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NACCOP Questions and Comments Relative to the Department of Education's
Proposed Title IX Regulations

Re Docket ID: ED-2018-OCR-0064, RIN 1870–AA14, Overview:

The National Association of Clery Compliance Officers and Professional (NACCOP) is a professional association for Clery Compliance Officers and Professionals to collaborate with each other, share resources and best practices, and participate in professional development opportunities to support colleges and universities in their efforts to comply with the Clery Act. NACCOP also provides support for Title IX coordinators and professionals as we help them better understand the intersections of the Clery Act and Title IX. NACCOP is a young but growing association with more than 700 members and represents hundreds of colleges and universities from all over the United States. Member institutions include large state institutions, private institutions, community colleges and a variety of other institutions of higher education of varying size, mission and scope. Our constituents include campus law enforcement and security directors, chiefs, and professionals; Clery Compliance Officers; Title IX Coordinators; Student Conduct and Student Affairs professionals; Human Resources professionals; and a variety of other Higher Education administrators focused on compliance-related issues. NACCOP partners with other Higher Education Associations to provide training and education to the members of both associations, thereby expanding its reach and influence.

NACCOP has also been proactively engaging officials from the Department of Education (ED) as well as Congressional leaders relative to membership issues and concerns pertaining to regulatory oversight and enforcement. In September of 2017, NACCOP leaders met with Candice Jackson, Deputy Assistant Secretary for Strategic Operations and Outreach in the Office for Civil Rights (OCR) of ED. In October of 2017, NACCOP leaders and members from across the United States met with OCRs Title IX Policy Team and General Counsel as part of OCR's Listening Sessions following the rescission of the 2011 Dear Colleague Letter and implementation of 2017 Interim Guidance. During those meetings, NACCOP described the process for the intake and resolution of complaints of sex-based harassment and discrimination across Institutions of Higher Education (IHEs); what was working well; what was challenging or problematic; and what didn't seem to be working at all. Much of our conversation focused on how IHEs were ensuring equity in existing processes, the specific due process protections IHEs were already providing students, and how IHEs were providing notice to parties of their rights and options. In February and March of 2018, NACCOP leaders engaged staff from both the House Committee on Education and the Workforce and the Senate Committee on Health, Education, Labor and Pensions (HELP) around issues and concerns relative to the reauthorization of the Higher Education Act (HEA) as it related to potential

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changes to the Clery Act, including language specific to campus sexual misconduct grievance policies and protocols.

NACCOP appreciates this opportunity to provide input to ED in response to the notice of proposed rulemaking (NPRM) regarding the proposed Title IX regulations designed to provide standards on how recipients must respond to incidents of sexual harassment.

The comments and questions will address specific aspects of the NPRM with two overarching themes. While OCR describes the intention of the proposed regulations in the Federal Register posting as promoting "the purpose of Title IX by requiring recipients to address sexual harassment, assisting and protecting victims of sexual harassment and ensuring that due process protections are in place for individuals accused of sexual harassment," NACCOP has heard concerns from its members that these proposed regulations will likely have the opposite effect. Generally, NACCOP has concerns that some of the proposed regulations will result in fewer reports, but not actual incidences, of sexual harassment. Reducing the responsibility of IHEs to respond to sexual harassment—including potential criminal behavior in a sexual assault—puts campus communities at risk. And restricting an institution's ability to respond only where there is a signed complaint regarding behaviors that have already created a hostile environment, while simultaneously restricting some complainants from a formal adjudication process, will discourage reporting and leave potentially escalating behaviors unaddressed. Decreased reporting artificially reduces the number of Clery crime reports disclosed within an institution's annual statistical disclosure, which creates a false sense of safety not only among current campus students and community members, but also prospective students, their families, and employees.

Similarly, conflating the criminal process with an IHEs administrative process will also likely have a sobering effect on reporting, and runs contrary to institutional best-practices which have stated; "[t]he attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound." *The General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline at Tax Supported Institutions of Higher Education*, published by the United States District Court for the Western District of Missouri in 1968. The proposed regulations mandate of a "live hearing" with cross-examination by an advisor, is a "bridge too far," (Doe v. Baum,et al.,Case No. 17-2213 (6th Cir. Sept. 7, 2018, Gilman dissenting opinion) and create serious administrative hurdles for IHEs as they are not equipped to manage their grievance procedures like a criminal court. NACCOP believes the additional staffing and training requirements needed to properly facilitate such a process is tantamount to an unfunded mandate and increases the regulatory burden for IHEs rather than reducing it.

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Comments and Questions:

1. Conduct constituting sexual harassment. Sexual harassment is defined to mean either an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to a recipient's education program or activity; or sexual assault as defined by CFR 668.46(a), implementing the Clery Act. § 106.30 (Sexual Assault is defined as an offense that meets the definition of Rape, Fondling, Incest or Statutory Rape as used in the FBI's UCR program).

    a. COMMENTS: The proposed definition of sexual harassment in § 106.30 provides a much higher threshold for Title IX specific cases then what had been used in both 2001 and 2017. The most significant modification involves the change surrounding hostile environment, as the unwelcome conduct must now be "objectively offensive that it effectively denies a person equal access to education." This is a much higher threshold than old guidance which stated "sufficiently serious to deny or limit," and the proposed regulations provide additional clarification that an IHE's obligation is not triggered if a complainant was not "participating in, or even attempting to participate in the educational programs or activities provided by that recipient. (Doe v. Brown, 896 F.3dat 132-33 1st Cir. 2018) where a non-student complainant who was sexually assaulted on Brown's campus by a Brown student, was only able to access the conduct system as she "had not availed herself or attempted to avail herself of any of Brown's educational programs, and therefore, could not have been denied these benefits."). Codes of conduct typically include sexual misconduct, and they work in tandem with any separate sexual misconduct policies in regard to adjudication processes (i.e. student-on-student sexual misconduct complaints are often adjudicated through the processes outlined in the student code of conduct). The proposed regulations separate "Title IX" from "conduct" when in fact, they are parallel tracks at many IHE. These regulations force two completely different processes and standards based on the identity of the complainant, or the location of the incident, and unnecessarily burdening schools in the process.

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The proposed regulations also state "[A]lthough the Clery Act focuses on crimes that may also meet the definition of 'sexual harassment' under the Title IX definition proposed in section 106.30, such crimes do not always necessarily meet that definition (for example, where an incident of stalking is not 'based on sex' as required under the Title IX definition of sexual harassment). Members have expressed confusion as to when incidents of dating violence, domestic violence and stalking will constitute sexual harassment as they are not specifically referenced as Sexual Assault has been, and have asked for clarification and examples to help better define "based on sex."

The proposed regulations also state that if the alleged conduct in a formal complaint does not meet the definition of sexual harassment as defined in 106.30 or occurred outside a recipient's program or activity, the recipient must terminate its grievance process with regard to that conduct. § 106.45(b)(3). Members have concerns that this limits IHEs from addressing behaviors prior to the creation of a hostile environment. Members also have concerns that ED fails to recognize that conduct and Title IX work in conjunction to address behaviors on campus—these regulations will require at a minimum two distinct grievance processes.

b. QUESTIONS:
   i. What might rise to the level of "objectively offensive?"
   ii. What is meant by "deny" as opposed to limit?
   iii. What are ED's expectations for a conduct process involving a non-student complainant? For example, will the expectation be to bring the conduct process in-line with the same standards outlined in the regulation or can the same definitions apply in conduct cases but using different processes outside of Title IX? Many IHEs currently investigate and follow-up on a variety of behaviors in which there is a non-student complainant (child pornography, for example) but do not utilize live hearings with cross-examination.
   iv. As referenced above, there needs to be additional clarification regarding intimate partner violence and stalking. For example, will there be a move to include the Clery Act definition for domestic violence, dating violence and stalking, as the proposed regulations now contain the Clery Act definitions for Sexual Assault? What is required in the examination of "based on sex?" Many institutions include intimate partner violence and stalking in their sexual misconduct policies. Will this conduct now need to be adjudicated separately under an IHEs

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conduct procedures, or a separate Clery Procedure? There are times in which these violations overlap, which could result in the utilization of multiple policies.

v. If behavior is considered "conduct" and not "Title IX" would an institution remain free to discipline, up to and including expulsion, for sex-based conduct in violation of a school's published conduct codes if it does not rise to the level of ED's definition of sexual harassment or fall outside of it, such as cases of domestic violence?

2. Definition of Actual Knowledge: Actual Knowledge is defined by the regulations as notice of sexual harassment or allegations of sexual harassment provided to the recipient's Title IX Coordinator or any official of the recipient who has the authority to initiate corrective measures on behalf of the recipient (§106.30). This standard is not met when the only official of the recipient of actual knowledge is also the respondent, and that the mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has the authority to institute corrective measures on behalf of the recipient.

   a. COMMENTS RE: ACTUAL NOTICE: This shift from constructive notice to actual notice triggering an IHEs duty to respond is significant, and constitutes a significant shift in the definition and role of a responsible employee, IHEs training responsibilities, and the obligation to respond. As stated in 2001, an IHE had notice if a "responsible employee 'knew, or in the exercise of reasonable care should have known' about the harassment. (Quoting *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 287 (1998) and reasoning that "OCR interprets its regulations to ensure that recipients take reasonable action to address, rather than neglect, reasonably obvious discrimination.") 2001 continued, "A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility." (Referencing *Gebser* and *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) and clarifying that "even though a school will only be liable for money damages in a private lawsuit where there is actual notice . . . [T]he concept of a 'reasonable employee' under our guidance is broader. That is, even if a responsible employee does not have the authority to address

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the discrimination and take corrective action, he or she does have the obligation to report it to appropriate school officials.")

b. COMMENTS RE: RESPONSIBLE EMPLOYEES: As seen above, prior Guidance referenced U.S. Supreme Court cases which highlighted a broadening of the definition of Responsible Employees for the purpose of ensuring that reasonable action be taken to *address, rather than neglect*, acts of discrimination. Limiting an IHEs obligation to respond only when allegations are "provided to an official of the recipient who has authority to initiate corrective measures," will likely result in fewer opportunities to address acts of discrimination, again, putting students at risk. The new definition of actual knowledge and the apparent flexibility of IHEs to more narrowly define Responsible Employees is likely to translate into confusion among IHE professional staff and the greater likelihood that complainants will not get connected to important resources or provided with the support necessary to understand how to formalize a complaint through the IHEs grievance procedures. Since the 2011 DCL, IHEs have made considerable strides broadly identifying Responsible Employees and providing them with the necessary training to ensure accurate and timely reporting for appropriate follow-up. Similarly, considerable trainings and outreach to students have focused on the ability to report incidences of sexual misconduct to Responsible Employees with the expectation that the IHE would respond to these reports, including the ability to receive interim measures. A change such as this may result in a student believing that they have made an official report and initiating an IHE response, yet frustrated and without proper support if they did not make a report to the appropriate party.

c. QUESTIONS:
   i. What IHE officials would ED consider have the "authority to initiate corrective measures, as the language in the proposed regulations can be interpreted to limit that role to the Title IX Coordinator?
   ii. Past Guidance had called for the use of Deputies. Are those roles still appropriate?
   iii. Would it be wiser to keep the previous definition of Responsible Employee, but only require IHEs to activate a formal response if the complainant desires to provide written notice of a complaint or in instances in which the school's safety analysis warrants an investigation? This

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would ensure students are getting connected to appropriate on and off campus resources while at the same time ensure potential Clery Act crimes are properly assessed for Timely Warning Considerations and included in the IHEs annual statistical disclosures.

iv. Alternatively, can we identify specific groups to be Responsible Employees such as coaches and trainers in athletics to coincide with NCAA compliance guidelines? Here is an excerpt from the NCAA toolkit: "Responsible Employees" and "Campus Security Authorities" within the athletics department are identified, in consultation with the Title IX coordinator and legal counsel, and their identity is shared with staff and students." Requiring members of athletic departments, including coaches, to be named and trained as Responsible Employees was done to address concerns that campus silos had resulted in incidents of sexual misconduct being kept "in house" and not being addressed appropriately. Recent ED OCR and Clery Act Compliance Audits have highlighted these concerns as evidenced by the tragic events occurring at Penn State University, Michigan State University and Montana State University.

v. Are there training recommendations dedicated to addressing the information that has been provided since 2011 regarding a Responsible Employees obligation to respond, as well as disseminating this information to students?

vi. How does this impact the responsibility of a Campus Security Authority (CSA) or does this allow flexibility to IHEs to more narrowly define Responsible Employees to those who are already CSAs? Under the Clery Act, "a crime is reported when it is brought to the attention of a CSA, the institution's police department, campus safety office, or local law enforcement personnel by a victim, witness, other third party or even the offender." (2016 Handbook for Campus Safety and Security Reporting -p. 4-1). The regulations update the language of the Title IX Coordinator, but do not provide new language regarding Responsible Employees

vii. If, as the regulations stipulate; "the mere ability or obligation to report sexual harassment does not qualify an employee as one who has the authority to institute corrective measures on behalf of the recipient," – does this indicate that CSAs have no obligation to report these incidents to the Title IX Coordinator?

viii. The proposed regulations state that notice also involves a "formal complaint" (a document signed by the complainant). If an IHE determines that an investigation and adjudication

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process is warranted despite the absence of a signed complaint (for example, when evidence is readily available and/or an on-going threat to campus exists), can the Title IX Coordinator serve as a complainant or must that case proceed outside the Title IX process?

3. Limits response to incidents to "on-campus" or within "educational program or activity" - Proposed § 106.44(a)states that an IHE will only be responsible for conduct that occurs within its "educational program or activity," which is defined by the Title IX statue as "all operations of a recipient." 20 U.S.C. 1687. However, complainants will be entitled to supportive measures for incidents which occur off-campus. Additionally, IHE could also initiate a student conduct proceeding for incidents which occur outside of a program or activity.

    a. COMMENTS: The proposed regulations clarify that IHEs have a duty to adjudicate incidents that happen in off-campus houses run by fraternities if those fraternities are an "operation" of the IHE. It further suggests that similar off-campus behaviors that occur outside of an "educational program or activity" may be referred to the "conduct process." Codes of conduct typically contain a violation regarding sexual misconduct, and they work in tandem with separate sexual misconduct policies in regard to adjudication processes (i.e. student-on-student sexual misconduct complaints are often adjudicated through the processes outlined in the student code of conduct). The proposed regulations separate "Title IX" from "conduct" when in fact, they are parallel tracks at many IHEs. These regulations force two completely different processes and standards based on the identity of the complainant, severity of the behavior, or location of the incident, unnecessarily burdening schools in the process.

    b. QUESTIONS:
        i. What are ED's expectations for a conduct process regarding similar behaviors that happen off-campus? For example, will the expectation be to bring the conduct process in-line with the same standards outlined in the regulations or can the same definitions apply in conduct cases but using different processes if outside of Title IX? Many IHEs currently investigate and follow-up on a variety of off campus conduct that violates established codes of conduct, but do not utilize live hearings with cross-examination.

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ii. How can an IHE prevent recurrence or retaliation on campus if it doesn't follow-up on conduct off campus; especially if the parties involved are all affiliated with the IHE?
iii. Similarly, the proposed regulations may limit an IHEs response to online harassment, in conflict with the recent decision *Feminist Majority Foundation v. Hurley* (4th Cir 2018) which held that an IHE violated Title IX by failing to adequately respond to harassment conducted via anonymous messaging apps.

4. Limits incidents to the United States – The language contained in proposed § 106.8(d) states that the policy and grievance procedures "need not apply to persons outside of the United States."

   a. COMMENT: Carving out behaviors that occur abroad is counter to language in the Clery Act. According to NASFA.org, 332,727 US students study abroad each year, raising questions as to how IHE are to respond if there is an incident abroad (available at https://www.nafsa.org/ Policy_ and_Advocacy/Policy_Resources/Policy_Trends_and_Data/Trends_in_U_S__Study_Abroad/).

   b. QUESTIONS: Additionally, if an IHE has a separate campus abroad or owns or controls a building or property abroad that is used in direct support of, or in relation to the IHEs educational purposes and is frequently used by students, the IHE is require to disclose Clery Act crimes that occur at these locations that are reported to CSAs in its annual statistical disclosures. These crimes are additionally required to be assessed for Timely Warning Considerations. It would put IHEs in a precarious situation if they were to issue Timely Warnings and include these numbers in annual disclosures, yet be limited by their response.

5. "Emergency removal" and safety/risk assessment – The proposed regulations allow recipients to remove respondents who may pose an immediate threat to the health and safety of the campus community, "provided that the recipient undertakes a safety and risk analysis and provides notice and opportunity to the respondent to challenge the decision immediately following removal." §106.44(c)

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a. COMMENTS: NACCOP appreciates the ability for schools to remove a respondent that may be a threat to the complainant or the broader campus community. But while this language tracks language in the Clery Act, additional clarification is needed as to what elements need to be included in the assessment.

b. QUESTIONS:
   I. Are there specific assessment tools that are recommended? What does assessment look like? Who conducts this assessment?
   II. What conduct or behavior would constitute a broader threat? Is it a standard threat assessment?
   III. What constitutes the process for a "challenge," and who hears that challenge; i.e. does that have to be someone separate from the Title IX Coordinator, investigator, decision maker, or appeals person?
   IV. Does "removal" include all "programs/activities" such as extra-curricular activities like athletics; and if so, does that impact who is conducting the assessment, and to whom a "challenge" should be made?
   V. The Clery Act requires IHEs to alert their campus communities to certain crimes in a manner that is timely and will aid in the prevention of similar crimes. Warnings are issued regarding criminal incidents to enable people to protect themselves. Warnings are issued after an assessment is conducted to determine if the crime that has occurred represents a serious or continuing threat to the campus community. (2016 Handbook for Campus Safety and Security Reporting, p. 6-12). Is it EDs intention to require IHEs to conduct a similar assessment before initiating the emergency removal of a respondent?

6. Resolution Time-Frames and Reasonable Delays- The proposed regulations state that a grievance procedure must include "reasonably prompt timeframes for conclusion of the grievance process." § 106.45(b)(1). The regulations further propose including a process that allows for the temporary delay of the grievance process for good cause.

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a. COMMENT RE: TIMEFRAMES: IHEs are required to set "reasonably prompt timeframes" yet the guidance does not provide any clarification as to what this might mean. While past Guidance had moved away from the 60-day requirement established in 2011, many institutions still use this timeframe as a goal for completion as no alternatives have been suggested. As there are other sections in the proposed regulations which are very prescriptive, suggested time frames may prove helpful, particularly when coupled with the strong language allowing for extensions for good cause and with notice.

b. COMMENT RE: DELAYS: Many IHEs establish Memos of Understanding (MOU) or other agreements with local law enforcement (LLE) agencies that have concurrent jurisdiction with regard to responding to and investigating violent crimes; especially crimes against persons. It has been a practice for IHEs to pause temporarily, but not indefinitely, with an administrative investigation in sex-based crime cases while a LLE agency engages in its initial criminal fact-finding phase. Deferring indefinitely interferes with an IHEs ability to respond administratively to a complaint in order to implement safety measures, prevent a recurrence and reduce the likelihood for retaliation or a potential broader threat to the campus community. If IHEs are to defer to a concurrent law enforcement investigation, there should be a time-frame established to allow for the administrative process to move forward even as the criminal case moves forward. A past OCR audit at Hunter College provided reasonable guidance that a suspension beyond the existing guidance of 2-10 days required only a specific request with justification. (Letter from OCR to Hunter College of the City University of New York (31 October 2016), available at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02132052-a.pdf).This would preferable to an open-ended delay.

c. QUESTIONS:
   i. If a school must delay pending a law enforcement investigation and the respondent withdraws from school, what happens to the existing case?

      Similarly, if a school can't complete the investigation, how does this impact schools that have transcript notation?

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7. **Informal Resolution** – Beginning in 2001, OCR prohibited mediation for some cases, including sexual assault. This was standard until the 2017 Guidance which stated that informal resolution, including mediation, was available for all incidents, including sexual assault. The proposed regulations further clarify that recipients may "facilitate an informal process, such as mediation, that does not involve a full investigation and adjudication." § 106.45(b)(6).

    a. COMMENT: The allowance of informal resolution has been welcomed by some in higher education and allows for additional flexibility when working with a complainant who does not want to get a respondent "in trouble," and instead, wants to be able to have the respondent understand how their actions negatively impacted them, while also receiving supportive measures allowing the parties to move forward. But while the proposed language provides multiple layers of detail on the formal grievance procedures, the informal resolution process is much more vague and requires additional clarification.

    b. QUESTIONS:
        i. What constitutes informal resolution? While the Background and Summary document states that informal resolution includes "mediation, restorative justice, or other models of alternative dispute resolution" additional details about these processes would be helpful. https://www2.ed.gov/about/offices/list/ocr/docs/background-summary-proposed-ttle-ix-regulation.pdf
        ii. Could an informal resolution include a student taking responsibility and accepting disciplinary action without any formalized meeting or process?
        iii. Could informal resolution include a change to a respondent's academic or residence without any findings of responsibility?
        iv. As per Question 4 in the proposed regulations regarding questions and concerns about training, more guidance needs to be provided regarding training for those who conduct these processes? Who is authorized to conduct these informal processes? Would officials of an IHE be required to have annual training on informal resolution, mediation or restorative justice practices? If so, what do these trainings require?

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v. Are the records confidential, as is typical of some forms of informal resolution, and if so, what if there is a separate criminal process that is occurring?
vi. Would informal resolution force respondents into acceptance of responsibility, thereby forfeiting their due process rights?
vii. Would a second complaint involving a respondent automatically disqualify that incident for informal resolution, and if so, what then happens to the complaint if the complainant does not want to participate in a formal resolution process?
viii. Would such a process be binding/non-binding?
ix. What types of supportive measures are available through this process, i.e. academic/residential changes; additional mediation, restorative justice for the community as well as the individuals involved?
x. If both students want informal resolution but the IHE determines that the case is inappropriate for an informal resolution, does the IHE have final say?
xi. What steps will be taken to ensure that these processes are voluntarily entered into, conducted in a prompt manner, and parties are notified of the outcome of the parties to avoid issues that presented themselves in University of California, Berkeley (where OCR identified concerns regarding lack of prompt timelines, inequity as only the complainant could initiate the alternative resolution process, the parties did not receive notice of the outcome of the process, and there was no specific language stating that this process was voluntary, leading some students to believe that this process was required)?

8. Role of the Title IX Coordinator - The proposed regulations in 106.8(a) recognize that the current regulations do not address directly the designation of the Title IX Coordinator. The reasoning provided in the proposed regulations indicates that the phrase "and carry out" in the existing regulations could be read to suggest the Title IX Coordinator must be the one to take action rather than "coordinate" the response. However, additional language in the proposed regulations do appear to place specific burdens on the Title IX Coordinator, which does not fully consider the range of institutions covered under this law. §§ 106.30, 106.44(b).

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a. COMMENT RE: TITLE IX COORDINATOR AS SUPPORTIVE MEASURES COORDINATOR - The proposed regulations state that the Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures § 106.30. The reasons go further and state that the Title IX Coordinator "must serve as point of contact for affected students to ensure that the supportive measures are effectively implemented." (p. 81471). This language would require that the Title IX Coordinator be the sole administrator on campus who is responsible for the initiating of a grievance procedures, serving as the complainant in cases of multiple complaints, while also spearheading all supportive measures for complainants, respondents, and witnesses. At small institutions, it is common for the Title IX Coordinator to wear multiple hats separate from their Title IX responsibilities and those institutions have raised significant concerns about one person assuming these responsibilities; and on large campuses, concerns have been raised regarding the administrative impact falling to one person. Guidance documents identified additional resources on campus who could help assist in this matter, including deputies and other trained college officials. It would be helpful to get additional clarification to see if staff beyond the Title IX Coordinator can be utilized in coordination efforts, and if so, how.
b. COMMENT RE: TITLE IX COORDINATOR AS GATEKEEPER - Per the proposed regulations, recipients have "actual notice" when a complaint is filed with the Title IX Coordinator. § 106.30. The Coordinator must review if the necessary elements are present to move forward with a formal complaint - if the complaint is signed, and if the alleged conduct meets the threshold required to initiate a grievance procedure or should be referred to another department (i.e. is it more appropriate for a conduct referral; supportive measures; etc.). As there is only one Coordinator on campus, this responsibility falling to one person may prove to be too burdensome.
c. COMMENT RE: TITLE IX COORDINATOR AS COMPLAINANT – The regulations stipulate that when a recipient has "actual knowledge" of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint. § 106.44(b)(2). The proposed regulations do not provide enough clarity as to the extent of the role the Title IX Coordinator has when acting as the Complainant.

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d. QUESTIONS:
   i. When does the Coordinator determine if the alleged conduct meets the threshold—before or after an investigation?
   ii. How many "reports" would be required for the Title IX Coordinator to file a formal complaint and how would that change the grievance procedure in terms of the advisor's role and cross-examination? Who would be the advisor for the Title IX Coordinator?
   iii. Can a "signed complaint" be considered to be a Public Safety/Police report? Often, students report to campus law enforcement or public safety before they ever seek services from Title IX.
   iv. The proposed regulations prohibit the Title IX Coordinator from serving as the decision-maker. § 106.45(b)(4). Can the Title IX Coordinator serve as the investigator? Can the Title IX Coordinator serve as the appeal decision-maker?

9. Supportive Measures – Proposed regulation § 106.30 defines supportive measures as non-disciplinary, non-punitive individualized services offered to both the complainant and respondent . . . without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment.

   a. COMMENT: NACCOP members have expressed concern regarding the limitation of supportive measures compared to what had been available in the past. One such concern would be the inability to move the respondent's class or residence after the filing of a formal complaint, as previously customary. Another such example is a "mutual restriction on contact between the parties." The requirement that these orders be mutual was recently the basis for a lawsuit (Doe v. Oregon State University) in which the complainant was given a mutual no-contact after reporting she was raped to the University. The complainant argued that this order was "discriminatory, retaliatory, and unlawful to violate her federal rights under Title IX, as well as her right to free speech and due process." https://www.gazettetimes.com/news/local/osu-student-drops-lawsuit-against-university-in-rape-case/article_1b8cf206-3d3a-5997-a85f-4e409b9e88da.html While this lawsuit has since been dismissed on other grounds, it raises questions associated with this practice.

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b. Questions:
   i. Can supportive measures include "victim advocacy, housing assistance, academic support, disability service, health and mental health service, legal assistance as they have in the past?
   ii. Are anti-retaliation measures available, and if so, what are they?
   iii. Under the Clery Act, IHEs must provide victims with written notification of their option to request changes in their academic, living, transportation, and working situations, and they must provide any accommodations or protective measures that are reasonably available once the student has requested them, regardless of whether the student has requested or received help from others or whether the student provides detailed information about the crime. (79 Fed. Reg. 62763). How will this be reconciled with the proposed regulations?

10. Presumption of Innocence - As stated in 2017, a recipient must provide certain notice requirements into its grievance procedures and documents. The proposed regulations state that the written notice to the parties of an allegation must include language that the respondent is presumed not responsible. 106.45(b)(2).

    a. **COMMENT:** NACCOP members have expressed concern with the requirement that the notice documents contain a statement that the respondent is presumed "not responsible" for the alleged conduct. Members have commented that there should not be any presumption, whether responsible or not responsible, that is made prior to the conclusion of a grievance procedure, and some have also raised concern that including this language in the notice letter to the complainant, may impact the complainants desire to participate in the adjudication process. The unspoken language suggested in this is that the presumption IS that the complainant is responsible, and/or untruthful. Additionally, there is concern about the requirement that the recipient must provide "sufficient time to prepare a response" which could impact an investigation conducted in the immediate aftermath of an incident, while also being much too vague.

    b. QUESTIONS:
       i. This requirement has led to questions regarding the ability for a campus police officer to ask questions of a respondent prior to a formal complaint being filed, i.e. what if the police are

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called to the scene of an incident, are they unable to question the parties? Also, as there is no indication as to what is "sufficient," there is the likelihood that students may postpone meetings indefinitely suggesting they have not had adequate time to prepare and some may potentially withdraw from the IHE prior to a case being reviewed.

ii. Wouldn't a better phrasing be that no presumption is made as to responsibility prior to the determination of responsibility?

11. **Staffing and Training requirements** (as per Question 4 of the Proposed Regulations regarding questions and concerns about training)–The proposed regulations in § 106.45(b)(1) call for separate Title IX Coordinators, investigator(s), and decision-maker(s), all of whom must be trained on both definitions of sexual harassment and how to conduct a grievance process, including hearings. These materials cannot rely on sex stereotypes and promote impartial investigations. However, there is no clarification as to what constitutes sex stereotypes, or the promotion of impartial investigations. Additionally, IHEs must also provide for advisor(s) who are responsible for the direct questioning of the parties involved.

    a. COMMENT: As is at issue in other areas of the proposed regulations, there are no guidelines regarding training of advisors, which would be very important as they are the parties who are responsible for cross-examination. It is also noteworthy that prior Guidance, including VAWA, provides requirements regarding trauma-informed investigations. However, there is no mention of trauma-informed in these proposed regulations.

    b. **QUESTIONS:**
        i. Can the Title IX Coordinator serve as the investigator?
        ii. What aspect of training would ED consider promoting "sex stereo-typing?" Do they consider "trauma-informed" training as biased training?
        iii. If one party brings an attorney as an advisor, is the recipient required to provide an attorney for the other party if not advisor is present?
        iv. Can the "decision-maker" be one person or must it be a panel?

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12. **Cross Examination in Live Hearings -- Proposed** regulations § 106.45(b)(3)(vi)-(vii) states that an IHE recipient's grievance procedures must provide for a live hearing at which the recipient must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing *must* be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an advisor present, the recipient must provide the party with an advisor aligned with the party to conduct cross-examination.

    a. COMMENT: ED recognizes the high stakes for all parties involved in a sexual harassment investigation and recognizes that the need for recipients to reach a reliable determination lies at the heart of Title IX's guarantees for all parties. As such, ED concludes that cross-examination is the best way to deliver this result, stating that cross examination is the "greatest legal engine invented for the discovery of truth." *California v. Green*, U.S. 149, 158 (1970). However, Justice Steven's dissent in *US v. Salerno*, 505, 317(1992) is noteworthy as he states that "cross examination is the principle means of undermining credibility of a witness whose testimony is false or inaccurate." It is also important to remember that both the Green and Salerno case involved criminal matters with the possibility of imprisonment, as opposed to an administrative hearing at an IHE. Additionally, as it is a judicial procedure, there are rules of evidence that apply, whereas, administrative processes do not have such rules. There are also additional questions and clarifications as listed below.

    b. QUESTIONS:
        i. The leaked regulations stated, "with or without a hearing." Why has there been a shift to impose this standard?
        ii. While the proposed regulations cite *Baum*, that case limited cross-examination to public colleges and situations where "credibility is in dispute and material to the outcome." There are no such limitations here.
        iii. How do IHEs best address concerns over information that is available being used in a retaliatory manner, as parties will have access to all information, including information that is not being used, and the proposed regulations appear to be silent on retaliation.

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iv. What guidance will be provided to better understand the parameters of such cross-examination? In an administrative hearing process, could cross examination still be fulfilled allowing parties to submit questions to a hearing board chair rather than allowing direct cross examination by advisors? This seemed to be the standard in the leaked regulations and Doe v. Michigan Case Number 18-11776 (E.D. Mich. July 6, 2018).
v. Is cross-examination required in staff/faculty cases, and student v. staff/faculty?
vi. What if the student does not want an advisor – can they appoint themselves? Does this mean the school must allow students to cross-examine each other?
vii. While Clery allows for advisors, it also states that their role can be limited. Can IHEs limit the role of advisors in a hearing, and if so, how?
viii. Is this written to force schools to allow full participation by advisors OR face cross-examination by students? Could a school allow advisors of choice but appoint separate advisors to do the cross examination?
ix. If the questions are not directed to go through central person (as these regulations make no allowance for it), how will IHEs insure the cross examination excludes inappropriate evidence of the complainant's sexual behavior?
x. The proposed regulations state the cross-examination must exclude "evidence of the complainant's sexual behavior or predisposition . . . unless the evidence concerns specific incidents of the complainant's behavior with respect to the respondent and is offered to prove consent." What is meant by "offered to prove consent?" Are there examples? Also, is this the same standard for all stages of the grievance process, including informal resolution?
xi. What role does the investigative report play? Can the hearing be limited only to information not previously included in the report given that the investigation requires equal opportunity to the parties to present witnesses and inculpatory and exculpatory evidence? What is the purpose of the investigation and report if none of the information can be used should a party or witness not appear at the hearing?
xii. Can a police report be used if neither party participates in the hearing, or if the incident was investigated and the report was completed in the aftermath of an incident, prior to the

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respondent being provided proper written notice and when given sufficient time to prepare a response?

xiii. How does this requirement comply with an IHEs ability to limit an advisor's role throughout the other grievance processes – does this mean that limits can be placed on cross examination, i.e. rules of evidence?

xiv. What is the threshold for "not participating in cross examination" to render that past statements cannot be used? Do the parties have to answer all questions? Is there a 5th Amendment issue regarding self-incrimination?

xv. As per question 5 of the proposed regulations addressing concerns for individuals with disabilities, what special considerations will be provided for complainants and respondents with disabilities? Undergoing cross-examination can be an incredibly stressful situation, which may be exacerbated for students with disabilities. If an accommodation is such that a student is not subject to cross-examination, will their prior statements be allowed?

xvi. What happens if a party does not show up to the hearing? Does the hearing take place? What if a witness does not show? Will schools be required to subpoena witnesses to appear at hearings?

xvii. The proposed regulations state that "the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties." How does that mesh with a mandate for a live hearing and providing advisors that "align" with the party to conduct cross-examination? Doesn't that suggest it should be the IHE's responsibility to cross-examine?

xviii. What questions can a hearing officer prevent from being asked? What does that process look like in regard to reasoning?

xix. Does the university have to provide the same "level of advisor?" There are equity concerns as one student may be able to hire a lawyer as an advisor while another student may not. What is the risk associated with "ineffective counsel" for college-appointed advisors? Who is responsible for training the advisors?

xx. In cases in which the Title IX Coordinator brings forward a case, on which basis will they be cross-examined? Who will be the advisor for the Title IX Coordinator?

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xxi. As per Question 9 of the proposed regulations addressing concerns about technology that might be needed at live hearings, smaller institutions have indicated that they do not currently have access to this technology, and there would be a significant cost incurred in securing this technology.

13. **Access to all Evidence**: Proposed § 106.45(b)(3)(viii) would provide both parties an equal opportunity to inspect and review any evidence obtained, "including evidence upon which the recipient does not intend to rely in making a determination regarding responsibility." This section will address the request in Question 7 of the proposed regulation regarding questions or concerns about "directly related to the allegations," and the recommendation being that access to information be limited to information in which the IHE relies on reaching a determination.

    a. COMMENT: The proposed regulations are silent on the issue of "retaliation" which in past Guidance and ED audits has been considered a separate violation of Title IX. NACCOP members have serious concerns about providing evidence outside what is included in the investigative report and/or is used in the decision-making. This appears to be done in order to intimidate one or both parties.

    b. QUESTIONS:
        I. How does 106.45(b)(3)(viii) allowing for access to all evidence from the investigation, even that which the recipient does not intend to rely, mesh with 106.45(b)(3)(vi) which prohibits information about the complainant's sexual behavior etc. in cross-examination that might come up in the investigation? If such behaviors are raised during the investigation, must that information be shared? Is it only limited in the hearing?
        II. How should "directly related to the allegations raised" be defined? If information would not have been permitted due to rules of evidence in a criminal or civil proceeding—does it have to be provided here? Do discovery rules apply?
        III. What about medical or counseling records, or requests for supportive measures - do the parties have access to that information?
        IV. Do the investigator's private notes (which would be FERPA protected) need to be turned over as well?

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V. With no language on retaliation, what controls will be in place to limit how parties use information upon which the recipient did not rely?

14. **Standard of Evidence:** The proposed regulations in § 106.45(b)(4)(i) allows for IHEs to use either preponderance of the evidence, or the clear and convincing statement.

    a. **COMMENT:** There are concerns that this language is misleading, as the standard that is used must be the standard that is used for all "conduct code violations that carry the same maximum disciplinary standard" as well as "complaints against employees." As per Question 6 in the proposed regulations seeking guidance regarding the standard of evidence to be use, it is our recommendation that schools be left the option to choose which standard of evidence, and that they are not required to use the standard that is applied in cases in which similar disciplinary sanctions may be imposed.

    b. **QUESTIONS:**
        i. i. What happens at institutions in union environments, which may utilize the higher clear and convincing standard?
        ii. ii. What are the state law implications regarding which standard must be used in adjudicating these cases when in conflict?

15. **Written Determination Regarding Responsibility -** The proposed regulations in § 106.45(b)(4) require a "written determination regarding responsibility" which must include (A) Identification of the section(s) of the recipient's code of conduct alleged to have been violated; (B) A description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held; (C) Findings of fact supporting the determination; (D) Conclusions regarding the application of the recipient's policy to the facts; (E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any sanctions the recipient imposes on the respondent, and any remedies provided to the complainant designed to restore or preserve access to the recipient's education program or activity; and (F) The recipient's procedures and permissible basis for the complainant and respondent to appeal. The recipient must provide the written determination to the parties simultaneously. If

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the recipient does not offer an appeal, the determination regarding responsibility becomes final on the date that the recipient provides the parties with the written determination. If the recipient offers an appeal, the determination regarding responsibility becomes final at either the conclusion of the appeal process, if an appeal is filed, or, if an appeal is not filed, the date on which an appeal would no longer be considered timely."

a. COMMENT: This exceeds current statutory language within the Clery Act. The Clery Act requires written, simultaneous notification to both parties of "the result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking; (B) The institution's procedures for the accused and the victim to appeal the result of the institutional disciplinary proceeding, if such procedures are available; (C) Any change to the result; and (D) When such results become final § 668.46(k)(2)(v). The Clery regulations further clarify that the "result" must include any sanctions and rationale for results and sanction (notwithstanding FERPA). For simplicity's sake, this section should mirror Clery. The additional sections proposed are burdensome, repetitive, and unnecessary, particularly given the requirements that the parties have already been provided the investigative report.

16. Impact on Employee Conduct Cases: The proposed regulations state that that nothing should be read "in derogation of an employee's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. and its implementing regulations." Another provision impacting employees is § 106.45(b)(4)(i), stating that a recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty. A third provision permits placing a non-student employee respondent on administrative leave. § 106.44(d). This section also addresses Question 3 of the proposed regulations seeking input on the applicability of the rule to employees.

a. COMMENT: NACCOP members appreciate EDs inclusion of employees in regulations addressing the implementation of Title IX relative to employees on campus. Members also appreciate the ability to place non-student employee respondents on administrative leave given potential safety implications. However, additional clarifying guidance is necessary to better understand the intersection of Title VII and Title IX as these anti-discrimination laws use different definitions as well as different grievance

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procedures. Title VII states that employers are responsible for harassment by non-supervisory employees or non-employees over whom it has control, (i.e. a client or a customer) if it knew about the harassment and failed to take prompt and appropriate corrective action. The proposed regulations state that recipients will only be held liable for conduct over which they "have control." More clarification is needed as it may conflict with the requirement that the complainant must have been participating in, or even attempting to participate in, the educational programs or activities provided by the recipient. As discussed above, this language limits the IHEs ability to follow-up on allegations of harassment depending upon the definition of control.

b. QUESTIONS:
   i. The EEOC defines Sexual Harassment as illegal "when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted)." https://www.eeoc.gov/laws/types/sexual_harassment.cfm
   ii. This definition lacks the "objectionably offensive" language stated in § 106.30 . Which definition applies when an employee alleges harassment by a student?
   iii. Title VII uses a "reasonable" standard regarding employer liability. The proposed regulations state that a recipient must respond in a manner that is not deliberately indifferent, meaning "clearly unreasonable." Which standard should apply in employee on employee cases that occur on campus?
   iv. If an IHE has a union that mandates a higher standard of evidence than used in all other conduct cases on campus, would a school be required to change standards for cases that do not involve employees?
   v. How does ED define "administrative leave?" Can this be unpaid leave per existing campus conduct provisions?

17. Religious Exemption: While the regulations have always allowed for a religious exemption if application of Title IX would be inconsistent with the religious tenets of the IHE, the proposed regulations change the way in which this process is conducted. § 106.12. Specifically, IHE were previously required to submit a request for

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an exemption identifying the provisions which conflict with a specific tenant of the religious organization. While these requests were neither accepted or denied by ED, interested parties could then search a published list of institutions which had requested an exemption. The proposed regulations remove the requirement that IHE apply for an exemption, and instead, allows schools to apply for an exemption at any time, including after a complaint has been filed. However, it is important to note that the ED website currently states "[A]n institution's exemption status is not dependent upon its submission of a written statement to OCR. https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html

a. COMMENT: By officially removing the requirement that IHE need to apply prior to a complaint being filed, there will no longer be a way to determine if an IHE has applied for an exemption.

General Questions Asked by Members:

1. Retaliation - Prior guidance documents have spoken directly to retaliation, including the now rescinded 2014 Question and Answers, 2015 Dear Colleague Letter, and the April 24, 2013 Dear Colleague Letter which sought to "clarify the basic principles of retaliation law and describe OCRs methods of enforcement." Additionally, 106.71 (incorporated by reference 34 C.F.R. s. 100.7(3) intimidatory or retaliatory acts prohibited) also speaks specifically of retaliation. Moreover, in *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167 (2005), the Supreme Court held that Title IX allowed suits alleging retaliation for reporting sex discrimination, as such retaliation constituted intentional discrimination on the basis of sex. However, despite this holding and various guidance documents on the subject, there is no mention of retaliation anywhere in the proposed regulations. As such, there is a need to clarify EDs position regarding retaliation, including updating section 106.71 to speak directly to Retaliation.

2. Gender-based discrimination - The 2001 Guidance stated "Acts of verbal, nonverbal or physical aggression, intimidation or hostility based on sex, but not involving sexual activity or language, can be combined with incidents of sexual harassment to determine if the incidents of sexual harassment are sufficiently serious to create a sexually hostile environment." Similarly, the 2010 DCL stated that, "it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic of their sex, or failing to conform to stereotypical notions of masculinity or femininity. Title IX also prohibits

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sexual harassment or gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target." However, the proposed regulations do not stipulate if gender-based harassment is still covered and additional clarification is necessary to address that point. Similarly, are incidents of sexual exploitation to be included in these grievance procedures?

3. Potential Conflict with Clery:

    a. Complainant v. Victim language - Section 106.44(e)(2) defines complainant as "an individual who has reported being the victim of conduct that could constitute harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint." However, the Clery Act uses the word "victim" throughout. While it is a small point, additional clarification is helpful in regard to this conflicting language.

    b. Period for Record Retention – As per Question 8 of the proposed regulations seeking input on if 3 years is appropriate, there are concerns that this might conflict with the Clery records retention requirement of 7 years. As the average graduation rate is 6 years, there may be times in which a respondent had a prior allegation in year one, and another allegation in year 5. Would the Title IX Coordinator be required to bring forward a complaint, and if so, what records would be used if this 3-year period had passed. Additionally, some record retention policies require that an IHE keep records regarding an expulsion or suspension in perpetuity.

4. Reconciliation with State Laws around responding to incidents of sexual misconduct? Will Federal rules always trump? Can schools go farther in some places, and if so, where?

    a. These are examples from association members for New York to provide examples of conflicts between their State legislation and the proposed federal regulations.
    b. Education Law Article 129-B New York State:
        i. Harassment: The definition of sexual harassment as defined in the proposed regulations creates a conflict with New York State expectations for students and for employees. NYS employment sexual harassment law exceeds the federal definition as well.

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ii. Proposed regulations omit dating violence, domestic violence and stalking. All throughout NY 129-B, the Title IX coordinator is referenced as the resource for Domestic Violence, Dating Violence, Sexual Assault and Stalking. There is also a conflict regarding allowing a reporting individual to maintain privacy- with the proposed regulations and the cross-examination requirement, there would be no way to limit the confidentiality of the reporting party.

1. NY 129-B: Every institution shall ensure that reporting individuals are advised of their right to…File a report of sexual assault, domestic violence, dating violence, and/or stalking and the right to consult the Title IX Coordinator and other appropriate institution representatives for information and assistance. Reports shall be investigated in accordance with institution policy and a reporting individual's identity shall remain private at all times if said reporting individual wishes to maintain privacy.

NACCOP representatives would be pleased to discuss these and other issues with representatives from OCR in a more direct and personal way should we receive an invitation to do so.
Sincerely,

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