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THE U.S. DEPARTMENT OF EDUCATION2020 TITLE IX REGULATIONS:
Major Implications for STEMM Academic and Professional Disciplinary Societies and Higher Education

Prepared for Members of the Societies Consortium on Sexual Harassment in STEMM

July 14, 2020 (updated)

OVERVIEW

On May 6, 2020, the U.S. Department of Education (USED) published Title IX regulations on sexual harassment, which amend longstanding regulations and guidance to recipients on implementing Title IX of the Education Amendments of 1972. The effective date of USED's regulations is August 14, 2020,[i] unless a court orders a delay. USED has already been sued in the federal district courts for Maryland, the District of Columbia, the Southern District of New York, and Massachusetts by plaintiffs seeking to invalidate and enjoin implementation of the Title IX regulations.[ii]

This guidance addresses three major areas of relevance to academic and professional disciplinary societies in science, technology, engineering, mathematics and medical (STEMM) fields (societies) and institutions of higher education (IHEs). It:

1. Highlights USED's major substantive regulatory changes and their likely implications for IHEs and other entities that are subject to them (collectively, "covered entities").
2. Addresses limitations on how covered entities may respond to certain sexual harassment that USED's regulations do not cover.
3. Explores key circumstances in which a society would be subject to USED's or other federal funding agencies' Title IX regulations.

Nearly all IHEs will be subject to these regulations. Because many leaders and members of societies are also employed or studying at IHEs, their conduct in either setting may affect the inclusivity and excellence of both settings. Whether or not they are subject to USED's regulations, societies have an important interest in understanding what IHEs must and may change in their policies and practices to address sexual harassment. More broadly, societies have an interest in understanding where challenges may exist to harmonizing conduct expectations and practices across settings in STEMM and other fields so that those challenges may be addressed.

This guidance is not comprehensive, nor does it constitute entity-specific legal advice. Please consult with your counsel before taking action on these issues.

THE TAKEAWAYS

The final USED regulations have a significant effect, arising from their:

- **Limited definition of Title IX-covered sexual harassment;**
- **Limited program and geographical reach;**
- **Limited definition of what constitutes an entity's knowledge of sexual harassment;**
- **Limited response requirements for incidents of sexual harassment;**
- **Requirement that an identified target or Title IX Coordinator file a formal complaint before an IHE or other entity that is subject to the regulations is permitted—formally or informally—to resolve an incident between an identified target and an accused;**
- **Requirement that an identified target be (or is attempting to be) a current participant in the educational program/activity at the time a formal complaint is filed (making it impossible to file a complaint if a target leaves the organization);**
- **Prescriptive formal grievance process that is mandatory when a formal complaint is filed; and**
- **Requirement that covered entities that seek to address sexual harassment beyond the Title IX regulations' limited reach, adopt separate policies and processes (for Title IX sexual harassment and other sexual harassment)—even when the same parties and incidents are involved.**

In cumulative effect, the final regulations establish impediments to the discovery and prevention of harassment, create disincentives for individuals to come forward with claims of harassment, and establish administrative burdens on addressing sexual harassment, both within and beyond the scope of the regulations.

I. MAJOR SUBSTANTIVE CHANGES IN TITLE IX POLICY IN LIGHT OF THE USED's FINAL 2020 TITLE IX REGULATIONS

As used in this chart, an "entity" is an IHE or other recipient of USED assistance for an education program that is subject to Title IX.

ISSUE	MAJOR CHANGE	TAKEAWAYS
LIMITED DEFINITION OF TITLE IX-COVERED SEXUAL HARASSMENT	USED's regulations define Title IX "sexual harassment" as quid pro quo, hostile environment and assault. They define hostile environment harassment as "unwelcome conduct…so severe, pervasive **and** objectively offensive" that it would "effectively deny" a "reasonable person" of "equal access" to the entity's education program/activities. This standard replaces the prior USED standard of "severe, persistent, **or** pervasive" conduct that "alters" or "adversely affects" participation in a program or activity. (Emphasis added.) Quid pro quo is limited to situations where an employee is the harasser. The definition of assault explicitly includes dating and domestic violence and stalking, rape and other criminal sexual assault as defined by federal law.	This change in the hostile environment definition adopts a Supreme Court standard that the Court applied to private suits for monetary damages (not to USED's enforcement authority); and almost certainly narrows the conduct deemed to violate Title IX under USED rules.[iii] In its 2001 sexual harassment policy guidance on this issue, USED asserted that the two standards ("and" vs. "or; " "deny" vs "alter") "capture the same concept" in application.[iv] The act of amending the regulatory language in 2020 to adopt the more restrictive language, however, appears to indicate an intent to assert a difference. This can be expected to result in single instances of severe sexual harassment—as well as repeated instances of consequential but less individually severe sexual harassment (including some forms of gender harassment)—no longer being within the scope of USED's prohibitions. Also, both Title VII (the federal employment law) and Title IX apply to sexual harassment of employees. Title VII applies an "or" hostile environment standard for agency enforcement, as well as for private damages suits. The Title IX regulations now apply an "and" standard in all contexts, when the Supreme Court had required that discordant result only for private damages suits under Title IX. Quid pro quo harassment by students of other students appears not to be covered (e.g. when a student who is not an employee is in a position of power to determine participation in special class projects or co-curricular activities). Volunteers also may not be covered.

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LIMITED GEOGRAPHICAL AND PROGRAM REACH OF TITLE IX COVERAGE	Actionable harassment under USED's regulations must occur in an entity's education program/activity, in circumstances where the entity has "substantial control" of both the accused and the setting/context where the harassment occurs. (Such settings are deemed to include buildings controlled by recognized student organizations.) Harassment occurring abroad is excluded from the scope of the regulations.	Reflecting a narrower interpretation of circumstances to which an entity's Title IX responsibility extends than past USED policy, this change will result in many harassment situations that no entity is obligated to resolve, even when one or more entities could take general actions to address the effects of harassment on their communities. USED narrowly interprets the Title IX statute that prohibits subjecting a "person in the U.S." to sexual discrimination in "any education program or activity receiving Federal financial assistance."[v] A U.S.-based entity with a program conducted both abroad and in the U.S. would be unable to consider a single individual's conduct in both locales to decide responsibility for Title IX sexual harassment affecting the program in the U.S., or to address the individual's sexual harassment in both places under a single process when conduct abroad affects the program in the U.S. This limitation affects, e.g., research projects conducted by the same individuals in the U.S. and abroad, as well as academic travel abroad associated with a U.S.-based educational program.
REQUIRED INSTITUTIONAL NOTICE SUFFICIENT TO TRIGGER AN OBLIGATION TO RESPOND	Under the regulations, an entity's "actual knowledge" of Title IX sexual harassment in its education program/activity in the U.S. occurs only when a Title IX Coordinator or another official with "authority to institute corrective measures on behalf of the [entity]" acquires that knowledge. And only with that actual knowledge does the entity have an obligation to respond promptly in a general manner, with supportive measures and information about filing formal complaints and the	This change significantly limits the circumstances in which institutions must respond even generally to incidents of sexual harassment. The new regulations replace USED's prior standard that required an entity to respond where a "responsible employee" knew or should have known about the harassment.[vi] This eliminates a regulatory incentive for entities to become aware of problems occurring in their programs and prevent recurrence. Furthermore, that incidents are known to employees with significant responsibility or senior advisory roles is not enough. Knowledge of an employee who is obligated to report harassment or to inform students on how to report,

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	grievance process.	or who is otherwise in a position that students would reasonably expect to have authority to institute corrective measures—but who does not have that authority—would not create actual knowledge by the entity.[vii] An entity may voluntarily establish a greater obligation to become aware of problems than this or the deliberate indifference standard in the USED regulations require; and may respond generally to the effects of harassment, in its community. Many IHEs can be expected do so. However, USED's regulations will no longer require that action.
DELIBERATE INDIFFERENCE	Even when an institution has actual knowledge and an obligation to respond, the institution satisfies its obligation if is not "deliberately indifferent," i.e., not "clearly unreasonable in light of known circumstances." The character of response that is required and permitted is limited to providing information about the complaint and grievance processes, and providing information about and implementing non-punitive "supportive measures" to deter sexual harassment and restore equal access to the education program. Supportive measures must not impose an undue burden, discipline or other consequences on the accused, unless and until a formal complaint is filed and the formal grievance process required by the regulations or, in limited circumstances, an informal resolution, is completed. Among other limitations, no-contact orders must be	The limited response required by this standard eliminates regulatory incentives to discover recurring or widespread problems. The regulations also lack the clarity of previous guidance that supportive measures must extend to witnesses and others who are affected, in addition to the identified target.

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	"mutual" and supportive measures must be kept confidential, unless that would impede their implementation.	
FORMAL COMPLAINTS AND GRIEVANCE PROCESS	The new regulations provide that when a formal complaint is filed, an investigation of all allegations is required. Also, unless the entity offers and the identified target and accused agree to an informal resolution, a formal grievance process is required. For IHEs, the requirement is a live hearing. The parties' advisors (who may be lawyers) must be able to question and cross examine the parties and witnesses, who must be present in real time (though they may be in separate rooms or participate virtually). A written statement may not be relied upon to determine responsibility, if the party- or witness- author doesn't submit to cross-examination. For all other entities (K-12 and other public and private entities that are subject to USED's regulations), the entity may opt to conduct a hearing or to provide the parties an opportunity to submit written questions to each other and witnesses via the decision-maker (after receiving the investigation report), and then to receive answers and submit limited written follow-up questions. The grievance process is to be promptly conducted, but temporary delays are permitted for "concurrent law enforcement activity" or "absence of a party, a party advisor, or a witness."	Few targets file formal complaints—and students are highly unlikely to file formal complaints against faculty or staff—due to fear of adverse career or education and relationship impacts.[viii] For those who wish to file a formal complaint, the USED regulations have limited the options for when and by whom a formal complaint may be filed. An identified target who feels safe to file only after leaving an IHE, other covered entity, or the field, is now unable to file. That creates a situation where an entity is unable to take action against the accused, formally or informally, for known, otherwise Title IX-covered sexual harassment. Anyone may report sexual harassment for purposes of initiating general supportive measures. However, only an identified target or Title IX Coordinator (regarding an identified target who satisfies the participation criteria) may file a formal complaint, which is a prerequisite to an entity being able to take action against a responsible perpetrator. Once a formal complaint is filed, the identified target loses control over whether a formal or informal resolution will be pursued. Both parties must agree to an informal resolution, and either party may require resumption of a formal process. Due process is important before consequential action is taken against an individual in an adjudicatory process. However, USED's limitations on informal resolutions by IHEs and other entities—and its required hearing process for IHEs—eliminate an IHE's or other entity's discretion on how best to advance its mission in a fair and inclusive manner. Also, permitting an entity to dismiss a resolution process upon an accused's departure from the entity could enable an accused to

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	A formal complaint alleging actionable Title IX sexual harassment is required before an entity is permitted to conduct a formal grievance process or to offer an informal resolution between an accused and identified target. And to file a formal complaint, an individual must be the identified target and must be participating in, or attempting to participate in, the education program/activity at the time of filing. (The Title IX Coordinator also **may** file a complaint concerning an identified target who satisfies the participation criteria.) An informal resolution may be pursued only if both parties agree. Either party may compel resumption of the formal grievance process prior to a final resolution. If a complaint covers both Title IX and other sexual harassment, it and the grievance process must be dismissed if the complaint doesn't meet all regulations' requirements to sustain the Title IX claim. To pursue the non-Title IX harassment, the entity must have a separate policy and process. (See part II below.) An entity may end a Title IX process prior to its completion, if an accused is no longer enrolled or employed by the entity, the identified target requests dismissal, or circumstances prevent collection of sufficient evidence to make a determination.	change institutions and avoid an allegation's determination. It can be difficult for an accused to participate in an IHE's or other entity's process, while preserving self-defense rights when law enforcement is engaged; but delays for law enforcement can be substantial and burden the identified target. This policy decision is left to the entity. The USED regulations limit the circumstances in which community-building and restorative processes may be used to resolve incidents between individuals. General, non-punitive, community-building, not aimed at a specific accused, may be pursued, however, to advance a more inclusive climate and culture.

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	Harassment by an employee of a student may never be resolved informally.	

II. ADDRESSING SEXUAL HARASSMENT BEYOND WHAT IS REQUIRED BY THE USED TITLE IX REGULATIONS.

A Society's or IHE's policies may create inclusive conduct standards that exceed the requirements of Title IX regulations within limits addressed below, but still must also satisfy the regulations' specific requirements.

Good policy that goes beyond the USED regulations' requirements for Title IX sexual harassment. An entity that is subject to Title IX and wants to adopt policies that go beyond the regulations' baseline requirements for Title IX sexual harassment, may do so only when such action is not at odds with the regulations' requirements. For example, entities are likely able to conduct investigations for the sole purpose of taking general restorative actions, and should be able to take general actions (not aimed at or imposing consequences on an accused), to address the effects of sexual harassment in their communities and prevent their recurrence.

Addressing sexual harassment that is not within the USED regulations' reach. If an entity wants to address sexual harassment that is outside of the Title IX regulations' reach, the regulations require the entity to create a separate policy and process to address and determine any consequences for that non-Title IX sexual harassment.[ix] This requires such entities to adopt and implement bifurcated policies and processes—one set to address Title IX sexual harassment and another set to define and address other sexual harassment. That will likely create administrative inefficiencies and confusion, causing some entities to avoid that burden by just complying with USED's Title IX regulations and not adopting more inclusive policies.

Other laws. Tort (negligence) law and state non-discrimination and anti-harassment laws may impose obligations on entities to exercise reasonable care to prevent and respond to sexual harassment (particularly when it causes foreseeable physical, economic/career, or, in some cases, severe emotional harm), even when the Title IX regulations do not.[x] However, the USED

regulations provide that compliance with the regulations "is not obviated or alleviated by any [conflicting] State or local law." Similar to the constraints on a covered entity's policies, if certain provisions of state or local law and the USED regulations cannot be reconciled, the USED regulations govern. Note also that the USED regulations require that the full investigatory record "directly related to the allegations" be made available to the accused, the identified target, and their advisors—even records that will not be relied upon to make a determination of responsibility. In some circumstances, this may create a conflict with requirements of the Family Educational Rights and Privacy Act and its regulations which, with limited exceptions, prohibit the disclosure of certain personally identifiable student "education records" maintained by an IHE without the student's consent.

III. THE EXTENSION OF TITLE IX'S COVERAGE TO ACADEMIC AND PROFESSIONAL DISCIPLINARY SOCIETIES: WHAT WE KNOW AND WHAT WE DON'T

Consistent with Title IX's language,[xi] the USED regulations apply to **all** "education programs or activities" operated by any "recipient" of "federal financial assistance" (funding, equipment, real estate, staffing or other federal assistance) that is administered by USED for any education program or activity.[xii] "Education programs or activities" mean "any academic, extracurricular, research, occupational training, or other educational program or activity operated by a recipient." For IHEs that receive USED assistance, the effect is application of the regulations institution-wide, including to all IHE-associated activities of their faculty, researchers, staff and students, who also may be members of societies. USED's final regulations, however, do not impose a regulatory obligation on an IHE to respond to a faculty's, researcher's, staff's or student's harassing conduct in a Society role or activity (or vice versa)—even if that harassment affects both entities' education environment.

USED and the Department of Justice (DOJ) have not issued guidance specifically on the question of whether Societies are subject to Title IX or which agencies' implementing regulations apply if they are. However, the U.S. Supreme Court, [xiii] USED regulatory language, and DOJ guidance, as well as a Common Rule published by DOJ and covering many other federal funding agencies, explicitly provide that Title IX coverage is not limited to IHEs and K-12 institutions, but extends to all recipients of federal assistance, from any federal agency, for any education program.[xiv] If a Society receives support from USED for an education program (broadly defined and including research), the USED regulations almost certainly apply to the Society's education programs.

The Common Rule further makes clear that Title IX applies to all federal agencies that fund education programs and activities, including, in addition to academic programs, workshops, training programs, research, vocational training, and any other education program, broadly defined. If a Society receives support from another federal agency for any education program, that agency's Title

IX regulations and required compliance assurances apply to the Society's education programs. DOJ noted at the time the Common Rule was promulgated in 2000 that most agencies' regulations were modeled on the USED's regulations, because USED's regulations have had the most robust public, Congressional and court review, and promoting consistency is in the agencies' and recipients' interests. In response to comments at the time that USED's Title IX regulations might not be a good "fit" when applied to educational programs and activities conducted "outside traditional educational institutions," DOJ stated that individual funding agencies "may consider developing agency-specific guidance to address particular areas of concern." It is unclear whether these other federal agencies will conform their Title IX requirements to USED's significantly amended regulations.[xv]

If a Society and IHE are working jointly on a project that is subject to Title IX, but different agencies are funding the Society's and IHE's work, a researcher's harassing conduct on the project might be subject to two different (and no longer similar) Title IX regulations, perhaps with different standards for when the Society and IHE must or may respond, and how. Generally, agencies other than USED articulate high-level principles of prompt and equitable resolution of sexual harassment and provide more flexibility as to approach than the USED regulations do. That could make harmonizing the different regulations' easier, as a technical matter; however, USED's prescriptive regulations and other agencies' more flexible approaches may create confusion about expected conduct and be difficult to coordinate in practice.

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[i] The Department's press release, the final regulations and analysis, and related documents, and a video are available here.

[ii] *See Know Your IX, et. al v. DeVos*, Case 1:20-cv-01224 (U.S. D.Ct. for the District of Maryland, May 14, 2020); *Pennsylvania, et. al v. DeVos,* Case 1:20-cv-01468 (U.S. D.Ct. for the District of Columbia, June 4, 2020) (filed by the Attorneys General for Pennsylvania, New Jersey, California, Colorado, Delaware, District of Columbia, Illinois, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin); *New York v.U.S. Dept. of Ed., et. Al*, 1:20-cv-04260 (U.S. D.Ct. for the Southern District of New York, June 4, 2020); *Victim Rights Law Center v. DeVos, et al.,* Case 1:20-cv-11104 (U.S. D.Ct. for the District of Massachusetts, June 10, 2020).

[iii] While the final USED regulations adopt language from U.S. Supreme Court precedent, that language may be broader than required by that precedent. The standard relevant to the authority of private parties to sue for damages (the subject of these Supreme Court cases) is more limited than standards relevant to USED's enforcement authority. See *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651-52 (1999); n. vii, *infra*.

[iv] Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (2001), available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html, p. vi (regardless of the "and" in *Davis* and the "or" in USED's 2001 policy, the two are "intended to capture the same concept," i.e., that conduct must be sufficiently serious to adversely affect a student's ability to benefit from or participate in an education program.)

[v] 20 U.S.C. 1681(a).

[vi] The 2001 guidance provided examples of "responsible employee," including employees with responsibility to take action, employees with a duty to report, or "an individual who a student could reasonably believe has the authority or responsibility to report or take action." https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html, p. 13. It further provided examples of other ways a school could have learned about harassment such as a parent reporting to a bus driver, a teacher witnessing the harassment, reports about harassment in the local community or the media, notice of some instances that should trigger an investigation that would lead to discovery of other incidents, or the existence of widespread, openly-practiced, or well-known harassment in the school community. *Id.* In cases of harassment of students by employees in the context of providing aid, benefits or services, the school was responsible to remedy the effects of the harassment regardless of notice. *Id.* at p. 10.

[vii] The Supreme Court has rejected an "agency" basis (imputing responsibility to an entity for a teacher's or third party's independent acts) and a general negligence basis (holding an entity responsible for what an entity "should have…known"), for the purpose of determining an entity's liability for damages to a private party upon a violation of Title IX. The Court has held that an entity is responsible only for its own misconduct under Title IX. To be liable for damages to private parties, an entity must intentionally violate Title IX, including by having actual knowledge of student-on-student, teacher-on-student, or other third-party harassment and being "deliberately indifferent" in failing to respond. See *Davis* 526 U.S. at 641; *Gebser v. Lago Vista Independent School Dist*., 524, U.S. 274, 283 (1998). The new USED regulations go beyond these holdings by applying them to USED's own enforcement actions. USED's prior regulations had rejected an actual knowledge standard as applying to USED's own enforcement authority. The prior regulations allowed USED enforcement for sexual harassment that an entity should have known about—if it had exercised reasonable diligence—because the agency's enforcement process always gives a recipient actual notice of a problem and an opportunity to correct it before USED takes any action to seek to terminate federal funding or to impose other corrective action. *See* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html, pp. iii-iv (noting that commenters uniformly agreed that the *Gebser* and *Davis* standards applied only to private actions for money damages and that OCR's administrative enforcement standards remained valid); *See also Gebser*, 524 U.S. at 288-89.

[viii] *See* The National Academies of Science, Engineering and Medicine, Consensus Study Report: *Sexual Harassment of Women, Climate Culture and Consequences in Academic Sciences, Engineering and Medicine*, pp. 81-82, 106-07.

[ix] A covered entity must dismiss a complaint and grievance process if the allegations (even if proved) could not constitute sexual harassment, within USED's regulatory definition and geographical limitations—but may separately address the matter under another provision of the entity's conduct code.

[x] *See Davis*, 526 U.S. at 644 (even where liability does not arise under Title IX, state negligence law may impose liability on schools "to protect students from tortious acts of third parties," including teachers and others.)

[xi] "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a).

[xii] 34 CFR 106.2(g), (h), and (i). "Recipient" is defined in longstanding and still effective provisions of USED's regulations to include, in addition to public authorities, "any public or private agency, institution, or organization, or other entity, or any person" that receives federal financial assistance, 34 CFR 106.2(i), if the assistance is provided for an "education program or activity." *Id*.

[xiii] *See Davis*, 526 U.S. at 638 ("Federal departments or agencies with the authority to provide financial assistance are entrusted to promulgate rules…to enforce the objectives" of Title IX.); n. xiv, *infra*.

[xiv] 34 CFR 106.2(h), 106.31 (these sections are longstanding and have not been amended by the 2020 USED Title IX regulations; see also, https://www.justice.gov/crt/fcs/TitleIX-SexDiscrimination ("Title IX applies, with a few specific exceptions [e.g., religious and certain single sex schools], to all aspects of federally funded education programs or activities. In addition to traditional educational institutions such as colleges, universities, and elementary and secondary schools, Title IX also applies to any education or training program operated by a recipient of federal financial assistance."). https://www.justice.gov/crt/federal-coordination-and-compliance-section-152 (referencing USED's regulations for recipients of all federal funding).

[xv] 65 Fed. Reg. 52857, 52859 (August 30, 2000), available at https://www.govinfo.gov/content/pkg/FR-2000-08-30/pdf/00-20916.pdf (Common Rule for many federal funding agencies, including, e.g., NSF, NASA, DOD, EPA, USAID, etc. USED's regulations at 34 CFR 106 are the model for the other federal funding agencies' regulations, the substantive obligations of which "for the most part, are identical to those established by [USED]." That promotes consistency benefiting the agencies and recipient community, and recognizes that USED has taken the lead in enforcement and public and Congressional review, and USED's regulations have been interpreted by courts. "Of course, Title IX prohibits discrimination on the basis of sex in the operation of, and the provision or denial of benefits by, education programs conducted by noneducational institutions, including, but not limited to, prisons, museums, job training institutes, and for profit and nonprofit organizations." It applies to "such diverse activities as…workshops…boater education training…how to start a small business" and to "academic, extracurricular, research, occupational training, or other educational programs," and "the educational programs or activities of any entity receiving financial assistance from the participating agencies." The Common Rule also states that the Department of Agriculture, HHS and DOE had previously published their Title IX regulations to explain why they are not listed among the agencies covered by the Common Rule.)