Information Collection Comments

September 9, 2022

The Honorable Miguel Cardona
U.S. Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Via electronic submission at *regulations.gov*

Re: Docket ID No. ED 2021-OCR-0166, Proposed Regulations Implementing Title IX of the Education Amendments of 1972, 34 CFR Part 106

Dear Secretary Cardona,

On behalf of the 9,000+ Association of Title IX Administrators (ATIXA) members, thank you for the opportunity to provide comments on the U.S. Department of Education's (ED) Notice of Proposed Rulemaking on Regulations Implementing Title IX (Title IX NPRM).

ATIXA is the primary membership association for administrators who oversee and implement Title IX at schools and institutions of post-secondary education. ATIXA is also the leading provider of Title IX training, certification, and professional development in the U.S., having certified more than 56,000 Title IX professionals since 2011. ATIXA is committed to providing Title IX administrators with best practices and sound, practical advice to help meet and exceed the mandates of Title IX, including sources such as regulatory and sub-regulatory guidance, case law, and industry standards. In addition to in-person trainings, ATIXA provides instructor-led virtual training and self-paced eTraining, as well as policy templates, whitepapers, position statements, and other published materials to support the expanding Title IX professional community.

ATIXA has been working closely with recipients, including K-12 schools, to understand and implement the 2020 regulations since their publication. Given the unique challenges that recipients face across the country, ATIXA has been at the forefront of and involved with the most compelling Title IX issues. Whether recipients need experts to fill vital roles in their Title IX process, including conducting Title IX hearings and investigations, or to consult on their most complex questions, ATIXA provides those comprehensive services. ATIXA also advocates for best practices in Title IX implementation, as well as new practices to fill in gaps, exemplified by our work in support of the Student Loan Deferment for Sexual Violence Survivors Act (H.R. 7980), which ATIXA hopes has ED's support. As a result, ATIXA has a nuanced view of the current regulations, including areas of strength as well as areas of improvement, from which we offer our comment on the NPRM.

The commentary below offers a few remarks on some general topics before offering more specific comments in the order in which they appear in the NPRM. In terms of style, ATIXA has noted each section of the proposed rule below in italics for ease of readability and subsequently indicates whether it supports or does not support the provision. If ATIXA has commentary, questions, or requests for clarification, they are noted in bullet points below the specific sections of the proposed regulations. ATIXA would like to note that the following ideas reflect ATIXA's comments on the proposed regulations, rather than ATIXA's recommended best practices for Title IX practitioners.

We appreciate ED's commitment to respond to each of ATIXA's comments as well as those submitted by the thousands of other concerned stakeholders who have taken the time to submit comments.

Very truly yours,

Brett A. Sokolow, Esq.
President, ATIXA

This comment was unanimously adopted by the ATIXA Advisory Board on August 30, 2022.

General Comments

- ATIXA asks that ED explicitly stipulate that the new regulations apply to any complaint received after the effective date of the new regulations – regardless of when the underlying conduct occurred.
    - Recipients sometimes express confusion when they receive a complaint for conduct occurring in the past. They do not know if they ought to apply their policy under current regulations or apply their policy that was in force at the time of the underlying conduct. ED's explicit instruction in this area would prove very helpful.
    - Additionally, doing so will avoid requiring recipients to maintain two (or more) separate sets of policies and/or procedures, on an ongoing basis, to apply to conduct occurring before and conduct occurring after the effective date of ED's new regulations. Having to maintain two separate sets of procedures, each with their own training, staffing, and recordkeeping requirements– not to mention the expertise to operate both simultaneously – would present an unnecessary burden on most recipients.

- ATIXA recommends that ED develop more robust privacy protections for pregnant students, especially regarding termination of pregnancy. ATIXA would welcome additional clarity for the protections already included in the proposed regulations, too.

- ATIXA recommends adjusting the religious exemption to require exempted recipients to make their exemption, and the rationale to support it, known on their website, so their students and employees are aware of the claimed exemption and justification supporting it. We suggest adding the following language to the exemption provision: *A funding recipient must publicly disclose in its Title IX-related policies the specific Title IX provisions for which it asserts an exemption, in addition to the justification for that exemption.*

- ATIXA recommends clarifying how Title IX interacts with union grievance processes and/or collective bargaining agreements. Our members often ask how to navigate such situations. Does the Title IX process take precedence? Can an additional union process only modify sanctions, not determine responsibility? Another significant issue is the lack of notification to the complainant once the complaint enters a non-Title IX, collectively bargained process. ATIXA would appreciate some guidance on this complex topic, including what expectations and obligations exist regarding the involved parties.

- ATIXA seeks clarity on ED's intended interpretation of the interplay between supportive measures that burden a respondent as defined in § 106.44(g) and the emergency removal provision identified in § 106.44(h). Overall, ATIXA supports ED's reconsideration of supportive measures to allow for a flexible and individualized approach to determine which supportive measures are reasonable under the circumstances, including that certain circumstances may necessitate burdening a respondent in order to restore or preserve a complainant's access during the pendency of the grievance process. Likewise, ATIXA welcomes the change in proposed § 106.44(h) to remove the word "physical" from the regulation. However, in addition to these changes, ATIXA recommends ED provide additional clarity about whether it is possible, in some limited circumstances, to institute a supportive measure that burdens a party without invoking the removal processes outlined in § 106.44(h).
  - Under the 2020 regulations, ATIXA has observed the field struggle regarding the permissibility of placing restrictions on a respondent short of a complete removal from a recipient's program and activity. Recipients question whether they may institute "partial removals," by which a party remains enrolled but is restricted from a specific portion of the education program or activity (e.g., study abroad or service-learning events, clubs, debate teams). As it stands, the current emergency removal provision has been interpreted broadly, as if to prevent any level of removal without satisfying the current emergency removal provision. This has led to confusing and challenging results for recipients.
    - For example, under the current regulations, if two students signed up for a spring break service trip while they were in a dating relationship but later on, and prior to the trip, one of the students alleged the other engaged in dating violence, the recipient might be unable to remove the respondent from the trip without removing them from their entire educational program. This common phenomenon requires the complainant to self-select out and conflicts with the policy goals espoused by ED.
    - It is unclear whether the same result would be reached under the proposed rule. ATIXA asks ED to clarify whether it intends for supportive measures that burden a respondent to be subject to the violence risk assessment proscribed in §106.44(h), and if that is not the intent of ED, ATIXA implores ED to clarify and provide specific examples to establish in what situation a burdensome supportive measure may be instated without meeting the high threshold for removal set forth in § 106.44(h).
  - ATIXA recommends ED provide examples and guidelines for recipients to rely upon concerning when partial removals might or might not be appropriate.

        - ATIXA is specifically interested in ED's stance on partial removals, or burdensome supportive measures, that surround removals from non-academic extracurricular activities. ATIXA asks ED to provide information on whether a partial removal would be appropriate in situations such as:
            - A complainant is a member of the football team and has brought forth a stalking complaint against a respondent who is in the band and performs at football games. Would a Title IX Coordinator be able to limit the respondent's ability to perform with the band to prevent the parties from being in the same location without conducting the analysis described in § 106.44(h)?
            - Would the Title IX Coordinator only be able to do so if the complainant made a request or indicated the respondent's presence was limiting their ability to fully participate in the football team?
            - Would the situation be different if the complainant was not a member of the football team but simply wanted to attend the football game, but for the respondent's presence on the field?
        - If ED did not intend for burdensome supportive measures to open the door to partial removals, ATIXA asks ED to provide some examples of burdensome supportive measures that would not constitute partial removals.
    - ATIXA also asks ED to address under what circumstances, if any, should the Title IX Coordinator consult with other administrators to establish supportive measures that are equitable to similar contexts outside of Title IX.
        - For example, if a member of the Student Government (SGA) is not allowed to participate in SGA activities while a conduct investigation for theft or assault occurs, does that have any impact on whether the student is allowed to participate in SGA activities during the pendency of a Title IX grievance process?
    - Specifically, ATIXA would ask ED to address whether a recipient could make an "involuntary change" to a respondent's access to an extracurricular activity, even when no comparable alternative exists so long as:
        - 1) the change is necessary to restore or preserve the complainant's access;
        - 2) the involuntary change is not intended to be punitive or disciplinary; and
        - 3) the recipient provides the process safeguards required under § 106.44(g)(4).

- Speaking to athletics, ATIXA requests clarification of whether a coach would be able to enforce team rules for players under a Title IX investigation. For example, if it is the coach's practice to interim suspend players during the pendency of an investigation into non-sexual assault, theft, drug use – or other violations of team rules like missing a team meeting – may a coach continue the same practice for Title IX investigations?
- ATIXA recommends ED limit the requirements of § 106.44(h) to those situations that are "complete removals" or entire removals from a recipient's program and activities. Put another way, this standard should be reserved for situations in which a respondent might have previously been subject to an interim suspension, pending the outcome of a grievance process. ATIXA further recommends allowing "partial removals" that are not intended to be disciplinary or punitive to be instituted as part of a recipient's obligation to preserve a complainant's access during the pendency of the grievance process. ATIXA recommends allowing a respondent the opportunity to appeal any such measures.

- Does ED envision any protections for non-birthing parents? ATIXA will frequently field questions about accommodations for non-birthing parents (e.g., time away supporting the birthing parent).
    - A corollary – does ED envision any protection for adoptive parents using a surrogate in case the surrogate has a medical issue?

Provision: 106.1 Purpose.

The purpose of this part is to effectuate Title IX, which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate §844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484.

- ATIXA supports this provision.

Provision: 106.2 Definitions.

Administrative law judge means a person appointed by the reviewing authority to preside over a hearing held under § 106.81.

- ATIXA supports this provision.

Administratively separate unit means a school, department, or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

- ATIXA supports this provision.

Admission means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

- ATIXA supports this provision.

Applicant, as used in the definition of educational institution in this section and as used in § 106.4, means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

- ATIXA supports this provision.

Assistant Secretary means the Assistant Secretary for Civil Rights of the Department.

- ATIXA supports this provision.

Complainant means: (1) a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX; or (2) a person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.

- ATIXA supports this provision. However, we ask ED to define and provide examples for "participating or attempting to participate in the recipient's education program or activity," especially considering the July 2021 Q&A on this topic.

- If a person was not participating or attempting to participate in the recipient's education program or activity, and if the Title IX Coordinator signs a complaint to investigate the alleged behavior, is that investigation subject to the resolution process in accordance with this Part? ATIXA recommends clarity on this topic after reading the July 2021 Q&A.

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.

- ATIXA supports this provision but suggests the term "verbal" to be more precise than "oral" in this definition.

Confidential employee means: (1) an employee of a recipient whose communications are privileged under Federal or State law associated with their role or duties for the institution; (2) an employee of a recipient whom the recipient has designated as a confidential resource for the purpose of providing services to persons in connection with sex discrimination—but if the employee also has a role or duty not associated with providing these services, the employee's status as confidential is limited to information received about sex discrimination in connection with providing these services; or (3) an employee of a postsecondary institution who is conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination—but the employee's confidential status is limited to information received while conducting the study.

- ATIXA supports this provision and suggests the following language addition: (1) an employee of a recipient whose communications are privileged under Federal or State law associated with their role or duties for the institution, who is functioning within the course and scope of duties to which privilege reasonably attaches.
    - The purpose of this suggested change is to make clear (akin to similar language in the Clery Act for professional or pastoral counselors) that a privileged provider is only able to maintain confidentiality when "functioning within the scope of" their licensure and/or the provision of services to a client/patient/parishioner to whom privilege attaches.[1]

Department means the Department of Education.

- ATIXA supports this provision.

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[1] Clery Handbook 4-7.

Disciplinary sanctions means consequences imposed on a respondent following a determination that the respondent violated the recipient's prohibition on sex discrimination.

- ATIXA supports this provision. To meaningfully differentiate sanctions from remedies that may be implemented after a final determination, ATIXA suggests the addition of the following clarifying language:
  - "Disciplinary sanctions means consequences imposed on a respondent following a determination that the respondent violated the recipient's prohibition on sex discrimination, based on that determination. This language is not intended to prevent any recipient from considering a respondent's cumulative conduct history when imposing sanctions."

Educational institution means a local educational agency (LEA) as defined by § 8101 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (20 U.S.C. 7801(30)), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education.

- ATIXA supports this provision.

Elementary school means elementary school as defined by § 8101 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (20 U.S.C. 7801(19)), and a public or private preschool.

- ATIXA supports this provision.

Federal financial assistance means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:
(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.
(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.
(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

- ATIXA supports this provision. Two recent federal district court cases have ruled that tax-exempt status subjects a private school to Title IX compliance.[2] Could ED clarify in the regulations whether it is ED's position that claiming tax-exempt status subjects a school and/or other educational non-profits to compliance obligations under Title IX?

Institution of graduate higher education means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or
(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or
(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

- ATIXA supports this provision.

Institution of undergraduate higher education means:
(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or
(2) An institution offering academic study leading to a baccalaureate degree; or
(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

- ATIXA supports this provision.

[2] *Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass'n*, Case 1:20-cv-03214-RDB (D. Md. July 21, 2022) and *E.H. v. Valley Christian Acad.*, 2:21-cv-07574-MEMF (GJSx) (C.D. Cal. Jul. 25, 2022).

Institution of professional education means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

- ATIXA supports this provision.

Institution of vocational education means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

- ATIXA supports this provision.

Parental status, as used in §§ 106.21(c)(2)(i), 106.37(a)(3), 106.40(a), and 106.57(a)(1), means the status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:

(1) A biological parent;
(2) An adoptive parent;
(3) A foster parent;
(4) A stepparent;
(5) A legal custodian or guardian;
(6) In loco parentis with respect to such a person; or
(7) Actively seeking legal custody, guardianship, visitation, or adoption of such a person.

- ATIXA supports this provision. ATIXA asks ED to clarify part (6) of this definition, including examples.

Peer retaliation means retaliation by a student against another student.

- ATIXA supports this provision. ATIXA suggests that this definition could also extend to adult agents acting on behalf of the student, including, in unusual circumstances, parents or guardians in post-secondary settings.

Postsecondary institution means an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education that serves postsecondary school students.

- ATIXA supports this provision.

Pregnancy or related conditions means:
(1) Pregnancy, childbirth, termination of pregnancy, or lactation;
(2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
(3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions.

- ATIXA supports this provision. ATIXA has the following comments and questions for ED:
    - ATIXA recommends revising (1) to read: "Pregnancy, childbirth, voluntary or involuntary termination of pregnancy, loss of pregnancy, or lactation; or"
        - ATIXA notes that historically, ED included "loss of pregnancy" in this and similar definitions. Although "loss of pregnancy" could fall within involuntary termination or even a past pregnancy, the removal of "loss of pregnancy" could cause confusion about the extent of Title IX's coverage to both procedures resulting in a termination of pregnancy and unexpected pregnancy losses that occur without a procedure. Therefore, to ensure clarity, ATIXA recommends adding "loss of pregnancy" or, at the very least, asks ED to clarify why it removed "loss of pregnancy."
        - ATIXA recommends revising (2) and (3) to also incorporate "loss of pregnancy" as described above.
    - Does Title IX require recipients to excuse absences for out-of-state travel for critical care related to pregnancy or related conditions as described in this Part?
    - Does Title IX require recipients to excuse absences related to complications arising from termination or loss of pregnancy, after termination?
    - Does Title IX protect the confidentiality of disclosures to Title IX/recipient officials related to termination or loss of pregnancy?
        - Does disclosure by the recipient violate Title IX, and under what circumstances?
    - Given the Supreme Court's decision to overturn *Roe v. Wade*, are there other Title IX protections related to termination or loss of pregnancy that ED wishes to clarify in the regulations?
    - Does Title IX protect students seeking to become pregnant by undergoing fertility treatments, such as IUI or IVF, and if so, how?

Program or activity and program means all of the operations of –

(1) (i) A department, agency, special purpose district, or other instrumentality of a State or local government; or
(ii) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
(2) (i) A college, university, or other postsecondary institution, or a public system of higher education; or
(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;
(3) (i) An entire corporation, partnership, other private organization, or an entire sole proprietorship -
(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or
(4) Any other entity that is established by two or more of the entities described in paragraph (1), (2), or (3) of this definition, any part of which is extended Federal financial assistance.

- ATIXA supports this provision.

Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.

- ATIXA supports this provision and suggests, based on the holding in *Peltier v. Charter Day School*[3], that ED make it explicit that Title IX applies to charter school operating companies and subcontractors engaged by charter schools or their owners to operate charter schools.

[3] 37 F.4th 104, (4th Cir. 2002).

Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

- ATIXA supports this provision but recommends that "relevant" should include evidence aiding in credibility determinations, even if the questions or evidence are not necessarily directly relevant to show whether the alleged sex discrimination occurred. Other areas of the NPRM connect credibility determinations with relevance, too. The proposed regulations include credibility determinations in § 106.45(b)(6), the provision mandating objective evaluation of all relevant evidence, underscoring the importance of credibility determinations in relevance considerations.

Remedies means measures provided, as appropriate, to a complainant or any other person the recipient identifies as having had equal access to the recipient's education program or activity limited or denied by sex discrimination. These measures are provided to restore or preserve that person's access to the recipient's education program or activity after a recipient determines that sex discrimination occurred.

- ATIXA supports this provision, with the suggested changes noted above to the definition of sanctions, to better differentiate sanctions and remedies.

Respondent means a person who is alleged to have violated the recipient's prohibition on sex discrimination.

- ATIXA supports this provision but asks whether ED considered whether a student organization (or similar entity) could be a respondent? If ED broadens this definition, ATIXA asks for more information about managing organizational complaints.

Retaliation means intimidation, threats, coercion, or discrimination against any person by a student, employee, person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, or recipient for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including in an informal resolution process under § 106.44(k), in grievance procedures under § 106.45, and if applicable § 106.46, and in any other appropriate steps taken by a recipient in response to sex discrimination under § 106.44(f)(6).

- ATIXA supports this provision, but has questions, as follows:
    - Retaliatory harassment is widely recognized by law, but ED did not explicitly include it in the definition above. Is the exclusion intentional?
    - Are acts of retaliatory grading included, and if so, under what term of this definition?
    - Are acts of retaliatory exclusion from programs included, and if so, under what term of this definition?
- Page 294 of the NPRM Preamble suggests that the proposed regulations define retaliation to include retaliatory and/or improper disclosures of information. However, the phrase "improper disclosure of information" does not appear anywhere in the regulations. ATIXA recommends updating either the § 106.2 definition of retaliation or § 106.71 to include a specific reference to and description of improper disclosure of information.
    - ATIXA asks ED to clarify that disclosure of information related to Title IX findings, as part of an employee reference check, is not an act of retaliation.
- ATIXA asks ED to clarify the difference or overlap between this provision and the provision governing peer retaliation.
- ATIXA asks ED to clarify whether respondents have protections from retaliation and the basis for providing such protection, given that doing so is a minority view in the courts.

Reviewing Authority means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

- ATIXA supports this provision.

Secondary school means secondary school as defined by § 8101 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (20 U.S.C. 7801(45)), and an institution of vocational education that serves secondary school students.

- ATIXA supports this provision.

Secretary means the Secretary of Education.

- ATIXA supports this provision.

Sex-based harassment prohibited by this part means sexual harassment, harassment on the bases described in § 106.10, and other conduct on the basis of sex that is:

(1) Quid pro quo harassment. An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;
(2) Hostile environment harassment. Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

(i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
(ii) The type, frequency, and duration of the conduct;
(iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;
(iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and
(v) Other sex-based harassment in the recipient's education program or activity.

(3) Specific Offenses.

(i) Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;
(ii) Dating violence meaning violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim;
(iii) Domestic violence meaning felony or misdemeanor crimes of violence committed by a person who:

(A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim; Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
(B) Shares a child in common with the victim; or
(C) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction; or

(iv) Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

(A) Fear for the person's safety or the safety of others; or
(B) Suffer substantial emotional distress.

ATIXA supports this provision, but has questions and suggestions as follows:

- The first portion of the definition of sex-based harassment currently includes a reference to the "bases" described in § 106.10. ATIXA asks ED to clarify the meaning of "bases" to indicate whether this includes the entirety of § 106.10 or if ED meant to include only "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."
    - To prevent possible confusion, ATIXA recommends removing the reference to § 106.10 and instead providing recipients an encompassing definition of sex-based harassment by changing the first portion of the definition to:
        - "Sex-based harassment prohibited by this part means sexual harassment, including but not limited to, harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, gender identity, and other conduct that…"

- The definition of Quid Pro Quo (QPQ) harassment does not include reference to detriment or a threat of detriment. ATIXA recommends including language clarifying that a detriment or threat of detriment, if an individual does not consent to unwelcome sexual conduct, falls within the QPQ prohibition. For example, if a faculty member threatens a bad grade unless a student engages in sexual conduct, the student consents for fear of a detriment, not as the result of an aid, benefit, or service.

- Additionally, the QPQ harassment definition does not explicitly contemplate a student as the respondent. The Preamble, at page 85, cites to federal court decisions relying upon the concept of "someone in authority," and then asserts, at page 86, that a team captain or club president is "generally not authorized" by a recipient to provide an aid, benefit, or service. But, there are legal and practical problems with such a conclusion, and it is not always correct in our experience with recipients.
    - ATIXA suggests that ED may be proposing to adopt a too narrow definition of "someone in authority" and "authorized by a recipient." The word "authority" means someone with the right to make decisions, or someone having power or control. Such dynamics exist in every group, including student groups under a recipient's purview. For example, a chess club president may have the authority to select which students are entered into an upcoming competition. Often one or more students hold power over decision-making and group norms. Such dynamics are common among student populations, and ATIXA questions why QPQ harassment should not apply to those occurrences.

- ATIXA is also concerned that ED seems to be adopting too narrow a definition of “aid, benefit, or service” as part of a recipient’s education program or activity. Given the graduate student example in the Preamble on pages 85-86, ED seems to cabin “aid, benefit, or service” within academics. Extracurriculars should be included, and many extracurriculars are, in practice, student-run – whether they have an employee advisor or not. Indeed, the NPRM, in other areas, suggests that an “aid, benefit, or service” outside the classroom is part of the recipient’s education program or activity. For example, the NPRM does not permit removing an accused student from an athletic team, student organization, or study abroad program without a violence risk assessment. The inference suggests that such extracurricular experiences are an aid, benefit, or service of a recipient’s education program or activity. ED states such a conclusion directly on page 44 of the Preamble, too.

- Some students, therefore, meet the requirements for QPQ harassment, as outlined by ED. Apart from the legal argument supporting the inclusion of students as respondents, in practice, recipients would benefit from applying QPQ to student respondents. Recipients may see QPQ harassment perpetrated by students in positions of power, such as a student government official conditioning a benefit, like an endorsement, advice, or support, on consenting to sexual acts. Another example could be a club sports team captain conditioning playing time on another participant consenting to sexual acts. Some of these examples clearly have the potential to negatively impact complainants and deprive them of access to the recipient’s education program and activity. However, such examples may or may not fit within another definition, as they may not be severe or pervasive, for example, especially if rejected. Providing recipients the option to use the QPQ harassment definition to prohibit these kinds of sex discrimination is crucial.

- ATIXA recommends adjusting the definition of QPQ harassment to include students as respondents. ED could add additional clarity to describe recipient “authorization” or an “aid, benefit, or service” to limit the application of QPQ harassment when students are respondents.

- The Hostile Environment Harassment definition, as written, is clunky to read and challenging to apply. The NPRM proposed definition lacks clarity, namely which elements the clause “that, based on the totality of the circumstances and evaluated subjectively and objectively…” modifies. Does “the totality of the circumstances” and subjective/objective evaluation apply to “sufficiently severe or pervasive” or “unwelcome sex-based conduct”? Both? Also, the current definition limits its application to actual deprivations, which is narrower than federal court standards, which recognize conduct that could cause a hostile environment as well as conduct that does cause a hostile environment. ATIXA suggests that ED should include language to broaden applicability.

- ATIXA recommends simplifying/reformatting the definition to:
    - "Unwelcome sex-based conduct that is sufficiently severe or pervasive that it could or does deny or limit a person's ability to participate in or benefit from the recipient's education program or activity.
    - For purposes of this definition:
        - Hostile environment harassment requires consideration of the totality of the circumstances, analyzing the conduct from both objective and subject perspectives.
        - Such a fact-specific inquiry could include consideration of the following…. [include existing list of factors]"

- Such a reformulation would allow this definition to do double duty more readily (as also being the applicable Title VII/Fair Housing Act (FHA) standard), makes the standard more readable and comprehensible, and maintains the concepts in the NPRM proposed definition. Reformatting the definition would also assist in readability and comprehension.

- ATIXA recommends expanding the stalking definition to provide additional clarification and to differentiate stalking from lurking, which is a common and benign behavior for some individuals. ATIXA is concerned that the current definition of stalking inadvertently facilitates discrimination against individuals with disabilities (e.g., where the "stalking-like" behavior is a manifestation of the disability) or individuals from different cultural backgrounds. Additionally, as written, the provision is at risk of violating the First Amendment, by being overbroad or vague, and/or for prohibiting protected speech. ATIXA recommends:
    - Stalking, defined as:
        - Engaging in a menacing or invasive course of conduct,
        - On the basis of sex,
        - Directed at the complainant, that
            - Would cause a reasonable person to fear for the person's safety, or
            - the safety of others; or
            - suffer substantial emotional distress.
        - For the purposes of this definition—
            - Course of conduct means two or more acts, including, but not limited to acts in which the respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
            - Reasonable person means a reasonable person under similar circumstances and with similar identities to the complainant.

    - Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
  - If ED adopts this definition, or opts not to do so, ATIXA requests examples in the Preamble that address the different elements.

- Lastly, ATIXA continues to have concerns about any requirement or perceived requirement that policy definitions use the term "forcible" and "nonforcible" even though those terms are only for purposes of cross-references to FBI classifications. In ATIXA's experience when the terms "forcible" or "nonforcible" appear in recipients' policy definitions, it can lead to inadvertent misunderstanding that an incident must involve physical force to be an assault, and unintentionally exclude other kinds of situations where consent may not be present.

Student means a person who has gained admission.

- ATIXA does not support this definition. This definition is too broad, as it could include individuals who never participated in a recipient's program or activity beyond applying or completing an application for admission. For some institutions, this definition could mean a "student" population much larger than its actual enrollment. This definition also fails to encompass K-12 students, who enroll, but typically do not gain admission, or community college students, who may take classes sporadically, rather than in consecutive terms or semesters.

- ATIXA recommends the following definition: Student means any individual who has accepted an offer of admission, or who is registered or enrolled for credit or non-credit-bearing coursework, who maintains an ongoing educational relationship with the Recipient, or who has demonstrated an intent to maintain an ongoing educational relationship with the Recipient.

Student with a disability means a student who is an individual with a disability as defined in the Rehabilitation Act of 1973, as amended, 29 U.S.C. 705(9)(B), (20)(B), or a child with a disability as defined in the Individuals with Disabilities Education Act, 20 U.S.C. 1401(3).

- ATIXA supports this provision.

Supportive measures means non-disciplinary, non-punitive individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a party, and without fee or charge to the complainant or respondent to: (i) restore or preserve that party's access to the recipient's education program or activity, including temporary measures that burden a respondent imposed for non-punitive and non-disciplinary reasons and that are designed to protect the safety of the complainant or the recipient's educational environment, or deter the respondent from engaging in sex-based harassment; or (ii) provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k).

- ATIXA supports this provision, generally, and suggests inserting a cross reference to § 106.44(g) here.
- ATIXA is concerned that the new flexibility given to recipients to implement supportive measures that burden a respondent could violate their due process rights if not done properly. ATIXA asks ED to provide more guidance in this area and suggests that the Preamble could indicate that sources beyond Title IX, including state law, constitutional rights, etc., guardrail the lawfulness of supportive measures.
- ATIXA made a general comment about the interplay between burdensome supportive measures, emergency removals, and "partial removals" at the beginning of this comment document.

Title IX means Title IX of the Education Amendments of 1972 (Pub. L. 92-318; 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688), as amended.

§ 106.3 [Amended]

- No comment.

106.8 Designation of coordinator, adoption and publication of nondiscrimination policy and grievance procedures, notice of nondiscrimination, training, and recordkeeping.

(a) Designation of a Title IX Coordinator.

(1) Title IX Coordinator. Each recipient must designate and authorize at least one employee, referred to herein as the Title IX Coordinator, to coordinate its efforts to comply with its responsibilities under this part.

(2) Delegation to designees. As appropriate, the recipient may assign one or more designees to carry out some of the recipient's responsibilities for compliance with this part, but one Title IX Coordinator must retain ultimate oversight over those responsibilities.

- ATIXA supports this provision but asks for ED to clarify that contractors may serve as coordinators, as least on an interim basis (especially given the current acute labor shortage in the field), and that it accounts for the shared coordinator model that some recipients are using, in which the coordinator serves multiple recipients, but is technically only an employee of one of them.

(b) Adoption and publication of nondiscrimination policy and grievance procedures.

(1) Nondiscrimination policy. Each recipient must adopt and publish a policy stating that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and this part, including in admission (unless subpart C of this part does not apply) and employment.

(2) Grievance procedures. A recipient must adopt and publish grievance procedures consistent with the requirements of § 106.45, and if applicable § 106.46, that provide for the prompt and equitable resolution of complaints made by students, employees, or third parties who are participating or attempting to participate in the recipient's education program or activity, or by the Title IX Coordinator, alleging any action that would be prohibited by Title IX and this part.

- ATIXA supports this provision and encourages ED to provide a simple definition of "prompt" (such as "without undue delay that is under a recipient's control").

(c) Notice of nondiscrimination. A recipient must provide a notice of nondiscrimination to students; parents, guardians, or other authorized legal representatives of elementary school and secondary school students; employees; applicants for admission and employment; and all unions and professional organizations holding collective bargaining or professional agreements with the recipient.

(1) Contents of notice of nondiscrimination. The notice of nondiscrimination must include the following elements:

(i) A statement that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and this part, including in admission (unless subpart C of this part does not apply) and employment;

(ii) A statement that inquiries about the application of Title IX and this part to the recipient may be referred to the recipient's Title IX Coordinator, to the Office for Civil Rights, or to both;

(iii) The name or title, office address, email address, and telephone number of the recipient's Title IX Coordinator;

(iv) How to locate the recipient's nondiscrimination policy under paragraph (b)(1) of this section; and

(v) How to report information about conduct that may constitute sex discrimination under Title IX, how to make a complaint of sex discrimination under this part, and how to locate the recipient's grievance procedures under paragraph(b)(2) of this section, § 106.45, and if applicable § 106.46.

(2) Publication of notice of nondiscrimination.

(i) Each recipient must prominently include all elements of its notice of nondiscrimination set out in paragraphs (c)(1)(i)-(v) of this section on its website and in each handbook, catalog, announcement, bulletin, and application form that it makes available to persons entitled to notice under paragraph (c) of this section, or which are otherwise used in connection with the recruitment of students or employees.

(ii) If necessary, due to the format or size of any publication under paragraph (c)(2) of this section, the recipient may instead comply with paragraph (c)(2) of this section by including in those publications a statement that the recipient prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator, and providing the location of the notice on the recipient's website.

(iii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex, except as such treatment is permitted by Title IX or this part.

- ATIXA supports this provision.

(d) Training. The recipient must ensure that the persons described below receive training related to their responsibilities as follows. This training must not rely on sex stereotypes.

(1) All employees. All employees must be trained on:

(i) The recipient's obligation to address sex discrimination in its education program or activity;

(ii) The scope of conduct that constitutes sex discrimination under this part, including the definition of sex-based harassment; and

(iii) All applicable notification and information requirements under §§ 106.40(b)(2) and 106.44.

(2) Investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures. In addition to the training requirements in paragraph (d)(1) of this section, all investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures under § 106.44(g)(4) must be trained on the following topics to the extent related to their responsibilities:

> *(i) The recipient's obligations under § 106.44;*
> *(ii) The recipient's grievance procedures under § 106.45, and if applicable § 106.46;*
> *(iii) How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and*
> *(iv) The meaning and application of the term relevant in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance under § 106.45, and if applicable § 106.46.*

(3) Facilitators of informal resolution process. In addition to the training requirements in paragraph (d)(1) of this section, all facilitators of an informal resolution process under § 106.44(k) must be trained on the rules and practices associated with the recipient's informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.
(4) Title IX Coordinator and designees. In addition to the training requirements in paragraphs (d)(1)-(3) of this section, the Title IX Coordinator and any designees under paragraph of this section must be trained on their specific responsibilities under paragraph (a) of this section, § 106.40(b)(3), § 106.44(f), § 106.44(g), the recipient's recordkeeping system and the requirements of paragraph (f) of this section, and any other training necessary to coordinate the recipient's compliance with Title IX.

- ATIXA supports this provision and asks ED to clarify whether the requirement is to ensure that recipients train all employees, or that recipients offer or make training available to all employees. Recipients are unlikely to be able to train 100 percent of their employees and be able to show proof of training, even if they offer training to all employees.

- ATIXA recommends adding a training topic, for § 106.8(d)(2), regarding supportive measures, their role in restoring or preserving access, and whether a supportive measure is non-punitive and non-disciplinary.

- ATIXA asks ED why it determined that general, age-appropriate training on Title IX directed to students (rights, resources, how to report, policy, etc.) is not a requirement, and whether ED would consider imposing such a requirement in this section.

- ATIXA does not believe in “one-and-done” training requirements because they are ineffective. ATIXA asks ED to consider making the trainings in this section required on a regular, annual, or ongoing basis, especially considering the federal government’s changes to Title IX requirements and processes over the last several years.

(e) Students with disabilities. If a complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator must consult with the student’s Individualized Education Program (IEP) team, 34 CFR 300.321, if any, or the group of persons responsible for the student’s placement decision under 34 CFR 104.35(c) (§ 504 team), if any, to help ensure that the recipient complies with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, throughout the recipient’s implementation of grievance procedures under § 106.45, and if applicable § 106.46. If a complainant or respondent is a postsecondary student with a disability, the Title IX Coordinator may consult, as appropriate, with the individual or office that the recipient has designated to provide support to students with disabilities to help comply with § 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

- ATIXA supports this provision and would appreciate a clarification from ED in the Preamble to this effect: When K-12 recipients act to resolve a complaint involving a respondent who has or is regarded as having a disability, the Title IX investigation and grievance process typically play out first, unless there is an emergency removal that may necessitate a manifestation determination. Then appropriate school officials are required to make a manifestation determination or evaluation in accordance with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, before a change in placement or discipline is imposed.

(f) Recordkeeping. A recipient must maintain for a period of at least seven years:

(1) For each complaint of sex discrimination, records documenting the informal resolution process under § 106.44(k) or the grievance procedures under § 106.45, and if applicable § 106.46, and the resulting outcome.

(2) For each incident of conduct that may constitute sex discrimination under Title IX of which the Title IX Coordinator was notified, records documenting the actions the recipient took to meet its obligations under § 106.44.

(3) All materials used to provide training under paragraph (d) of this section. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(4) All records documenting the actions the recipient took to meet its obligations under §§ 106.40 and 106.57.

- ATIXA supports this provision.

106.6 Effect of other requirements and preservation of rights.

* * * * *

(b) Effect of State or local law or other requirements. The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement. Nothing in this part would preempt a State or local law that does not conflict with this part and that provides greater protections against sex discrimination.

* * * * *

(e) Effect of § 444 of General Education Provisions Act (GEPA)/ Family Educational Rights and Privacy Act.

The obligation to comply with this part is not obviated or alleviated by the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99.

* * * * *

(g) Exercise of rights by parents, guardians, or other authorized legal representatives.

Nothing in this part may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person, subject to paragraph (e) of this section, including but not limited to making a complaint through the recipient's grievance procedures for complaints of sex discrimination.

- ATIXA supports this provision, and as noted above, asks ED to clarify the use of the term "greater," and assess whether "broader" might be a more accurate word. Given the increasing number of state laws regarding sex discrimination, gender identity, and other related concepts, ATIXA recommends clarifying and explaining ED's intent with this provision.

- Does ED wish to weigh in on the rights/obligations of a recipient to withhold gender identity-related information from parents/guardians at the request of a student?

- Does ED wish to provide specific information on what should happen when a K-12 student files a discrimination complaint on the basis of gender identity and the parent/guardian invokes a right to demand that the recipient dismiss or not entertain the complaint?

- Does ED wish to provide clarification on a K-12 student's request for a name/pronoun change that is countermanded by a parent/guardian? Whose request should the recipient respect?

- In reference to (g), ATIXA asks that ED consider including information from the January 2021 Q&A, Part 1. Question Six discusses notification of parents, a topic about which our members ask questions frequently.[4]

106.10 Scope.

Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

- ATIXA recommends clarifying the language in § 106.10 to explicitly state that the scope applies to sex discrimination AND sex-based harassment. This would clarify the scope for recipients and would eliminate the need to engage in a complicated cross-reference to sufficiently understand the obligations under these regulations. Currently, incorporating § 106.10 into the definition of sex-based harassment in § 106.02 could create confusion about the scope of § 106.46.
    - If ED would prefer not to adjust the language of § 106.10, then ED should eliminate the cross reference to § 106.10 within the definition of sex-based harassment and simply import the relevant parts of § 106.10 directly into the definition of sex-based harassment.

- ATIXA recommends inserting "but not limited to" after "includes" to emphasize and clarify if ED does not intend for this list to be exhaustive. Additionally, the Preamble provides definitions of some of these terms. ATIXA recommends those definitions appear in the regulations, rather than just the Preamble. Recipients will be more likely to define the terms in their policies if they appear in the regulations, which in turn will help their students and employees to comprehend the policy more effectively.

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[4] https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf

- Example based on two above suggestions: "Discrimination on the basis of sex includes, but is not limited to, discrimination and/or harassment on the basis of sex, sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."

- ATIXA asks ED to use the Preamble to clarify that pay inequity on the basis of sex is a form of discrimination, as this is not clear.

106.11 Application.

Except as provided in this subpart, this part applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States. For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority. A recipient has an obligation to address a sex- based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

- ATIXA supports this provision, while noting its complexity, and the incentive it may create for recipients to refuse to take off-campus/out-of-school jurisdiction for any misconduct. Regarding the phrase "conduct that is subject to the recipient's disciplinary authority," the Preamble, on page 46, asserts that schools may not "disclaim responsibility" for addressing sex discrimination that occurs in a "similar context." From the examples provided, it is unclear where ED draws the line for "similar context." A recipient exerting disciplinary authority over students engaging in serious crimes, such as theft or non-sexual assault, may be examples of similar context, but does similar context apply to other policy violations like minor in possession (MIP), drug use or sale, threats, or property damage, for example?

- ATIXA recommends clarifying the "similar context" concept in the Preamble and considering inserting the concept into the regulations. Recipients may respond to the current proposed language by accepting jurisdiction for all off-campus conduct or no off-campus conduct for fear they may draw the "similar context" line incorrectly.

- ATIXA would appreciate additional guidance from ED defining the expectations to "address" a sex-based hostile environment under this section. In addition to offering a remedial response through supportive measures, is the expectation that recipients should investigate, and possibly discipline, the underlying behavior? If so, in what circumstances? Alternatively, are recipients responsible for addressing only the effects of the underlying behavior rather than the underlying behavior itself?
    - Relatedly, what is the responsibility of recipients if they have control over the parties, but the underlying incident is outside the program or activity?

106.15 Admissions.

No comment.

106.21 Admissions.

(a) Status generally. No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies.
** * * * **

- ATIXA supports this provision.

(c) Parental, family, or marital status; pregnancy or related conditions. In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

> *(1) Must treat pregnancy or related conditions or any temporary disability resulting therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and*
>
> *(2) Must not:*
>
> > *(i) Adopt or apply any policy, practice, or procedure concerning the current, potential, or past parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;*
> >
> > *(ii) Discriminate against any person on the basis of current, potential, or past pregnancy or related conditions, or establish or follow any policy, practice, or procedure that so discriminates; and*
> >
> > *(iii) Make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss or Mrs." A recipient may ask an applicant to self- identify their sex, but only if this question is asked of all applicants and if the response is not used as a basis for discrimination prohibited by this part.*

- ATIXA does not support any provision that states that pregnancy is to be treated as a temporary disability, as this does not align with disability law. Instead, these provisions should clarify that recipients should treat conditions/complications related to pregnancy as temporary disabilities, but not the pregnancy itself.

- ED has largely neglected protections related to parenting, but these merit clearer inclusion and details. For example, when a person who gives birth has medical needs related to giving birth, for how long after birth does Title IX require these protections? Similarly, are there rights that attach to parents if a child needs medical attention as a result of the birthing process? If so, for how long after birth should these protections pertain? What about non-birthing parents of children who have medical needs related to birth, or non-birthing parents who have obligations to a birthing parent who has complications or medical needs related to pregnancy or childbirth? What about medical issues of a surrogate, where the parents are students? Do they have protections under Title IX?

106.31 Education programs or activities.

(a) General.

(1) Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance.

(2) In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, unless otherwise permitted by Title IX or this part. Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

(3) This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (i) a recipient to which subpart C does not apply, or (ii) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

* * * * *

- ATIXA supports this provision and asks ED to provide additional clarification of § 106.31(a)(2). What qualifies as "more than de minimis harm?" The Preamble provides several examples of inappropriate restrictions on transgender individuals, but does "de minimis harm" extend from topics like bathroom use to mispronouncing/misgendering/deadnaming to participation in athletics? The Preamble helps clarify the purpose of this subsection, but the regulation itself is vague. Given the purpose of § 106.31(a)(2), the state laws limiting transgender rights, and the ongoing conversations about transgender individuals' participation in education programs or activities, clarity is necessary to avoid recipients leveraging the vague concepts in this subsection to thwart the purpose of § 106.31(a)(2).

106.40 Parental, family, or marital status; pregnancy or related conditions.

(a) Status generally. A recipient must not adopt or apply any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex.
(b) Pregnancy or related conditions.

> *(1) Nondiscrimination. A recipient must not discriminate in its education program or activity against any student based on the student's current, potential, or past pregnancy or related conditions. A recipient may permit a student based on pregnancy or related conditions to participate voluntarily in a separate portion of its education program or activity provided the recipient ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions.*
> *(2) Requirement for recipient to provide information. A recipient must ensure that when any employee is informed of a student's pregnancy or related conditions by the student or a person who has a legal right to act on behalf of the student, the employee promptly informs that person of how the person may notify the Title IX Coordinator of the student's pregnancy or related conditions for assistance and provides contact information for the Title IX Coordinator, unless the employee reasonably believes the Title IX Coordinator has already been notified.*
> *(3) Specific actions to prevent discrimination and ensure equal access. Once a student, or a person who has a legal right to act on behalf of the student, notifies the Title IX Coordinator of the student's pregnancy or related conditions, the Title IX Coordinator must promptly:*
>
> > *(i) Inform the student, and if applicable the person who notified the Title IX Coordinator, of the recipient's obligations to:*
> >
> > > *(A) Prohibit sex discrimination under this part, including sex-based harassment;*

(B) Provide the student with the option of reasonable modifications to the recipient's policies, practices, or procedures because of pregnancy or related conditions, under paragraphs (b)(3)(ii) and (b)(4) of this section;
(C) Allow access, on a voluntary basis, to any separate and comparable portion of the recipient's education program or activity under paragraph (b)(1) of this section;
(D) Allow a voluntary leave of absence under paragraph (b)(3)(iii) of this section;
(E) Ensure the availability of lactation space under paragraph (b)(3)(iv) of this section; and
(F) Maintain grievance procedures that provide for the prompt and equitable resolution of complaints of sex discrimination, including sex-based harassment, under § 106.45, and if applicable § 106.46.

(ii) Provide the student with voluntary reasonable modifications to the recipient's policies, practices, or procedures because of pregnancy or related conditions, under paragraph (b)(4) of this section.
(iii) Allow the student a voluntary leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's physician or other licensed healthcare provider. To the extent that a recipient maintains a leave policy for students that allows a greater period of time than the medically necessary period, the recipient must permit the student to take leave under that policy instead if the student so chooses. Upon the student's return to the recipient's education program or activity, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the leave began.
(iv) Ensure the availability of a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.

(4) Reasonable modifications for students because of pregnancy or related conditions. Reasonable modifications to the recipient's policies, practices, or procedures for a student because of pregnancy or related conditions, for purposes of this section:

(i) Must be provided on an individualized and voluntary basis depending on the student's needs when necessary to prevent discrimination and ensure equal access to the recipient's education program or activity, unless the recipient can demonstrate that making the modification would fundamentally alter the recipient's education program or activity. A fundamental alteration is a change that is so significant that it alters the essential nature of the recipient's education program or activity;
(ii) Must be effectively implemented, coordinated, and documented by the Title IX Coordinator; and

(iii) May include but are not limited to breaks during class to attend to related health needs, expressing breast milk, or breastfeeding; intermittent absences to attend medical appointments; access to online or other homebound education; changes in schedule or course sequence; extension of time for coursework and rescheduling of tests and examinations; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other appropriate changes to policies, practices, or procedures.

(5) Comparable treatment to temporary disabilities or conditions. To the extent not otherwise addressed in paragraph (b)(3) of this section, a recipient must treat pregnancy or related conditions or any temporary disability resulting therefrom in the same manner and under the same policies as any other temporary disability or physical condition with respect to any medical or hospital benefit, service, plan, or policy the recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's education program or activity.

(6) Certification to participate. A recipient may not require a student who is pregnant or has related conditions to provide certification from a physician or other licensed healthcare provider that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless:

(i) The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;

(ii) The recipient requires such certification of all students participating in the class, program, or extracurricular activity; and

(iii) The information obtained is not used as a basis for discrimination prohibited by this part.

- ATIXA is generally supportive of these rights, but ATIXA does not support any inference (based on ED's proposed language here) that recipients should treat pregnancy as a temporary disability, as this does not align with disability law. Instead, these provisions should clarify that recipients should treat conditions/complications related to pregnancy as temporary disabilities, but not the pregnancy itself. This understanding is clear from the Preamble, but ATIXA noted that the language in the section leads to the inference that pregnancy is a temporary disability.

- To repeat the point from above, ED has largely neglected protections related to parenting, but these merit clearer inclusion and details. For example, when the person who gives birth has medical needs related to giving birth, for how long after birth does Title IX require these protections? Similarly, are there rights that attach to parents if a child needs medical attention because of the birthing process? If so, for how long after birth should these protections pertain? What about non-birthing parents of children who have medical needs related to birth, or non-birthing parents who have obligations to a birthing parent who has complications or medical needs related to pregnancy or childbirth? Do they have protections under Title IX? What about student expecting parents whose surrogate experiences medical issues? Are they protected?

- ATIXA supports student access to appropriate lactation space, in addition to employee access. Additionally, ATIXA appreciates ED's recognition of the potential need for alternative space, solutions, or other reasonable modifications when addressing individual student concerns regarding lactation space accessibility.

- ATIXA invites ED to provide additional clarity to assist recipients to provide reasonable access to lactation spaces to students and employees, including 1) the location of lactation spaces; 2) the number of recommended lactation spaces based on institution size, student population, and available financial resources; and 3) access to lactation spaces during evenings and weekends.

106.44 Action by a recipient to operate its education program or activity free from sex discrimination.

(a) General. A recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects. To ensure that it can satisfy this obligation, a recipient must comply with this section.

- ATIXA supports this provision.

(b) Monitoring. A recipient must:

> *(1) Require its Title IX Coordinator to monitor the recipient's education program or activity for barriers to reporting information about conduct that may constitute sex discrimination under Title IX; and*
>
> *(2) Take steps reasonably calculated to address such barriers.*

(c) Notification requirements.

> *(1) An elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.*

(2) All other recipients must, at a minimum, require:

(i) Any employee who is not a confidential employee and who has authority to institute corrective measures on behalf of the recipient to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX;

(ii) Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity to notify the Title IX Coordinator when the employee has information about a student being subjected to conduct that may constitute sex discrimination under Title IX;

(iii) Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity and has information about an employee being subjected to conduct that may constitute sex discrimination under Title IX to either:

(A) Notify the Title IX Coordinator when the employee has information about an employee being subjected to conduct that may constitute sex discrimination under Title IX; or

(B) Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with the information; and

(iv) All other employees who are not confidential employees, if any, to either:

(A) Notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX; or

(B) Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with information about conduct that may constitute sex discrimination under Title IX.

(3) A postsecondary institution must make a fact-specific inquiry to determine whether the requirements of paragraph (c)(2) of this section apply to a person who is both a student and an employee of the postsecondary institution. In making this determination, a postsecondary institution must, at a minimum, consider whether the person's primary relationship with the postsecondary institution is to receive an education and whether the person learns of conduct that may constitute sex discrimination under Title IX in the postsecondary institution's education program or activity while performing employment-related work.

(4) The requirements of paragraphs (c)(1) and (c)(2) of this section do not apply when the only employee with information about conduct that may constitute sex discrimination under Title IX is the employee-complainant.

- ATIXA recommends changes to § 106.44 and would support this provision with the recommended changes. The proposed regulations create reporting requirements for post-secondary recipients that change depending on both the identity of the reporting individual and of the individual receiving the report. The result is a confusing amalgamation of requirements that will likely prove very challenging for recipients to implement. Additionally, most mandatory reporters will not receive disclosures with any regularity. On those rare occasions, it is unlikely most unpracticed faculty, staff, or administrators will recall how to navigate the complex reporting requirements the NPRM outlines. Keep it simple.

- ATIXA supports § 106.44(c)(1) as written. However, ATIXA suggests in proposed § 106.44(c)(2), keep (i), delete (iii), and expand (ii) so it pertains to all individuals, not just students. The result would, in the post-secondary setting, require (1) individuals with authority to institute corrective measures on behalf of the recipient, and (2) any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising to report, regardless of the identity of the reporting individual. All other non-confidential employees would retain the flexibility to report or notify. Such changes would reduce the complexity inherent in the proposed regulations. The changes would center reporting considerations around the question "who can I reasonably expect would be able to help?" The changes also set a reasonable floor of expectations and flexibility. Subsection (c)(3) would become unnecessary because reporting allegations would not depend on the identity of the reporting individual.

- Could subsection (iv) include additional explanation of "information about how to report sex discrimination?" Do they need to provide the website or reporting form in writing? How should they access the website or form? Could ED describe what kind of information constitutes a disclosure?

- In general, any individual making a report to the Title IX Coordinator should have an obligation to notify the individual who made the original disclosure, preferably at the time of disclosure. Doing so would aid the Title IX Coordinator in their outreach, as well as give the disclosing individual an opportunity to ask questions and understand next steps. Reporting should not be a surprise and helps the disclosing individual maintain some control in the situation.

- ATIXA asks ED to clarify that § 106.44(c)(1) applies to all district employees, not just school-based employees.

- If ED chooses to retain the proposed framework, ATIXA asks ED to clarify the meaning of "advising" and "leadership."

(d) Confidential employee requirements.

(1) A recipient must notify all participants in the recipient's education program or activity of the identity of any confidential employee.

(2) A recipient must require a confidential employee to explain their confidential status to any person who informs the confidential employee of conduct that may constitute sex discrimination under Title IX and must provide that person with contact information for the recipient's Title IX Coordinator and explain how to report information about conduct that may constitute sex discrimination under Title IX.

- ATIXA supports this provision.

(e) Public awareness events. When a postsecondary institution's Title IX Coordinator is notified of information about conduct that may constitute sex-based harassment under Title IX that was provided by a person during a public event held on the postsecondary institution's campus or through an online platform sponsored by a postsecondary institution to raise awareness about sex-based harassment associated with a postsecondary institution's education program or activity, the postsecondary institution is not obligated to act in response to this information under this section, § 106.45, or § 106.46, unless the information reveals an immediate and serious threat to the health or safety of students or other persons in the postsecondary institution's community. However, in all cases the postsecondary institution must use this information to inform its efforts to prevent sex-based harassment, including by providing tailored training to address alleged sex-based harassment in a particular part of its education program or activity or at a specific location when information indicates there may be multiple incidents of sex-based harassment.

- ATIXA supports this provision but suggests a few minor changes. The regulations should:
    - (1) Define "public event;"
    - (2) Specify whether a public event qualifies under this provision if the event is within the recipient's education program or activity but held off-campus or in community space rather than on-campus or online;
    - (3) Define "sponsored;" and
    - (4) Define "raise awareness."

- Additionally, how should recipients respond to disclosures made in the context of an assignment, such as a presentation, speech, or writing assignment?

- ATIXA requests ED clarify whether disclosures on social media may fall under this provision.

(f) Title IX Coordinator requirements. A recipient must require its Title IX Coordinator to take the following steps upon being notified of conduct that may constitute sex discrimination under Title IX:

(1) Treat the complainant and respondent equitably;

(2) (i) Notify the complainant of the grievance procedures under § 106.45, and if applicable § 106.46; and

(ii) If a complaint is made, notify the respondent of the applicable grievance procedures and notify the parties of the informal resolution process under this section if available and appropriate;

(3) Offer and coordinate supportive measures under paragraph (g) of this section, as appropriate, to the complainant and respondent to restore or preserve that party's access to the recipient's education program or activity;

(4) In response to a complaint, initiate the grievance procedures or informal resolution process under § 106.45, and if applicable § 106.46;

(5) In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures under § 106.45, and if applicable § 106.46, if necessary to address conduct that may constitute sex discrimination under Title IX in the recipient's education program or activity; and

(6) Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity, in addition to remedies provided to an individual complainant.

- ATIXA supports this provision.

(g) Supportive measures. Upon being notified of conduct that may constitute sex discrimination under Title IX, a Title IX Coordinator must offer supportive measures, as appropriate, to the complainant or respondent to the extent necessary to restore or preserve that party's access to the recipient's education program or activity. For allegations of sex discrimination, other than sex-based harassment or retaliation, a recipient's provision of supportive measures would not require the recipient, its employee, or other person authorized to provide aid, benefit or services on the recipient's behalf to alter the allegedly discriminatory conduct for the purpose of providing a supportive measure.

- ATIXA supports this provision. ATIXA recommends the phrasing be modified to "…to the complainant and/or respondent" to make clear that supportive measures might be appropriate to one, both, or all parties depending on the circumstances.

(1) Supportive measures may vary depending on what the recipient deems to be available and reasonable. These measures may include but are not limited to: counseling; extensions of deadlines and other course-related adjustments; campus escort services; increased security and monitoring of certain areas of the campus; restrictions on contact between the parties; leaves of absence; voluntary or involuntary changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative; and training and education programs related to sex-based harassment.

- ATIXA supports this provision. ATIXA assumes that the use of the term "work" refers to changes to work parameters, rather than removal from work, which would not be a supportive measure, and asks ED to confirm this understanding.

(2) Supportive measures that burden a respondent may be imposed only during the pendency of a recipient's grievance procedures under § 106.45, and if applicable § 106.46, and must be terminated at the conclusion of those grievance procedures. These measures must be no more restrictive of the respondent than is necessary to restore or preserve the complainant's access to the recipient's education program or activity. A recipient may not impose such measures for punitive or disciplinary reasons.

- ATIXA supports this provision and a flexible and individualized approach to determining which supportive measures are available and reasonable under the circumstances as discussed in our general comment above. Furthermore, ATIXA supports ED's acknowledgement that some limited circumstances necessitate burdening a respondent in order to effectuate the policy goals of this provision: to restore or preserve a complainant's access during the pendency of the grievance process.

- ATIXA has long acknowledged that unilateral restrictions on contact between the parties (typically with the respondent restricted from contacting the complainant) are sometimes appropriate to preserve access, ensure safety, and deter harassment. ATIXA interprets the phrasing of the proposed rule – "restrictions on contact between the parties" – to be intentionally flexible to allow a recipient to impose a unilateral restriction (on the respondent) or a mutual restriction (on all parties), depending on what is reasonable to restore or preserve access to the recipient's education program or activity, and asks ED to confirm whether this interpretation is accurate.

- ATIXA recommends that ED clarify that supportive measures may burden a respondent to restore or preserve a complainant's access (such as removal from a specific class, housing assignment, or extracurricular) without embarking on the individualized safety and risk analysis required under § 106.44(h).

- ATIXA asks ED to clarify the extent to which the Title IX Coordinator can and should collaborate with the professionals who oversee the program (coaches, advisors, faculty) to make a removal determination.

- ATIXA also asks ED to clarify whether the Title IX Coordinator may consider the norms, rules, or bylaws of that program when determining whether to implement supportive measures.

> *(3) For supportive measures other than those that burden a respondent, a recipient may, as appropriate, modify or terminate supportive measures at the conclusion of the grievance procedures under § 106.45, and if applicable § 106.46, or at the conclusion of the informal resolution process under paragraph (k) of this section, or the recipient may continue them beyond that point.*

- ATIXA supports this provision.

> *(4) A recipient must provide a complainant or respondent affected by a decision to provide, deny, modify, or terminate supportive measures with a timely opportunity to seek modification or reversal of the recipient's decision by an appropriate, impartial employee. The impartial employee must be someone other than the employee who made the decision being challenged and must have authority to modify or reverse the decision, if appropriate. A recipient must make a fact-specific inquiry to determine what constitutes a timely opportunity for seeking modification or reversal of a supportive measure. If the supportive measure burdens the respondent, the initial opportunity to seek modification or reversal of the recipient's decision must be provided before the measure is imposed or, if necessary under the circumstances, as soon as possible after the measure has taken effect. A recipient must also provide a complainant or respondent affected by a supportive measure with the opportunity to seek additional modification or termination of such supportive measure if circumstances change materially.*

- Although ATIXA conceptually supports the idea that parties ought to be able to seek modification or reversal of what is perceived by them as an adverse decision with respect to supportive measures, we note that as currently drafted this provision adds a cumbersome "appeal" procedure to a very narrow aspect of a recipient's grievance procedures. Overall, the effect of these regulations should be to reduce the burden on recipients, if possible, but this provision requires the identification and training of someone to manage "appeals," though many recipients are already short-staffed.
    - ATIXA recommends that this provision be limited to circumstances where a supportive measure burdens the respondent and results in partial removal. In all circumstances, any party should be permitted to seek modification or reconsideration of supportive measures through a more straightforward process of making a request for modification or reconsideration to the Title IX Coordinator.

(5) A recipient must ensure that it does not disclose information about any supportive measures to persons other than the complainant or respondent unless necessary to provide the supportive measure. A recipient may inform a party of supportive measures provided to or imposed on another party only if necessary to restore or preserve that party's access to the education program or activity.

- ATIXA supports this provision.

(6) Under paragraph (f)(3) of this section, the Title IX Coordinator is responsible for offering and coordinating supportive measures.

- Some state laws are now directing that confidential resources have the authority to offer and coordinate supportive measures, which may also raise privilege issues. *See, e.g.,* 5 M.R.S.A c. 445 (which directs confidential resource advisor to "coordinate with the campus resources to arrange possible school-provided supportive measures"). ATIXA recommends ED consider these state laws in finalizing this provision, but notes that there are likely circumstances where the Title IX Coordinator will need to be able to access this information.

(7) (i) If the complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator must consult with the Individualized Education Program (IEP) team, 34 CFR 300.321, if any, or the group of persons responsible for the student's placement decision under 34 CFR 104.35(c) (§ 504 team), if any, to help ensure the recipient complies with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the implementation of supportive measures.

- ATIXA supports this provision and asks ED to confirm the assumption that consultation with the IEP team is informal at this stage of the process.

(ii) If the complainant or respondent is a postsecondary student with a disability, the Title IX Coordinator may consult, as appropriate, with the individual or office that the recipient has designated to provide supports to students with disabilities to help ensure that the recipient complies with § 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the implementation of supportive measures.

- ATIXA supports this provision.

(h) Emergency removal. Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate and serious threat to the health or safety of students, employees, or other persons arising from the allegations of sex discrimination justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision must not be construed to modify any rights under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., § 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12134.

- Overall, ATIXA in unsupportive of such a high bar being imposed on actions that may be needed to protect recipient communities. ATIXA supports ED's decision to remove the term "physical" from the 2020 regulations. However, ATIXA recommends additional changes, noted below.

- ATIXA requests that ED reevaluate whether an "immediate" standard is appropriate. The requirement for immediacy is not in keeping with the law or standards of the field of threat assessment, which use an objective tool or evaluation process to determine the likelihood and severity of threat, rather than just its immediacy. ED might make this standard more practical with language to this effect: "determines that a realistic (credible) threat to health or safety is imminent, ongoing, and/or reasonably likely to occur." Further, ATIXA suggests that ED remove the language "arising from the allegations of sex discrimination." This limiting language is unnecessary and constraining. If a credible threat is present, requiring that threat to be related to the underlying allegations would needlessly limit a recipient's ability to respond. Furthermore, it may sometimes require further investigation (and possibly a hearing) to subsequently determine whether certain alleged acts or threats were connected to the sex discrimination allegations. The limiting language also ignores the longitudinal work of threat assessment and behavioral intervention teams, which track the emergence of

threats over time. Patterns of conduct may emerge from the risk assessment process, which commonly looks beyond just the most recent allegations.

- As indicated in our general comment above, ATIXA recommends ED limit the requirements of § 106.44(h) to those situations that are "complete removals" or entire removals from a recipient's program and activities and to specify this distinction within the language of § 106.44(h). Put another way, this standard should be reserved for situations in which a respondent might have previously been subject to an interim suspension, pending the outcome of a grievance process. For other removal decisions that do not interfere with the student's ability to progress academically, such as removal from extracurricular activities, recipients should have more flexibility. ATIXA recommends that ED consider these "partial removals" as supportive measures that burden a respondent in order to preserve or restore the access of the complainant, rather than an emergency removal under this subsection.

(i) *Administrative leave. Nothing in this part precludes a recipient from placing an employee respondent on administrative leave from employment responsibilities during the pendency of the recipient's grievance procedures. This provision must not be construed to modify any rights under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12134.*

- ATIXA supports this provision.

(j) *Recipient prohibitions. When conducting an informal resolution process under paragraph (k) of this section, implementing grievance procedures under § 106.45, and if applicable § 106.46, or requiring a Title IX Coordinator to take other appropriate steps under paragraph (f)(6) of this section, a recipient must not disclose the identity of a party, witness, or other participant except in the following circumstances:*
   (1) When the party, witness, or other participant has provided prior written consent to disclose their identity;
   (2) When permitted under the Family Educational Rights and Privacy Act, 20 U.S.C 1232g, or its implementing regulations, 34 CFR part 99;
   (3) As required by law; or
   (4) To carry out the purposes of this part, including action taken to address conduct that may constitute sex discrimination under Title IX in the recipient's education program or activity.

- ATIXA supports this provision.

(k) Discretion to offer informal resolution in some circumstances.

(1) At any time prior to determining whether sex discrimination occurred under § 106.45, and if applicable § 106.46, a recipient may offer to a complainant and respondent an informal resolution process, unless there are allegations that an employee engaged in sex discrimination toward a student or such a process would conflict with Federal, State or local law. A recipient that provides the parties an informal resolution process must, to the extent necessary, also require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

(i) A recipient has discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that may constitute sex discrimination under Title IX or a complaint of sex discrimination is made, and may decline to offer informal resolution despite one or more of the parties' wishes.

(ii) Circumstances when a recipient may decline to allow informal resolution include but are not limited to when the recipient determines that the alleged conduct would present a future risk of harm to others.

(2) A recipient must not require or pressure the parties to participate in an informal resolution process. The recipient must obtain the parties' voluntary consent to the informal resolution process and must not require waiver of the right to an investigation and adjudication of a complaint as a condition of enrollment or continuing enrollment, or employment or continuing employment, or exercise of any other right.

(3) Before initiation of an informal resolution process, the recipient must provide to the parties notice that explains:

(i) The allegations;

(ii) The requirements of the informal resolution process;

(iii) That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures;

(iv) That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;

(v) The potential terms that may be requested or offered in an informal resolution agreement;

(vi) Which records will be maintained and could be shared;

(vii) That if the recipient initiates or resumes its grievance procedures under § 106.45, and if applicable § 106.46, the recipient or a party must not access, consider, disclose, or otherwise use information, including records, obtained solely through an informal resolution process as part of the investigation or determination of the outcome of the complaint; and

(viii) That, when applicable, and if the recipient resumes its grievance procedures, the informal resolution facilitator could serve as a witness for purposes other than providing information obtained solely through the informal resolution process.

(4) The facilitator for the informal resolution process must not be the same person as the investigator or the decisionmaker in the recipient's grievance procedures. Any person designated by a recipient to facilitate an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. Any person facilitating informal resolution must receive training under § 106.8(d)(3).

(5) Potential terms that may be included in an informal resolution agreement include but are not limited to:

(i) Restrictions on contact; and

(ii) Restrictions on the respondent's participation in one or more of the recipient's programs or activities or attendance at specific events, including restrictions the recipient could have imposed as remedies or disciplinary sanctions had the recipient determined that sex discrimination occurred under the recipient's grievance procedures.

- ATIXA is generally supportive of these provisions. ATIXA supports the use of informal resolution in appropriate circumstances. The structure of the informal resolution provision suggests its primary use will be in matters involving a complainant and a respondent, or what is considered a relational complaint. However, many recipients are also navigating structural complaints — those involving allegations of sex-based discrimination involving policies, practices, and environments — that do not cleanly fit in the formal grievance process structure, or the informal resolution structure prescribed by the regulations. Further, the regulations do not contemplate the recipient having a participatory role in the informal resolution process, which many institutions view as necessary to ensure equity across complaints. ATIXA recommends providing guidance for resolving structural complaints as well as specifying whether the recipient may have a participatory role in the informal resolution process.

- Recipients appreciate the flexibility afforded to them in determining the best informal resolution options or practices within their specific settings. However, the regulations seem to envision that an informal resolution would never result in a determination of responsibility under recipient policy. This perspective is inconsistent with ATIXA's recommended informal resolution framework, as well as the practice of many recipients. Through the informal resolution process, many complainants are seeking either an acceptance of responsibility or demonstrated accountability for harmful behavior. As such, one commonly available (though less used) method of informal resolution involves the respondent accepting responsibility for violating recipient policy. For recipients who employ restorative practices as part of their informal resolution, participation in such

practices necessitates the respondent accepting some level of accountability for harmful behavior, while not necessarily accepting responsibility for violating policy. We ask ED to broaden these provisions to permit informal resolution for accepted responsibility, which could result in a finding and sanctions.

- Although mediation is a common form of conflict resolution used as an alternative to more formal processes in a variety of settings, ATIXA discourages ED from referencing mediation as a potential option for informal resolution under the regulations. One of the premises of mediation is that all parties contributed to the dispute or conflict – a problematic construct to apply to instances of sex-based discrimination. If ED determines the need to provide specific examples of possible informal resolution structures, ATIXA notes that facilitated dialogues, shuttle negotiation, and restorative practices are more suited to this context.

- ATIXA requests that ED clarify whether voluntary consent to participate in informal resolution must be obtained in writing.

- ATIXA recommends the following specific revisions to the proposed regulations:

    - (k)(3)(iv): Add "unless the alleged behavior continues" at the end of the provision. If the reported behavior continues post-informal resolution, the grievance procedures should be able to consider the totality of the allegations, not just those behaviors which occurred following the agreement.
    - (k)(3)(vii): ATIXA recommends removing this subsection entirely. Although a rule conferring absolute confidentiality during an informal resolution process is thought to promote the effectiveness of the informal resolution process, that is rarely true in practice. ATIXA believes that the parties ought to be able to ask for confidentiality as a term of the agreement, or when agreeing to informal resolution, but that it should not be a default. The provision, as written, may provide a vehicle by which the parties can strategically use informal resolution to disclose and suppress evidence from being considered later during formal resolutions if informal resolution is unsuccessful.
    - (k)(3): ATIXA recommends inserting a provision that the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from requesting an appeal of the agreement.
        - Because an informal resolution is a voluntary agreement between the parties, there should be no need to provide for an appeal of an informal resolution.

- (k)(3): ATIXA recommends that, prior to the parties agreeing to a resolution, or prior to the Title IX Coordinator approving an informal resolution, the informal resolution facilitator may stop the informal resolution process and give the parties the option of initiating or resuming the recipient's grievance procedures.
    - If the informal resolution facilitator has reason to believe that the informal resolution process has become harmful to one or more parties, the facilitator must have the authority to end the informal resolution process on behalf of the recipient, even if that is against the parties' wishes. Likewise, if the facilitator learns information that, if known prior to the initiation of the informal resolution process, would have rendered informal resolution an inappropriate or prohibited option, the facilitator must have authority to end the informal resolution process as an option.
- (k)(5): ATIXA recommends specifying that any potential terms that may be included in an informal resolution agreement may not include terms restricting or obligating actions by an individual or group who is not a party to the informal resolution.
    - ATIXA has seen many complainants request that a student organization, in which the respondent holds membership, attend a training or something similar, and we advise that the respondent cannot obligate their organization to attend training as part of an informal resolution. However, informal resolution facilitators often fail to address such a restriction during the informal resolution process. In the spirit of ED's intention to provide guard rails for the informal resolution process, we believe that this added limitation will provide for a more equitable informal resolution process for all parties.

- With the expanded jurisdiction to off-campus behavior in the proposed rule, and all the potential permutations of relationships in higher education--especially those at a large institution--ATIXA wonders if a blanket prohibition of informal resolution for employee-on-student harassment is too blunt an instrument. For example, consider a stalking complaint between a faculty member and a graduate student who academically and professionally have nothing to do with each other. The two individuals could meet on a dating app and both happen to be affiliated with the institution. In this sense, they would be more like peers than people in an authoritative relationship. One approach would be to leave the decision of permissibility of informal resolution to the Title IX Coordinator, with some guidance for coordinators provided in the Preamble. Another approach would be to cabin the authority to permit informal resolution between students and employees to those situations in which the Title IX Coordinator has determined that an imbalance of power does not exist, can be neutralized, or is unlikely to impact the ability of the parties to negotiate a resolution in good faith. Still another approach would be to prohibit

employee-student informal resolution when an employee is the respondent, but not when they are the complainant. ATIXA asks ED to consider these potential options.

- Would ED like to provide any guidance on how recipients are to respond when a party violates a term of their informal resolution agreement?

106.45 Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination.

(a) (1) General. For purposes of addressing complaints of sex discrimination, a recipient's prompt and equitable grievance procedures must be in writing and include provisions that incorporate the requirements of this section. The requirements related to a respondent apply only to sex discrimination complaints alleging that a person violated the recipient's prohibition on sex discrimination. When a sex discrimination complaint alleges that a recipient's policy or practice discriminates on the basis of sex, the recipient is not considered a respondent.
(a) (2) Complaint. The following persons have a right to make a complaint of sex discrimination, including complaints of sex-based harassment, requesting that the recipient initiate its grievance procedures:

(i) A complainant;
(ii) A person who has a right to make a complaint on behalf of a complainant under § 106.6(g);
(iii) The Title IX Coordinator;
(iv) With respect to complaints of sex discrimination other than sex-based harassment, any student or employee; or third party participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.

- ATIXA is generally supportive of these provisions. With respect to § 106.45(a)(1), ATIXA recommends clarifying the last sentence. Additional guidance would be helpful to show recipients what the process should look like if there is no respondent. The Preamble does not provide any guidance as to which provisions of § 106.45 apply to § 106.45 processes involving the recipient's own potentially discriminatory policies and practices.

(b) Basic requirements for grievance procedures. A recipient's grievance procedures must:

(1) Treat complainants and respondents equitably;
(2) Require that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. The decisionmaker may be the same person as the Title IX Coordinator or investigator;

(3) Include a presumption that the respondent is not responsible for the alleged conduct until a determination whether sex discrimination occurred is made at the conclusion of the recipient's grievance procedures for complaints of sex discrimination;
(4) Establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case- by-case basis for good cause with notice to the parties that includes the reason for the delay. Major stages include, for example, evaluation (i.e., the recipient's determination of whether to dismiss or investigate a complaint of sex discrimination); investigation; determination; and appeal, if any;
(5) Take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures, provided that the steps do not restrict the ability of the parties to obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with a family member, confidential resource, or advisor; prepare for a hearing, if one is offered; or otherwise defend their interests;
(6) Require an objective evaluation of all relevant evidence, consistent with the definition of relevant in § 106.2—including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness; and
(7) Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:

> *(i) Evidence that is protected under a privilege as recognized by Federal or State law, unless the person holding such privilege has waived the privilege voluntarily in a manner permitted in the recipient's jurisdiction;*
> *(ii) A party's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent for use in the recipient's grievance procedures; and*
> *(iii) Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is offered to prove consent with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent. The fact of prior consensual sexual conduct between the complainant and respondent does not demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred.*

- ATIXA is generally supportive of these provisions except as noted below: ATIXA requests that ED define "equitably."

- Section 106.45(b)(7)(iii): This construct adheres too closely to the current regulations in ATIXA's opinion, and without modification, ATIXA cannot support it. ATIXA suggests the language below in replacement:
  - Information about a complainant's sexual interests, history, and/or predisposition offered by a source other than the complainant can only be considered to prove that someone other than the respondent committed the alleged conduct or to prove consent with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent. Evidence of a complainant's sexual interests, history, and/or predisposition can always be provided by the complainant and can be relied on to the extent relevant.
  - ED should provide examples of interests, history, and predisposition in the Preamble.

- Section 106.45 does not require recipients to permit advisors. ATIXA asks whether this was intentional, especially since § 106.45 may include employee complaints implicating VAWA protections, including the right to an advisor. ATIXA generally recommends recipients include the right to advisors in their policy.

(c) Notice of allegations. Upon initiation of the recipient's grievance procedures, a recipient must provide notice of the allegations to the parties whose identities are known.

(1) The notice must include:

(i) The recipient's grievance procedures under this section, and if applicable § 106.46, and any informal resolution process under § 106.44(k);

(ii) Sufficient information available at the time to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident, the conduct alleged to constitute sex discrimination under Title IX, and the date and location of the alleged incident, to the extent that information is available to the recipient; and

(iii) A statement that retaliation is prohibited.

- ATIXA recommends ED permit reasonable delay of delivery of the Notice of Allegation (NOA) when necessary to accommodate the administrative obligations of the recipient, such as making a jurisdiction determination.

(2) If, in the course of an investigation, the recipient decides to investigate additional allegations about the respondent's conduct toward the complainant that are not included in the notice provided under paragraph (c)(1) of this section or that are included in a complaint that is consolidated under paragraph (e) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

- ATIXA supports this provision but encourages ED to modify the language to allow for consideration of pattern conduct involving others, not just the original complainant.

(d) Dismissal of a complaint.

(1) A recipient may dismiss a complaint of sex discrimination made through its grievance procedures under this section, and if applicable § 106.46, for any of the following reasons:

(i) The recipient is unable to identify the respondent after taking reasonable steps to do so;

(ii) The respondent is not participating in the recipient's education program or activity and is not employed by the recipient;

(iii) The complainant voluntarily withdraws any or all of the allegations in the complaint and the recipient determines that without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX even if proven; or

(iv) The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX. Prior to dismissing the complaint under this paragraph, the recipient must make reasonable efforts to clarify the allegations with the complainant.

(2) Upon dismissal, a recipient must promptly notify the complainant of the basis for the dismissal. If the dismissal occurs after the respondent has been notified of the allegations, then the recipient must also notify the respondent of the dismissal and the basis for the dismissal promptly following notification to the complainant, or simultaneously if notification is in writing.

(3) A recipient must notify all parties that a dismissal may be appealed, provide any party with an opportunity to appeal its dismissal of a complaint, and must:

(i) Notify the parties when an appeal is filed and implement appeal procedures equally for the parties;

(ii) Ensure that the decisionmaker for the appeal did not take part in an investigation of the allegations or dismissal of the complaint;

(iii) Ensure that the decisionmaker for the appeal has been trained as set out in § 106.8(d)(2);

(iv) Provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome; and

(v) Notify all parties of the result of the appeal and the rationale for the result.

(4) A recipient that dismisses a complaint must, at a minimum:

(i) Offer supportive measures to the complainant as appropriate under § 106.44(g);

(ii) For dismissals under paragraphs (1)(iii) or (1)(iv) of this section in which the respondent has been notified of the allegations, offer supportive measures to the respondent as appropriate under § 106.44(g); and

(iii) Require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity under § 106.44(f)(6).

- ATIXA supports the streamlined, yet flexible, approach in this revised dismissal provision, which permits, but does not necessarily require, that a Title IX Coordinator dismiss a complaint when the jurisdictional elements are not met. Importantly, ATIXA reads the proposed rule to address the "timing problem" in the current regulations. Notice of a dismissal to a respondent currently exists in current § 106.45(b)(3)(iii), requiring a recipient provide notice of a dismissal to all parties, even when the respondent has not yet been notified about the existence of the complaint. ATIXA supports the revised provision here that would only require notification to a complainant in those cases where a recipient has not yet notified a respondent of the complaint. We ask ED to confirm ATIXA's understanding of the proposed regulation is correct.

- ATIXA recommends that ED further revise this provision to consider the same approach with respect to the right to appeal a dismissal. ATIXA asks ED to clarify whether, as currently drafted, the appeal right applies to all parties, even when the recipient has not notified the respondent of the complaint or the dismissal? If so, in those circumstances, ATIXA recommends that the appeal right only be available to a complainant. In those cases where the respondent has already been notified about the complaint, and the dismissal, then all parties would be entitled to an appeal of the dismissal.

- ATIXA requests clarification on one point. There does not appear to be a dismissal provision based on the conduct not being "in the program or activity" as a jurisdictional element. Was this omission by ED intentional?

(e) Consolidation of complaints. A recipient may consolidate complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances. If one of the complaints to be consolidated is a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures for investigating and resolving the consolidated complaint must comply with the requirements of this section and § 106.46. When more than one complainant or more than one respondent is involved, references in this section and in § 106.46 to a party, complainant, or respondent include the plural, as applicable.

- ATIXA is supportive of this provision. ATIXA members often inquire about whether they may consolidate multiple different incidents involving the same parties (pattern investigations). Some additional explanation or examples of the concept "arising out of the same facts and circumstances" in the Preamble would help recipients determine when consolidation is appropriate. ATIXA also asks ED to recognize that recipients may consolidate pattern conduct in many cases even when the pattern does not arise from the same (but similar) facts or circumstances. ATIXA asks ED to clarify whether it permits consolidation only as per this paragraph or is consolidation available in other circumstances?

(f) Complaint investigation. A recipient must provide for adequate, reliable, and impartial investigation of complaints. To do so, the recipient must:

> *(1) Ensure that the burden is on the recipient—not on the parties—to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred;*
> *(2) Provide an equal opportunity for the parties to present relevant fact witnesses and other inculpatory and exculpatory evidence;*
> *(3) Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance, consistent with § 106.2 and with paragraph (b)(7) of this section; and*
> *(4) Provide each party with a description of the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, as well as a reasonable opportunity to respond.*

- ATIXA is generally supportive of these provisions. § 106.46 explicitly mentions expert witnesses; however, § 106.45(f)(2) only mentions fact witnesses. The Preamble explains that expert witnesses are allowable under § 106.45, but they are not referenced within the regulations themselves. ATIXA recommends inserting a provision into § 106.45 clarifying that recipients have the option to permit expert witnesses. ATIXA believes the regulations should permit access to experts in all sex-based discrimination complaints.

- ATIXA asks ED why (f)(2) is limited to "relevant fact witnesses," and suggests that "relevant witnesses" would offer better flexibility, as not all witnesses are or need to be fact witnesses.

- Regarding § 106.45(f)(4), ATIXA strongly recommends that any description or report of the relevant evidence be in writing. Mandating any description or report to be in writing helps all parties to understand the relevant evidence and lessens the risk that recipients omit relevant evidence by mistake. There are also significant due process concerns because parties will have a much more difficult time reviewing and responding to the relevant

evidence if recipients only review the evidence verbally. Parties could walk away from such a meeting with no hard copy to review with their parents, guardians, advisors, or attorneys. If a party is younger, or they are unable to access or afford a knowledgeable and experienced advisor, a party may simply be too overwhelmed by a verbal report to meaningfully participate. Even in "simple" investigations, comprehending the technical nature of Title IX is challenging. The potential for error is too significant and permitting verbal reports under the regulations could open recipients up to liability in federal courts, as well.

- Additionally, as the result of other regulatory requirements, recipients are not saving much time and energy giving verbal reports. Section 106.8(f)(1) requires recipients to document the process, including documentation of a verbal description of the evidence. Given that recipients must create documentation of a verbal description of the evidence, why not simply require them to put any description of the evidence in writing? Given the requirements of § 106.8(f)(1), the drawbacks of permitting verbal reports far outweigh the time and energy recipients would spend on a written description.

- On a similar note, the Preamble, discussing § 106.45(f)(4), requires recipients to provide parties with "sufficient information…to meaningfully prepare arguments, contest the relevance of evidence, and present additional evidence." ATIXA recommends adding further clarification of the concept "sufficient information" to ensure recipients understand expectations. ATIXA welcomes ED's efforts to provide flexible options for recipients to fulfill their obligations under Title IX, but some additional guidance would be helpful.

- Lastly, ATIXA asks ED to require recipients to provide a report of some kind, even if it is a summary report containing witness statements and other collected evidence. An investigation report is a best practice to ensure parties have a full opportunity to review and respond to the evidence. Simply providing the parties an evidence file or some other description of the evidence may impede the parties' ability to comprehend the evidence or the full picture of the investigation, especially if they do not have the expertise of a trained attorney advisor or expert to assist. Certainly, many investigations, especially in K-12, may not require a full investigation report like recipients have produced over the past few years. A slimmed-down report may be appropriate instead. However, given the due process concerns cited above, we ask ED to offer some additional clarification on this topic.

(g) Evaluating allegations and assessing credibility. A recipient must provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

- ATIXA supports this provision.

(h) Determination of whether sex discrimination occurred. Following an investigation and evaluation process under paragraphs (f) and (g) of this section, the recipient must:

(1) Use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred. Both standards of proof require the decisionmaker to evaluate relevant evidence for its persuasiveness; if the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker should not determine that sex discrimination occurred.

(2) Notify the parties of the outcome of the complaint, including the determination of whether sex discrimination occurred under Title IX, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable;

(3) If there is a determination that sex discrimination occurred, as appropriate, require the Title IX Coordinator to provide and implement remedies to a complainant or other person the recipient identifies as having had equal access to the recipient's education program or activity limited or denied by sex discrimination, and require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity under § 106.44(f)(6);

(4) Comply with this section, and if applicable § 106.46, before the imposition of any disciplinary sanctions against a respondent; and

(5) Not discipline a party, witness, or others participating in a recipient's grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination of whether sex discrimination occurred.

- ATIXA recommends that ED require a written notification of outcome in § 106.45(h)(2). Although ATIXA is sensitive to the concerns outlined in the Preamble, that current written notification requirements are burdensome to recipients, written notification is a necessary safeguard of due process, and a requirement for post-secondary institutions under VAWA § 304. ED could lessen the burden on recipients by reducing the required elements in a written notification, which would be preferable to removing the written requirement altogether. Given the recordkeeping requirements in the proposed

regulations, there must be written record of the determination, so it is not clear ED's proposed change would result in significant resource savings or reduced burden.

- ATIXA recommends ED provide guidance regarding the need for some sort of appeal process under § 106.45. ATIXA recommends that if recipients offer an appeal for similar types of conduct or non-Title IX processes, recipients should be required to mirror those protections within the Title IX process. The opportunity to appeal should be equitable between all parties.

- ATIXA recommends ED clarify when a decision is final under § 106.45.

(i) Additional provisions. If a recipient adopts additional provisions as part of its grievance procedures for handling complaints of sex discrimination, including sex-based harassment, such additional provisions must apply equally to the parties.

- ATIXA recommends changing the word "equally" to "equitably," as the Preamble provides examples that hew closer to "equitably" than "equally" in meaning.

(j) Informal resolution. In lieu of resolving a complaint through the recipient's grievance procedures, the parties may instead elect to participate in an informal resolution process under § 106.44(k) if provided by the recipient consistent with that paragraph.

- ATIXA supports this provision.

(k) Provisions limited to sex-based harassment complaints. For complaints alleging sex- based harassment, the grievance procedures must:

> *(1) Describe the range of supportive measures available to complainants and respondents under § 106.44(g); and*
> *(2) Describe the range of, or list, the possible disciplinary sanctions and remedies that the recipient may impose following a determination that sex-based harassment occurred.*

- ATIXA supports this provision.

106.46 Grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions.

(a) General. A postsecondary institution's prompt and equitable written grievance procedures for complaints of sex-based harassment involving a student complainant or student respondent must include provisions that incorporate the requirements of § 106.45 and this section.

- ATIXA supports this provision.

(b) Student employees. When a complainant or respondent is both a student and an employee of a postsecondary institution, the postsecondary institution must make a fact-specific inquiry to determine whether the requirements of this section apply. In making this determination, a postsecondary institution must, at a minimum, consider whether the party's primary relationship with the postsecondary institution is to receive an education and whether the alleged sex-based harassment occurred while the party was performing employment-related work.

- ATIXA supports this provision.

(c) Written notice of allegations.

(1) Upon the initiation of the postsecondary institution's sex-based harassment grievance procedures under this section, a postsecondary institution must provide written notice to the parties, whose identities are known, of:

i. All information required under § 106.45(c); and

ii. Allegations potentially constituting sex-based harassment, including the information required under § 106.45(c)(1)(ii), with sufficient time for the parties to prepare a response before any initial interview.

(2) The written notice must also inform the parties that:

i. The respondent is presumed not responsible for the alleged conduct until a determination of whether sex-based harassment occurred is made at the conclusion of the grievance procedures under this section and that prior to the determination, the parties will have an opportunity to present relevant evidence to a trained, impartial decisionmaker;

- Overall, ATIXA supports the Notice of Allegation provision of proposed § 106.46. As we did in 2019 with respect to then-proposed § 106.45(b)(1)(iv), ATIXA resurrects our concern about the above provision (c)(2)(i) and whether it is necessary and appropriate in federal regulations. ATIXA endorses the concept, of course, but continues to question whether a criminal law construct – the presumption of innocence – has any appropriate place in a Title IX administrative proceeding. The technical concern is around the concept of presumptions. Recipients have always worked (at least in theory) under an assumption that a respondent is not responsible unless the weight of the evidence meets the preponderance of the evidence standard for each allegation. If the respondent-facing provision is to remain, ATIXA asks whether there should also be a presumption that the complaint is made in good faith, to preserve equity for each party? By way of bridging our positions, ATIXA would be comfortable with this alternate language: The respondent is not to be found responsible for the alleged conduct until a determination of whether sex-

based harassment occurred is made at the conclusion of the grievance procedures under this section by the applicable standard of proof and that prior to the determination, the parties will have an opportunity to present relevant evidence to a trained, impartial decisionmaker.

ii. They may have an advisor of their choice to serve in the role set out in paragraph (e)(2) of this section, and that the advisor may be, but is not required to be, an attorney;

- ATIXA supports this provision.

iii. They are entitled to receive access to relevant evidence or to an investigative report that accurately summarizes this evidence as set out in paragraph (e)(6) of this section and

- ATIXA does not support this provision and recommends that ED revise it to require "access to relevant evidence and to an investigative report that accurately summarizes evidence.…" The field, and particularly higher education institutions to which this recommendation would apply, have become accustomed to compiling written investigation reports as an industry standard practice prior to the 2020 regulations, and certainly as part of the current regulatory requirements under § 106.45(b)(5)(vi). As mentioned above, ATIXA believes that due process protections for all parties are most robust in a process with thorough transparency, best achieved when an investigator compiles and synthesizes the relevant evidence into a cohesive report. This is a professional standard commonly practiced in all civil rights investigations contexts, and ED should not dispense with such practices here. The length and complexity of an investigation report may vary depending upon the amount of evidence and the complexity of the underlying complaint under investigation, but the requirement of the report should remain. Furthermore, ATIXA is concerned with potentially allowing recipients the ability to simply provide the parties with access to unorganized and un-synthesized evidence (which may be extremely voluminous) and such steps being ultimately meaningless to a party who may not have the resources to organize and/or understand the evidence that is before them.

iv. If applicable, any provision in the postsecondary institution's code of conduct prohibits knowingly making false statements or knowingly submitting false information during the grievance procedure.

- ATIXA supports this provision.

(3) To the extent the postsecondary institution has legitimate concerns for the safety of any person as a result of providing this notice, the postsecondary institution may reasonably delay providing written notice of the allegations in order to address the safety concern appropriately. Legitimate concerns must be based on individualized safety and risk analysis and not on mere speculation or stereotypes.

- ATIXA supports this provision.

(d) Dismissal of a complaint. When dismissing a complaint alleging sex-based harassment and involving a student complainant or a student respondent, a postsecondary institution must:

(1) Provide the parties, simultaneously, with written notice of the dismissal and the basis for the dismissal, if dismissing a complaint under any of the bases in §106.45(d)(1); and
(2) Obtain the complainant's withdrawal in writing if dismissing a complaint based on the complainant's voluntary withdrawal of the complaint or allegations under §106.45(d)(1)(iii).

- ATIXA supports this provision.

(e) Complaint investigation. When investigating a complaint alleging sex-based harassment and throughout the postsecondary institution's grievance procedures for complaints of sex-based harassment involving a student complainant or a student respondent, a postsecondary institution:

(1) Must provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all meetings, investigative interviews, or hearings with sufficient time for the party to prepare to participate;
(2) Must provide the parties with the same opportunities to be accompanied to any 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 the advisor for the complainant or respondent in any meeting or grievance proceeding; however, the postsecondary institution may establish restrictions regarding the extent to which the advisor may participate in the grievance procedures, as long as the restrictions apply equally to the parties;
(3) Must provide the parties with the same opportunities, if any, to have persons other than the advisor of the parties' choice present during any meeting or proceeding;

(4) Has discretion to determine whether the parties may present expert witnesses as long as the determination applies equally to the parties;
(5) Must allow for the reasonable extension of timeframes on a case-by-case basis for good cause with written notice to the parties that includes the reason for the delay; and

(6) Must provide each party and the party's advisor, if any, with equitable access to the evidence that is relevant to the allegations of sex-based harassment and not otherwise impermissible, consistent with §§106.2 and 106.45(b)(7), in the following manner:

i. A postsecondary institution must provide either equitable access to the relevant and not otherwise impermissible evidence, or to the same written investigative report that accurately summarizes this evidence. If the postsecondary institution provides an investigative report, it must further provide the parties with equitable access to the relevant and not otherwise impermissible evidence upon the request of any party;

ii. A postsecondary institution must provide the parties with a reasonable opportunity to review and respond to the evidence as provided under paragraph (6)(i) of this section prior to the determination of whether sex-based harassment occurred. If a postsecondary institution conducts a live hearing as part of its grievance procedures, it must provide this opportunity to review the evidence in advance of the live hearing; it is at the postsecondary institution's discretion whether to provide this opportunity to respond prior to the live hearing, during the live hearing, or both prior to and during the live hearing;

iii. A postsecondary institution must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the sex-based harassment grievance procedures; and

iv. Compliance with paragraph (e)(6) of this section satisfies the requirements of § 106.45(f)(4).

- ATIXA recommends adding the following language to the end of subsection § 106.46(e)(2): "but which do not inhibit the ability of the advisor to offer advice or for the advisee to be effectively advised."

- ATIXA notes its support for subsection § 106.46(e)(3).

- ATIXA recommends § 106.46(e)(4) be revised to allow all parties to offer relevant expert witnesses. Although interviewing an expert witness as part of a grievance process may add steps to an investigation, in certain cases the information that recipients may glean from experts could be very valuable to a decisionmaker. In all cases, the decisionmaker would be able to evaluate the expert witnesses and determine how much weight the expert should be given, just as they would do with all other cases.

- As noted above, § 106.46(e)(6)(i) permits equitable access to the relevant and not otherwise impermissible evidence, or to a written investigative report that accurately summarizes the evidence. ATIXA recommends that ED require a comprehensive investigative report for post-secondary recipients. Although the investigative report need not contain the prescriptive elements required by the 2020 regulations, an investigative report is the best way to ensure that the parties have a reasonable opportunity to review and respond to the evidence, as required in § 106.46(e)(6)(ii). Some investigations in post-secondary institutions are exceedingly complex and can include hundreds of pages of witness statements and evidence. If recipients may simply provide a disorganized evidence file to the parties, the parties may not be able to make sense of all the evidence. In turn, their ability to "review and respond" in any meaningful way may be diminished or even eradicated.

(f) Evaluating allegations and assessing credibility.

(1) Process for evaluating allegations and assessing credibility. A postsecondary institution must provide a process as specified in this subpart that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment. This assessment of credibility includes either:

i. Allowing the decisionmaker to ask the parties and witnesses, during individual meetings with the parties or at a live hearing, relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, before determining whether sex-based harassment occurred and allowing each party to propose to the decisionmaker or investigator relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, that the party wants asked of any party or witness and have those questions asked during individual meetings with the parties or at a live hearing under paragraph (g) of this section subject to the requirements in paragraph (f)(3) of this section; or

ii. When a postsecondary institution chooses to conduct a live hearing, allowing each party's advisor to ask any party and any witnesses all relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, subject to the requirements under paragraph (f)(3) of this section. Such questioning must never be conducted by a party personally. If a postsecondary institution permits advisor-conducted questioning and a party does not have an advisor who can ask questions on their behalf, the postsecondary institution must provide the party with an advisor of the postsecondary institution's choice, without charge to the party, for the purpose of advisor- conducting questioning. The advisor may be, but is not required to be, an attorney.

(2) Compliance with § 106.45(g). Compliance with paragraph (f)(1)(i) or (f)(1)(ii) of this section satisfies the requirements of § 106.45(g).
(3) Procedures for the decisionmaker to evaluate the questions and limitations on questions. The decisionmaker must determine whether a proposed question is relevant and not otherwise impermissible under §§ 106.2 and 106.45(b)(7), prior to the question being posed, and must explain any decision to exclude a question as not relevant. If a decisionmaker determines that a party's question is relevant and not otherwise impermissible, then it must be asked except that a postsecondary institution must not permit questions that are unclear or harassing of the party being questioned. A postsecondary institution may also impose other reasonable rules regarding decorum, provided they apply equally to the parties.
(4) Refusal to respond to questions related to credibility. If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position. The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond questions related to their credibility.

- ATIXA is overall supportive of this provision but recommends reconsidering how ED formats § 106.46(f)(1). As written, the provisions suggest subsections (i) and (ii) are coequal options, but (ii) should be a subset of (i) for the provision to read properly. The provision should not be an "or" option. Section 106.46(f)(1)(i) mentions live hearings as an option, and (ii) elaborates on live hearings, should a recipient choose to go that route. As written, the provision is confusing.

- Additionally, ATIXA recommends adding to § 106.46(f)(1) to emphasize that (f)(1) is not required if the respondent admits responsibility or credibility is not at issue. Currently, this explanation is in the Preamble, but recipients might benefit from its inclusion in the regulatory language itself.

- ATIXA recommends removing § 106.46(f)(4). The provision is broad and sweeping, echoing the prohibition in the 2020 regulations struck down by the *Cardona* decision. The provision is also unworkable, practically speaking. How does the decisionmaker determine whether a question relates to credibility? Arguably, every question asked of a witness could be a question of credibility, depending on the context, circumstances, and the substance of the answer. Where will the decisionmaker draw the line? If they draw it incorrectly, they rely on prohibited evidence or block relevant evidence from consideration, both of which open recipients to liability. ATIXA is also concerned by the language "supports that party's position," as this is an oversimplification of testimony as being either supportive or unsupportive. Sometimes, a party's testimony against their own position is the most credibility-enhancing testimony, and sometimes it is difficult to

discern what works for or against a party. Sometimes testimony is neither or both, or some unquantifiable mixture of the two, but may be still relevant for the decisionmakers to understand the overall factual situation.

  - This provision appears to track the "statement against interest" hearsay exception. Judges have significant expertise, cultivated through study and practice, to make such subtle and nuanced distinctions. A faculty dean or student conduct officer moonlighting as a Title IX decisionmaker likely does not have the expertise to properly implement this provision. Parsing through the evidence to determine when § 106.46(f)(4) applies and therefore excludes relevant evidence could be very challenging and time-consuming.

  - ATIXA doesn't understand the purpose or value of this subsection and thinks the process will work just fine without any suppression requirements of any kind. ATIXA recommends permitting the decisionmaker to consider all relevant, and not otherwise impermissible, evidence. A party's failure to answer questions about their own credibility would simply factor into the larger credibility analysis applied to the relevant evidence. These suppression requirements dramatically increase the risk that decisionmakers with little experience in evidentiary evaluations will not consider relevant evidence. This rule could allow the decision-making phase to be sidetracked with these evidence requirements and technicalities rather than obtaining the relevant information necessary to evaluate the complaint.

- ATIXA recommends editing § 106.46(f)(4)(ii), specifically the second half of the provision starting with "such questioning must never…." This part of subsection (4)(ii) should only apply in the event the party wants to conduct cross examination. If they do not, and the party does not want an advisor, they do not need one. ATIXA often receives questions about the need to provide an advisor for cross examination if the party does not want to attend and/or does not want to ask questions. Clarification from ED would be helpful.

(g) Live hearing procedures. A postsecondary institution's sex-based harassment grievance procedures may, but need not, provide for a live hearing. If a postsecondary institution chooses to conduct a live hearing, it may conduct the live hearing with the parties physically present in the same geographic location, but at the postsecondary institution's discretion or upon the request of all parties, it will conduct the live hearing with the parties physically present in separate locations with technology enabling the decisionmaker and parties to simultaneously see and hear the party or the witness while that person is speaking or communicating in another format. A postsecondary institution must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

- ATIXA supports this provision but asks ED to caution recipients that this provision will be applicable or inapplicable based on a review of state law and applicable court precedent, which they should review carefully with legal counsel.

(h) Written determination of whether sex-based harassment occurred. The postsecondary institution must provide the determination whether sex-based harassment occurred in writing to the parties simultaneously.

(1) The written determination must include:

(i) A description of the alleged sex-based harassment;

(ii) Information about the policies and procedures that the postsecondary institution used to evaluate the allegations;

(iii) The decisionmaker's evaluation of the relevant evidence and determination of whether sex-based harassment occurred;

(iv) When the decisionmaker finds that sex-based harassment occurred, any disciplinary sanctions the postsecondary institution will impose on the respondent, and whether remedies other than the imposition of disciplinary sanctions will be provided by the postsecondary institution to the complainant and, to the extent appropriate, other students identified by the postsecondary institution to be experiencing the effects of the sex-based harassment; and

(v) The postsecondary institution's procedures for the complainant and respondent to appeal.

(2) The determination regarding responsibility becomes final either on the date that the postsecondary institution provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

- ATIXA supports this provision but would appreciate clarity whether "simultaneously" in § 106.46(h) ultimately means "without undue delay between notifications," as recipients often ask about this requirement in the current regulations.

(i) Appeals.

(1) A postsecondary institution must offer the parties an appeal from a determination that sex-based harassment occurred, and from a postsecondary institution's dismissal of a complaint or any allegations therein, on the following bases:

(i) Procedural irregularity that would change the determination of whether sex-based harassment occurred in the matter;

(ii) New evidence that would change the outcome of the matter and that was not reasonably available at the time the determination of whether sex-based harassment occurred or dismissal was made; and

(iii) The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome of the matter.

(2) A postsecondary institution may offer an appeal equally to the parties on additional bases, as long as the additional bases are available to all parties.

(3) As to all appeals, the postsecondary institution must comply with the requirements in § 106.45(d)(3)(i), (iv), and (v) in writing.

- ATIXA is supportive of this section and recommends specifying whether the appeal decisionmaker may be an individual serving in other roles in the process (e.g., Title IX Coordinator, investigator) for the same complaint. ATIXA recommends the appeal decisionmaker not serve in any other role.

- ATIXA asks ED whether "change" is the correct word in § 106.46(i)(1)(i-iii), or if "impact" more accurately describes ED's intent?

(i) Informal resolution. If a postsecondary institution offers or provides the parties to the grievance procedures under § 106.45 and under this section with an informal resolution process under § 106.44(k), the postsecondary institution must inform the parties in writing of the offer and their rights and responsibilities in the informal resolution process and otherwise comply with the provisions of § 106.44(k)(3) in writing.

- ATIXA is supportive of this provision.

§ 106.47 is added to subpart D to read as follows:

Assistant Secretary review of sex-based harassment complaints.
The Assistant Secretary will not deem a recipient to have violated this part solely because the Assistant Secretary would have reached a different determination than a recipient reached under § 106.45, and if applicable § 106.46, based on an independent weighing of the evidence in sex-based harassment complaints.

- ATIXA is supportive of this provision.

106.51 Employment.

- No comment.

106.57 Parental, family, or marital status; pregnancy or related conditions.

(a) Status generally. A recipient shall not adopt or apply any policy, practice, or procedure, or take any employment action on the basis of sex:

> *(1) Concerning the current, potential, or past parental, family, or marital status of an employee or applicant for employment which treats persons differently; or*
> *(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.*

- ATIXA is supportive of this provision.

(b) Pregnancy or related conditions. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of current, potential, or past pregnancy or related conditions.

- ATIXA is supportive of this provision.

(c) Comparable treatment to temporary disabilities or conditions. A recipient shall treat pregnancy or related conditions or any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

- To restate our comments from the sections governing student pregnancies:

  - ATIXA is generally supportive of these rights, but ATIXA does not support any inference (based on ED's proposed language here) that recipients should treat pregnancy as a temporary disability, as this does not align with disability law. Instead, these provisions should clarify that recipients should treat conditions/complications related to pregnancy as temporary disabilities, but not the pregnancy itself. This understanding is clear from the Preamble, but ATIXA wonders why the language in the section leads to the inference that pregnancy is a temporary disability.

  - ED has largely neglected protections related to parenting, but these merit clearer inclusion and details. For example, when the person who gives birth has medical needs related to giving birth, for how long after birth does Title IX require these protections? Similarly, are there rights that attach to parents if a child needs medical attention because of the birthing process? If so, for how long after birth

should these protections pertain? What about non-birthing parents of children who have medical needs related to birth, or non-birthing parents who have obligations to a birthing parent who has complications or medical needs related to pregnancy or childbirth? Do they have protections under Title IX? Please note our comments on surrogacy, above, as well.

- ATIXA supports employee access to appropriate lactation space, in addition to student access. Additionally, ATIXA appreciates ED's recognition of the potential need for alternative space, solutions, or other reasonable modifications when addressing individual concerns regarding lactation space accessibility.

- ATIXA invites ED to provide additional clarity to assist recipients to provide reasonable access to lactation spaces, including 1) the location of lactation spaces; 2) the number of recommended lactation spaces based on institution size, employee population, and available financial resources; and 3) access to lactation spaces during evenings and weekends.

(d) Pregnancy leave. In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

- ATIXA is supportive of this provision.

(e) Lactation time and space.

(1) A recipient must provide reasonable break time for an employee to express breast milk or breastfeed as needed.
(2) A recipient must ensure the availability of a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed.

- ATIXA is supportive of this provision.

106.60 Pre-employment inquiries.

No comment.

106.71 Retaliation.

A recipient must prohibit retaliation in its education program or activity. When a recipient receives information about conduct that may constitute retaliation, the recipient is obligated to comply with § 106.44. A recipient must initiate its grievance procedures upon receiving a complaint alleging retaliation under § 106.45. As set out in § 106.45(e), if the complaint is consolidated with a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures initiated by the consolidated complaint must comply with the requirements of §§ 106.45 and 106.46. Prohibited retaliation includes but is not limited to:

(a) Initiating a disciplinary process against a person for a code of conduct violation that does not involve sex discrimination but arises out of the same facts and circumstances as a complaint or information reported about possible sex discrimination, for the purpose of interfering with the exercise of any right or privilege secured by Title IX or this part; or
(b) Peer retaliation.

- Proposed § 106.71(a) prohibits initiating a disciplinary process against a person for a code of conduct violation arising out of the same facts and circumstances. The Preamble, page 558, describes § 106.71(a) to prevent a recipient from enforcing their conduct code in ways that deter reporting. The treatment of § 106.71(a) in the Preamble gives the impression that the sole purpose of § 106.71(a) is to ensure recipients do not act against complainants, via the disciplinary process, in ways that chill reporting.

- The current phrasing of § 106.71(a) may chill recipient attempts to enforce student conduct codes against all parties because recipients fear that doing so could be retaliatory. ATIXA's members often experience such situations and seek our advice. Recipients' inability to enforce their conduct code for non-Title IX transgressions during the pendency of a § 106.45 or § 106.46 grievance process can have negative impacts on community standards and peers, colleagues, and others impacted by the conduct. ATIXA recommends ED clarify the phrase "for the purpose of interfering with any right or privilege secured by Title IX" and, since the Preamble already contains complainant examples, provide some examples of initiating a disciplinary process for respondent behavior to guide recipients' decision-making.

106.81 Procedures.

No comment.

Directed Questions

*1. Interaction with Family Educational Rights and Privacy Act (FERPA) (proposed § 106.6(e))
Some aspects of the proposed regulations address areas in which recipients may also have obligations under FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99, including, for example, provisions regarding the exercise of rights by parents, guardians, or other authorized legal representatives at proposed § 106.6(g); disclosure of supportive measures at proposed § 106.44(g)(5); consolidation of complaints at proposed § 106.45(e); description of the relevant evidence at proposed § 106.45(f)(4); access to an investigative report or relevant and not otherwise impermissible evidence at proposed § 106.46(e)(6); and notification of the determination of a sex discrimination complaint at proposed §§ 106.45(h)(2) and 106.46(h)(1).*

The Department is seeking comments on the intersection between the proposed Title IX regulations and FERPA, any challenges that recipients may face as a result of the intersection between the two laws, and any steps the Department might take to address those challenges in the Title IX regulations.

- Overall, ATIXA supports ED's longstanding interpretation of FERPA that ensures that complainants have access to information about interim and permanent remedies to resolve reports of harassment and discrimination. ATIXA has observed that in K-12 settings, confusion still exists about the necessity of sharing information with complainants.

- ATIXA also notes that confusion can arise when a minor is enrolled in a post-secondary institution, where FERPA rights would have transferred to the student, but yet parents and guardians may still retain the right to act on behalf of their student under Title IX.

- ATIXA often hears concerns from K-12 recipients about Title IX requirements that require recipients to provide the parties with information, as part of the resolution process, that may qualify as education records. Common examples include witness statements, disclosing respondent sanctions to the complainant, or sharing information with an advisor. Particular regulatory attention to the application of FERPA to any witness statements or other evidence made by non-party students would help to assist K-12 practitioners to navigate the intersection of these two federal laws.

2. Recipient's obligation to provide an educational environment free from sex discrimination (proposed §§ 106.44-106.46)

The proposed regulations at §§ 106.44, 106.45, and 106.46 clarify the obligation of a recipient to respond promptly and effectively to information and complaints about sex discrimination in its education program or activity in a way that ensures full implementation of Title IX. The Department invites comments on whether there are additional requirements that should be included in, or removed from, the current and proposed regulations to assist recipients in meeting their obligation under Title IX to provide an educational environment free from discrimination based on sex. The Department also seeks comment on whether and how any of the proposed grievance procedures (or any proposed additions from commenters) should apply differently to various subgroups of complainants or respondents.

- In almost all applicable legal frameworks, due process rights attach to individuals based on their status as respondents who have property or liberty interests in their education or employment. ED appears to reflect this concept in the varying rights that attached through the processes designed in § 106.45 and § 106.46, with some rights/protections attaching to K-12 students and to some employees in § 106.45, and greater rights/protections attaching to college students who are party to a complaint involving sex-based harassment in § 106.46. However, ATIXA does not understand why grievance process rights and due process rights should change based on the accuser's identity (complainant). The identity of the respondent should dictate which process attaches unless ED is referring to/ referencing other applicable legal precedent of which we are not aware.

- ATIXA's interpretation of the NPRM is that § 106.46 attaches any time a post-secondary student is a party in a complaint involving sex-based harassment, regardless of whether the student is a complainant or respondent. When a post-secondary student is not a party, § 106.45 attaches. Therefore, the rights and protections of a post-secondary employee will vary depending solely on whether a student or employee is the complainant. Why should that employee respondent have different procedural protections based simply on the arbitrariness of the status of their accuser? ATIXA is concerned that the lack of a legal foundation for this variation in protections leaves this section of the regulations vulnerable to post-publication challenge in the courts. Accordingly, ATIXA strongly recommends revising the bifurcation of § 106.45 and § 106.46 to focus on the identity/role of the respondent or using the Preamble to explain why attaching rights to employees only based on the identity of the complainant in § 106.46 is not arbitrary.
  - For example, two professors are co-teaching a first-year seminar at a post-secondary institution. One of the professors engages in behavior that could qualify as hostile environment sexual harassment. If that behavior is directed toward the other professor, and the other professor makes a report, the harassing professor's rights are different than if the harassing professor directed their

conduct toward a student and the student made a report. The professor's behavior is arguably no different, but because the identity of the complainant is different, the professor's rights in the process change. Such a distinction is novel and could open recipients to liability, as case law precedent does not typically support the idea that a respondent's rights change in the Title IX process simply due to the identity of their accuser.

3. Single investigator (proposed § 106.45(b)(2))

The Department is aware that, prior to August 2020, some recipients used a single investigator or team of investigators to investigate complaints of sex-based harassment and make determinations whether sex-based harassment occurred. The Department invites comments on recipients' experiences using that model to comply with Title IX and the steps taken, if any, to ensure adequate, reliable, and impartial investigation and resolution of complaints, including equitable treatment of the parties and reliable grievance procedures that are free from bias. The Department also invites comments on these issues from persons who were parties or served as an advisor to a party to a complaint that was investigated and resolved by a recipient using a single investigator model.

- ATIXA recommends limiting the availability of the so-called "single investigator model" (SIM) as described in § 106.45(b)(3). Generally, ATIXA recommends that the investigator(s) be able to make non-binding recommended findings and final determinations. Next, the Title IX Coordinator or some other administrator acts as a decisionmaker, completing a final review, decision, sanctioning, and implementation. The decisionmaker may do additional fact-gathering as needed, including meetings with parties or witnesses, consistent with VAWA for the "Big 4" offenses.
- Although ATIXA does not recommend SIM to its members, ATIXA recognizes that SIM may be the only option in some K-12 or post-secondary environments given some of the resource constraints in small districts or smaller higher education institutions. ATIXA therefore encourages ED to make SIM an exception, not the rule. If a recipient chooses to use SIM, an emphasis on providing a full written decision-making rationale would facilitate a robust appeal opportunity. ATIXA recommends revising § 106.45 and § 106.46 to prohibit the use of the SIM for post-secondary institutions unless resource limitations or school size prohibit the feasibility of any other resolution model.

4. Standard of proof (proposed § 106.45(h)(1))

a. To the extent commenters take the position that the clear and convincing standard would be appropriate when used in all other comparable proceedings, the Department invites comments on steps that recipients implementing that standard have taken to ensure equitable treatment between the parties.

b. The Department 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.
c. The Department invites comments on whether it would be appropriate to mandate the use of only one standard of proof for sex discrimination complaints.

- ATIXA cautions ED not to assume that all complaints are student-on-student or employee-on-employee. Thus, the effect of this approach chosen by ED could be that in two identical complaints by a student complainant, the complaint against another student could be easier to prove than an identical complaint against an employee if the recipient uses the preponderance of evidence standard for complaints against students but uses the clear and convincing evidence standard for complaints against employees. Why should it be harder to prove the same complaint against an employee versus one against a student? Why should a process insulate an employee respondent from the consequences of engaging in sex-based harassment more than a student respondent?

- ATIXA recommends clarifying the term "comparable proceedings." Currently, ED chooses to clarify the meaning of "comparable proceedings" in the Preamble on page 343, but recipients may not read the Preamble. If ED keeps the proposed rule as written, ATIXA recommends that ED, in the regulatory language, emphasizes that recipients do not need to use the same standard of proof for complaints against students as it would for complaints against employees. This is an important point, but the current proposed regulatory language does not intuitively lead to such a conclusion.

- ATIXA supports ED's decision to provide flexibility to recipients to determine standards of proof in § 106.45(h)(1), though ATIXA would adopt the preponderance standard universally as the only equitable standard.

Regulatory Impact Analysis

- ATIXA requests that the Department provide its basis for estimating a Title IX Coordinator's hourly rate to be $100.36, which equates to roughly $209,000 annually for full-time employment. Unfortunately, out of more than 700 respondents to ATIXA's 2021 State of the Field Survey, only six individuals reported earning a salary of $201,000 or greater. Of those six individuals, each is employed in post-secondary education and only one is solely focused on Title IX compliance; the others have responsibility for other civil rights compliance, human resources, or other functions. Four out of six are employed by private post-secondary institutions. The annual salary of eight out of ten of the Title IX Coordinators employed by U.S. News & World Report's Top 10 Public Universities for 2021 is publicly available. Of those eight individuals, four of them have responsibilities limited

to Title IX compliance while the others have additional equity and/or compliance responsibilities. The average salary of those four coordinators was $153,831 in 2021 (or roughly $73.95 per hour). It is also worth noting that all four institutions are located in California, which has, on average, a higher cost of living than other parts of the country. The State of the Field Survey did not report any K-12 employee serving as a Title IX Coordinator to be making $201,000. Salary information is not widely available for those serving as Title IX Coordinators for K-12 districts; however, since many of the K-12 participants in our survey indicated they reported directly to the district superintendent, ATIXA has looked at available data on superintendent salaries. According to AASA's 2021-2022 Superintendent Salary & Benefits Study, the median salary for superintendents with enrollments below 10,000, constituting 90% of districts surveyed, was below ED's projected $209,000. It is reasonable to assume that if the superintendent's salary is below the estimate, it is unlikely that the Title IX Coordinator is compensated comparably. An accurate average is likely under $50.00/hour across the field.

1. The Department assumes that the proposed inclusion of these areas in the Department's Title IX regulations may result in a 10 percent increase in the number of investigations conducted annually. The Department seeks comment on the assumptions regarding the categorization of affected entities and the extent to which these assumptions are reasonable. (pg. 591)

- ATIXA believes that the increase in the number of investigations is likely to be far higher than 10 percent. Given the expansion of Title IX's scope to include sex discrimination, the expectation to address downstream effects of out of program harassment, the de minimis provision, and enhanced reporting requirements, ATIXA anticipates a significant increase in reports and, as a result, investigations. ATIXA believes, based on some conversations with members, that the proposed rules could lead to significant increases in Title IX case load, possibly higher than 50 percent, skewing higher for community colleges and high schools, which are less likely to take broad off-campus jurisdiction at present. Additionally, given that the Covid-19 pandemic likely reduced reporting numbers even further under the 2020 regulations, any predicted increase based on those pandemic numbers would likely underestimate the actual increase we will see as a field. Indeed, some of our members are already reporting their numbers are up over last year.

- Further, investigations are not the only significant cost in Title IX programs. Title IX Coordinators and designees spend significant amounts of time doing case management even for supportive-measures-only responses. Case management often makes up a large percentage of Title IX Coordinator time and energy week-to-week. Case management needs may skyrocket given the proposed changes and the likely increase in reporting. The intake of reports, providing and maintaining supportive measures, and handling informal resolutions can take up much of a Title IX's Coordinator's day-to-day operation, without even factoring in the formal investigations and hearing processes.

2. Review of regulations and policy revisions. The Department requests comment on these estimates. (pg. 595-97)

- ATIXA believes that ED has drastically underestimated the amount of time needed to read the regulations and revise policy, procedures, and non-discrimination statements accordingly. Title IX Coordinators typically do not have the unilateral authority to institute policy change and must consult with stakeholders when drafting policy and procedure revisions. Such revisions are also often subject to several layers of approval depending upon the recipient. Thus, it is likely the Title IX Coordinator and legal counsel will need to invest significant additional hours implementing policies and procedures consistent with the revised regulations. It is also true that many administrators will need to read and digest the regulations, in addition to those on the Title IX team. Title IX Coordinators may also need to provide new and/or revised training programs campus wide.

- In addition to § 106.45 and § 106.46 grievance procedures, most recipients will need to develop or revise procedures related to pregnancy and related conditions. This process could include some additional or different stakeholders than the general revisions to the grievance process.

3. The Department seeks comment on assumptions related to the effects of the proposed regulations on training. (pg. 599)

- ATIXA believes ED underestimated the amount of additional time required to implement the new training provisions. In the RIA, ED assumes that training all employees would not be much additional time, but there is often a great deal of administrative burden and tracking for recipient-wide training mandates. Recipient systems don't speak to one another, so administrative redundancies and collaboration with other departments, possibly manually, is inescapable for some institutions. The solution is unlikely to be as simple as tacking an additional training onto the end of other annual training.

- The RIA also underestimates the time it takes for Title IX Coordinators to either design their own training for their Title IX officers or to identify and fund comparable training sources. Costs are likely to be higher in the first year if Title IX Coordinators need to pivot and produce new training. The mandated reporting approach in the proposed rule is complex, and will add to the training time, expense, and need for reiteration, both for those required to report and those who are deemed confidential. This will require segmenting all employees into at least three cohorts for training on three different regimes and designing the training content for each.

4. The Department requests comment on the likely effect of the proposed regulations on the costs associated with the provision of supportive measures, particularly regarding assumptions about the likely effects of recipients offering supportive measures in instances of receiving information about sex discrimination not related to sex-based harassment or prohibited retaliation. (pg. 604)

- Recipients are likely to provide significantly more supportive measures based on the broadening of Title IX's scope. The more supportive measures a recipient provides, the more case management is required. Supportive measures, depending on the level of collaboration and cooperation, can be cumbersome to plan, implement, and follow-up on, depending on the context and situational details, especially given the proposed addition of an appeal process, which we do not support. For example, a Title IX Coordinator's involvement in ensuring in-class supportive measures may require ongoing communications and discussions with the student, faculty member, and dean. It is not uncommon for a Title IX Coordinator to receive significant questions and clarification requests (and sometime challenges) from faculty members about providing students with supportive measures.

- ED's assumption that individuals accepting supportive measures in lieu of the formal grievance process (2-3 times greater) is likely far too low. Many would-be complainants, under the 2020 regulations, preferred supportive measures over filing a formal complaint. It's likely the number of individuals accessing supportive measures rather than pursuing the formal grievance process is closer to at least ten to one. Given that we anticipate even more reports may be likely to come forward under these proposed regulations, recipients would likely see a far greater increase in supportive measure requests than 10 percent, which is ED's assumption.

5. In some instances, such as when an alleged incident occurred outside of the United States and may have contributed to a hostile environment in the recipient's education program or activity domestically, the Department anticipates that the resulting investigation may be more time consuming. Due to a lack of high-quality data on these issues, the Department does not have a basis upon which to develop estimates of this change. The Department seeks comment to help better estimate the effects of this change. (pg. 605)

- ATIXA believes that any investigation involving individuals or settings outside of the recipient's control will inevitably take additional time to complete, even more so if the investigation intersects with law enforcement agencies with whom the recipient does not have an established working relationship. Much cooperation between recipients, or between law enforcement and campus police, in Title IX matters depends significantly on the relationship between the two entities. Information sharing practices, for example,

may make investigations much more challenging. Such a dynamic is compounded when the situation implicates different state laws or laws of another country. Perhaps ED could encourage recipients to enter into memoranda of understanding (MOUs) with local law enforcement entities to ease this challenge.

- The costs associated with these types of investigations are hard to quantify because there are additional costs beyond just the time spent investigating and gathering evidence. There's the administrative burden of creating memoranda of understanding (MOUs) with other agencies, language or cultural differences, or travel time to meet with other agencies, for instance. The same rationale applies to community agencies supporting survivors, too.

6. The Department seeks comment this issue: Although it is possible that at least some portion of recipients have an appeal process as part of their current procedures for resolving complaints of sex discrimination, the Department assumes that its current estimates may overestimate the costs of the proposed regulations in this area. (pg. 614)

- There is likely to be an uptick in appeals, especially given the NPRM's provisions permitting appeals for dismissals, supportive measures, and determinations. ATIXA recommends, in our comment, somewhat limiting those opportunities to appeal. In all likelihood, recipients will need to decide more appeals just as a natural extension of having more investigations and determinations. ED's estimation of the increase in appeal numbers is likely low, given the overall increase ATIXA anticipates the proposed rule will have on reporting of incidents.

- The NPRM also makes appeals optional in § 106.45, which could reduce the number of appeals, though ATIXA expects that most recipients will continue to provide appeals, either because they do currently, they believe they should, and/or law requires it.

7. Across all recipients, the Department estimates that one or more parties in approximately half of all fully adjudicated complaints appeal the determination. This estimate is consistent with estimates from the 2020 amendments and the Department again seeks comment on the extent to which this estimate is reasonable and whether this proportion is likely to change under the proposed regulations. (pg. 614)

- This estimate seems consistent with ATIXA's impressions.

8. The Department seeks comment on these [recordkeeping cost] estimates, particularly whether they accurately reflect the likely changes in annual burden on recipients associated with the proposed changes to § 106.8(f). (pg. 618)

- Recordkeeping is tied directly to case management, so it is likely the administrative burden would increase significantly. With more reports, more outreach, more supportive measures, more investigations, more informal resolutions, and more determinations, there are more records to create and maintain. The estimates ED provides in the RIA are likely far too low. Consider as well that many K-12 districts still don't have an electronic recordkeeping system. There are also many smaller post-secondary institutions that don't either. This makes recordkeeping even more burdensome and inefficient for tracking patterns, trends, outcomes, supportive measures, and repeat offenders.

9. [T]he Department requests comment on the likely costs associated with monitoring a recipient's environment for barriers to sex discrimination and taking steps reasonably calculated to remove such barriers. (pg. 619)

- This new requirement is written broadly, so it is challenging to determine the associated costs. To some extent, this is already happening for some recipients, but likely not all – especially given the extraordinary turnover in Title IX roles right now. ED identifies options with "de minimis" costs, but the options ED identifies are more cumbersome than the RIA suggests, likely taking several hours to perform assessment, interpret the results, and create new initiatives or training. ED is asking recipients to effectively create new assessments and programs to reduce barriers – and that takes time and personnel with expertise. As a result, it is ATIXA's view that ED dramatically underestimates the cost associated with this requirement, especially in conjunction with recently enacted requirements in VAWA that mandate climate surveys in higher education, which will likely be administered by Title IX offices.

10. The Department requests comment on the burdens currently faced by small entities in complying with the 2020 amendments and likely changes to that burden as a result of the proposed regulations, including the total number of Title IX investigations conducted each year by small entities and the extent to which the burden assumptions described in the RIA are reasonable for small entities (i.e., whether particular activities are likely to take more or less time or cost more or less than otherwise estimated). (pg. 637)

- ATIXA believes the flexibility in these regulations will benefit small entities by providing them with more options to find the best fit given their resources and capabilities. Smaller recipients may elect to use a single investigator model, for example, to ease staffing burdens and streamline the process.

11. The Department requests comment on any additional burdens for small entities. (pg. 643)

- Smaller recipients vary greatly and may experience burdens in some areas more so than others. For example, doing a barrier analysis may be less of a burden at smaller recipients if the Title IX Coordinator is directly involved in prevention and awareness activities already. Developing a new policy may be simpler at a smaller recipient because the number of individuals involved in the policymaking process may be minimal compared with larger institutions with multiple layers of approval or even shared governance practices. On the other hand, smaller recipients may not have the personnel to manage an increased case load and may lack the personnel to investigate and adjudicate the additional complaints. Many smaller recipients rely on volunteers to serve in Title IX capacities such as investigators or appeal decisionmakers. Although the regulations permit more flexible approaches than the 2020 regulations, there is little doubt that reporting and investigations will increase and stress whatever system those smaller recipients choose (this is not limited to smaller recipients). The protections for gender identity alone will have a staggering effect on K-12 recipient caseloads.

12. The Department also requests comment on whether small entities may discontinue their Federal funding due to the impacts of the proposed regulations. (pg. 643)

- ATIXA believes the additional burden or impact of the proposed regulations is highly unlikely to be significant enough for smaller recipients to forego their federal funding.

13. The Department requests comment on the extent to which the Department's rationale for not adopting each of the alternatives [that could potentially reduce the burden on small entities] discussed in this section is reasonable and whether there are additional alternatives for reducing burden on small entities without frustrating the purpose of the proposed regulations. (pg. 643-44)

- ATIXA agrees with ED's rationale for not adopting the alternatives identified in the RIA. ATIXA included recommendations in its comment on this topic, including permitting the single investigator model. Students and employees should not have different rights or protections because they must or choose to participate in a smaller recipient's program or activity. Due process is not owed to lesser extents just because a recipient may not be affluent. In fact, students enrolled at such schools may have greater need for due process protections than students of privileged socioeconomics. Additional flexibility enables creative approaches attuned to the resources and needs of the recipients.