

NWU Response to Draft Title IX Regulations

January 2019

As President of Nebraska Wesleyan University, I am submitting this institutional response to “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” a Proposed Rule by the Education Department as published in the Federal Register on 11/29/2018. This letter addresses the eight items on which the Department requested comment, followed by additional comments on impacts the proposed rule would have on Nebraska Wesleyan University, which is a small, private institution of higher education.

Nebraska Wesleyan University agrees strongly with the principle that it is “the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined” (p. 61464). However, Nebraska Wesleyan University has concerns about the way the proposed rule carries out those principles. Nebraska Wesleyan University also has concerns about implications that some provisions of the proposed rule have for the corporate rights of recipient institutions.

1) The Department seeks comment on the effects of the proposed regulations for minors.

Nebraska Wesleyan University is an institution of higher education with a student body that is primarily over the age of 18 and therefore has no comment on this point.

2) The Department seeks comment on whether these proposals are “unworkable in the context of sexual harassment by employees” and on whether there are any “unique circumstances that apply to processes involving employees.”

Nebraska Wesleyan University’s comments in this area are as follows.

The Department proposes in §106.30(b)(5)(e) to narrow the definition of sexual harassment protections under Title IX as:

- (i) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct; (ii) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or (iii) Sexual assault, as defined in 34 CFR 668.46(a).

The restriction in §106.30(b)(5)(e)(i), that Title IX protections apply only in cases of conduct by an employee of the recipient, is not a definition workable for institutions where participants in the recipient’s programs and activities (whether students or faculty or staff) may have regular, recipient-governed, program-specific or activity-specific contact with non-employees, who nonetheless function as agents of the recipient. Such individuals would include people supervising community-based practicum, internship, or clinical experiences; employees of vendors or contracted campus service providers who regularly interact with the recipient’s students or employees; and volunteers who are regular and ongoing participants in the academic or co-curricular programs of a not-for-profit educational institution.

The definition in §106.30(b)(5)(e)(ii) that sexual harassment is unwelcome conduct “on the basis of sex” is at odds with the definitions of sexual harassment in the Violence Against Women Act and the Clery Act. In those laws the definition of sexual harassment includes conduct based on gender or perceived gender. In Nebraska, as in other states, the definition in §106.30(b)(5)(e)(ii) is also at odds with the way that the state statute defines sexual harassment.

Nebraska Revised Statute 28-311.02, section 2, defines Sexual Harassment this way (emphasis added):

(a) Harass means to engage in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose;

(b) Course of conduct means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including a series of acts of following, detaining, restraining the personal liberty of, or stalking the person or telephoning, contacting, or otherwise communicating with the person;

This definition of sexual harassment under Nebraska state law is broader than the definition given in proposed regulation §106.30. The disparity between the two definitions makes the proposed regulation burdensome when responding to sexual harassment of or by employees of Nebraska Wesleyan University. Title IX enforcement for employees involves the Director of Human Resources, who is also responsible for ensuring that the institution complies with all relevant state employment laws. Nebraska Wesleyan University has a Compliance and Employee Relations staff of only one person. Small institutions such as Nebraska Wesleyan University already face a challenge in complying with the requirements of both state law and Title IX guidance in a manner that is clear and equitable for employees and that does not inadvertently blur the boundaries between those different enforcement requirements. If the definition of sexual harassment in §106.30(b)(5)(e)(ii) were adopted, then the same individual would be responsible for enforcing both the Nebraska state law on sexual harassment and the Title IX restrictions on sexual harassment, while those two definitions of sexual harassment would differ in ways that would require different actions.

An additional obstacle to enforcing the regulations in the current proposal is the absence of any regulation regarding retaliatory conduct. In the enforcement of Title IX to protect employees from sexual harassment, it is imperative that employees and students be protected when they bring forward allegations against people who are in a position to retaliate against them. Some categories of employees have little independence in their work and little job security. Students have limited independence in relation to the professors who are teaching, grading, or supervising them. Nebraska Wesleyan University considers it essential that the proposed regulations include prohibitions on retaliatory conduct.

The proposed §106.30 limits the definition of an institution’s “actual knowledge” of sexual harassment through the wording, “Imputation of knowledge based solely on *respondeat superior* or constructive notice is insufficient to constitute actual knowledge.” This narrowing of the regulatory definition could have a chilling effect on reporting of sexual harassment in the absence of protection from retaliation and in the absence of an alternative mechanism for reporting beyond reporting to “one who has the authority for instituting corrective measures.”

We focus here on the impact on employees. However, we have comparable concerns about an adverse impact on students. In some cases, particularly in a small organization, the employee may reasonably

fear that the individual who has the authority for instituting corrective measures would be likely to retaliate or may have a real or perceived bias that would prevent that individual receiving the report from treating the reporting individual fairly.

Moreover, lower level employees may lack direct access to someone who has the authority to institute corrective measures. Many employees report first to someone who may lack the necessary level of authority and who may resist the requirement to re-report at a higher level of authority. The lack of appropriate reporting can be re-traumatizing to a victim. Following the proposed requirement may lead a reporting individual to believe that the first person told about harassment does not believe the report or does not care to address the situation. This situation grounds Nebraska Wesleyan University's concern that the proposed regulations will have a chilling effect on victims of harassment being willing to report. The current practice allows a third party employee to move reports forward on behalf of the employee who intends to make a report. The current practice is better than the proposal because it supports employees who may lack the confidence, employment security, or emotional resilience to make sequential reports in the case where the first report does not go to someone who has the necessary authority to take corrective measures.

According to both the United States Equal Employment Opportunity Commission and the Society for Human Resource Management, there is already significant underreporting of workplace harassment (see <https://www.insurancejournal.com/news/national/2018/02/05/479581.htm>). The aggregate effects of §106.30 will create obstacles to employee reporting and will unacceptably reduce for employees the protections offered under Title IX.

There are several provisions of the proposed regulations that are not responsive to how different the circumstances are that apply to processes involving employees and processes involving students. Students can be protected during an investigation by a no-contact order. With employees, however, it must be presumed that all parties, including witnesses, have ongoing relationships with one another and are likely to continue working with one another throughout the process of an investigation and beyond. Employees who wish to retain their employment may risk escalating a situation or harming their job status if they participate in a complaint as either complainant or witness. This vulnerability is particularly true in a small university such as Nebraska Wesleyan University where there are few parallel employment categories in different departments of the institution into which an employee can move if a particular workplace environment is hostile.

Particularly onerous for employees and students who experience harassment are (a) the definition of "formal complaint" in proposed §106.44(e)(5), a document "signed by a complainant or by the Title IX Coordinator," in concert with (b) the written notice requirements in §106.45(b)(2) that "upon receipt of a formal complaint," the recipient must provide all parties with written notice that includes the identities of all parties, including witnesses, as well as the opportunity to review all evidence. In cases where a complainant or witness risks retaliation, or where there is reason to believe that the notification itself may exacerbate the situation, Title IX Coordinators and Investigators should have the opportunity to initiate the preliminary steps of an investigation prior to notification. Title IX Coordinators and investigators should also have the opportunity to redact some elements of the record to protect the claimant and witnesses as necessary. The importance of beginning an investigation before notification and redacting some elements of the record is particularly true given that the proposed regulation offers no protection against retaliation. These proposed requirements taken together make it unlikely that a complainant will be willing to come forward with a complaint, however legitimate, and they make it even less likely that witnesses will cooperate with an investigation. Again, Nebraska Wesleyan University

objects to the chilling effect that the proposed regulations will have on students and employees who experience sexual harassment, sexual assault, sexual violence, and sexual stalking.

3) Training: The Department seeks comment as to whether the stated training requirements are adequate to ensure that recipients will provide necessary training to all appropriate individuals.

Nebraska Wesleyan University's comments in this area are as follows.

Under the proposed rule, recipients would be responsible for providing training to Title IX Coordinators, Investigators, and Decision Makers. The subjects of the training would include the definition of sexual harassment and the procedures for investigation and grievance (p. 61483). Additionally, the institution would be responsible for providing an advisor of choice or support person during the investigation (§10645 (b) (3)). The result of this proposed portion of the rule that the institution would be responsible for the appropriate training of any individuals who might be called upon to serve as advisor of choice during the course of an investigation or appeal. In addition, the required training would have to be sufficient to ensure that the party assigned by the institution to act as the advisor of choice was not disadvantaged by inadequate qualifications or insufficient preparation to serve as assigned advisor.

Given the proposed new procedures for the investigation, hearing, and appeal process articulated in §106.45(b)(3), and given the new standard of evidence regulations proposed in Section 106.45(b)(4), the obligation on Nebraska Wesleyan University in providing and training any individual who may be designated as the institutionally-provided advisor of choice or support person would be very burdensome. The burden would occur in two ways: (1) Nebraska Wesleyan University has small staffs in the areas of human resources and student affairs, with no one in either office trained as an attorney. Like most small universities, Nebraska Wesleyan University also does not employ in-house counsel.

Most of the staff whose jobs already require training and expertise in Title IX policies and procedures will probably be involved already in a particular Title IX case, by the time a party sought an institutionally-designated advisor of choice for that same Title IX case. This circumstance means that the individuals eligible to serve in the institutionally-appointed advisor role would likely be persons without prior training and expertise regarding Title IX. They would need extensive training, well beyond the scope of their existing professional roles and preparation. This one-time training need would be burdensome on Nebraska Wesleyan University. It would also be likely to disadvantage the student who is assigned a non-expert advisor, opening Nebraska Wesleyan University to liability simply because our institution is small and has a limited budget.

The proposed regulations are silent about the threshold of training required for employees of recipient institutions to hold any of the relevant roles: Title IX Coordinator, Title IX Investigator, Decision Maker, and Institutionally-Assigned Advisor. This absence of a threshold of training creates a significant liability for Nebraska Wesleyan University and similar institutions, both in terms of the potential for legal challenges to the sufficiency of the employees' training and in terms of the potential overextension of resources to meet such an unclear need. Nebraska Wesleyan University is particularly concerned about the silence in the proposed regulations about what training is needed regarding evidentiary and procedural standards.

Proposed §106.45(b)(3)(vii) requires that "the decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant." However, the United States Department of Education has provided no guidance on nor any definition of a justifiable

limitation on cross-examination. The Department has also not provided guidance on a training requirement to ensure appropriate practices in allowing or excluding questions. Neither the recipient's appointed decision-maker nor any other employee in the Title IX procedures is required to have any legal background, which seems a necessary basis for understanding precedent for limitations on cross-examination (e.g: *Smith v. Illinois*, 390 U.S. 129 (1968)). The silence of the proposed regulations on these matters seems to create an unstated requirement that all institutions of higher education add attorneys to their staffs in order not to create a legal liability for the institution based on a challenge to a procedure because the basis of questioning or cross-examination has either been allowed or excluded.

4) The Department seeks comment as to whether the proposed rule adequately takes into account other issues related to the needs of students and employees with disabilities when such individuals are parties in a sex discrimination complaint.

Section 106.45(b)(3)(vii) requires the institution to permit cross-examination of all parties and witnesses, with the opportunity for cross-examination to occur with the parties located in separate rooms with technology enabling all parties and the decision maker to simultaneously see and hear the party answering questions. The Department has requested specific comment on the extent to which institutions already have and use technology that would enable the institution to fulfill this requirement without incurring new costs, or whether institutions would likely incur new costs associated with this requirement. Nebraska Wesleyan University does not have technology available that would allow all individuals, regardless of disability, to participate in cross-examination in separate locations. The proposed requirement would therefore impose a significant burden on Nebraska Wesleyan University to acquire specialized technology for a quite limited purpose.

5) The Department seeks comment on (1) whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate; and (2) if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed.

Nebraska Wesleyan University's comments in this area are as follows.

Recipient institutions have different campus cultures, different employee types (for example, researchers, physicians, and police officers in some cases but not in others), and different student types (for example, part-time and adult in some cases but not in others). Therefore, Nebraska Wesleyan University considers it compelling that the option remain open to schools to choose a Standard of Evidence appropriate to their particular circumstances in campus culture, employee type, and student type. If schools retain the option to select the standard they wish to apply, then Nebraska Wesleyan University considers it appropriate to require schools to use the same standard in Title IX cases that they apply to other similar cases. Nebraska Wesleyan University does not consider it appropriate to require schools to use identical procedures for Title IX and non-Title IX cases. Our reason is that many non-Title IX cases are different in the extreme in the issues involved and in the seriousness of the matter, compared with Title IX cases.

Furthermore, virtually all universities have a culture and practice of shared governance that differentiates the employment practices that apply to faculty from the employment practices that apply to other employees. In many cases, the procedures differ for these different categories of employment. Requiring an identical process for different employee categories would be burdensome because it would

require extensive revision of faculty and employee policies and procedures and it would interfere with shared governance. Examples of areas in which procedures are likely to differ, not only between employees and students, but also between faculty and staff employees, are the requirement that the grievance procedure require a live hearing in §106.45(b)(3)(vii) and the appeals process requirements in §106.45(b)(5).

Moreover, as described elsewhere in this comment, many of the procedures entailed in these proposed regulations would have an additional cost that would itself be a burden for small institutions with small levels of full-time staffing in the areas of human resources and compliance. Adding more procedures, such as mandatory cross-examination and the provision of advisors of choice for cases beyond Title IX, would be prohibitive in the burden placed on the human and financial resources of Nebraska Wesleyan University and similar institutions. Adding more procedures, such as mandatory cross-examination and the provision of advisors of choice for cases beyond Title IX, would be prohibitive to Nebraska Wesleyan University and similar institutions also in the burden placed on the time and workload of campus employees charged with carrying out these procedures.

Unifying standards and procedures across different categories, faculty, staff, and students, would prove burdensome particularly, but not exclusively, in terms of the staffing requirements implicit in the proposed regulations. For example, §106.45(b)(5)(ii) that stipulates that the decision maker in an appeal is not the same person as any investigator or decision maker who reached the initial determination regarding responsibility. Similarly, the provision that both parties must have equal access to an advisor of choice (§106.45(b)(3)(iv)) has budgetary and staffing implications beyond the current staffing of Nebraska Wesleyan University.

Nebraska Wesleyan University is not unique in having budgetary limitations that make it burdensome to have enough qualified and trained employees to enact these provisions, among others that implicitly dictate particulars of staffing. The proposed regulation would impose a staffing burden particularly for Title IX cases involving employees. Nebraska Wesleyan University employs multiple student life and academic professionals who have roles that could potentially accommodate additional responsibilities with respect to Title IX at a moderate cost. However, cases involving employees would appropriately involve participation from the human resources staff. Nebraska Wesleyan University employs only one professional trained in and dedicated to employee support and employee relations which means that additional staffing would be necessary under the proposed requirements, which would create financial burden for the institution.

6) The Department seeks comment on the proposed evidentiary practices and procedures particularly in relationship to the proposed “Directly Related to the Allegations” evidence standard.

Nebraska Wesleyan University’s comments in this area are as follows.

The Department has requested comment on proposed section 106.45(b)(3)(viii) which would require recipients to provide each party with an equal opportunity to inspect and review any evidence directly related to the allegations obtained as part of the investigation, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, and to provide each party with an equal opportunity to respond to that evidence prior to completion of the investigative report. In particular, the Department requested comment on whether further regulation was needed in relation to the category of evidence “directly related to the allegations.”

Given the nature of some Title IX investigations, it seems likely that some of the evidence collected might not be permissibly distributed to all parties, because doing so would violate another existing privacy regulation. Those existing privacy regulations include federally mandated regulations, such as HIPAA and FERPA. They also include privacy policies of Nebraska Wesleyan University, such as institutional policies governing the confidentiality of employee records and institutional policies regarding the privacy of student conduct records.

The stipulation that all parties have the right to inspect and review evidence, including information upon which the recipient does not intend to rely in reaching a determination regarding responsibility, may foster procedural abuse. It is easy to imagine one party deliberately slowing the pace of an investigative process by requesting more and more documentation, even when that documentation is irrelevant. For recipients that have small staffs within their Title IX offices, particularly in those cases where Title IX services and compliance constitute only a portion of an individual's professional responsibilities, managing documentation requests for all evidence, including that which is not relevant to the case, will create a burdensome workload. Nebraska Wesleyan University urges the Department to maintain the current limitation on the access to evidence. The current limitation is appropriate, that parties have access only to "information that will be used" in making a determination regarding responsibility (34 C.F.R. § 668.46(k)(3)(i)(B)(3)).

Current technology gives virtually everyone ready access to software that can be used to edit images, audio files, and text files. Current technology also gives virtually everyone ready access to means of mass publication through social media. Because of these circumstances, Nebraska Wesleyan University urges the Department to reconsider the provision in 106.45(b)(3)(viii) that materials in a case should be provided electronically. Once either party is presented with an electronic copy of all evidence regarding the other party, there is significant risk that the evidence itself, possibly in a manipulated or falsified form, will end up circulating online in a way that harms the other party. This threat of uncontrolled circulation of falsified materials will have a chilling effect on the submission of evidence. As a result, the recipient will be hindered in its ability to conduct a fair and thorough investigation of cases brought forward under Title IX.

It is important for parties to understand the evidence that has been collected, so that they can respond to it. However, such communication should happen in a controlled environment. As has been the case under previous guidance from the United States Department of Education, all parties should have "timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings" (34 C.F.R. § 668.46(k)(3)(i)(B)(3)), but the parties should not take physical possession of that information. Parties should be able to view any evidence and take notes on any evidence, with a third party present to prevent tampering with the file or attempts to make electronic copies.

A further obstacle to enacting this proposed regulation is the potential conflict between the requirement that written notice of grievance procedures be timely and the requirement that it be sufficient, including provisions regarding supplementary notification (§106.45(b)(2)). In complex cases, in which new claims arise in the course of an investigation, or in which one party makes a counterclaim against another in the course of the investigation, or in cases in which new evidence arises during the course of the investigation, the notification requirements may themselves become obstacles to timely investigation and resolution of any claim. This burden of the notification requirement is especially true for a recipient that, like Nebraska Wesleyan University, has a small staff to manage the institution's

compliance with Title IX protections. Particularly in institutions that have limited staffing to manage investigations, hearings, and appeals, parties to complaints may well use the notification and review of evidence requirements as tactics to create procedural delays, to harass the other party, and to stymie the ability of the Title IX staff to bring cases to completion in a timely manner.

7) The Department has requested comment on the retention of records provisions.

Nebraska Wesleyan University has no comment in this area.

8) The Department has requested comment on the needs for technology implicit in the proposed regulations.

Nebraska Wesleyan University's comments on the technology needs implicit in the proposed regulations are subsumed under the comment on the implications for individuals with disabilities (#4 above).

In addition to the comments above in items 1 through 8, Nebraska Wesleyan University has additional comments regarding the actual knowledge provisions of §106.30; the jurisdictional provisions of §106.44(a); the cross-examination requirements of §106.45(b)(3)(vii); and the need for Title IX regulation that is sensitive to the particular needs of small institutions.

Nebraska Wesleyan University's comments on the actual knowledge provisions of §106.30:

§106.30 of the proposed regulation relates to the responsibility entailed by the recipient's actual knowledge of a Title IX violation; it narrows the definition of the recipient's responsibility in this way: "*Actual Knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient." §106.30 of the proposed regulation offers the further definition that "The mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient" (§106.30).

Such a definition of "actual knowledge" may be appropriate for employees who could reasonably be expected to understand the organization's structure and could reasonably be expected to know who the people are who hold relevant roles in the organization. This definition may also be appropriate in a K-12 context, where the administration of the institution is relatively simple. In the context of an institution of higher education, however, the proposed definition of "actual knowledge" is inappropriate. It is particularly inappropriate in complex organizations, such as universities with multiple colleges and school within them, or with multiple campuses. Students may not have direct access to an individual who meets the "actual knowledge" criterion for institutional reports. Even if students do have that access, they may not be comfortable approaching a person in a high administrative role. Students are much more likely to report their experiences first with an employee they already know and trust. That person will often be a professor or a member of the student life staff. Requiring students to take their reports higher up in the organization for the report to count as "actual knowledge" makes it less likely that victims will report the harmful experiences they have endured.

According to research in the United States Department of Justice December 2014 report, "Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013," sexual assault is generally underreported, and it is even less likely to be reported by victims who are college students than by non-

students. The report states, “A greater percentage of student (80%) than nonstudent (67%) rape and sexual assault victimizations were not reported to police.” This gap in reporting is not due to students having other reporting mechanisms. When asked why they did not report, victims most frequently cited their belief that the assault was “a personal matter” or they cited their fear of reprisal. Only a small group of student victims indicated that they did not report to law enforcement because they had another recourse with some other reporting mechanism (e.g., a campus procedure such as a Title IX investigation). These data from the 2014 United States Department of Justice report indicate that underreporting is just as much a problem for student victims as it is for non-student victims. The report concluded that Title IX procedures should be designed to enable, rather than to hinder, student reports. The rationales given by victims for not reporting indicate fear (fear of reprisal) or shame (the belief that their victimization was a personal matter). Given the presence of these sentiments, it seems likely that making reporting more challenging, which is what the proposed regulations do, will further depress reporting rates. The result will be that the United States Department of Education has made it harder for victims of sexual harassment and sexual violence to have equitable access to educational programs and services.

Nebraska Wesleyan University’s comments on the jurisdictional provisions of §106.44(a):

Proposed §106.44(a) asserts that a recipient is only responsible for responding to conduct that occurs within its “educational program or activity.” Small universities, particularly those in small cities and rural areas, offer many opportunities for daily personal interaction among students, faculty, and staff, beyond a formal professional or academic framework. In such circumstances, it will be challenging for an institution to provide clear and consistent definitions of what conduct has occurred strictly within its educational program and which conduct is beyond its educational program. In a small institution such as Nebraska Wesleyan University, even students who are not connected to particular faculty members through course registration or departmental affiliation are likely to know who those faculty members are. They are likely to respond to them as faculty members, even when the student is not directly a student of the particular faculty member.

For example, if a faculty member sexually harassed a university student off campus, and the student knew that the faculty member was a professor and therefore understood that the harassment had the potential to create barrier to the student’s future participation in an academic program, under proposed §106.44(a) that situation might not constitute a Title IX violation, even though it could reasonably result in the student perceiving a threat to the student’s future ability to participate in the recipient’s academic program. Moreover, in the context of undergraduate education, new sets of formal relationships between faculty members and students are established every four months, when students enroll in new courses each academic term. Any given student may not currently be under the supervision of a particular faculty member, but that situation could change in a matter of a few weeks. Such reconfigurations every semester add to the difficulty of determining whether a particular circumstance is or is not within the scope of Title IX as the proposed §106.44(a) would redefine it. Under the proposed regulations, recipient institutions would have significant legal liability, regardless of whether they determined such a circumstance took place “within its educational program or activity” or not. Either party would be able to sue if the determination of jurisdiction was not in their favor, because the United States Department of Education had created an unclear and inconsistent guidance about jurisdiction.

Nebraska Wesleyan University’s comment on the proposed cross-examination requirements of §106.45(b)(3)(vii)

Personal Attention to Students is one of Nebraska Wesleyan University's six Core Values. Students choose small, personal institutions such as Nebraska Wesleyan University because the students value the supportive environment that such institutions provide. The provisions under §106.45(b)(3)(vii) require all parties to submit to cross-examination and the exclusion of all statements not subject to cross-examination in the decision-making process. Although Nebraska Wesleyan University shares the Department's concerns for the presumption of innocence and for the thorough investigation of all claims, Nebraska Wesleyan University objects to the proposed absolute requirement for cross examination in all cases.

The Substance Abuse and Mental Health Services Administration of the United States Department of Health and Human Services identifies four hallmarks of a trauma-informed approach to victim services. One of those four hallmarks is designing processes that seek to avoid re-traumatizing victims (<https://www.samhsa.gov/nctic/trauma-interventions>). Research demonstrates that even trained professionals can inadvertently re-traumatize victims in their delivery of services. Moreover, such re-traumatization may be invisible to the practitioners (Rebecca Campbell, "What Really Happened? A Validation Study of Rape Survivors' Help-Seeking Experiences With the Legal and Medical Systems," *Violence and Victims* 20 (March 2005): 55-68). Nebraska Wesleyan University believes strongly that cross-examination is not appropriate in some circumstances. Nebraska Wesleyan University asserts that recipients should have the flexibility to design institutionally-appropriate alternative processes that fairly balance the needs and rights of the claimant with the needs and rights of the respondent.

Moreover, the cross-examination procedures proposed under §106.45(b)(3)(vii) will contribute further to an infringement by institutions of higher education on the roles of civil authorities. It is neither appropriate nor desirable for universities to operate as extralegal courts of law. The proposed regulation would require employees of educational institutions to participate in hearing procedures modeled on those of the judiciary, even though such university employees seldom have the relevant legal training to do the work of attorneys and judges. The proposed regulations run counter to the fact that Title IX protections were designed to protect students from sexual harassment or gender-based discrimination even in an instance where the student chose not to pursue recourse through the legal system. Sexual assault is currently the most under-reported crime in the United States (see: <https://dlib.bc.edu/islandora/object/bc-ir:101267>). Enacting the cross-examination requirements of §106.45(b)(3)(vii) will open universities to a greater liability of being challenged about employee qualifications for conducting quasi-legal proceedings. Enacting the cross-examination requirements of §106.45(b)(3)(vii) will create burdensome and costly new administrative apparatuses in higher education through an unfunded federal mandate. Enacting the cross-examination requirements of §106.45(b)(3)(vii) will further suppress reporting of already underreported crimes.

Nebraska Wesleyan University's comment on the need for Title IX regulation sensitive to the particular needs of small institutions.

As mentioned many times above, several of the provisions of the proposed regulation make implicit demands on an institution regarding the allocation of human resources. The provisions that make these implicit demands regarding institutional staffing include the advisor of choice requirement under 106.45(b)(3)(vii) and the prohibition of the single investigator model under §106.45(b)(4)(i). While such provisions may be accommodated within the work of larger institutions, such as research universities, they are inappropriate to the staffing circumstances in small recipient institutions. There are many recipient institutions that are similar to Nebraska Wesleyan University, with small numbers of staff

members responsible for operations. It is inappropriate for the federal government to dictate how private institutions allocate their staff resources. That is part of what is objectionable about the proposed regulations, that they dictate particular roles for particular individuals on the Nebraska Wesleyan University staff. The proposed regulations implicitly mandate an increase in staffing levels for Nebraska Wesleyan University and other recipient institutions.

Among the rationales offered in public comments by the United States Secretary of Education for the proposed revisions to the regulations is the desire to restrict federal overreach (see: <https://www.washingtonexaminer.com/betsy-devos-looks-to-curb-federal-overreach-in-education>). Defining the practices of recipient institutions in such a way that the federal government would dictate how private, as well as public, universities and colleges staff certain operational functions is contrary to that goal. It violates the principles of free, private enterprise. The proposed regulations are wrong and should be abandoned.

Yours truly,

A handwritten signature in black ink, appearing to read 'Frederik Ohles', with a long, sweeping horizontal line extending to the right.

Frederik Ohles
President
Nebraska Wesleyan University