

## MEMORANDUM

**To:** Senator Brian Campion

**From:** Jeffrey J. Nolan, Esq.  
Partner, Holland & Knight, LLP

**Date:** March 13, 2024

**Re:** Resources Cited in March 12, 2024 Testimony Regarding Amnesty Section of Campus Sexual Harm Bill

Dear Senator Campion:

As you requested, I am sending this memorandum to provide the committee with the citations to the resources cited in my March 12, 2024 testimony regarding the campus sexual harm bill. My professional background, publications and speaking engagements regarding Title IX and college and university responses to sexual harassment and other forms of sexual assault (“sexual harassment”) are summarized on my website, here:  
<https://www.hklaw.com/en/professionals/n/nolan-jeffrey-james>.

In my experience, amnesty provisions are usually included in college and university sexual harassment policies, particularly following an [April 4, 2011 Dear Colleague Letter](#) issued by the U.S. Department of Education, which encouraged their adoption. That Dear Colleague Letter provided in pertinent part:

The education programs also should include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities. Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved.[ ] As a result, schools should consider whether their disciplinary policies have a chilling effect on victims’ or other students’ reporting of sexual violence offenses. For example, OCR recommends that schools inform students that the schools’ primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence.

When the U.S. Department of Education promulgated the [current Title IX regulations](#) on May 19, 2020, it mandated an amnesty provision in its anti-retaliation section, as follows:

§ 106.71 Retaliation.

(a) *Retaliation prohibited.* No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this

part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. . . . Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(b) *Specific circumstances.* (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

34 C.F.R. § 106.71 (emphasis added). The emphasized language prohibits colleges and universities from charging individuals who report sexual harassment, seek formal or informal resolution of same, or seek related supportive measures with code of conduct violations that do not involve sexual harassment but arise out of the same facts or circumstances as the reported incident (e.g., alcohol or drug policy violations), where such charges have the purpose of interfering with any right or privilege secured by Title IX.

On July 12, 2022, the Biden Administration’s Department of Education issued a [Notice of Proposed Rulemaking](#) (“NPRM”) which outlined changes it proposed to make to the current Title IX regulations. The pertinent section of the NPRM provides in pertinent part:

§ 106.71 Retaliation. A recipient must prohibit retaliation in its education program or activity. When a recipient receives information about conduct that may constitute retaliation, the recipient is obligated to comply with § 106.44. A recipient must initiate its grievance procedures upon receiving a complaint alleging retaliation under § 106.45. As set out in § 106.45(e), if the complaint is consolidated with a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures initiated by the consolidated complaint must comply with the requirements of §§ 106.45 and 106.46.

Prohibited retaliation includes but is not limited to:

(a) Initiating a disciplinary process against a person for a code of conduct violation that does not involve sex discrimination but arises out of the same facts and circumstances as a complaint or information reported about possible sex

discrimination, for the purpose of interfering with the exercise of any right or privilege secured by Title IX or this part; or

(b) Peer retaliation.

Federal Register, Vol. 87, No. 132, July 12, 2022 at 41,579 (emphasis added). As you can see, the emphasized language is virtually identical to the anti-retaliation language in the current regulation, but significantly, the proposed regulation does not include subsection (b), which makes an exception for bad faith reporting. The Biden Administration's rationale for eliminating the exception for bad faith reporting is summarized in the Preamble to the NPRM in part as follows:

#### Section 106.45(h)(5) Prohibition on Discipline Based Solely on Determination

*Current regulations:* Section 106.71(b)(2) provides that when a recipient charges an individual with a code of conduct violation for making a materially false statement in bad faith during a Title IX grievance proceeding, such an action is not retaliatory as long as the recipient did not base its determination that a person made a materially false statement in bad faith solely on the outcome of the grievance proceeding.

*Proposed regulations:* Proposed § 106.45(h)(5) would prohibit a recipient from initiating a disciplinary process against a party, witness, or other participant in a recipient's grievance procedures under proposed § 106.45, and if applicable proposed § 106.46, for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination of whether sex discrimination occurred. This proposed provision incorporates the relevant content of current § 106.71(b)(2), which the Department would fully remove.

*Reasons:* In order to provide an education program or activity free from sex discrimination, a recipient must implement grievance procedures under proposed § 106.45, and if applicable proposed § 106.46, in a way that does not impede parties, witnesses, and other participants from providing information to the recipient regarding sex discrimination that may have occurred in the recipient's program or activity. Allowing parties, witnesses, and other participants to participate fully in the recipient's grievance procedures is also integral to ensuring that a recipient's efforts to address sex discrimination are equitable. Proposed § 106.45(h)(5) would further these goals by providing parties, witnesses, and other participants in a recipient's grievance procedures with assurance that the recipient cannot discipline them for making a false statement or engaging in consensual sexual activity based solely on the determination of whether sex discrimination occurred. The Department proposes changing the word "person" in current § 106.71(b)(2) to the phrase "parties, witnesses, or other participants" to make clear that this provision protects any form of participation in the recipient's grievance procedures under proposed § 106.45, and if applicable proposed § 106.46. In light of the Department's concern about chilling participation in these grievance procedures, the Department believes that providing protection for all

participants would best ensure a thorough and equitable process. The Department also notes that these prohibitions would apply regardless of whether the recipient intended use the disciplinary process to retaliate against a person. If a recipient were to engage in this type of discipline for the purpose of retaliating against a party, witness, or other participant in its grievance procedures, it would be in violation of both proposed §§ 106.45(h)(5) and 106.71(a). False statements. As explained in greater detail in the discussion of proposed § 106.71, the Department proposes removing current § 106.71(b)(2). Current § 106.71(b)(2) provides that it is not retaliatory to charge an individual with a code of conduct violation for making a materially false statement if the determination that the statement was materially false was not based solely on the recipient's determination of responsibility in the underlying grievance proceeding. The Department proposes explicitly stating in proposed § 106.45(h)(5), which applies to all grievance procedures under Title IX, that a recipient must not discipline a person for making a false statement based solely on a determination from the recipient's grievance procedures that the person's allegations, arguments, or other statements were not supported by the evidence. In the preamble to the 2020 amendments, the Department explained that it added current § 106.71(b)(2) in response to comments stating that "lying should not be protected and that any retaliation provision should explicitly exclude from protection those who make false allegations or false statements during a grievance process." 85 FR 30537. During the June 2021 Title IX Public Hearing and in listening sessions with stakeholders, OCR received feedback expressing confusion generated by the wording of current § 106.71(b)(2). Stakeholders requested that the Department clarify that it would be retaliatory to discipline a student for making a false report of sex discrimination solely because the recipient found in favor of the respondent. The Department acknowledges that the wording of this prohibition in current § 106.71(b)(2) as an exception to a general rule permitting discipline for false statements might have caused confusion. The Department is also concerned that current § 106.71(a) may have a chilling effect on a person's participation in a recipient's grievance procedures for fear of being disciplined. As a result, the Department proposes replacing the current provision with proposed § 106.45(h)(5), which would make clear that the recipient must not initiate its disciplinary process against a person for making a false statement based solely on a determination in the recipient's grievance procedures that sex discrimination did not occur including, for example, when the recipient found the person's statements were not supported by the evidence. The Department also proposes removing the term "materially" from current § 106.71(b)(2) and referring simply to "false" statements. The Department now believes that allowing a recipient to discipline a person for making any false statement based solely on its determination in the underlying complaint of sex discrimination could chill participation in the grievance procedures. This proposed change would not only address concerns about adequate protection for those participating in the recipient's grievance procedures but also would maintain the recipient's discretion to discipline those who make false statements based on evidence other than the outcome of its grievance procedures. Consensual sexual activity.

Proposed § 106.45(h)(5) would also clarify that a recipient must not discipline a person for having engaged in consensual sexual activity when that determination is based solely on the findings of the recipient's grievance procedures. As noted in the discussion of proposed § 106.44(b), the Department recognizes that discipline for collateral conduct violations, including consensual sexual conduct, may create a barrier to participation in the recipient's grievance procedures. The Department received comments as part of the June 2021 Title IX Public Hearing requesting a broader prohibition on discipline for collateral conduct violations such as consensual sexual conduct to ensure that the regulations address a broader range of situations in which a complainant may fear that discipline for disclosing information about sexual conduct in a sex-based harassment grievance procedure. In addition, the Department notes that this concern regarding discipline for consensual sexual conduct has been raised by plaintiffs in Title IX litigation as well as in OCR's enforcement practice. See, e.g., *Doe v. Gwinnett Cnty. Sch. Dist.*, Civil Action No. 1:18-CV-05278-SCJ, 2021 WL 4531082, at \*6 (N.D. Ga. Sept. 21, 2021); OCR Case No. 06-11-1487, *Henderson Indep. Sch. Dist.* (June 14, 2012) (letter of finding), <https://www2.ed.gov/about/>.

Federal Register, Vol. 87, No. 132, July 12, 2022 at 41,490. This analysis by the Department of Education incorporates public input received on a national scale, and the Department's analysis of how to strike the best balance between encouraging reporting and permitting colleges and universities the discretion to take disciplinary action as appropriate.

The rulemaking process for the new Title IX regulations is ongoing. Most observers expect the new regulations will be issued in late May or early June 2024. At that point we will know how the final version of the federal amnesty provision will be phrased.

Given this well-developed body of existing federal law, the highly nuanced issues involved, and the flux introduced by the pending rulemaking process, I would note that the amnesty provision in the bill under consideration by the committee is unnecessary, duplicative of common institutional policies and such law, and may conflict with the final revised Title IX regulations. At the very least, it will create unnecessary confusion between the state and federal legal obligations of Vermont colleges and universities in this complicated area.

Thanks very much to you and the committee for being willing to consider my perspective on these issues. Please let me know if the committee has follow-up questions.