strategies on campus and in the community to address this critical issue. University leadership and staff worked closely with agencies, organizations, leaders, and key stakeholders at the federal, state and local level to bring awareness to this issue and craft state legislation governing institutional response to sexual harassment and violence.

We appreciate the time and effort the Department has expended on this proposed overhaul of the 2020 Final Regulations and, while lauding many of the great changes that have been made to ensure a clearer, fairer process for students reporting sex discrimination and sex-based harassment, we are eager to be a thoughtful partner in identifying potential areas for improvement. Overall, the Department has done much to reduce the chilling effect that policies and procedures related to sex discrimination reporting and adjudication under the current regulations have had, especially as related to sex-based harassment and its impact on parties.

Below please find comments and feedback on behalf of SUNY concerning both key areas of great support and those in which we seek further consideration, clarity, and guidance.

SUNY supports key qualities and provisions of the proposed Title IX regulations, including but not limited to:

- The revised definition and jurisdictional scope of harassment and discrimination on the basis of sex, which provides increased institutional flexibility to integrate state-specific legal requirements into Title IX related policies and procedures;
- Flexibility for employers on the standard of proof in disciplinary hearings related to employees; and
- Removal of the mandate of advisor-led cross-examination and flexibility around cross-examination in cases that turn on credibility.

SUNY requests further consideration and clarity regarding the following key issues:

- Institutional expectations and response requirements when direct or indirect knowledge of a potential Title IX violation is gained outside of a formal complaint, as defined in the current regulations;
- Institutional expectations and response requirements under Title IX related to harassment or discrimination on the basis of sex that occurs outside of the United States, such as during study abroad programming, that results in a request for supportive measures, absent evidence of a hostile environment per the proposed definition;

- The definition of “employee” and whether or not collectively bargained disciplinary processes would be sufficient to fulfill Title IX’s due process requirements;
- Challenges surrounding the existing cross-examination processes, especially as related to attorney participation as advisors thereof;
- The intended scope (as related to the persons to be trained and the substance of the proposed training tiers) and publication/reporting requirements associated with employee Title IX training for compliance purposes; and
- Peer-to-peer retaliation and First Amendment related issues implicated by disciplinary action and intersection of free speech.

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## I. Sex-Based Harassment and Sex Discrimination- Scope

SUNY appreciates the Department’s revised definitions regarding “sex-based harassment” and others that broaden jurisdictional reach, however, SUNY respectfully requests clarification on certain expansions that would help in effectively implementing the final rule.

### A. Sex-based Harassment and Sex Discrimination- Definition Considerations

SUNY recognizes the Department’s ongoing efforts to identify sex-based harassment as a critical area of concern and define a scope of conduct that requires institutional attention and action to enhance safety measures and mitigate potential harm on campuses and surrounding communities. As previously noted, SUNY is committed to its ongoing efforts to mitigate and respond to sexual and interpersonal violence on campus and related spheres of impact in furtherance of a safe and welcoming environment and experience for all. Thus, SUNY supports the Department’s revised definition of “sexual harassment” to “sex-based harassment” which reflects an expanded scope of conduct substantively, in addition to a broadened jurisdictional reach from an authority and disciplinary standpoint.<sup>2</sup> Furthermore, we support the changes that address the circumstances in which a “hostile environment” can be addressed under Title IX.<sup>3</sup> The new definition of “hostile environment” more appropriately aligns with Title VII case law, and the factors and guideposts established to determine what constitutes a “hostile environment” is much clearer for application purposes than under the current definition of “sexual harassment,” which is extremely narrow.<sup>4</sup>

The narrow scope of the Department’s current definition for “sexual harassment” under the 2020 Final Rule has posed significant challenges for institutions in recent years beyond those concerning hostile environment related matters.<sup>5</sup> The nuances surrounding various provisions include, but are not limited to, (a) appropriate and effective interpretation of the severe, pervasive, *and* objectively offensive conduct requirement necessary to meet the definition threshold and (b) the employee only status requirement associated with “quid pro quo” related instances have forced institutions to create and implement different policies to address similar conduct.<sup>6</sup> Considering this, the Department’s expansion of Title IX to include “sexual harassment,” as currently defined, within the broader definition of “sex-based harassment,” allows institutions to integrate otherwise separate processes, thus facilitating more streamlined and efficient investigatory and adjudication processes.

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<sup>2</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,567 (Jul. 12, 2022) (to be codified at 34 C.F.R. pt. 106) (hereinafter referred to as “2022 Title IX Proposed Regulations”).

<sup>3</sup> 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41.571.

<sup>4</sup> 34 C.F.R. § 106.30(a).

<sup>5</sup> *Id.*

<sup>6</sup> See New York’s “Enough Is Enough” law, which proscribes a specific process for postsecondary institutions in the state of New York, for handling of complaints of sexual assault, dating violence, domestic violence, and stalking, along with prioritizing prevention of these acts. N.Y. EDUC. L ART. 129-B, *available at* <https://www.nysenate.gov/legislation/laws/EDN/A129-B>.

SUNY also commends the Department’s thoughtful approach in re-envisioning the scope of Title IX from “sexual harassment” to “sex-based harassment” which now also addresses discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity, including “sexual harassment” as defined in the current regulations.<sup>7</sup> This change is central to fostering the idea that postsecondary academic institutions must prioritize inclusivity and proactively combat the very real and traumatic experiences navigated by students and employees related to discrimination and harassment in order to truly achieve their overall mission, which is grounded in providing quality education in a fair and equitable manner.<sup>8</sup> It is important that we, as institutions of learning and human development, protect our diverse student body and provide an education free from this type of discrimination overall. The robust way in which the proposal addresses and clarifies various aspects of Title IX’s scope from a substantive and jurisdictional standpoint will assist campuses across the country in effectuating a more tolerant and inclusive environment.<sup>9</sup> There are distinct forms of sex discrimination that were not clearly accounted for in the current rules, and this clarity will help guide institutions going forward.<sup>10</sup>

#### *B. Sex-Based Harassment and Sex Discrimination – Jurisdictional Considerations*

SUNY recognizes the Department’s efforts to clarify existing provisions and make changes surrounding the jurisdictional scope of Title IX, including off-campus conduct that creates or contributes to a hostile environment in an institution’s educational setting. The proposed updates align more directly with current student code of conduct provisions across our institutions where reported incidents of sex-based harassment on- and off-campus are concerned.<sup>11</sup> This update provides clearer and more appropriate parameters around how to most effectively address allegations associated with study abroad programs, fraternity and sorority organization related conduct, and other conduct that often straddled or just fell beyond a line of jurisdictional scope, such as the provision regarding conduct that occurs outside of the United States. Furthermore, institutions’ scope of control and disciplinary authority over sororities and fraternities has been nationally litigated under various circumstances to achieve clarity. Thus, the Department’s incorporation of case law in the preamble confirming the institution’s scope of authority to adjudicate associated conduct under Title IX is appreciated.

In light of the expanded jurisdictional scope of Title IX, SUNY seeks further clarification related to the Department’s guidance in the preamble regarding the need for institutions to

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<sup>7</sup> 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41,571, 41,531-41,534.

<sup>8</sup> As the Department expands Title’s IX scope to include sex discrimination, we respectfully request that the Department provide detailed guidance related to the intersection between sex discrimination- as defined and student and employee rights to freedom of speech, and academic freedom to ensure that all legal rights within the institution and surrounding community are appropriately upheld.

<sup>9</sup> 2022 Title IX Proposed Regulations, 87 Fed. Reg. 41,428 (Requiring that training does not rely on sex stereotypes).

<sup>10</sup> *Id.* at 41, 528.

<sup>11</sup> *Id.* at 41,571.

uniformly address sex-based discrimination and harassment under Title IX similar to that of other conduct matters within the institutions' disciplinary authority in accordance with their codes of conduct. We appreciate the Department's elimination of language in Section 106.44(a) of the current regulations that defines "educational program or activity" for the purposes of sexual harassment to ensure uniform application across all forms of sex discrimination, including sex-based harassment. We also further agree that institutions should strive to address conduct within its disciplinary authority in a uniform matter in accordance with their codes of conduct to ensure equity and mitigate potential discriminatory practices. However, our institutions often have provisions within their codes of conduct which grant the institution the authority to address illegal or reckless conduct that create health and/or safety risks for the campus and/or broader community. Such conduct may occur far beyond the scope of the institution's typical jurisdictional reach, depending on the severity of the issue. Considering this, we respectfully ask for clarity regarding the degree of institutional reach and parity the Department intended to convey between Title IX and other conduct related matters within campus codes of conduct.

## **II. Complaints and Complainant Autonomy**

Generally, our institutions appreciate the discretion surrounding when to dismiss complaints of sex discrimination and sex-based harassment, and that the Department is no longer mandating dismissal in certain cases before an investigation can be conducted.<sup>12</sup> This is much appreciated because often an institution will not know if a claim is actionable without investigation, and the current regulation forces an institution to dismiss a potential complaint without being able to fact-find. This may have the unintended consequence of complaints being dismissed that may have borne out as actionable with more investigation.

### *A. Complaints*

One issue that has been identified is the broadened definition of "complaint."<sup>13</sup> While this change would certainly assist with no longer having a chilling effect on student reports, it does pose some difficult issues for an institution to implement. First, it may cause complaints to be harder to track. It may be important for the Department to address the context of when a report becomes a complaint that is actionable in terms of the broader sex discrimination grievance procedures, as well as those that constitute sex-based harassment.

Second, it may also create complications around what scenarios actually constitute complaints and may create gray areas in reporting. While the Department acknowledged they wanted to respect complainant autonomy, it still may pose some difficulties from a practical application standpoint.<sup>14</sup> There are quite a few different scenarios in which discretion may cause confusion at an institution in these situations.

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<sup>12</sup> 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41,397.

<sup>13</sup> *Id.* at 41,567 ("Complaint means an oral or written request to the recipient to initiate the recipient's grievance procedures as described in § 106.45, and if applicable § 106.46.").

<sup>14</sup> *Id.* at 41,444-41,445.

Lastly, the allowance of third-party complaints may create significant confusion for institutions because if the third-party is not a student or employee of the institution, there may be very little that can realistically be done to support specific complainants.<sup>15</sup> This may open up institutions to a significant influx of complaints of sex discrimination that may be difficult to investigate because the Complainant does not attend the institution itself. Overall, the flexibility provided by the Department on complaints of sex discrimination and sex-based harassment is helpful, but there are a few areas of clarification that may assist in better complying with these regulations when they become final.

### B. Complainant Autonomy

The Department's changes may not also fully achieve the goal of respecting complainant autonomy because of how grievance procedures must be initiated upon every verbal or written complaint received due to the "actual knowledge" standard. While the discretionary dismissal changes are helpful, it still does not alleviate issues surrounding complainant autonomy. There are times where the Complainant may not want to commence grievance procedures and to proceed forward without the Complainant could mean that the institution may not have enough evidence to continue to pursue an investigation when there is a lack of cooperation. While the institution would certainly have the discretion to dismiss, it creates a difficult balancing act for Title IX Coordinators without more guidance around this issue.

Some of this may come down to community education to students on the role of employees who are mandated to report to the Title IX Coordinator, and the "why" of this mandate, so that students understand these rules are intended to ensure that patterns of harassment and discrimination are addressed for all of the community. This may impact differently sized institutions in a variety of ways: smaller institutions generally have less resources to take on a campaign of this nature, and students sometimes miss the nuance of these rules because of their complicated nature. Clearer language is necessary for both students and employees in this realm. While the Preamble does address factors for an institution to consider when a complainant does not want to move forward but the institution may need to still commence a complaint based on the information received, this may need to be more definitive in the regulations themselves.<sup>16</sup> These factors do provide a guidepost, however, this again leaves some ambiguity for institutions in ensuring that Title IX's nondiscrimination mandate is enforced appropriately.

SUNY respectfully recommends that the Department considers clearer guidance surrounding initiation of complaints. This may be achieved by clarifying whether institutions may establish certain document submission or complaint request procedural requirements to honor complainant autonomy while still making clear guidelines and providing notice to

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<sup>15</sup> 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41,408.

<sup>16</sup> *Id.* at 41,445 (leaves the decision to the Title IX Coordinator, weighing certain factors such as "risk of additional sex discrimination," "seriousness of alleged sex discrimination," "age and relationship of the parties," "scope of alleged sex discrimination," "availability of evidence to assess whether sex discrimination occurred," and "disciplinary sanctions.").

institutions as to if a complaint has been initiated on the student’s behalf based on the student’s request rather than an independent initiative undertaken by the institution. It will benefit all institutions if there is clearer guidance and clarification in the regulations regarding initiation of complaints.

### **III. Employee Title IX Issues**

SUNY respectfully requests clarification on whether or not one central policy will be required for both students and employees. Due to SUNY being a state entity, it is subject to certain State labor laws that require negotiation of any change to terms and conditions of employment. Further, SUNY also respectfully requests clarification on the definition of “employee” under these proposed regulations.

#### *A. Collective Bargaining Agreements*

While the Department invited comment specifically on different standards of proof for student disciplinary matters versus employee-on-employee matters, the Department did not clearly address the issues that may arise with Employee-Respondents subject to collective bargaining agreements.<sup>17</sup> The Department did acknowledge that they received direct feedback on these challenges through OCR when considering these 2022 Proposed Title IX Regulations, however, there still seems to be a lack of clarity around whether contractually bargained disciplinary processes would be sufficient to meet Title IX standards in the Department’s view.<sup>18</sup> If the current processes are not sufficient to meet Title IX obligations, institutions with unionized employees would be required to collectively bargain any changes to the employee disciplinary process because this would affect the terms and conditions of employment.<sup>19</sup>

SUNY has concerns regarding the administration of current collective bargaining agreements as they pertain to employee disciplinary action within the framework of the proposed Title IX regulations. This concern should also exist for any other unionized institutions. Specifically, SUNY is party to eight different collective bargaining agreements that all have slightly different disciplinary grievance procedures that provide due process for employees subject to disciplinary penalties, up to and including termination. These collective bargaining agreements dictate the procedure to be followed by the Employer for alleging any misconduct and taking disciplinary action against a unionized Employee. SUNY would prefer to use its

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<sup>17</sup> 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41,488 (“The Department also invites comments on whether it is appropriate to allow a recipient to use a different standard of proof in employee-on-employee sex discrimination complaints, than it uses in sex discrimination complaints involving a student.”); (“Finally, the Department invites comments on whether it would be appropriate to mandate the use of only one standard of proof for sex discrimination complaints.”).

<sup>18</sup> *Id.* at 41,458.

<sup>19</sup> As a public employer in the state of New York, SUNY is subject to the Taylor Law which requires collectively bargaining terms and conditions of employment. *See* N.Y. Civ. Serv. L. § 201(6); *See also generally* N.Y. Civ. Serv. L. Art. 14. Changes to a policy that would affect terms and conditions of employment and carry potential disciplinary action or termination would require negotiation. The reason this is considered “permissive,” is because an institution would technically have a choice not to accept federal funds.

contractually required processes to fulfill its obligations under Title IX regarding disciplinary proceedings for Employee-respondents. This process includes an investigation, written notice of allegations, and a hearing with presentation of evidence and witnesses before an arbitrator (neutral decisionmaker).

Previously, all employees and all students had to utilize the same formal process under one Title IX Grievance Policy per the 2020 Final Regulations.<sup>20</sup> While the Department has stated in the proposed regulations there is flexibility on standard of proof for employees and recognizes that there may be complications arising from administration of different collective bargaining agreements the Department does not specifically state whether *employees* must be subject to a separate process created for Title IX under § 106.45, and § 106.46, or whether this process must be the same for both students and employees.<sup>21</sup>

The NYS Civil Service Law (“Taylor Law”) prohibits changes to our disciplinary processes without negotiation, as such Respondent Employees are currently facing a two-tiered process when accused of violating Title IX. First, the Respondent would participate in the Title IX hearing required by the 2020 Final Regulations. Then, depending on the outcome of that hearing, a proceeding pursuant to the disciplinary process in the collective bargaining agreement to determine guilt and appropriate penalty. This is time consuming, cumbersome, and repetitive, because both the Employer and the Respondent must prepare for and participate in two hearings. Further, participating in two separate proceedings is not complainant-friendly. Rather, it would likely result in a chilling effect for Complainants because such Complainant would have to testify two different times. Forcing a Complainant to testify multiple times on the same set of facts can cause unnecessary re-traumatization and other negative effects as well. Further, collective bargaining agreements have statutes of limitations for proffering disciplinary charges against employees (two as short as 9 months).<sup>22</sup> If an institution has to hold a separate Title IX hearing prior to engaging in the contractual disciplinary process, this prolongs the process substantially. Such delay not only delays closure to the matter, but also may preclude an employer from taking any disciplinary action, despite a finding of responsibility, if the Title IX

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<sup>20</sup> U.S. Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (hereinafter “2020 Final Regulations”), 85 Fed. Reg. 30,026, 30,439 (May 19, 2020) (codified at 34 C.F.R. pt. 106), stating (“The Department agrees that students and employees, including faculty and student workers, should not be treated differently under its final regulations. Employees should receive the same benefits and due process protections that students receive under these final regulations, and these final regulations, including the due process protections in § 106.45, apply to employees.”)

<sup>21</sup> 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41,459 (“With respect to sex discrimination complaints involving a recipient’s employees, the Department tentatively recognizes the need for grievance procedures to ensure that a recipient can respond to reports of employee-on-employee sex-based harassment and other forms of sex discrimination involving employees promptly and equitably as required by Title IX, and also comply with its obligations under Title VII, using a framework that is suited to these types of complaints.”).

<sup>22</sup> Agreement Between the State of New York and New York State Correctional Officers and Police Benevolent Association, Inc., Security Services Unit (2016-2023), p. 30, *available at* <https://oer.ny.gov/system/files/documents/2019/11/nyscopba-2016-2023-contract-final.pdf>; Agreement Between the State of New York and The Police Benevolent Association of New York State, Inc., Agency Police Services Unit (2005-2015), p. 23, *available at* [https://oer.ny.gov/system/files/documents/2018/06/apsu2005-2015\\_0.pdf](https://oer.ny.gov/system/files/documents/2018/06/apsu2005-2015_0.pdf) (Both agreements state that “[a]n employee shall not be disciplined for acts, except those which would constitute a crime, which occurred more than nine months prior to the service of the notice of discipline.”).

process does not conclude until outside of the statute of limitations. This could disadvantage both Complainants and the Employer and could create situations where an Employer still has to continue to employ an Employee-Respondent despite allegations of misconduct.

Accordingly, SUNY would appreciate clarity on how much “flexibility” exists with respect to Title IX hearings for Employee Respondents. Specifically, SUNY would like to know whether a contractual due process proceeding pursuant to a collective bargaining agreement, which contains the necessary elements outlined in the proposed regulations, can simultaneously meet the due process requirements set forth in the 2022 Proposed Regulations, or if a separate process is deemed necessary. SUNY respectfully requests the ability to use current contractually negotiated processes for providing due process and effectuating penalties pertaining to alleged violations of Title IX by our employees.

#### B. Definition of “employee”

SUNY respectfully requests that the Department define the word “employee” to not include agents or other subcontractors in order to clearly capture who should be subject to this policy, along with who should be trained on Title IX’s proposed notice provisions. However, it is helpful that the Department provided clarification around student employees.<sup>23</sup> This definition provided far more concrete information and ability to assess this population and to define “employee” concretely in a similar manner under these regulations would be extremely helpful to institutions, since many institutions have contractors and subcontractors that may be on the campus but do not report directly to the institution in their employment reporting structure.

### **IV. Cross-Examination, Credibility Assessments and Role of the Advisor**

SUNY appreciates that the Department has provided flexibility in terms of whether or not an institution must allow advisor-led cross-examination. However, it would be ideal if advisor-led cross-examination was removed totally from the 2020 Regulations. Further, the role of the advisor needs to be clarified in light of this change regarding the purpose of advisors.

#### A. Cross-Examination and Credibility Assessments

As previously mentioned, SUNY appreciates that the Department has provided flexibility regarding advisor-led cross-examination and no longer mandates it through the 2022 Proposed Regulations. However, the ideal change would be to remove this totally from the 2020 Regulations.

The Department itself even notes that some of the assertions in the 2018 Proposed Regulations and Preamble to the 2020 Final Rule in regard to cross-examination were not quite accurate in terms of the portrayal of the role of cross-examination in postsecondary

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<sup>23</sup> 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41,390.

administrative hearings.<sup>24</sup> Further, the Department itself even points out that there is a whole body of psychological research on trauma victims and cross-examination, which shows that trauma victims are a more vulnerable population that can often be re-traumatized by this type of questioning.<sup>25</sup> We recognize that there is currently a circuit split<sup>26</sup> on this issue which is why the Department provided this flexibility but did not remove it totally, however, it would be ideal to see this removed completely.

SUNY also applauds the Department for taking a more trauma-centered approach in relation to questioning credibility. Allowing institutions the flexibility to ask questions via live format without prescribing that it must be done by advisors in the context of adversarial cross-examination will improve the process.<sup>27</sup> Specifically, the use of attorney-advisors has caused delay and confusion in these processes. This has also caused these processes to be lengthy, confusing and tended to chill reporting because students did not want to move forward with complaints due to this type of adversarial questioning.<sup>28</sup> While this change did not fully remove adversarial cross-examination from the Title IX process, allowing institutions the flexibility to decline to use it while still asking relevant credibility questions in a live format is a welcome change. SUNY appreciates the thoughtful, interdisciplinary approach that the Department has taken on this section of the regulations.

### *B. Role of the Advisor*

In the context of the grievance procedures process for sex-based harassment, it is important that students have access to an advisor of their choice, who may or may not be an attorney. However, with the mandated advisor-led cross-examination as part of the 2020 Regulations, it created a perception that these grievance procedures were quasi-litigation in nature, rather than an academic administrative process.<sup>29</sup> By mandating cross-examination, the

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<sup>24</sup> 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41,503 (“In the 2018 NPRM, the Department described cross-examination as ‘the greatest legal engine ever invented for the discovery of the truth[.]’”; 41,507 (“The Department recognizes, however, that while that statement is oft-repeated, notable research from the last several decades has called into question whether adversarial cross-examination is the most effective tool for truth-seeking in the context of sex-based harassment complaints involving students at postsecondary institutions.”))

<sup>25</sup> *Id.* at 41,507.

<sup>26</sup> *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018); 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41,507 (“The Department recognizes that some courts, advocates, and legal scholars believe that advisor-conducted cross-examination is the most effective way, and in the view of some, the only way, to ensure the accuracy of witness testimony, especially in cases that hinge on credibility.”); *c.f. Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir 2019) (“This is not to say that a university can fairly adjudicate a serious disciplinary charge without any mechanism for confronting the complaining witness and probing his or her account. Rather, we are simply not convinced that the person doing the confronting must be the accused student or that student’s representative. In this respect...due process in the university disciplinary setting requires ‘some opportunity for real-time cross-examination, even if only through a hearing panel.’”)

<sup>27</sup> 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41,507.

<sup>28</sup> *Id.* at 41,504-41,505.

<sup>29</sup> *See Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (stating, “Due process requires that appellants have the right to respond, but their rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial.”); *See also* 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41,505-41,506.

Department created a perception that a student needed an attorney as an advisor, rather than that being just an option. While the Department did allow institutions to limit the role of the advisor as long as it applied equally to both parties, adversarial cross-examination conducted by an attorney-advisor created a negative perception that was hard to combat for many institutions. It created a perceived unfairness if a student was provided an advisor that was not an attorney, even though the 2020 Regulations stated that was equitable.<sup>30</sup>

Further, by allowing institutions to decline to mandate advisor-led cross-examination, it frees advisors of choice to perform the critical role of support for a party as was originally intended. The intent for this role is to assist the parties navigating through this process and provide support on the behalf of the party, along with attending any meetings or discussions with that party.<sup>31</sup> Much of the Department's previous explanation on the role of the advisor<sup>32</sup> focused on the live cross-examination aspect, rather than the other critical supports an advisor can provide. SUNY appreciates that there has been clarification on this aspect in relation to advisors, and appreciates the flexibility given by the Department on cross-examination related matters. SUNY also hopes that the Department will focus more on the other critical roles advisors play in this process going forward.

## **V. Training**

SUNY recognizes how important institutional training is to ensure that employees are appropriately equipped to mitigate, identify, address, and resolve discrimination and harassment on campus, especially on the basis of sex. Effective training helps ensure that individuals fully understand not only the importance of Title IX protections but the appropriate processes and procedures necessary to effectuate a safe and supportive community. We support the Department's desire to expand the range of employees trained to more holistically further this effort as articulated in §106.8(d). However, we respectfully request further clarification and detailed guidance regarding the defined role parameters and associated training requirements for third-party agents. Third-party agents do not report to an institution's Human Resources Department typically and lack of clarification may cause confusion here on how institutions are to train employees that they may not be responsible for as an Employer.

Furthermore, additional guidance regarding the publication requirements for all trainings categories would be appreciated to ensure appropriate compliance by institutions and their respective Title IX specific education and training providers. The current regulations require training materials to be made publicly available on institutional websites.<sup>33</sup> Institutions must otherwise make such materials available upon request for inspection by members of the public if a website is not maintained.<sup>34</sup> The ambiguous nature of this provision has resulted in significant

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<sup>30</sup> 2020 Final Regulations, 85 Fed. Reg. at 30,297-30,299.

<sup>31</sup> 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41,496-41,497 (recognizing that postsecondary students are on different footing than employees or others who may have contractual rights to an advisor).

<sup>32</sup> See generally 2020 Final Regulations, 85 Fed. Reg. at 30,311-30,334.

<sup>33</sup> 34 C.F.R. § 106.45(b) (2020).

<sup>34</sup> *Id.*

inconsistencies in the nature, form, and scope of public posting of training materials. More defined contours around these parameters for providing training in a publicly available format would be extremely helpful to institutions. SUNY respectfully requests that the Department remove the requirement to publicly post available trainings.

## **VI. Retaliation**

SUNY appreciates the Department's attempts to clarify the definition of retaliation in the regulations, however, the highlighting of peer-to-peer retaliation may cause some enforcement issues for institutions. Specifically, while the Department points out that nothing in Title IX should abrogate First Amendment rights,<sup>35</sup> often what institutions practically see are social media statements by parties about their respective situations which are perceived to be retaliation and harassment by who the statement may have been about. This tends to put institutions in tricky positions of explaining different First Amendment private rights of action to students that they may personally consult an attorney about because the institution is obligated to follow the First Amendment and protect student free speech.

SUNY respectfully asks for more clarity surrounding what would constitute peer-to-peer retaliation that would not implicate free speech and hopes that the Department can provide clearer guidance around this issue than what was stated in the Preamble. SUNY does appreciate that peer-to-peer retaliation itself was clearly stated in the Proposed Regulations and looks forward to more clarification and guidance surround peer-to-peer retaliation and the intersection of the First Amendment.

## **VII. Conclusion**

In conclusion, SUNY welcomes the positive changes that the Department has advanced in this critical area and the thoughtful, measured approach the Department has taken. SUNY looks to be a thought partner in this process and appreciates the opportunity to comment on these Proposed Regulations.

Respectfully,



Deborah F. Stanley  
Interim Chancellor  
The State University of New York

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<sup>35</sup> 2022 Title IX Proposed Regulations, 87 Fed. Reg. at 41,415.