Comment Regarding Proposed Rule §106.45(b)(3)

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Filed in Response to the Notice of Proposed Rulemaking regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Office of Civil Rights, Department of Education, ED-2018-OCR-0064, RIN 1870-AA14

I file this comment as the third in a series of four comments regarding the proposed rules in the *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, ED-2018-OCR-0064, RIN 1870-AA14, proceeding. Although each of my separate comments focuses on a more narrow issue or specific proposed provision, all of my comments fit into a common theme: as a whole, these proposed rules upend the purpose and violate the spirit of Title IX. They do so in the manner of a cancer, attempting to establish enforcement rules that go beyond just failing to fulfill Title IX's goal of ending discrimination, and actually facilitate that discrimination against the very classes of people that the statute is designed to protect, essentially eating away at Title IX from the inside. I therefore write this cover note to make clear that I oppose these proposed rules in their entirety, and I urge the Department of Education (ED) to withdraw all of these proposed rules and withdraw its rescission of the 2011 Dear Colleague Letter and of the 2014 Questions & Answers regarding sexual harassment and sexual violence.

I say that these proposals are cancerous to the purpose and spirit of Title IX because they not only subvert Title IX's effectiveness in preventing sexual harassment (including in its most severe forms, such as sexual violence) but also enable and encourage recipients to actively discriminate against women, girls and gender-minorities. The methods these proposals use to accomplish planting this cancer include: (1) directly discriminating against girls, women and gender minorities by trading on sex stereotypes, often racialized, as well as selectively ignoring the voices of those in historically-disenfranchised and now protected classes (2) drastically changing the definition of "sexual harassment" to make what counts as sexual harassment so narrow that schools will be allowed to ignore the vast amount of sexual harassment that harms their students, (3) importing and/or deferring to standards and methods intended for use only in the criminal justice system, which treats victims and accused perpetrators unequally, giving much greater rights to the accused than to the victim, (4) making it as difficult as possible for victims to report or seek meaningful redress from their schools after having experienced sexual harassment, and (5) requiring and/or encouraging schools to establish grievance procedures that intimidate and traumatize victims and make it needlessly difficult for recipients to prevent and end sexual harassment and gender-based violence affecting their students.

The live hearing that Proposed Rule §106.45(b)(3) would require institutions of higher education (IHEs) and potentially some elementary and secondary schools to use for investigations of sexual harassment complaints is an example of method #5 above. Such a rule, if finalized, provides a third example of the cancerous approach of the NPRM, as it would run exactly opposite to best practices for effectively investigating sexual harassment complaints and require recipients to adopt practices that would make it extremely hard to meet their obligations under applicable law. Indeed, Proposed Rule §106.45(b)(3) would push IHEs to take steps that risk affirmatively violating the Jeanne Clery Disclosure of Campus Security Policy and Campus

Crime Statistics Act (Clery Act), which was amended by the Violence Against Women Act of 2013 (VAWA). Because these comments incorporate the Clery Act, which only applies to IHEs, these comments will generally refer to IHEs as a synonym for the particular type of recipient that would be governed by the Clery Act as well as Title IX.

As detailed in my second comment, recipients' handling of sexual harassment complaints are not governed by criminal laws and the federal laws allow recipients to use a wide range of investigative methods, as long as those methods are consistent with the comprehensive prevention goals of both Title IX and the Clery Act. IHEs are not, therefore, limited to the kinds of investigative procedures typically used by police and prosecutors in the criminal justice system.[i] Instead, they are free to choose the kind of investigation method that is most likely to fulfill their specific legal obligations, as well as the methods that will be best for their campus communities as a whole.

In contrast to the NPRM's requirement, "civil rights investigations" are the most likely to fulfill the requirements, purpose and spirit of Title IX and the Clery Act. Both these statutes support recipients in establishing comprehensive systems to prevent gender-based violence, including "sexual misconduct," sexual harassment, domestic violence, dating violence, and stalking,[ii] and civil rights investigations are vastly more effective at comprehensively preventing sexual misconduct than live hearings are. These comments will therefore discuss, first, why IHE investigations of gender-based violence should take a comprehensive prevention approach, including the basis for this approach in federal law. Next, they will discuss the different models for investigations of campus gender-based violence commonly available to IHEs and explain why IHEs should select one of the civil rights investigation models.

A. Comprehensive Prevention

The comprehensive prevention approach discussed in these comments originates with the public health model of prevention first articulated by the Centers for Disease Control and Prevention (CDC) (Centers for Disease Control, 2004, p. 3) and explained in greater detail below. Comprehensive gender-based violence prevention is required most explicitly by U.S. Department of Education (ED) regulations under the Clery Act, but the regulations under Title IX also take a comprehensive prevention approach.

First, the Clery Act requires that IHEs provide "programs to prevent dating violence, domestic violence, sexual assault, and stalking" and defines such programs as "comprehensive, integrated and intentional programs, initiatives, strategies, and campaigns intended to end dating violence, domestic violence, sexual assault, and stalking" (Legal Information Institute, 2014). Because I was a Negotiator in the Negotiated Rulemaking that adopted this definition (U.S. Department of Education, 2018) and chaired the subcommittee that drafted several iterations of this language, I can confirm that "comprehensive" refers to the CDC, public health model.

Although Title IX's regulations, particularly as interpreted by various guidance documents issued by ED's Office for Civil Rights (OCR), do not refer directly to the CDC public health model as the Clery Act regulations do, OCR's and courts' interpretations of Title IX for the last twenty plus years are consistent with a comprehensive prevention approach to gender-based

violence. Both court and past OCR enforcement of Title IX recognize that the statute requires schools of all kinds, including IHEs, to prevent sexual harassment, a legally-recognized form of sex discrimination, which includes most gender-based violence affecting the IHE's community. With regard to OCR's enforcement, the 2001 *Revised Sexual Harassment Guidance* (*Revised Guidance*) remains in force while the NPRM is not finalized, and states the following: "Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence. A school also may be responsible for remedying the effects of the harassment on the student who was harassed" (Office for Civil Rights, 2001). Similarly, the standard that courts follow under Title IX has been articulated by the Supreme Court in Davis v. Monroe County Bd. Of Ed (1999) as prohibiting schools from acting with "deliberate indifference" to known instances of sexual harassment, defining "deliberate indifference" as actions or failures to act that cause students, at a minimum, "to undergo" harassment or "make them liable or vulnerable" to it (Davis v. Monroe County Bd. Of Ed., 1999).

Comprehensive prevention incorporates three forms of prevention: primary, secondary and tertiary prevention. Primary prevention seeks to prevent gender-based violence before it starts. Secondary prevention includes methods that respond to gender-based violence immediately or very soon after the violence occurs, often focusing on interventions to address the trauma of gender-based violence and the harms that gender-based violence victims[iii] experience, affecting their health, their relationships with others, and their abilities to work and/or go to school. Tertiary prevention addresses the long-term consequences of gender-based violence, not only on the immediate victims but also secondary victims, those responsible for committing gender-based violence, and the community as a whole (Centers for Disease Control, 2004, p.3).

The systems IHEs put in place to investigate and resolve complaints of gender-based violence between students are key components to effective secondary and tertiary prevention. IHEs may be called upon to investigate a complaint of gender-based violence either immediately after the violence occurs or at some later point, and the form and results of their investigations have important short- and long-term consequences for many IHE members and the school itself. In addition, the effectiveness of an IHE's investigation of gender-based violence complaints influences the effectiveness of primary prevention programs since students are less likely to take primary prevention educational messages seriously when the IHE's investigations do not appear to be undertaken seriously. For instance, an increasingly popular primary prevention program is bystander intervention, which trains students to recognize situations where a fellow student may be in danger and methods of safely intervening in those situations. However, because the IHE is the most important bystander to the harassment, if the IHE seems unwilling to investigate cases, or does so using methods that re-victimize the survivor, students will question why they should be responsible for intervening as bystanders when the IHE is not.

B. Civil Rights Investigation Models: the Investigative Model or the Investigation + Deliberative Panel Hybrid

For these reasons, the methods used by IHEs to investigate gender-based violence complaints should seek to maximize their compatibility and effectiveness within the comprehensive prevention approach. IHEs have four basic options for such investigations. These options include the "Investigative Model," the "Hearing Model," the "Investigation + Hearing

Hybrid" (IH Hybrid), and the "Investigation + Deliberative Panel Hybrid" (IDP Hybrid). Of the four models, the Investigative Model and the Hearing Model are the older options, whereas the hybrids are more recent innovations. For the reasons discussed below, both the Investigative Model and the IDP Hybrid qualify as civil rights investigation models and are greatly preferred over the Hearing Model or IH Hybrid because live hearings are the least consistent with and effective at comprehensive prevention.

In general, the Investigative Model uses skilled professional investigators who gather evidence and interview the parties (i.e. the complainant and respondent) and any witnesses in separate, individual meetings, then write an investigative report where they review the evidence and make factual findings. In contrast, the Hearing Model generally depends on the parties involved in the allegations to present evidence and witnesses in support of their own factual account, usually while both parties are present, to a neutral panel of university community members who are not professional investigators. These panelists do not do their own investigation but passively hear testimony and consider evidence presented by all parties and witnesses, then make factual findings based on that testimony & evidence. The Investigative Model has long been used in the employment context to address workplace sexual harassment (Whittenbury, 2013), which is part of the reason why it is referred to as a "civil rights investigation," whereas the Hearing Model has often been used in school disciplinary proceedings, but is less and less favored (Schuster, 2012, p. 40).

The hybrid models have both developed more recently as IHEs have struggled to identify and implement investigations of sexual harassment complaints. The IH Hybrid model combines the Investigation Model with a hearing panel so that the investigator's report goes to the hearing panel and the panel reviews it along with hearing testimony from parties and witnesses, then makes factual findings based on the report and the testimony. In contrast, the other civil rights investigation model, the IDP Hybrid, depends on the professional investigators to make factual findings as in the Investigative Model, but adds a Deliberative Panel review of the investigation report that requires the investigators to appear before the panel to answer questions before the panel makes a final decision. The student parties may also appear before the panel to make statements, at their option, but the Deliberative Panel does not consider evidence not presented in the investigators' report or by the parties' statements.

These models have important similarities and differences, with the most important difference dealing with each model's effectiveness as a method of comprehensive prevention. Most importantly with regard to similarities, nothing in the basic structure of any of these models would cause an IHE to violate the federal laws that apply to IHE's obligations regarding gender-based violence and accused students' rights, including Title IX, the Clery Act, and U.S. constitutional law regarding accused students' due process rights. As long as an investigation model: (1) provides a mechanism for investigation (e.g., does not tell student victims that they must report to police in order to get any investigation); (2) uses rules that guarantee "due process" or "fair process" procedural rights *equally* to complainants and respondents (including with regard to notice of the investigation and the right to be heard by those investigating); (3) investigates and resolves a complaint of gender-based violence promptly and without undue delay; and (4) otherwise does not conflict with the *spirit* of the Clery Act, VAWA, and Title X, that model complies with these federal statutes.

In particular, as long as they comply with the *Revised Guidance* (i.e., the point that this paragraph makes would not be true under some legitimate interpretations of the proposals in the NPRM), all four models comply with schools' "due process" obligations for student conduct proceedings under U.S. constitutional law and, as long as they give equal "process," or procedural rights, to victims, will also comply with Title IX and the Clery Act, as amended by VAWA 2013. It has long been acknowledged that the legal requirements for due process in campus disciplinary procedures generally are quite minimal, as they only give accused students at state institutions (who are at risk of being suspended or expelled) rights to "some kind of notice and… some kind of hearing" (Goss, 579). Accused students at private schools receive a much more vague right to fundamental fairness based on the institution's contractual obligations to the student. However, in the context of campus gender-based violence, the Clery Act, VAWA 2013, and Title IX have combined to provide students accused of gender-based violence with rights that they do not receive for other kinds of misconduct. These additions to accused students' rights have come as a result of the expansion of rights for student victims and complainants guaranteed by the VAWA 2013 amendments to the Clery Act, expansions which then extend to accused students because in Title IX proceedings OCR expects schools to provide equal procedural rights to both students.

An example of such an expansion relates to students' abilities to bring attorneys to student conduct proceedings. Neither the constitutional due process for accused students at state schools nor the rights to fundamental fairness for private school students require schools to allow an accused student to bring an attorney into student conduct proceedings. However, VAWA 2013's language that complainants are allowed an "advisor of their choice" in such proceedings was interpreted by ED in its regulations implementing changes to the Clery Act made by VAWA 2013 to allow attorneys as advisors. When combined with Title IX's "procedural equality" (Cantalupo, 2016, p. 286), both accused student respondents and complainants now may have an attorney with them during the proceeding (Cantalupo, 2016, p. 288). Importantly, as with issues of due process generally, nothing in the statute or regulations regarding "an advisor of their choice" applies differently to the different investigatory models. The Clery regulations interpret that provision to guarantee a student the right to bring an advisor to all meetings and interactions related to the investigation (Federal Register, 2014, p. 62774), not only to a traditional "hearing," as such a hearing is defined in the Hearing Model discussed above. Therefore, student complainants and respondents may now bring advisors, including advisors who are attorneys, to all parts of an investigation, regardless of the model chosen.

Similarly, regardless of the model chosen by an IHE for its investigations, it must still fulfill the obligations it has under Title IX, Clery, and VAWA that do not deal with investigations. Indeed, in order to comprehensively prevent gender-based violence, IHEs must have various policies, procedures, and programs that guide it in addressing gender-based violence even if the survivor does not ever initiate an investigation. For instance, IHEs must provide clear paths by which students can disclose (confidentially) or report (non-confidentially) gender-based violence, as well as educational accommodations to students who have been subjected to gender-based violence, regardless of whether an investigation ever occurs and of what investigation model the IHE uses to investigate the allegations (Cantalupo, 2015, pp. 6–8).

Although it is important to acknowledge the significant commonalities between these models, their differences in effectiveness at achieving the comprehensive prevention goals articulated above clearly elevate certain models above others. The characteristics of certain models are more likely to be effective because their designs show an understanding of the scope and dynamics of campus gender-based violence that others lack. In addition, most IHEs face significant resource restrictions while simultaneously feeling a particular commitment to providing sufficient support to all students, victims or accused, involved in gender-based violence cases. Together, these considerations push in favor of IHEs adopting the civil rights investigation models (i.e. the Investigative Model, the IDP Hybrid, or some variation on these two models). As explained in greater detail below, these models most efficiently and effectively engage in comprehensive prevention, particularly in light of IHEs' limited resources.

C. Civil Rights Investigations as Tertiary Prevention

The Investigative Model and the IDP Hybrid options fit better into the comprehensive prevention approach because they qualify as both tertiary and secondary prevention strategies. For instance, with regard to tertiary prevention, the IDP Hybrid and Investigative Model are more effective due to their greater conduciveness for post-proceeding treatment of accused students who are found responsible for committing gender-based violence, as well as their greater sustainability as long-term responses to violence.

First, the Investigative Model and IDP Hybrid are more likely to encourage accused students who are found responsible for committing gender-based violence to respond to non-punitive sanctions such as those based in principles of restorative justice or those requiring treatment on how to stop committing gender-based violence. Recall that the structures of the Hearing Model and the IH Hybrid are adversarial in nature because they require the parties to present evidence that either supports one party's account of events or undermines the other party's evidence or both. This adversarial nature means that these models are less likely to create openness to restorative justice or treatment sanctioning options with which IHEs may wish to experiment. Several scholars and IHE professionals favor integrating restorative justice-based sanctioning methods in gender-based violence cases (Coker, 2017). In addition, the most punitive sanctions, especially expulsion, are often not supported by either student victims or IHE professionals, often because of several unintended consequences that could end up further damaging the student victim or other students who could be victimized. First, students who are expelled can and do go to new schools, and those schools may not be notified of disciplinary actions taken by the previous school, making it easy for that student to commit gender-based violence again, if that student tends toward repeat perpetration. Second, students who are expelled but do not go to another school may stay in the neighborhood of the school from which they have been expelled, but the school may not be able to compel non-violent behavior from that (now former) student because the school has no jurisdiction over or ability to control that former student.

Second, the IDP Hybrid and Investigative Model are more sustainable because they are more efficient as a resource matter and more likely to be affordable long-term for IHEs. Conducting gender-based violence investigations competently and well requires a lot of training in the dynamics and scope of gender-based violence, in trauma-informed practices for working

with victims, in general and trauma-informed investigation techniques, in the IHE's policies and procedures, and in the legal requirements of Title IX, Clery, VAWA, the constitutional law related to accused students' rights, and applicable state laws. When such extensive training is needed, it is almost guaranteed to be more efficient and effective to focus such training on a limited number of specialized employees who can develop expertise in the training areas over time.

The kind of traditional adversarial hearing panels that the NPRM proposes to require of recipients are structured in exactly the opposite fashion. The hearing panels used by the Hearing Model and IH Hybrid are commonly drawn from existing IHE faculty and staff,[iv] who serve on these panels on top of their full-time jobs. Because such service is an extra responsibility, hearing panel members generally rotate on and off such panels, often on an annual basis, requiring new people to be trained each year. Thus, the employees participating in these hearings have no specialty in such investigations—they are either generalists or specialists in another area. Nor do they have time to develop expertise, as they serve on hearing panels temporarily.

Thus, because adversarial hearing panel members generally have no expertise in gender-based violence, training them in basic competencies requires significant resources. However, at the end of their rotation, they are replaced by often untrained faculty and staff, and IHEs may get little to no return on their investment in training, especially if there are no gender-based violence complaints that initiate a hearing in that year. If there are gender-based violence complaints, they are unlikely to be frequent enough during these temporary panel members' time on a panel—not only because victim reporting rates are very low (an issue I addressed in my fourth comment for the NPRM) but also because many victims who have reported do not wish to initiate an investigation—for panel members to develop expertise. On the other hand, in the unlikely scenario that there are multiple complaints of gender-based violence in a year, although assigning an employee to multiple gender-based violence hearing panels potentially allows that employee to develop expertise in such cases, doing so is quite unfair to that employee when each case is an extra responsibility on top of the employee's regular job.

This unfairness is exacerbated by the nature of gender-based violence complaint hearings, which are unusually exhausting and carry significant risk of secondary trauma. Therefore, using an investigation method that relies even in part on a traditional adversarial hearing is at least highly inefficient and stressful for the hearing panelists and at most could cost the IHE a significant amount for little if any discernable return. Moreover, although the use of existing IHE employees to staff the panels seems low cost at first, properly training those employees increases expenses significantly, and carries the risk of expensive liability if the training is inadequate or the panel's lack of experience causes members to commit errors. In addition, because of the sustainability concerns already articulated, these savings, if they exist at all, are only short-term. Long-term IHEs are more likely to spend significantly more money on constantly training new hearing panel members as they rotate on and off the panels, and without a likely return on that significant investment. In contrast, because of the reliance of the civil rights investigation models on professional investigators who will investigate many cases over time, the investigators can act as repositories for skills, institutional knowledge, and experience that can not only sustain but improve the IHE's expertise in preventing gender-based violence.

Hiring professional investigators certainly can have high up-front costs from the kinds of salaries and/or retainers that highly trained people are paid, but in the long-term those investigators will be less expensive because they are a long-term investment from which the IHE will benefit well into the future.

Aside from the expenses and inefficiencies regarding training and personnel issues, the models involving adversarial hearings are inefficient in other ways. Hearings for gender-based violence complaints are often multi-day affairs, requiring the panel members, parties, advisors and any other staff the process requires to clear days on their calendars, a particularly complicated logistical matter because panel members may have to fulfill normal job responsibilities that have little if any overlap with their duties as hearing panel members. This formidable logistical endeavor cannot avoid expending significant resources that ultimately contribute little to nothing to the investigation itself, as well as making it more difficult for an IHE to investigate promptly, one of the central requirements under both Title IX and Clery/VAWA.

In contrast to the inefficiencies of the models involving hearings, the Investigative Model and IDP Hybrid use the IHE's resources more cost-effectively. Regardless of whether professional investigators are hired to work in-house as employees or hired on a case-by-case basis, the IHE can hire investigators with the applicable expertise, contract with an outside professional for specific cases, or train a limited number of existing employees who will be responsible for multiple investigations (including potentially those not involving gender-based violence) and who will be able to develop expertise in such investigations and improve their quality over time. Although, as noted above, this will certainly seem expensive at first, in the long-term it will be cheaper and more effective. Finally, because investigators interview the parties and witnesses individually, even with the investigatory team made up, as best practice suggests, of multiple investigators, scheduling can be expected to be significantly easier, and the investigation can be completed more quickly.

The civil rights investigation models also are more conducive to creating a consortium of IHEs that would share the expense of hiring professional investigators (Smith & Gomez, 2016). Such a consortium not only allows IHEs to share expenses, it enhances the independence of the investigators (who would report to the consortium rather than the individual IHE) and provides a mechanism for separate IHEs that are geographically close to address gender-based violence complaints brought by a student at one campus against a student at another campus. These advantages of an investigation consortium are facilitated when the evidence on which the decision is being made is collected by the consortium's investigators only, as would be the case in the IDP Hybrid and the Investigative Model. In contrast, the IH Hybrid model, which would include investigators but still hold a traditional adversarial hearing, would typically allow the parties and witnesses to present additional evidence which may or may not be in the investigators' report, regardless of its probative value, in an adversarial hearing where members of the specific IHE's community, not the consortium, make decisions. Where the specific IHE's hearing panel makes a decision on evidence that the specific IHE's panel alone has collected, much of the purpose of entering into such a consortium in the first place is defeated.

It is important to note that the models requiring adversarial hearings have resource implications for the student parties as well as IHEs. Some students' families have the resources to hire lawyers to advise students and others do not. This is true of both complainants and of respondents, so that inequality can exist not only between complainants and respondents but also between respondents and between complainants, where some respondents or complainants can afford an attorney and others cannot. Concerns about investigations where a respondent has an attorney, but the complainant does not, or vice versa, have long been discussed, including during the Negotiated Rulemaking amending the Clery Act regulations, when we (the negotiators) were debating whether the statutory language authorizing students to bring "an advisor of their choice" to conduct proceedings allowed the adviser to be an attorney (Vendituoli, 2014).

The structures of the adversarial Hearing Model and IH Hybrid exacerbate such income disparities and inequalities between students. Both of these traditional, adversarial models would create strong incentives for schools, complainants, and respondents to hire lawyers, because these models most closely model themselves after court proceedings and systems that lawyers are trained to navigate but most non-lawyers are not. In these systems, the ultimate decision-makers, especially regarding procedural matters, are judges who were usually lawyers before becoming judges. Because the Hearing Model and the IH Hybrid rely more on procedures familiar to lawyers but unfamiliar to non-lawyers, both complainants and respondents will feel more pressure to hire attorneys, perhaps regardless of whether they can afford them. IHEs in turn will feel pressure to hire lawyers to run their hearings so that the school is not placed in the difficult position of acting in the role of a judge and managing the behavior of attorneys who have more legal or judicial training, experience or skills than the IHE staff ultimately making the decision. This is a serious problem because some IHEs, including many Minority-serving and commuter/community colleges, cannot afford in-house lawyers. Although IHEs have good reasons to hire lawyers as investigators in the Investigation Model and the IDP Hybrid, non-lawyers have been shown to be effective investigators where these models are used in other settings, such as many workplaces. Moreover, even while acknowledging the insights and arguments of several scholars with regard to the benefits to survivors (Weiner, 2017; Behre, 2016). of retaining a lawyer either for pay or *pro bono*, the non-court-like procedures of the Investigative Model and the IDP Hybrid will make it more likely that student parties can protect their interests even if they do not prefer or cannot afford to hire a lawyer. Thus, in the face of these disparities and in the interest of not exacerbating such inequalities, the civil rights investigation models present the best options for conducting investigations that are as equally protective as possible of students regardless of income level. They do so because they seek to avoid exacerbating the disparities and inequalities that come with the realities of impoverished students and economic disparities between students.

D. Civil Rights Investigations as Secondary Prevention

The Investigative Model and IDP Hybrid also constitute a form of secondary prevention. To be effective as a secondary prevention strategy, IHE gender-based violence investigations must be trauma-informed, because secondary prevention aims to minimize the harm to the gender-based violence victim by intervening as quickly as possible after the harassment/violence and addressing the victim's needs. Trauma-informed investigations recognize, first, that some student victims initiate an investigation for trauma-related reasons, whether due to the increased

fear and trauma they experience from potentially or actually encountering the student they have accused of gender-based violence on campus or because they seek more abstract goods like empowerment and community acknowledgement of the wrong they experienced. Second, a trauma-informed investigation acknowledges the ways in which investigations can *re*-traumatize student victims. The IDP Hybrid model, in particular, and the Investigative Model to a lesser extent, allow complainants to access the positive aspects of the trauma-informed investigation while minimizing the re-traumatizing elements. The models that include adversarial hearings are not trauma-informed because they are much more likely to re-traumatize victims.

The adversarial Hearing Model and IH Hybrid are more likely to re-traumatize a complainant in several ways. First, these models require a complainant to recount—and in recounting, often to relive—much of the trauma of the original victimization a larger number of times. Whenever an adversarial hearing is involved in an investigation, a complainant will typically be required to recount the violence as many as six times, and several of those times will likely be to groups of people and potentially in the presence of the named harasser. First, the complainant will have to recount the violence at least once to whomever the complainant first discloses the harassment (either to a first responder who may not be further involved in the investigation or to someone who acts in no official capacity for the IHE or law enforcement). Second, when the complainant makes an official report, if it is not to the person to whom the complainant already disclosed, the complainant will have to recount the victimization at least one more time. Third, the complainant will likely take advantage of the right to bring an "advisor of her/his choice" to the proceeding, as guaranteed by the Clery Act since 2013, necessitating at least one further recounting to whomever the complainant chooses as an advisor. Fourth, the complainant will need to disclose at least once to the person designated by the IHE to "prosecute" the case if the IHE conducts "criminalized" hearings (adversarial hearings that imitate court procedures in criminal, as opposed to civil, cases[v]), or to the investigators *and* the "prosecutor" if the IHE uses a criminalized hearing as a part of the IH Hybrid model. In this sense, the IH Hybrid potentially requires the most retelling and reliving of the violence. Fifth or, in the case of a criminalized IH Hybrid, sixth, the complainant will have to recount the victimization at least once to the hearing panel, a re-telling that may be the most re-traumatizing of all because it usually involves telling a *group* of people that likely includes faculty members and/or other campus community members, and even fellow students at IHEs that are unaware of or opposed to the best practice of not putting students on such panels. The potential re-traumatizing effects of this final re-telling may be worsened if the complainant must potentially recount the harassment/violence in the presence of the student accused of committing such violent acts. These repeated re-tellings are *only* for the investigation; most complainants will need counseling and medical care, potentially requiring more recounting of the violence to health professionals.

Trauma-informed investigations minimize the number of times a gender-based violence victim must recount the violence. For instance, best practices for law enforcement often suggest methods by which police, prosecutors, and others such as Sexual Assault Nurse Examiners (SANE nurses) can work together to minimize the number of times sexual assault survivors must recount the violence they have experienced. Dr. Kim Lonsway and Sgt. (Retired) Joanne Archambault, who between them have about five decades of research on and/or practical experience with law enforcement investigations of sexual assault, advise law enforcement to

develop methods for reducing the numbers of times victims are interviewed or have to recount their victimizations to law enforcement, including by having police and SANE nurses conduct preliminary interviews together, having police and prosecutors conduct comprehensive interviews together, and not passing a survivor between law enforcement officers for trivial and avoidable reasons like a shift change (Lonsway & Archambault, 2008, pp. 10–11).

In the campus gender-based violence context, the Investigative Model and IDP Hybrid likely need fewer such re-tellings. Complainants will likely want to access their rights to an advisor and may initially tell a first responder or confidante who is not the advisor or the investigator, so those first two re-tellings are likely to happen regardless of the investigation model used. However, unlike the models involving adversarial hearings, the civil rights investigation models open up the possibility that complainants may have to recount the victimization only one more time, when they tell the investigator what happened in a first (and potentially only) interview, for which any follow-up interviews will tend to revisit only limited parts of the original account, as opposed to requiring a full re-telling to an entirely new person or persons, as both of the models with adversarial hearings would.

The re-traumatizing effects resulting from the greater number of re-tellings required by the adversarial Hearing Model and IH Hybrid are exacerbated by the adversarial hearing requirement of divulging deeply private information to a larger number of people, including potentially people with whom the complainant has an ongoing relationship that will be inevitably affected by the disclosure of this private information. An example of the secondary victimization adversarial hearings can cause was movingly but painfully described by a student survivor at the launch of the *Not Alone* report by the White House Task Force to Protect Students from Sexual Assault. In her introduction of Vice President Biden, this student discussed how traumatic it was for her to "sit[] in a room full of Harvard professors as they look[ed] at a magnified photo of [her] backside covered in bruises and broken blood vessels" (The Obama White House, 2014). These dynamics are likely to be even more traumatic if the school is small and the survivor is more likely to be forced to interact with campus community members who were on the hearing panel and thus privy to the invasive disclosures that the process requires.

In contrast to the two models with adversarial hearings, the Investigative Model and IDP Hybrid can limit the numbers of people who see such private disclosures to many fewer persons. Because the investigator meets with each party and witness separately and alone, with only the student party's adviser and the investigators present, survivors must endure only a fraction of the re-traumatizing privacy invasions required by the adversarial hearing models. Although the IDP Hybrid model presents the chance that a survivor might make a statement to the hearing panel, that choice is in the control of the survivor, since the IDP Hybrid allows student parties to make a statement but does not require them to do so (as the adversarial hearing models do).

Third, hearings can fail to separate the complainant and respondent during the course of the proceedings. This failure to separate is ironic in light of the acknowledgement by both courts and ED under Title IX that schools must separate the student victim from the accused student if requested by the victim (Cantalupo, 2009, pp. 646–48). For instance, in Title IX litigation, many courts have found that the failure to separate student victims and accused students can be evidence of the school's "deliberate indifference" to sexual harassment (Cantalupo, 2009), an

indirect acknowledgement of the re-traumatizing effects of failing to separate students (*See* Cantalupo, 2012). Likewise, courts in cases brought by accused students' alleging due process violations have upheld the use of a screen to separate complainants and accused students in student conduct proceedings (Cantalupo, 2012, p. 518). While screens, remote testimony or other methods can be and have been used to separate complainants and respondents, these devices must be added to the usual adversarial hearing structure, which has traditionally included no such separating devices. Since the Investigative Model and IDP Hybrid separate complainant and respondent throughout the process (except, in the case of the IDP Hybrid, if survivors decide of their own free will to give a statement to the deliberative panel), special efforts to separate the parties are not necessary with these civil rights investigation models as with the adversarial Hearing Model or the IH Hybrid.

Although the Investigative Model and IDP Hybrid fairly equally avoid the re-victimizing aspects just discussed, the IDP Hybrid more effectively facilitates the positive aspects of trauma-informed investigations. First, the option for complainants to stand up and speak out about the gender-based violence to a panel of campus community members has an empowering effect. The IDP Hybrid allows student parties the opportunity to make a statement to the Deliberative Panel, after the investigation report has been finalized, providing the student parties with the option to present their perspectives after actually seeing the report and allowing them to be heard directly by IHE decision-makers. Because the Deliberative Panel represents the campus community in a way that a single or pair of investigators cannot, when student parties make a statement to the Deliberative Panel, they can accurately feel that they are speaking more directly to the campus community.

Second, the Deliberative Panel provides safeguards against investigators who are not competent, are biased in some way, or are otherwise not in line with the policies and values of the institution. Like with the empowerment function of making a statement to the Deliberative Panel, the IDP Hybrid retains a positive characteristic associated with more traditional hearings, while eliminating the non-trauma-informed adversarial hearing characteristics.

Both civil rights investigation models are also more trauma-informed than the models involving adversarial hearings because each establishes an appropriate balance between an investigation's promptness, due process protections, and certainty (in terms of the ultimate decision). Promptness and the certainty of the decision, in particular, are both important to complainants' healing from trauma, especially if the complainant's fear of or actual encounters with the accused student repeatedly trigger a traumatic response. Separation of the survivor and accused student that lasts until the survivor graduates or leaves may be necessary for survivors to reestablish educational trajectories as close to their original trajectories as possible, and the longer an investigation takes, the longer survivors must wait before starting the long road to rebuilding normalcy in their educations and lives.

Unfortunately the parties' due process concerns can work at cross purposes with an investigation's promptness, and both promptness and increased process can diminish certainty. Increased process takes more time, interfering with promptness, but insufficient process and rushed investigations can lead to decisions that are more likely to be overturned if there is a right to appeal or an additional proceeding (such as a lawsuit against the IHE by any student party).

Increased process may also undermine accuracy by, for instance, increasing the likelihood that witnesses will meet and talk about their evidence during the lengthier investigation. Decisions that are less accurate and more uncertain thus make the entire matter drag on before a final decision can be reached and are not prompt in a different way, interfering with the complainant's healing from trauma.

The Investigative Model and IDP Hybrid are more likely to be prompt without sacrificing due process for all parties or certainty in the resolution of the investigation. The two models strike that balance differently, with the Investigative Model emphasizing promptness whereas the IDP Hybrid favors enhanced due process. Nevertheless, both models are more prompt than the adversarial hearing models due to their design involving professional investigators employed solely to conduct investigations, either full-time or on a case-by-case basis. This focus means that the investigation is the investigators' priority, rather than being an additional duty on top of other duties unrelated to gender-based violence or investigations, as is usually the case with adversarial hearing panel members. In addition, professional investigators' experience and expertise in conducting investigations will likely cause them to work more efficiently and proactively, allowing them to complete investigations more quickly and promptly without sacrificing the quality of the investigation. Similarly, this professional expertise is likely to increase the likelihood that the investigation will be high-quality and result in accurate factual findings that will be less challengeable and therefore more certain. Moreover, professionals who are dedicated entirely to conducting such investigations are likely to be more neutral and more independent in their fact-finding than faculty, staff and students who are intertwined with and influenced by the community in multiple ways that may interfere with the primarily technical character of the fact-finding process. This neutrality and independence thus also enhance the fairness of the process offered to the parties.

Although the advantages just listed apply to both the Investigative Model and the IDP Hybrid, the Investigative Model emphasizes promptness over process. Because the Investigative Model does not involve any kind of hearing, the model has fewer steps and therefore investigations can be completed more quickly. For example, investigations will not be slowed down by the time required in finding common times and arranging other logistics for the fairly sizeable groups of people involved in hearings to gather.

The fact that the IDP Hybrid model does involve such complex scheduling provides an example for how it balances promptness, process and certainty differently than the Investigative Model, emphasizing due process more than promptness. The IDP Hybrid increases the due process protections offered to all student parties because student parties are given an opportunity to speak directly to panel decision-makers after seeing the investigators' report and because of the greater accountability that investigators have due to panel oversight. This increased process also potentially provides greater certainty in the decision reached by the panel, as the panel's oversight guards against bias, shoddy evidence-gathering, or other reasons to question the accuracy of the investigators' fact-finding, while still not involving so many steps (i.e. process) in the investigation that it cannot be completed promptly.

Consistent with its emphasis on process rather than promptness, the IDP Hybrid faces many similar difficulties as the adversarial hearing models, such as the logistical difficulties

inherent in scheduling diverse and reasonably large groups to meet to consider a case's evidence. Nevertheless, because the Deliberative Panel's questioning is limited to the investigators, is based on the investigation report, and does not involve presentations of evidence by the parties (which is likely to lengthen the time needed for the hearing significantly and unpredictably), a Deliberative Panel meeting is generally limited to one day at most, whereas many, if not most, adversarial hearings require many days. Therefore, Deliberative Panel hearings are likely to be easier to schedule—and therefore likely to be held more promptly—than adversarial hearings because adversarial hearings involve a larger number of people (whereas both panels will include investigators, student parties, and perhaps their advisors, Deliberative Panel hearings would not include witnesses) who must be available for longer (sometimes much longer) periods of time. Besides being easier to schedule and therefore likely to make the investigation as a whole more prompt, the shorter hearings of the IDP Hybrid are less stressful for all involved. The design of adversarial hearings is more stressful because such hearings require people already in a highly stressful conflict to replay that conflict in front of third parties who must make virtually immediate decisions with very little time to consider conflicting evidence that has just been presented to them. In contrast, in the IDP Hybrid the investigators have more time to do the difficult fact-finding work of gathering, weighing, and synthesizing the evidence for their report, and the Deliberative Panel has more time to read and deliberate on the evidence presented in the report.

The value of such an approach is particularly obvious when compared to the other hybrid investigation model among the four reviewed above, the Investigation + Hearing Model, one of the two models that would meet the NPRM's requirements. As suggested by the name, in the IH Hybrid, an investigation similar to that done in the Investigative and the IDP Hybrid Models is done, but the investigators' report is considered in the traditional adversarial hearing that follows it as only one part of the evidence that the hearing panel members consider. Unlike in the IDP Hybrid, where the investigators' report establishes, with generally only minor exceptions, the full universe of evidence that is considered, IH Hybrid hearing panels also consider evidence presented at the hearing by the parties and witnesses, even if those parties' and witnesses' evidence is already addressed in the investigators' report. To the extent that the evidence presented in the investigators' report conflicts with the evidence presented in the adversarial hearing by parties or witnesses, the hearing panel is back to making very quick decisions with little time for consideration (and the parties are back to having to replay their conflict before an audience). Even worse, the IH Hybrid hearing panel may come to a different decision from the investigators because the panel and the investigators considered different evidence in making their decisions. Should such a conflicting decision occur, it automatically makes the ultimate decision less certain and more challengeable. The IDP Hybrid avoids this problem because the Deliberative Panel is not hearing new evidence that is not already in the investigator's report.

Thus, although all four of the investigatory models commonly used by IHEs to investigate and resolve gender-based violence complaints aim to be prompt, to provide due process and to reach certain and supportable conclusions, the models using traditional adversarial hearings sacrifice too much of the promptness needed by survivors to obtain a reasonably quick resolutions to their complaints that will allow them to go back to their studies and try to reestablish normalcy in their lives as quickly as possible. In contrast, the civil rights investigation models are trauma-informed because they manage to provide due process without sacrificing

promptness.

E. Conclusion

As all of my comments in this proceeding have consistently shown, this NPRM repeatedly requires recipients to adopt practices and procedures that are exactly the opposite to the purposes and spirit of Title IX, as well as to best practices for how to prevent and address the widespread problem of sexual harassment. Proposed Rule §106.45(b)(3) is no different. It would compel recipients to adopt practices that will act as barriers to recipients engaging in comprehensive prevention of gender-based violence, as defined by the CDC and subcategorized into primary, secondary and tertiary prevention methods. It would require recipients to use procedures exactly the opposite to the best practices of the Investigative Model and the IDP Hybrid, robbing recipients' and their students of these models' greater sustainability and efficiency in light of IHEs' limited resources, as well as their more trauma-informed character. Instead, Proposed Rule §106.45(b)(3) would *require* recipients to adopt either the Hearing or IH Hybrid models, the very models that research and logic show are the *worst* options, not only for complainants and recipients, but also arguably for accused students. In doing so, the NPRM's Proposed Rule §106.45(b)(3) provides another example of the NPRM's approach of proposing rules that are cancerous to the purpose and spirit of Title IX. For these reasons, as well as many others, the NPRM should be withdrawn and the previous guidance documents reinstated.

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[i] As already indicated, it is important to recognize that even law enforcement is not limited to a finite number of investigative methods. Although traditional police investigations of reported sexual violence tend to use a limited amount of methods, police departments are increasingly adopting approaches that are broader in scope. For instance, the You Have Options Program that has been adopted by police departments in Oregon, Colorado, Washington and Virginia (Lill, 2016) offers victims three options for how to report a sexual assault to police: an "Information Only report, a Partial Investigation and a Complete Investigation" (You have Options Program, n.d.).

[ii] These comments use the term "gender-based violence" as an umbrella term that refers to violence directed at cisgender women or gender minorities, including cisgender men and boys who are targeted because they are perceived as insufficiently masculine, as well as transgender and gender non-conforming persons. It includes conduct often referred to using more specific terms from the federal statutes, including "sexual harassment," a term used in connection with conduct prohibited by anti-sex discrimination laws such as Title VII and Title IX, and including conduct that also fits the Clery/VAWA terms "sexual assault," "domestic violence," "dating violence," and "stalking." Of the terms listed here, only "sexual misconduct" is not a legal/statutory term, even though it has been used by ED during the Trump administration. It is unclear whether this usage was deliberate or the result of imprecision by the drafters.

[iii] Note the usage of terms like "victim": When discussing other authors' research, I try to use the same terms they use for the subjects of their research. In other cases, I generally use "victim" and "survivor" interchangeably to refer to those who have reported or disclosed in some way that they have experienced harassment. In the context of claims, complaints, lawsuits, etc., involving accusations against a specific person for harassment/violence, I use "accuser," "complainant," or "plaintiff" to refer to victims or survivors and "respondent" to refer to the person accused of

harassment/violence. I also use "named," "accused," "alleged," or "reported," either as an adjective or a noun, to designate someone who has been accused of harassing or victimizing someone else. I do not use "defendant" at any point because these comments do not discuss the criminal process, so there are no defendants in these cases. I have selected all of these terms self-consciously with a goal of capturing and respecting, admittedly imperfectly, the self-identification of the people to whom these terms refer. I use "named," "accused" and "victims" / "survivors" / "accusers" / etc. regardless of whether a neutral factfinder has found an accused individual responsible for harassing or victimizing someone. I do so because, based on my 20+ years of working on sexual harassment in education as a student activist, university administrator, attorney, researcher, and scholar, I have observed that those who report or disclose in some way that they have experienced sexual harassment self-identify as victims, survivors, accusers, complainants, and plaintiffs at different points in time and in different contexts, but these self-identities almost never have anything to do with the judgment of a neutral factfinder. Likewise, those who have been accused of harassing or victimizing someone else generally refer to themselves as "accused" even when they have been found responsible for such conduct by a neutral factfinder.

[iv] In the past, many IHEs have also put students on such panels, a decidedly harmful practice that fortunately has been criticized enough that many schools have started limiting panel members to non-student employees.

[v] Note that such criminalized hearings are incompatible with Title IX's civil rights approach to preventing sexual harassment and gender-based violence, and put IHEs that adopt such procedures at risk of inadvertently violating Title IX (Cantalupo, 2013; Cantalupo, 2016).

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