SEXUAL MISCONDUCT ADVISORY COMMITTEE

FIRST REPORT AND RECOMMENDATIONS

as submitted to the Education Committees of the Senate and House of Representatives of the Colorado General Assembly

August 4, 2020

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EXECUTIVE SUMMARY

With the passage of Senate Bill 19-007 in May 2019, the state of Colorado positioned itself to be a national leader in the prevention and response to sexual misconduct on college campuses. Through the facilitation of the Colorado Department of Higher Education (CDHE), the legislation established an Advisory Committee comprised of Title IX coordinators, advocates and attorneys who represent both victims and those accused of sexual misconduct with a wealth of experience to coordinate statewide efforts in response to anticipated Title IX rule changes from the U.S. Department of Education and to collaborate in future efforts to reduce sexual misconduct. From its inception, the Advisory Committee committed itself to the central tenant of Title IX that has been a requirement for educational institutions receiving federal financial assistance since 1972: to prohibit discrimination on the basis of sex. To that end, the Advisory Committee unanimously established guiding principles to study, examine and recommend best practices – through comprehensive and full dialogue that respected legitimate differences of opinion – that would promote and sustain a safe and non-discriminatory environment and to ensure fair and equitable adjudication processes and procedures for all parties in Colorado's Institutions of Higher Education (Institutions).

Prior to the release of the new rules, the Advisory Committee began meeting in January 2020 and studied the impact of sexual misconduct on our college campuses, incidents of which are oftentimes occurring "off campus" and outside an Institution's programs and activities. Indeed, the impact of sexual assault and interpersonal violence can be profound and life-altering and affects both students and employees in Institutions across the county. Policies and procedures must be designed in ways that acknowledge this impact and restore or preserve educational access.

The Advisory Committee also studied and examined, with the assistance of attorneys representing both victims and those accused of sexual misconduct, how processes and procedures are impacting all parties following a complaint of sexual misconduct and developing caselaw regarding cross-examination in formal adjudications of sexual misconduct. While legal compliance with Title IX is essential, it is equally important and critical to ensure that Institutions are affording parties constitutional protections of due process and fundamental fairness.

As the Advisory Committee continued to study and examine best practices from January through April 2020, the U.S. Department of Education released its final Title IX rules on May 6, 2020. The rules comprised of over 2,000 pages of summaries, explanations and context (particularly with respect to the comments received regarding the proposed rules from 2018), and the regulatory language as codified in 34 C.F.R. § 106 (nondiscrimination on the basis of sex under Title IX). Following intensive review of the new rules and discussion of the same, and based on the collective experience and expertise of its members, the Advisory Committee provide the following recommendations to the Education Committees pursuant to its statutory charge under SB 19-007:

Recommendation One: Adjudicate and provide supportive measures regarding incidents of sexual misconduct outside of the designated Title IX jurisdiction

Recommendation Two: Complete disciplinary proceedings regardless of whether the respondent de-enrolls, quits, graduates, retires or otherwise leaves the Institution

Recommendation Three: Adjudicate and provide supportive measures even where complainant may not be participating or attempting to participate in programs or activities based on status of the respondent and an analysis of the safety and impact of the conduct on the educational or employment environment

Recommendation Four: Define Institution's relationship with all students to ensure clarity regarding Title IX jurisdiction

Recommendation Five: Ensure that policies (either in one policy or multiple policies) cover non-Title IX sexual misconduct that falls outside the definition of Title IX sexual harassment

Recommendation Six: Consider multiple options for informal resolution to maximize and promote agency for complainants and respondents but ensure expertise, experience and subject matter knowledge before offering any type of informal resolution, particularly for sexual violence, intimate partner violence (dating and domestic violence) and stalking

Recommendation Seven: Provide on and off-campus resources and supportive measures for non-Title IX cases for students and employees

Recommendation Eight: Provide complainants with the contact information for confidential victim advocates pursuant to C.R.S. § 23-5-146(4)

Recommendation Nine: For violations of Title IX and other forms of sexual misconduct (non-Title IX sexual misconduct) refer students and/or employees to the same sanctioning authorities

Recommendation Ten: Train students and employees pursuant to C.R.S. §§ 23-5-146(5) and (6) for both Title IX and non-Title IX cases

Recommendation Eleven: Train any individual designated as responsible for investigating or adjudicating complaints under the Institution's Title IX and non-Title IX sexual misconduct policy (or policies) pursuant C.R.S. §§ 23-5-146(5) and (6)

Recommendation Twelve: Provide documents explaining rights to entire grievance process and supportive measures for all parties

Recommendation Thirteen: Provide a case management document

Recommendation Fourteen: Ensure accessible and reliable technological support and space requirements

Recommendation Fifteen: Implement procedural/decorum rules and prohibit abusive, misleading, confusing and harassing questioning to ensure a fair process for all participants

The Advisory Committee provides fuller context below for each recommendation as well as additional areas identified in the discussions that may be topics for review and future recommendations.

Finally, the Advisory Committee wishes to express its appreciation to Executive Director Dr. Angie Paccione and the staff of CDHE, Senior Director of Student Success and Academic Affairs and Colorado GEAR UP Project Director Carl Einhaus, Legislative Liaison Chloe Mugg, and Special Projects Coordinator Erin McDonnell for their support and facilitation of the process.

BACKGROUND

U.S. Department of Education's Proposed Title IX Changes and Colorado's Senate Bill 19-007

In November 2018, the U.S. Department of Education issued new proposed rule changes[1] to Title IX regarding the adjudication of sexual misconduct cases on college campuses and K-12 schools. Enacted in 1972, Title IX prohibits discrimination on the basis of sex in educational settings that receive federal funds.

In May 2019, Colorado passed Senate Bill 19-007, codified as C.R.S. §§ 23-5-146 *et seq.* SB 19-007 required Institutions of Higher Education[2] to:

- Adopt sexual misconduct policies with required components not otherwise in conflict with applicable Title IX law (C.R.S. § 23-5-146(2)(a)(3));
- Provide information to students on how to receive support regarding sexual misconduct (C.R.S. § 23-5-146(4));

[1] The U.S. Department of Education commenced the "notice and comment" period on November 29, 2018. *See* https://www.govinfo.gov/content/pkg/FR-2018-11-29/pdf/2018-25314.pdf. The Secretary of Education stated that the new rules would, among other things, specify how Institutions covered by Title IX must respond to incidents of sexual harassment consistent with Title IX's prohibition against sex discrimination.

[2] An Institution of Higher Education or IHE means a state institution of higher education as defined in §23-18-102(10)(b), or any accredited campus of a state institution of higher education; a participating private institution of higher education, as defined in §23-18-102(8); a local district college, as defined in §23-71-102(1)(a); and an area technical college, as defined in §23-60-103(1).

- Promote awareness and prevention of sexual misconduct and applicable policy and distribute policy (C.R.S. § 23-5-146(5));
- Offer training (C.R.S. § 23-5-146(6)); and
- Provide to CDHE each October a copy of its sexual misconduct policy; a statement on how the Institution is informing students, promoting awareness and prevention and training; and any updates/changes to the information (C.R.S. §§ 23-5-146 (7) and (8)).

SB 19-007 also required CDHE to create a Sexual Misconduct Advisory Committee (Advisory Committee) to respond to the new federal rules to make recommendations to the General Assembly and Institutions. *See* C.R.S. § 23-5-147. SB 19-007 required the Advisory Committee to consist of three representatives from Institutions of Higher Education; two Title IX Coordinators from Institutions of Higher Education; three persons who are representatives of organizations that advocate on behalf of or provide services to victims of sexual misconduct; an attorney who has experience representing victims of sexual misconduct at Institutions of Higher Education; an attorney who has experience representing persons accused of sexual misconduct at Institutions of Higher Education; and a person with experience providing trauma-informed care. *See* C.R.S § 23-5-147(4)(a).

The initial charge of the Advisory Committee was to study, examine best practices, and make recommendations to the General Assembly and to Institutions of Higher Education on issues related to:

- **How to handle incidents of sexual misconduct that occur outside of an Institution's programs, activities, or property;**
- **How to conduct cross-examination of parties and witnesses at hearings;**
- **Whether a standard of reasonableness should be included in an Institution's sexual misconduct policy; and**
- **Can and should Institutions of Higher Education have higher standards than are required by federal law and regulation.**

See C.R.S. §§ 23-5-147(5)(a)-(d). Finally, within 90 days after the final federal rules on Title IX sexual misconduct were adopted, SB 19-007 required the Advisory Committee to submit a report to the Education Committees of the Senate and House of Representatives (or any successor committee) on suggested changes to the Institutions' policies of sexual misconduct due to the new federal rules. C.R.S. § 23-5-147(6).[3] This August 4, 2020 report is submitted pursuant to that requirement.[4]

[3] SB 19-007 also requires the Advisory Committee to submit a report on or before January 15, 2021, and each January 15 thereafter until 2023, and for CDHE to host biennial summits on sexual misconduct subject to available appropriations. C.R.S. §§ 23-5-147(6)(b) and (9).

[4] In consultation with the Office of Attorney General, the Advisory Committee calendared its due date for its report to be August 4, 2020, or 90 days from the May 6, 2020 release of the new rules.

Colorado Sexual Misconduct Advisory Committee Members and Process

In December 2019, Dr. Paccione appointed the eleven members of the Advisory Committee that would advise higher education leaders and policy makers on forthcoming federal rule changes to Title IX. The Advisory Committee included:

- Lara Baker, Attorney, Foster Graham Milstein & Calisher, LLP;
- Jeremy Enlow, Title IX Coordinator, University of Denver;
- Angela Gramse, General Counsel, Colorado Community College System;
- Ana Guevara, Director of Title IX, Adams State University;
- Julia Luciano, Victim Advocate, Advocates of Routt County;
- Elle Heeg Miller, Nurse Practitioner, Heath Center at Auraria;
- Emily Tofte Nestaval, Executive Director, Rocky Mountain Victim Law Center
- Monica Rivera, Director, Women and Gender Advocacy Center, Colorado State University;
- Cari Simon, Attorney, The Fierberg National Law Group;
- Raana Simmons, Director of Policy, Colorado Coalition Against Sexual Assault (***Co-Chair***); and
- Valerie Simons, Associate Vice Chancellor and Title IX Coordinator, University of Colorado Boulder (***Co-Chair***).

The Advisory Committee began meeting on January 27, 2020 to fulfill its obligations pursuant to SB 19-007. Through the subsequent sixteen[5], full Committee meetings (lasting approximately two hours each) as of this report and additional sub-committee meetings (related to cross-examination and incidents of sexual misconduct outside of an Institution's programs, activities or property) the Advisory Committee studied and examined best practices on issues related to the four subject areas identified by SB 19-007, including discussions with the Colorado Attorney General Office regarding the requirements of SB 19-007. *See* C.R.S. § 23-5-147(1)(a); Appendix 1 (Advisory Committee Charge dated March 10, 2020). Following the release of the of the new Title IX rules[6] on May 6, 2020, the Advisory Committee and subcommittees reviewed the new requirements for sexual misconduct adjudications with a primary focus on (1) handling incidents outside of an Institution's programs, activities or property as defined by the regulations; and (2) conducting cross-examination. While the Advisory Committee examined pursuant to their statutory charge the subject areas of

[5] The Advisory Committee commenced virtual meetings on March 27, 2020.

[6] The new Title IX rules can be found at: https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=. Additional resources include a (1) Summary of Major Provisions (https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=); (2) Summary of Major Provisions of 2020 New Rules as Compared to 2018 Proposed Rules https://www2.ed.gov/about/offices/list/ocr/docs/titleix-comparison.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=); and (3) OCR Webinar on new Title IX rules (https://www.youtube.com/watch?feature=youtu.be&utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=&v=TdfT5R8ibm4).

"reasonableness"[7] and whether Institutions should have "higher standards"[8], *see* C.R.S. §§ 23-5-147(5)(c) and (d), the Advisory Committee determined that given the requirements of the new rules, the recommendations should focus as an initial matter on the first two areas. As noted below, however, the Committee's recommendations do provide guidance on how and why Institutions should continue to address non-Title IX sexual misconduct – which could have different standards – than what is required by the new rules. Regardless of what standards are applied, Institutions must comply with all applicable federal and state law.[9]

Based on the full review of the new rules and after substantial sub-committee meetings and discussion, the full Committee voted on the recommendations below, which all passed with a super majority of the voting members.[10] As set forth below, the Committee summarized the applicable provisions of the new rules, provided recommendations for policies, and identified areas for additional consideration.

[7] Most Institutions do not currently have a general standard of "reasonableness" in their policies. Rather, Institutions have definitions regarding the "reasonable person" standard that is often applied in various contexts, including definitions and application of consent, hostile environment and retaliation. The new Title IX rules also use this "reasonable person" standard with respect to Title IX hostile environment. *See* 34 C.F.R. § 106.30(a)(defining sexual harassment as including "any unwelcome conduct determined by a *reasonable person* to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [institution's] education program or activity"). The new Title IX rules also define when an Institution's response(s) might be "*clearly unreasonable*" and therefore not compliant with Title IX. *See* 34 C.F.R. § 106.44(a).

[8] The Committee notes that what might be a "higher standard" is subject to various interpretations depending on the type of misconduct alleged and the applicable procedures. Regardless, it is imperative that Institutions provide fair and equitable policies and procedures for all individuals involved in their adjudication processes.

[9] While certainly not exhaustive, in addition to Title IX, Institutions must also comply with the following federal and state laws as related to the prevention and response to sexual misconduct (including dating violence, domestic violence and stalking): (1) The Violence Against Women Reauthorization Act ("VAWA"); (2) The Jeanne Clery Disclosure of Campus Security Policy and Crime Statistics Act ("Clery Act"); (3) Title VII of the Civil Rights Act of 1964 ("Title VII"); and (4) C.R.S. § 24-34-402, *et. seq*.(Colorado's Anti-Discrimination Act or CADA) (prohibiting discrimination on various bases including on the basis of sex and sexual orientation, which includes a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another person's perception thereof). *See also Bostock v. Clayton Cnty*, 590 U.S. ___ (2020)(holding that it is unlawful under Title VII for an employer to discriminate against homosexual or transgender employees on the basis of sex).

[10] The Advisory Committee agreed that they would be bound by majority vote of the 11 members. While CDHE representatives attended all full Committee meetings, they were not voting members of the Advisory Committee.

HOW TO HANDLE INCIDENTS OF SEXUAL MISCONDUCT THAT OCCUR OUTSIDE OF AN INSTITUTION'S PROGRAMS, ACTIVITIES, OR PROPERTY

New Title IX Rules Narrow Sexual Misconduct Definitions and Jurisdiction

As an initial matter, the Advisory Committee determined that the new Title IX rules narrowed both the ***types of sexual misconduct*** currently and previously covered by Institutions' sexual misconduct policies as well as the ***jurisdictional reach*** of those policies. Under the new rules, "Title IX sexual harassment" only includes three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect:

- Any instance of sexual assault (as defined by Clery Act), dating violence, domestic violence or stalking as defined in the Violence Against Women Act (VAWA);
- Any unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it denies a person equal educational access (hostile environment); and
- Any instance of an employee conditioning the provision of an aid, benefit or service of the Institution on an individual's participation in unwelcome sexual conduct or *quid pro quo* ("this for that") harassment.

See C.F.R.§ 106.30. Moreover, to trigger Title IX jurisdiction, these three types of Title IX sexual harassment must be:

- In the United States; (and)
- In a school's education "program or activity" (whether on or off campus) which includes locations, events, or circumstances over which the Institution exercised substantial control over both the respondent and the context in which the Title IX sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by an Institution (such as a fraternity or sorority house); (and)
- Alleged in a formal complaint by a complainant who is participating or attempting to participate in a "program or activity."

See 34 C.F.R. § 106.44(a) and 106.30(a). Both the type of misconduct and the jurisdiction must be met under these new Title IX rules for an Institution to proceed with the adjudication requirements for a formal complaint. *See* Appendix 2 (Title IX Definition/Jurisdiction Requirements). Otherwise a formal complaint must be dismissed. However, an Institution may address sexual misconduct falling outside of Title IX's jurisdiction or definitional requirements in any manner it chooses, including providing supportive measures and discipline. 34 C.F.R. §§ 106.8(c) and 106.44.

Impact of New Title IX Jurisdiction

Previously, the U.S. Department of Education guidance required Institutions to respond to all complaints of sexual harassment, regardless of where the harassment occurred, to determine if the harassment had negatively affected the educational or employment[11] environment.

Now, the new rules exclude from Title IX jurisdiction sexual misconduct that occurs (1) in study abroad programs (not in the United States even if in a "program or activity"); (2) student organizations that are not "officially recognized" even though the Institution might exercise control over the respondent[12] as a student; and (3) other off campus housing, again, where the Institution exercises control over the respondent but not the context in which it occurred. The impact is that a significant amount of sexual misconduct may not be addressed by an Institution, thereby putting at risk a complainant's ability to access their education or employment and the Institution's ability to respond effectively to incidences of sexual misconduct.

In addition, the Title IX jurisdiction narrows the definition of "complainant" to only include those who are participating or attempting to participate in an Institution's program or activity. By doing so, an Institution may not be addressing behavior as alleged by visitors against respondents who are under substantial control by the Institution (students or employees). This means that Title IX jurisdiction does not include a complaint of sexual harassment—even if the respondent is still enrolled or teaching at the school—if the complainant has already graduated, transferred, or even dropped out because of the harassment and doesn't want to re-enroll or stay involved in alumni programs. Similarly, Title IX jurisdiction does not include a visiting high school student who alleges that they were sexually assaulted by a college student or a professor during a so-called "admit weekend", unless they are applying to the college or express an intent to do so.

Advisory Committee Recommendations for Institutions

- *Recommendation One: Adjudicate and provide supportive measures regarding incidents of sexual misconduct outside of the designated Title IX jurisdiction*

The Advisory Committee's recommendation means that Institutions should continue to exercise jurisdiction over so-called "off campus" incidents similar to other student code

[11] Title IX rules apply to both students and employees.

[12] The Advisory Committee uses the terms "respondent" and "complainant" consistent with how those terms are defined by SB 19-007 and the new Title IX rules. As defined by the rules (there are no substantive differences with SB 19-007) a respondent or responding party means an individual who has been reported to be the perpetrator of conduct that could constitute sexual misconduct (Title IX sexual harassment under the rules), retaliation, or other conduct in violation of a sexual misconduct policy. A complainant means an individual who is alleged to be the victim of conduct that could constitute sexual misconduct (Title IX sexual harassment under the rules), retaliation, or other conduct in violation of a sexual misconduct policy. *See* 34 C.F.R. § 106.30(a); C.R.S. §§ 23-5-146(1)(b) and (f)(using "responding party" for respondent).

of conduct provisions (including misconduct like student assault for example). The Advisory Committee recommends Institutions address and investigate reports of sexual misconduct outside of a program or activity where there is some nexus between the conduct and the Institution, for example where the respondent is or was enrolled or employed by the Institution or has any other affiliation or connection with the Institution at the time of the misconduct, or where the misconduct impacts the educational or employment environment.

While the Title IX rules limit the jurisdiction of Title IX misconduct, they repeatedly state that Institutions may implement conduct proceedings for conduct occurring beyond the limited scope of Title IX. ("[N]othing in these final regulations precludes action under another provision of the recipient's code of conduct that these final regulations do not address." P. 30091).[13] The rules state that Institutions "may choose to address conduct outside of or not in its 'education program or activity,' even though Title IX does not require" it. P. 30091. To protect the safety of the community, and ensure educational access to students, the Advisory Committee recommends Institutions do so.

- *Recommendation Two: Complete disciplinary proceedings regardless of if the respondent de-enrolls, quits, graduates, retires or otherwise leaves the Institution*

The Title IX rules permit Institutions to dismiss complaints, even while an investigation or hearing is pending, if the respondent retires, graduates, or transfers to another school. This discretionary dismissal may hinder an Institution's ability to address a hostile environment created by the conduct, remedy effects of misconduct, and prevent the conduct from happening again. The Advisory Committee recommend that Institutions complete disciplinary proceedings regardless of whether the respondent de-enrolls, quits, graduates, retires or otherwise leaves the Institution.

- *Recommendation Three: Adjudicate and provide supportive measures even where complainant may not be participating or attempting to participate in programs or activities based on status of the respondent and an analysis of the safety and impact of the conduct on the educational or employment environment*

For a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the Institution. "Attempting to participate" can include a complainant who (1) is applying for admission or employment; (2) has graduated from one program but intends to apply to another program and/or intends to remain involved with a university's alumni programs or activities; or (3) has left school because of sexual misconduct but expresses a desire to re-enroll. We recommend that Institutions address and investigate sexual misconduct through its non-Title IX policies or codes of conduct even if the complainant is not participating or attempting to participate in an Institutions program or activity at the time of filing a formal complaint depending on a review of the status of the respondent, available information,

[13] *See* https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf.

and an analysis of the safety and impact of the conduct on the educational or employment environment.

- *Recommendation Four: Define Institution's relationship with all students* to ensure clarity regarding Title IX jurisdiction

The Advisory Committee recommends that Institutions define their relationship to students to ensure as much clarity and notice (essential for due process and fundamental fairness protections) for both complainants and respondents. For example, Institutions should formulate how they will determine whether or not complainants are "participating" or "attempting to participate"; the limits of control over a respondent; and the definition of "student". Relatedly, Institutions should also determine how to ensure a safe and non-discriminatory environment with respect to alleged misconduct by non-affiliates, including visitors, donors, and visitors and for either students or employees who are no longer affiliated.

- *Recommendation Five: Ensure that policies (either in one policy or multiple policies) cover non-Title IX sexual misconduct that falls outside the definition of Title IX sexual harassment*

The Advisory Committee recommends that Institutions create a new "non-Title IX sexual misconduct policy (or as part of a Title IX policy) to address "non-Title IX sexual harassment." Specifically, Institutions should continue to cover non-Title IX hostile environment (severe *or* pervasive as required for Title VII and other protected classes), non-Title IX *quid pro quo* (which may be perpetuated by a student), sexual exploitation (not currently covered under Title IX unless it qualifies as Title IX hostile environment as severe, pervasive and objectively offensive) and non-Title IX stalking (as required by VAWA).

- *Recommendation Six: Consider multiple options for informal resolution to maximize and promote agency for complainants and respondents but ensure expertise, experience and subject matter knowledge before offering any type of informal resolution, particularly for sexual violence, intimate partner violence (dating and domestic violence) and stalking, for both Title IX and non-Title IX sexual misconduct*[14]

The Advisory Committee found that the Title IX rules lack appropriate guidance on how Institutions should conduct informal resolution processes such as mediation, arbitration or restorative justice. Additionally, the Title IX rules do not outline how Institutions should be training the staff for informal resolutions, under what guidelines informal

[14] Although this recommendation is in the section designated for "incidents of sexual misconduct that occur outside of an Institution's programs, activities, or property," and thus applicable to incidents outside of the new Title IX jurisdiction, the Advisory Committee voted for this recommendation in both the non-Title IX and Title IX contexts. Thus, any such recommendations that apply to both contexts are so designated and not repeated.

resolutions may be appropriate or inappropriate, and how to screen for recurrence of misconduct. The Advisory Committee recommend Institutions require extensive and formal training for all individuals involved in administering informal resolutions and work with restorative justice and mediation specialists to create trainings utilizing a "trauma informed approach"[15] as applicable, and consistent with the Title IX rules[16] and any required duties of impartiality if required.

The Advisory Committee also found that mediation is not appropriate in cases of sexual assault, intimate partner violence (dating or domestic violence), or stalking. As mediation models are based in conflict resolution, they are inappropriate and ill-suited in cases of violence and stalking (which also often involve protective orders). If the mediator is unaware of the intricacies of such cases, the mediator's actions could in fact escalate the violence and place the victim (and mediator) at risk of further harm. We recommend Institutions only permit mediation in cases of sexual harassment where no threats or history of violence is present. To protect all parties involved, including the mediators, we recommend Institutions conduct safety and lethality screenings prior to initiating an informal resolution in any context.

Mediation (or arbitration) must also be distinguished from restorative justice. Mediation is a "dispute resolution" process that is commonly used on campuses in matters such as

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[15] The Substance Abuse and Mental Health Services Administration (SAMHSA) defines a "trauma informed approach" as a program, organization, or system that is trauma-informed: (1) Realizes the widespread impact of trauma and understands potential paths for recovery; (2) Recognizes the signs and symptoms of trauma in clients, families, staff, and others involved with the system; (3) Responds by fully integrating knowledge about trauma into policies, procedures, and practices; and (4) Seeks to actively resist re-traumatization.

[16] The Title IX rules explain as follows: "[R]ecipients have discretion to include trauma-informed approaches in the training provided to Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions so long as the training complies with the requirements of § 106.45(b)(1)(iii)." P. 30323. Resources cited include: Ryan M. Walsh & Steven E. Bruce, The Relationships Between Perceived Levels of Control, Psychological Distress, and Legal System Variables in a Sample of Sexual Assault Survivors, 17 VIOLENCE AGAINST WOMEN 5 (2011); Jacqueline M. Wheatcroft et al., Revictimizing the Victim? How Rape Victims Experience the UK Legal System, 4 VICTIMS & OFFENDERS 3 (2009); Mark Littleton, "Sexual Harassment of Students by Faculty Members," in Encyclopedia of Law and Higher Education 411-12 (Charles J. Russo ed., 2010); Jeffrey J. Nolan, Fair, Equitable Trauma-Informed Investigation Training (Holland & Knight updated July 19, 2019) (white paper summarizing trauma-informed approaches to sexual misconduct investigations, identifying scientific and media support and opposition to such approaches, and cautioning institutions to apply trauma-informed approaches carefully to ensure impartial investigations). Nothing in the final rules impedes an institution's ability to disseminate educational information about trauma to students and employees. Moreover, "[a]s attorneys and consultants with expertise in Title IX grievance proceedings have noted, trauma-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases. Because cross-examination occurs only after the recipient has conducted a thorough investigation, trauma-informed questioning can occur by a recipient's investigator giving the parties opportunity to make statements under trauma-informed approaches prior to being cross-examined by the opposing party's advisor." P. 30323.

roommate disagreements. Mediation does not require a party to take responsibility for the harm they caused before entering into the process, which is an essential tenant of any restorative practice to prevent a harmful confrontation between both parties.

Restorative justice is a process focused on restoring an individual's access to education and community safety. Institutions have an important obligation to keep their community safe and improve campus climate, and these interests clearly align with a restorative justice approach. Through restorative justice, representatives of the Institution could address harms to the campus community, communicate the Institution's strong disapproval of sexual misconduct, and assess the risk of re-offense to examine how the Institution could act to improve the safety of its community. Conversely, these concerns are not central to mediation and do not lead to changes in the campus policy and culture.

Restorative justice involves, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible. This process on campuses is a non-adversarial approach to addressing offensive behavior that seeks to identify and repair harm and rebuild trust through facilitated dialogue. Restorative justice practices allow those harmed to bring in support people who play an active role in the process. These individuals are able to actively support the victim and confront the offender (as admitted) and their conduct, which reduces the risk of intimidation and further traumatization of the victim. Moreover, restorative justice includes a variety of practices, including prevention circles, response conferences, and reintegration circles, designed to empower harmed parties and strengthen offenders' social ties and accountability to the community. We recommend Institutions that are interested in creating restorative justice programs for their campuses work with both on- and off-campus resources that are currently conducting restorative justice programs for sexual violence cases to create recommendations for best practices on conducting informal resolutions.

The Advisory Committee also finds that other types of informal resolutions, such as educational conversations, trainings, compliance meetings, and direct settlement discussions between parties are not precluded by the new rules. Regardless of the method of informal resolution utilized, it should not be considered a way for Institutions to avoid the financial costs of ensuring equal access. Informal resolution is not a substitute for the formal processes required by the new rules and Institutional policies and should only be used to sustain a safe and non-discriminatory environment.

- *Recommendation Seven: Provide on and off-campus resources and supportive measures for non-Title IX cases (as already required for Title IX cases) for students and employees*

The Advisory Committee found that it was essential that Institutions continue to provide supportive measures and resources for all parties (and consistent with their status as either a complainant or respondent as applicable) regardless of whether the matter was

considered Title IX sexual misconduct or non-Title IX sexual misconduct. Such measures include non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the Institution's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the Institution's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. 34 C.F.R. § 106.30.[17]

- *Recommendation Eight: Provide complainants with the contact information for confidential victim advocates pursuant to C.R.S. § 23-5-146(4) for both Title IX and non-Title IX cases*

The Advisory Committee noted existing obligations of Institutions under SB 19-007 to provide complainants with the contact information for confidential victim advocates who can provide resources for: academic accommodations, legal resources (on- and off-campus), housing concerns (on/off campus, assistance with breaking lease if living with respondent), safety planning, tips for disclosing to parents/friends, counseling/mental health resources, *see* C.R.S. § 23-5-146(4), and how to obtain a medical forensic exam pursuant to C.R.S. § 12-36-135, general medical resources, and how to report to local law enforcement.

The Advisory Committee also found that Institutions should provide complainants with information and referrals for support services, including the contact information for local and statewide nonprofits responding to incidents of violence pursuant to C.R.S. § 13-90-107(k)(I)(II) (*e.g.* domestic violence programs, sexual assault response agencies, etc.),

[17] The Title IX rules also explain it as follows: "The final regulations' emphasis on supportive measures recognizes that educational institutions are uniquely positioned to take prompt action to protect complainants' equal access to education when the educational institution is made aware of sexual harassment in its education program or activity, often in ways that even a court-issued restraining order or criminal prosecution of the respondent would not accomplish (e.g., approving a leave of absence for a complainant healing from trauma, or accommodating the re-taking of an examination missed in the aftermath of sexual violence, or arranging for counseling or mental health therapy for a sexual harassment victim experiencing PTSD symptoms). While we recognize that the range of supportive measures (defined in § 106.30 as individualized services, reasonably available, without fee or charge to the party) will vary among recipients, we believe that every recipient has the ability to consider, offer, and provide some kind of individualized services reasonably available, designed to meet the needs of a particular complainant to help the complainant stay in school and on track academically and with respect to the complainant's educational benefits and opportunities, as well as to protect parties' safety or deter sexual harassment. These final regulations impose on recipients a legal obligation to do what recipient educational institutions have the ability and responsibility to do to respond promptly and supportively to help complainants, while treating respondents fairly." P.30088.

agencies that provide emotional and mental health support pursuant to C.R.S. § 12-43-218, and legal resources including low-bono and pro bono options.

- *Recommendation Nine: For violations of Title IX and other forms of sexual misconduct (non-Title IX sexual misconduct) refer students and/or employees to the same sanctioning authorities*

The Advisory Committee noted that this recommendation would include a referral to appropriate disciplinary authority (depending on whether respondent is student or employee) to apply sanctioning factors and to impose sanctions or discipline that is proportionate to the violation and tailored to end to the violation, to prevent future reoccurrence, and to remedy the effects of the violation.

- *Recommendation Ten: Train students and employees pursuant to C.R.S. §§ 23-5-146(5) and (6) for both Title IX and non-Title IX cases*

Institutions must offer in-person or online trainings to promote awareness and prevention of sexual misconduct on campuses by offering annual trainings to all incoming students and new employees and, when applicable, to all students and employees if any sexual misconduct policies are substantially updated. The Advisory Committee recommends Institutions offer in-person or online trainings utilizing a "trauma informed approach" as applicable, and consistent with the regulations and any required duties of impartiality if required, on the following:

  - An explanation of the Institution's sexual misconduct polices (non-Title IX and otherwise);
  - Who is a mandatory reporter, what needs to be reported and to whom reports are made;
  - An explanation of the types of conduct that would constitute a violation of the Institution's sexual misconduct policies;
  - The Institution's definition of "consent";
  - The role of the Institution in ensuring a coordinated response to an allegation of sexual misconduct;
  - An explanation of relevant state and federal laws concerning sexual misconduct, including forensic evidence collection pursuant to C.R.S. § 12-36-135; and options for involving law enforcement, including mandatory reporting laws pursuant to C.R.S. §§ 19-3-304 and 307
  - Options for bystander intervention;
  - The effects of trauma on reporting parties or complainants who have experienced sexual misconduct that may include:
    - Information on how trauma impacts memory and recall of events surrounding trauma experiences;
    - Information about how fundamental neurobiological responses to sexual misconduct (prefrontal cortex impairment, freezing, habit behaviors, tonic immobility, collapsed immobility and dissociation, central vs. peripheral details related to memory and recall, and time-dependent effects of stress on memory encoding and storage)

should be used to inform decision-making related to determinations of credibility and preventing bias in investigations
        - Information on working with and interviewing persons who have experienced sexual misconduct
        - Ways to communicate sensitively and compassionately with a reporting party or complainant
        - Information regarding how sexual misconduct may impact a reporting party or complainant with intellectual and developmental disabilities
    - The importance of treating and how to treat others with dignity and respect

- *Recommendation Eleven: Train any individual designated as responsible for investigating or adjudicating complaints under the Institution's Title IX and non-Title IX sexual misconduct policy (or policies) pursuant* C.R.S. §§ 23-5-146(5) and (6)

Institutions must offer in-person or online trainings to promote awareness and prevention of sexual misconduct on campuses to any individual designated as responsible for investigating or adjudicating complaints under the Institution's non-Title IX sexual misconduct policy pursuant to SB19-007. We recommend Institutions offer in-person or online trainings utilizing a "trauma informed approach" as applicable, and consistent with the regulations and any required duties of impartiality if required, on the following:

- An explanation of Title IX and any substantial changes to the Institution's Title IX policies and procedures
- Who is a mandatory reporter, what needs to be reported and to whom reports are made;
- An explanation of the Institution's non-Title IX sexual misconduct policy;
- An explanation of the types of conduct that would constitute a violation of the Institution's non-Title IX sexual misconduct policy;
- The Institution's definition of "consent";
- The role of the Institution in ensuring a coordinated response to an allegation of sexual misconduct, including the Institution's responsibility to provide complainants with the contact information for confidential victim advocates pursuant to C.R.S. § 23-5-146(4) who can provide resources for: academic accommodations, legal resources (on and off campus), housing concerns (on/off campus, assistance with breaking lease if living with respondent), safety planning, tips for disclosing to parents/friends, counseling/mental health resources, obtaining a medical forensic exam pursuant to C.R.S. § 12-36-135, general medical resources, reporting to local law enforcement, etc.
- An explanation of relevant state and federal laws concerning sexual misconduct, including forensic evidence collection pursuant to C.R.S. § 12-36-135; and options for involving law enforcement, including mandatory reporting laws pursuant to C.R.S. §§ 19-3-304 and 307;

- The effects of trauma on reporting parties or complainants who have experienced sexual misconduct that may include:
    - Information on how trauma impacts memory and recall of events surrounding trauma experiences
    - Information about how fundamental neurobiological responses to sexual misconduct (prefrontal cortex impairment, freezing, habit behaviors, tonic immobility, collapsed immobility and dissociation, central vs. peripheral details related to memory and recall, and time-dependent effects of stress on memory encoding and storage) should be used to inform decision-making related to determinations of credibility and preventing bias in investigations
    - Information on working with and interviewing persons who have experienced sexual misconduct
    - Ways to communicate sensitively and compassionately with a reporting party or complainant
    - Information regarding how sexual misconduct may impact a reporting party or complainant with intellectual and developmental disabilities
- The importance of treating and how to treat others with dignity and respect
- Under the Clery Act, officials conducting disciplinary proceedings must "at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault and stalking and on how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability." 34 C.F.R. § 669.46(k)(2)(ii).
- Explicit training on common cross-examination strategies for hearing panel staff
- Rape shield protections[18]

HOW TO PREPARE FOR CROSS EXAMINATION

Title IX Rules Prescribe Specific Grievance Procedures for the Adjudication of Title IX Sexual Harassment

The new Title IX rules require that the Institution must investigate the allegations in any formal complaint of Title IX sexual harassment and send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint. During the grievance process and when investigating:

- The burden of gathering evidence and burden of proof must remain on Institutions, not on the parties.

[18] The new rules provide rape shield protections for complainants deeming irrelevant questions and evidence about a complainant's prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or to prove consent. 34 C.F.R. § 106.45(b)(6).

- Institutions must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- Institutions must not restrict the ability of the parties to discuss the allegations or gather evidence (*e.g.,* no "gag orders").
- Institutions must send the parties and their advisors written notice of any investigative interviews, meetings, or hearings.
- Institutions must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence.
- Institutions must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond.
- Institutions must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal and notice of the right to appeal.

See C.F.R. § 106.45(b)(5) (investigation of formal complaint). Most notably here, the rules also require a "live hearing with cross-examination" requirement for Institutions defined as "post-secondary institutions" (while being optional for K-12 schools and any other recipients not a post-secondary institution). The requirements for the hearing include:

- The decision-maker must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- Such cross-examination must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally (but can be done virtually).
- At the request of either party, the Institution must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other.
- Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party's advisor asking cross-examination questions any decision to exclude a question as not relevant.
- If a party does not have an advisor present at the live hearing, the Institution must provide, without fee or charge to that party, an advisor of the Institution's choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party.
- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

- Live hearings may be conducted with all parties physically present in the same geographic location or, at the Institution's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually.
- Institutions must create an audio or audiovisual recording, or transcript, of any live hearing.

34 C.F.4. § 106.45(b)(6)(hearings). With these rules in mind, the Advisory Committee provides the following recommendations as related specifically to the investigation and live hearing for cross-examination as set forth below.

Advisory Committee Recommendations for Institutions

- *Recommendation Twelve: Provide documents explaining rights to entire grievance process and supportive measures for all parties*

The Advisory Committee finds that one of the critical components of ensuring access and fairness in the adjudication process is to provide all participants – complainants, respondents, and witnesses – information that summarizes and describes the process and supportive measures and in a format that is understood by the various audiences.

- *Recommendation Thirteen: Provide a case management document*

The Advisory Committee recommends that Institutions provide parties with a "case management document" no less than 10 days in advance of a scheduled live hearing for cross-examination. Though not a requirement of the rules, the Advisory Committee foresees that specific advanced guidance for parties about deadlines, procedure, advising, and decorum will facilitate a fair, neutral and efficient hearing. Moreover, the rules require that complainant(s) and respondent(s) have an advisor of their choice (or as provided by the Institution) at the live hearing. Parties are not permitted to conduct questioning themselves. Specific legal expertise is not a necessity, though many parties may elect to retain a lawyer to represent them. Others may not have the resources to afford one, or opt to enlist a family member or friend to conduct questioning at the hearing.

It is the concern of the Advisory Committee that if parties are not provided in advance with appropriate and available lists of prospective advisors, parties may show up on the date of the hearing either without an advisor, unprepared or unable to adhere to the expected decorum of the proceeding. Delays in the hearing process, though not proscribed by the rules, may serve to prejudice parties or chill participation. Institutions may opt to include lists of available advisors who could serve in that capacity at a live hearing. Likewise, Institutions should caution parties and their advisor that abusive or harassing witness examinations will not be tolerated.

The case management document should set forth the rules of the decision-maker in the hearing. Further, parties and advisors should be notified of pertinent deadlines and timeframes through the case management document. For example, parties should

understand the amount of time allotted for the hearing or portions of the hearing so each may properly prepare and prioritize the presentation of their own case. The case management document may specify alternative options, if available, to a hearing.

The case management document should also delineate how the decision-maker intends to resolve objections to questions, and general suggestions to avoid the harassment or inappropriate questioning of witnesses.

- *Recommendation Fourteen: Ensure accessible and reliable technological support and space requirements*

The new rule specifies that an Institution "must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions." 34 C.F.R. § 106.45(b)(6)(i). The Advisory Committee recommends that Institution explicitly offer this option to the parties, and at either party's the request, provide such a hearing.

The Advisory Committee also recommends institutions consider virtual hearings. Should an Institution have an in-person hearing, we recommend Institutions provide at least three rooms. One reserved for the decision-maker, one for the complainant and their advisor(s), and one for the respondent and their advisor(s). The party who is testifying, offering a statement, or being questioned, should be permitted to be in-person before the decision-maker if they chose, accompanied by their advisor while the other party remains in their separate room, using the technology enabling that party to simultaneously see and hear the party speaking. When the opposite party's advisor cross-examines the party or witnesses, they will do so via technology allowing them to be heard and viewed in the hearing panel room.

Institutions should put measures in place to ensure that the complainant and respondent, their advisors, and anyone else present on their behalf do not encounter each other throughout the hearing. Potential interactions include excursions from the assigned rooms for meal breaks or to use the restroom, and at arrival and departure to the hearing. Measures to prevent these unwanted interactions should include where appropriate setting staggered arrival and departure times from the building, the provision of distanced parking spaces, setting differing entrances and exits, providing an escort for parties to and from the hearing room, and coordinating excursions to prevent overlap, and bringing in lunch so that party's do not need to leave for the same cafeteria. If either party requests that security be present, the Institution should provide this resource at no charge. Institutions must comply with any existing protection order between the parties.

All relevant components of the hearing facilities and cross-examination process should be compliant with ADA standards of accessibility and meet the accessibility needs of both parties. This may demand that the Institution provide wheelchair ramps,

translators, audio/visual accessible technology, or the provision or allowance of other tools used to support a demonstrated documented need. Parties should also have access to printing, outlets, and the internet. The institution should offer to have a copy of the report and all relevant case information printed and available at the hearing to all parties.

Given the added psychological and time burden of hearings and the cross-examination process, parties should be offered the option of additional supportive measures, even if they did not request or accept such measures at earlier points in time.

- *Recommendation Fifteen: Implement procedural/decorum rules and prohibit abusive, misleading, confusing and harassing questioning to ensure a fair process for all participants*

As an initial matter, It is the concern of the Advisory Committee that parties may unnecessarily seek to expand the length of the investigation to hearing process. As referenced above, the Institution should clearly define appropriate bases for continuances, set forth procedures to guard against them, and institute prompt and reasonable timeframes. (*See related case management document recommendation*).

More generally, at the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those questions challenging credibility. Procedural protections should act with the goal of protecting parties, ensuring meaningful participation, and reaching reliable outcomes.

Another component should include explicit instructions to witnesses prior to the hearing (case management document) on the rights they are afforded during questioning. These instructions should include informing witnesses and parties that they may provide complete answers to questions, as opposed to answering with a simple 'yes' or 'no.' Witnesses should also be informed of their right to take a break at any time and that they should not feel time pressure when answering questions. If the advisor's question or wording is confusing, witnesses should be able to ask for the question to be repeated, reworded, or explained.

Instructions should also be provided to advisors and decision-makers regarding questioning format. Such instructions should include the restriction of abusive, repetitive, harassing, misleading, or privileged questions. If the advisor issues a compound question, the decision-maker may require it be broken up. If advisors issue a question with the use of a double-negative, they should be expected to reword the question at the request of the witness or decision-maker.

In order to enforce proper decorum within questioning and throughout the hearing, all decision-maker(s) should receive explicit training on common cross-examination strategies (see training recommendation above) as the new rules state that an institution cannot limit parties' choice of advisor (student, parent, etc), and it is therefore

important decision-maker(s) understand the inequity that may be created within a hearing given either party's choice of advisor. Through this training and an explicit acknowledgment by the decision-maker to all parties, it is the responsibility of all decision-maker(s) and parties to uphold such standards of decorum within the hearing.

Fundamentally, Title IX hearings are not courtrooms and the process is not designed to be a trial. Thus, it is critical that policies and procedures implemented by Institutions describe the purpose of the Title IX hearing and their inherent limitations. Institutions should utilize decision-maker(s) with experience and training who can ensure not only relevant questioning consistent with the new rules but also appropriate conduct by parties and their advisors. Institutions should also ensure processes and practices that protect the privacy of information consistent with federal and state law. Staff who are involved in the adjudications should receive specific training and guidance about safeguarding such information.

ADDITIONAL ISSUES IDENTIFIED BY THE ADVISORY COMMITEE

Funding/Resources

The Advisory Committee discussed and expressed considerable concern for Institutions to fund and staff all the various requirements under the rules, most notably to provide new decision-makers (who will need to conduct hearings and apply "live" rules of evidence) for most Institutions and to provide advisors at no costs, if requested by either or both parties, at each hearing.

Moreover, Institutions must have a separate Title IX Coordinator, investigator, advisors (optimally training at least 3), decision-makers (optimally training at least 5), staff of informal resolutions if offered, and appellate adjudicators. These staffing requirements create a situation where Institutions, regardless of size, would need to have Title IX departments with no less than four separate employees to provide the bare minimum process required. To provide optimum compliance, Institutions would need more than 10 (and some commentators say close to 15-20) separate employees to take on various roles requiring training and accounting for the possibility of conflicts of interest. For small Institutions, whose Title IX departments have historically consisted of one, or two employees, the new regulations create a tension between optimum compliance and daunting administrative costs.

Requiring existing staff to comply with the additional and new responsibilities without fair financial compensation is potentially untenable. Further, the training of a decision-maker requires that that adjudicator understand the legal concept of relevancy, privilege, and the rape shield protections. However, decision-makers are prohibited from the application of other laws of evidence despite being required to maintain a sensitive legal process.

These Title IX regulations will also disparately impact small, rural institutions. The rules require significantly more personnel to be trained and actively participating in the Title IX process. An Institution of 2,000 students require the same size staff as an Institution of

10,000+. More personnel and more roles equal more training, an already burdensome and expensive proposition. Additionally, due to concerns surrounding overlapping roles and conflicts of interests, personnel involved would all have to be trained in multiple areas. Additionally, an increasingly confrontational process will lead to increased security costs and increases the potential for on-campus violence.

Small and rural Institutions already face additional costs surrounding training. Typically, the travel to/from an airport providing air travel to a conference is a cost that larger urban Institutions do not have to consider. In addition, rural Institutions seldom benefit from the ability to bring educators to campus, as they cannot share the burden of that expense with other local Institutions. A group of smaller schools in the southern half of the state have begun discussions around entering a cooperative consortium of Title IX professionals to ensure that there are enough appropriately trained professionals to provide for an appropriate grievance procedure.

Finally, these substantial costs are in the midst of a global pandemic and the significant and considerable resources Institutions are expending to respond to it. As the new rules noted, a national emergency was declared on March 13, 2020 concerning the novel coronavirus (COVID-19) and Institutions are continuing to navigate how to fulfil their educational missions while ensuring the health and safety of their respective campus communities.

Adjudicative Timeframes

Prior guidance from the U.S. Department of Education provided that investigations should be completed within 60 days. If there was an ongoing criminal investigation, Institutions were required to "promptly resume" the school's investigation as soon as the police had finished gathering evidence—not wait for the ultimate outcome of the criminal investigation. The new rule does not have a specific timeframe but does require Institutions to include "reasonably prompt timeframes" in their policies to conclude the grievance process, including appeals and informal resolutions as applicable, with allowance for good cause delays or extensions. The Advisory Committee notes that this appears not to conflict with controlling state law, which provides that:

> *Procedures for investigating reports of sexual misconduct, must: be fair, impartial, and prompt, and the Institutions must make a good faith effort to complete an investigation or adjudicative process, excluding any appeals, within an average of sixty to ninety days, without jeopardizing the rights of a complainant or responding party. The procedure may include a process that allows for the extension of these timeframes for good cause with prior written notice of the delay and the reason for the delay to the complainant and the responding party.*

CRS § 23-5-146(3)(d)(I). As nothing in this section appears to conflict with the new Title IX rules, Institutions should follow the state law related to timeline and preventing unnecessary delays.

Confidential Victim Advocates and Advisor Role

Community-based advocates who hold absolute privilege in Colorado pursuant to C.R.S. § 13-90-107(k)(I)(II) provide support to survivors of sexual and domestic violence (*People v. Turner*, 109 P.3d 639, 642 (Colo. 2005)). Given this level of privilege and the unique support role confidential victim advocates provide to survivors, appointing these confidential victim advocates as advisors for cross-examination to complainants in a Title IX hearing could unintentionally waive privilege.

Moreover, many schools have worked hard to center confidential victim advocates as the primary resource for survivors, which means they may consider confidential victim advocates as good options for complainant advisors for cross-examination. However, the role of an advisor for cross-examination in this process is antithetical to the ethics of victim advocacy. Previously, confidential victim advocates were permitted to accompany survivors through all aspects of the Title IX process. However, the rules may cause schools to exclude confidential victim advocates during the hearing and cross-examination, which will have a detrimental impact on survivors' ability to stay engaged and effective in the process. Confidential victim advocates can assist when survivors are neurobiologically triggered, guiding them in trauma-informed grounding techniques. The Advisory Committee notes that Institutions should consider the impact of the process on all parties, continue to provide full access to party-specific resources not otherwise precluded by the rules and as required to ensure access (such as interpreters or translators), and clearly clarify the role of all participants (including but not limited to advisors and confidential victim advocates) in the investigative process and hearing.

Cross-Examination and Children

The Advisory Committee notes that while Institutions defined as "postsecondary institutions" must provide a live hearing with cross-examination, such hearings are discretionary for elementary and secondary schools (and other Institutions that are not postsecondary). 34 C.F.R. § 106.45(6)(ii). Indeed, the rules state that parties in elementary and secondary schools generally are not adults with the developmental ability and legal right to pursue their own interests on par with adults. P 30364. While the Advisory Committee is not charged to advise regarding elementary and secondary schools in Title IX proceedings, we recognize that children still might be at risk by the Title IX rules in postsecondary institutions and therefore elicit our concern. The rules apply to the programs or activities of postsecondary institutions, without limitation to the *age* of those participating in them, and not as full-time university students or staff. For example, if a case of sexual misconduct arises where a party is a K-12 student enrolled in a college course or summer program, they may be subjected to the same required cross-examination procedures stipulated for postsecondary institutions. The same is true of extra-curricular college programming or even for children enrolled in a university-operated daycare center. Extensive research demonstrates that such a cross-examination process as outlined under the regulations are not only particularly harmful

to younger children, but that younger people are also more likely to provide inaccurate information in testimony as a result of the pressure and structure of cross-examination.

Impacts of Implicit Bias

Implicit bias describes attitudes or stereotypes that inform our understanding, actions, and decisions in an unconscious manner. Implicit bias, which can be either favorable or unfavorable, are triggered involuntarily and without awareness or intentional control. These biases are deep in the subconscious and are not the same as conscious bias that individuals may realize they need to hide due to social or societal pressure. Generally implicit biases are not accessible through introspection. These hidden biases inform our feelings and beliefs about people based on characteristics such as race, ethnicity, age and appearance.

Implicit bias may intersect with the Title IX process and impact both the respondent and the complainant. Societal beliefs about the "correct" way to respond to a sexual assault could lead an investigator or fact finder to determine that a complainant did not act in a manner consistent with an assault. Conversely, a fact finder may feel a person of color accused of sexual assault overly agitated or nervous and appears to be acting "guilty." These conclusions could be drawn subconsciously and without an understanding of neurocognitive impacts of trauma or the historical context and intergenerational trauma impacting people of color when confronted with such allegations.

The Advisory Committee finds it essential that Institutions ensure proper training for adjudicators at every stage of the process to identify and challenge such bias so as to ensure a neutral and fair resolution.

CONCLUSION

For the reasons stated above, the Advisory Committee submits the fifteen recommendations identified in this report to the Education Committees of the Senate and House of Representatives pursuant to C.R.S. § 23-5-147(6)(a). The Advisory Committee will submit its second report on or before January 15, 2021, which will include recommendations for changes to statutes and policies and methods to reduce sexual misconduct at Institutions of Higher Education, pursuant to C.R.S. § 23-5-147(6)(b). The Advisory Committee will also partner as requested with CDHE for statewide biennial summits on sexual misconduct subject to available appropriations.

APPENDIX 1: COMMITTEE CHARGE AS OF MARCH 20, 2020

COMMITTEE SHALL:

1) **Study and examine best practices** on issues related to sexual misconduct at institutions of higher education related to:
    a. How to handle incidents of sexual misconduct that occur outside of an institution's programs, activities, or property;
    b. How to conduct cross-examination of parties and witnesses at hearings;
    c. Whether a standard of reasonableness should be included in an institution's sexual misconduct policy; and
    d. Can and should institutions of higher education have higher standards than are required by federal law and regulation.

    (Statutory Reference: C.R.S. § 23-5-147(5)(a)-(d))

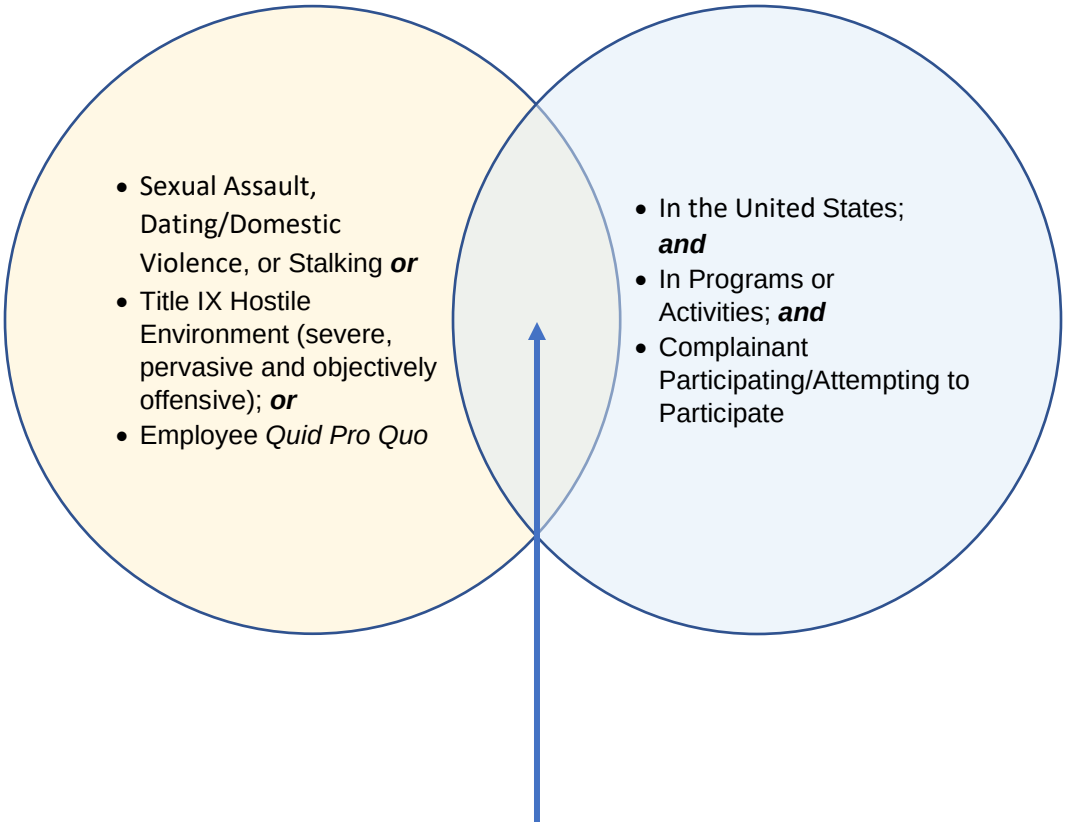
2) **Submit a report within 90 days after the final federal rules on Title IX sexual misconduct are adopted**, to the Education Committees of the Senate and House of Representatives or any successor committees, which includes recommendations related to 1(a)-(d) on suggested changes to institutions' policies of sexual misconduct due to federal rules.
    (Statutory Reference: C.R.S. § 23-5-147(6)(a))

3) **Submit a report on or before January 15, 2021,** to the Education Committees of the Senate and House of Representatives, any successor committees, and institutions of higher education, including recommendations for changes to statutes and policies and methods of institutions to reduce sexual misconduct at institutions of higher education.

4) **Submit a report on or before January 15, 2022,** to the Education Committees of the Senate and House of Representatives, any successor committees, and institutions of higher education, including recommendations for changes to statutes and policies and methods of institutions to reduce sexual misconduct at institutions of higher education.

5) **Submit a report on or before January 15, 2023,** to the Education Committees of the Senate and House of Representatives, any successor committees, and institutions of higher education, including recommendations for changes to statutes and policies and methods of institutions to reduce sexual misconduct at institutions of higher education.

APPENDIX 2: TITLE IX DEFINITION AND JURISDICTION REQUIREMENTS



Title IX Required Coverage and Prescribed Grievance Process