January 28, 2019

United States Department of Education  
Office for Civil Rights  
400 Maryland Avenue SW  
Room 6E310  
Washington, DC 20202

Attention: Ms. Brittany Bull

Re: Comments: Title IX Regulations  
Docket Number: ED-2018-OCR-0064

Dear Ms. Bull:

This letter is submitted on behalf of the New York State Association of School Attorneys (NYSASA), to share concerns we have with the proposed Title IX Regulations. Our organization is made up of 188 members who represent the great majority of the more than 700 school districts in New York State, and hundreds of thousands of resident children attending those schools. We regularly work with public school boards and administrators to investigate and eliminate all forms of sex discrimination, including those covered by Title IX.

NYSASA fully supports comprehensive measures for investigations designed to ensure that federal, state and local resources are utilized in a way that does not result in discrimination on the basis of gender, and that would include sexual harassment. School districts from across New York State have, for many years, operated pursuant to policies approved by local boards of education for the swift, thorough investigation of sexual harassment complaints. In 2018, New York State passed comprehensive legislation which obligates all employers in New York to adopt policies and conduct annual training in sexual harassment prevention. Those policies not only
educate employees as to their obligations, but protect those who are in the school environment as employees, students, visitors, etc. who might be victims of sexual harassment. Many of the requirements detailed in the regulations proposed for Title IX are already required in New York State.

Our main objective in providing the comments set forth below is to see that the Title IX regulations provide for thorough investigations, swift resolutions, protections for victims, elimination of retaliation, and due process for those who are accused. The proposed regulations, in most respects, meets all of those conditions. We do have concerns, however, as to some unintended consequences that the regulations may have on the efficiency of investigations and the effectiveness of resolutions. Further, the regulations as proposed create vulnerabilities for the alleged victims and those called to be witnesses. In that spirit the comments set forth below are respectfully submitted.

- **Effective Date.** An effective date for the new regulations is essential in order to allow recipients to implement policy changes, training, procedures, etc.

- **Following Regulatory Procedures.** Section 106.44 (b) indicates, if the recipient follows the regulatory procedures in response to a complaint, it will not be considered deliberately indifferent and it will not constitute discrimination under title IX. When a recipient has actual knowledge of reports by multiple complainants, the coordinator must file a formal complaint. If the recipient, in response to that complaint, follows the regulatory procedures it will not be found to be deliberately indifferent. That section should similarly indicate that it will not otherwise constitute discrimination under Title IX. If the recipient follows regulatory procedures. Is “multiple” two or more? Clarification would be helpful in that regard. By inference it would appear that a single report by a single complainant need not result in a “formal complaint.” What is required to avoid “deliberate indifference” in such circumstances should be clarified. For example, is an informal complaint process sufficient? The safe harbor provision which allows post-secondary institutions to avoid a deliberate indifference finding by showing
there was a single complainant that did not want to pursue a formal complaint should be extended to K-12. While the population of K-12 may be more vulnerable, the practical challenges of a disinterested complainant create a difficult if not impossible challenges for K-12 investigation and remediation. That should be clarified and added there as well.

- **Supportive Measures.** Section 106.44(b) For institutions of higher education, recipient will not be “deliberately indifferent” when it offers and implement supportive measures designed to effectively restore or preserve access to programs or activities. Similar language does not exist with the recipient as an elementary or secondary school. This should be added. See rationale above.

- **Emergency Removal.** Section 106.44(c) contains an emergency removal procedure that allows the recipient to remove the accused if the recipient undertakes an individualized safety and risk analysis and determines that individual’s an immediate threat to the health or safety of students or employees; after notice and an opportunity to challenge the decision. Subsection (d) indicates nothing shall preclude a recipient from placing a non-student employee accused on administrative leave pending the pendency of an investigation. Does that mean we have to meet the standards for emergency removal in order to implement an administrative reassignment to home? We would recommend adding language to clarify that nothing shall prevent a K-12 institution from using its discretion to implement an alternate assignment for students or staff during the pendency of an investigation, provided the same is otherwise permitted by law.

- **Actual Knowledge.** In section 106.44(e) the definition of “actual knowledge” should be clarified to explain that a report in the K-12 setting to a “teacher” would be to a teacher, other than a substitute teacher and a teacher in the respondent school district. For example, an alleged sexual harassment incident happened during an athletic competition held in school district “A.” The alleged perpetrator is a student in school district “A” and the victim is a visiting student
athlete who attends school district “B” and reports to a teacher in their home district; i.e. a report to school district “B” would be insufficient to provide actual notice to school district “A”. This would occur with students from different resident school districts who attend programs outside of their home district and those attending state-approved private schools as well.

- **Treatment.** Clarification of the type of “treatment” referenced in Section 106.45(a) that may constitute discrimination is needed. The “treatment” should be clarified to mean that by a reasonable and objective standard, the “treatment” is sufficiently severe or pervasive so as to interfere with a student’s educational opportunities and/or create a hostile work environment.

- **Responsible.** A respondent must not be “responsible” as contemplated in Section 106.45(iv) for the alleged sexual harassing conduct until a determination regarding responsibility has been made at the conclusion of the grievance procedure. “Responsible” should be defined to exclude reasonable safety measures used to separate the alleged victim and the accused. In addition Section 106.45(vii) should reference the standard of evidence used to determine “responsibility” should be defined as that required by relevant law.

- **Timelines.** With regard to the timelines for conducting an investigation and what may constitute good cause for the extension of a timeframe, where the regulations state at Section106.45(b)(1)(v) “good cause may include,” the phrase “but not be limited to” should be added directly thereafter, so the list of examples could not be construed as exhaustive.

- **Written Notice.** Section 106.45 (b)(2) obligates the recipient “upon receipt of a formal complaint” to provide written notice to the parties who are known, notice of the grievance procedure, notice of the allegations constituting a potential violation of the recipient’s code of conduct including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. This
recommendation goes against good investigation practices where there is some level of inquiry prior to notifying the accused to determine whether the complaint is facially valid. In addition, the accused is not generally apprised of details prior to the interview as the accused’s response is often measured incrementally as he/she is told of the details. Telling the accused of the identities of parties involved can be problematic in that it subjects victims and/or witnesses to acts of retaliation that can, at the very least, have a chilling effect on the investigation. This notice must also advise the parties of the right to inspect and review evidence; not something typically done at this stage and, at times not done at all. This is particularly important with regard to K-12 student-student or student-teacher allegations. Young students are a more vulnerable population. The obligate to provide the accused with due process and an opportunity to be heard should not artificially be imposed early in the process as contemplated by the regulations. Rather, due process and an opportunity to be heard is something to which the accused is entitled before a decision is made. Respondents must be afforded the freedom to conduct an investigation that is appropriate under the circumstances and to make judgments about when to share information that will not compromise the investigation or make vulnerable those who participate in it. Considerations for due process are certainly valid, but should not be artificially imposed at a particular point in the investigation by regulation.

- **Notice Requirement.** Section 106.45 (b)(2)(ii) references an ongoing notice requirement. When must a recipient provide notice of the additional allegations to the parties should be clarified. This should explain that notice shall be provided in writing and in a manner to ensure that both the victim and the accused are provided an opportunity to respond to the additional allegations prior to the conclusion of the investigation.

- **Discussion of Investigation.** Section 106.45 (b)(3)(iii) provides, in the context of investigating a formal complaint, the recipient must “not restrict the ability of either party to discuss the allegations under the
investigation and to gather and present relevant evidence.” It is not uncommon for participants in a sexual harassment investigation to be advised that they shall refrain from discussing the matter with anyone other than their personal representatives. This is done for many reasons, including, protecting the identity of complainants and witnesses, avoiding acts of retaliation or intimidation, maintaining the sanctity of the investigation while it is ongoing. We believe it is essential to preserve flexibility for the respondent to advise those involved in the investigation to refrain from discussing it with others.

- Advisors. Section 106.45 (b)(3)(iv) has language which affords the parties the opportunity during any grievance proceeding to be accompanied by the “advisor of their choice.” This is certainly problematic with regard to employees who are members of unions as we routinely refuse requests for counsel to attend under the theory that we are only obligated to recognize their collective bargaining agent, not their lawyer. Even having the lawyer for the victim in the room is problematic as that individual’s interest may be civil litigation against the Respondent. As a general rule, personnel conferences should not involve lawyers. This may also present concerns with the K-12 student population. There student confidentiality rights concerns are present and additional adult/legal presence may be intimidating, in turn interfering in the investigatory or adjudicatory process.

- Notice. Section 106.45 (b)(3)(v) obligates the recipient to give notice of interviews, etc., with sufficient time for the party to prepare to participate. Time is of the essence in these investigations and the delays that this creates can be untenable. Typically, the accused is administratively reassigned to home with pay, which means the school district will be paying the employee pending the investigation, and that can be costly. The regulations should not dictate timelines in this regard.

- Release of Evidence. Section 106.45 (b)(3)(vi) provides that prior to completion of the investigative report, the recipient must send each
party and the party’s advisor evidence in an electronic format and the party shall have at least 10 days to submit a written response prior to completion of the report. Release of this information creates a vulnerability for the recipient as documentation that might otherwise be kept as confidential may lose its designation as such. What if the questions submitted are not answered? The regulations should clarify that no negative inference may be drawn from an accused refusal to answer and that an alleged perpetrator must be given notice of the privilege against self-incrimination if the allegations involve criminal conduct.

- Decision Maker. Section 106.45(b)(4) sets forth that decision-makers cannot be the same person as the Title IX Coordinator or investigators. This may be very onerous for compliance purposes, especially in smaller school districts with limited personnel capable of performing these functions. An investigator should be permitted to be the same person as he/she who issues the final decision as opposed to requiring as two tier process.

- Conflict of Interest. Section 106.45(b)(1)(iii) contains requirements that an investigator, coordinator or decision-maker must not have a conflict of interest or a bias against the complainants or respondents in general or specifically. It is critical to clarify that an investigator, coordinator or decision-maker shall not be deemed bias against a specific complainant or respondent, per se, by virtue of having conducted an investigation previously involving the same subject(s), regardless of the outcome/findings of such prior investigation. The people trained to serve in such roles should be presumptively unbiased notwithstanding having previously investigated a matter involving one or more of people. Absent such a presumption it may be impossible for a school district to have qualified and trained personnel, as there are often multiple complaints filed by the same complainant or against the same respondent and this could be quite costly and require the hiring of outside investigators, which could otherwise, absent such clarification, be a negative externality of this provision.
Thank you for your consideration of the comments set forth above. Should you feel we can be of assistance in connection with the evaluation of these concerns and/or the development of regulatory language, please do not hesitate to contact me.

Very truly yours,

Thomas M. Volz
Advocacy Director

c. Board of Directors