CALIFORNIA LEGISLATURE

Assembly Committees on Arts, Entertainment, Sports, Tourism, & Internet Media and Higher Education

Federal Title IX and the California Sex Equity in Education Laws Examined: *The current state of gender equality in education*

Monday, March 25, 2019
State Capitol
Sacramento, California

~Chairman Kansen Chu and Chairman Jose Medina~
Honoring Jerry Zanelli, founder of the Women's Premier Soccer League, and the Fair Play for Girls in Sports Program, for their outstanding advocacy on behalf of women and girls in sports

STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0115

Assembly
California Legislature

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Monday, March 25, 2019 – 3:00 pm

State Capitol, Room 127 - Sacramento, California

Federal Title IX and the California Sex Equity in Education Laws Examined:
The current state of gender equality in education

I. Awarding of Resolutions for outstanding advocacy on behalf of women and girls in sports

- **Jerry Zanelli**, Founder of the Women's Premier Soccer League – accepting on behalf of the Zanelli Family – Hedy Govenar
- **Fair Play for Girls in Sports Program**, Legal Aid at Work – accepting on behalf of the Program - Elizabeth Kristen, Project Director and Kim Turner, Senior Staff Attorney

II. American Association of University Women California

- ***Alicia Hetman***, State Committee Chair, Title IX

III. California Attorney General's Office

- ***Laura Faer***, Deputy Attorney General, Bureau of Children's Justice in the Civil Rights Enforcement Section

IV. Higher Education

- **University of California, *Suzanne Taylor***, Systemwide Title IX Coordinator
- **California State University, *Linda Hoos***, Systemwide Discrimination, Harassment and Retaliation & Title IX Compliance Officer
- **California Community Colleges, *Peter Khang***, Deputy Counsel
- **Association of Independent California Colleges and Universities, *Thomas Vu***, Vice President of Policy

V. K-12 Education

- **California Department of Education, *Khieem Jackson***, Deputy Superintendent, Government Affairs and Charter Schools Division
- **California Interscholastic Federation, *Roger Blake***, Executive Director
- **California Association for Health, Physical Education, Recreation and Dance, *Ashley Sunamoto***, Vice President in Interscholastic Athletics
- **Fair Play for Girls in Sports Project, Legal Aid at Work, *Kim Turner***, Senior Staff Attorney

Title IX Overview

"Advancing Opportunity through Equity in Education"

Title IX

ADVANCING OPPORTUNITY THROUGH EQUITY IN EDUCATION

EXECUTIVE SUMMARY

STRONG EDUCATION FOR A SUCCESSFUL FUTURE

IN THE 45 YEARS SINCE Congress passed Title IX legislation prohibiting sex-based discrimination in federally funded education programs, schools have made huge strides in providing equal access to education. Simply by creating the same opportunities to learn for all students, K–12 schools and higher education institutions have paved the way for new levels of achievement.

The effects have been far-reaching. Women's gains in science, technology, engineering, and math (STEM) have expanded the country's innovation workforce. Efforts to expand access to career and technical education (CTE) have increased the pool and earning capacity of skilled trade workers. Greater chances to participate in school sports have led to unprecedented success for U.S. female athletes while conferring long-term health and social benefits. Protections for pregnant and parenting students and against sexual harassment have helped more students—both male and female—remain in school and succeed.

Despite these advances, many challenges to equity in education remain. Gender stereotyping continues to limit opportunities in CTE for women and men alike. Women still face hurdles in STEM, particularly in academia and in fields like computer science and engineering. Sexual harassment and assault are persistent problems across the education spectrum, affecting large proportions of both male and female students. Softer regulations have opened the door for single-sex classes and schools, which often rely on debunked notions about differences in the ways boys and girls learn.

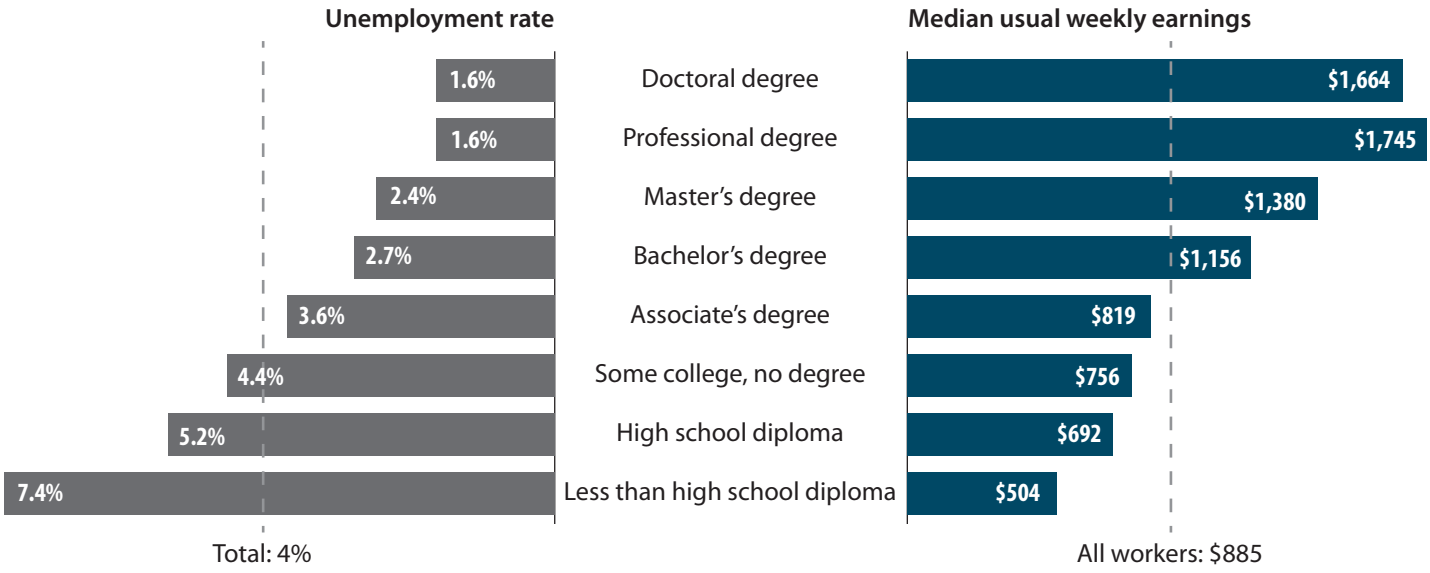
Continued education and leadership on Title IX, as well as monitoring and enforcement of compliance, are essential for helping students succeed in school and beyond. Competing in an increasingly innovation-driven marketplace depends on the ability of our education system to produce a large, skilled, and productive workforce. Ensuring that Title IX protections are strengthened, not weakened, is critical for meeting that need.

Why Title IX Matters

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity that receives federal funding. It applies to all students and staff, male or female, in preschool through postgraduate school.

In the 45 years since the legislation passed, girls and women have proved that they have the interest and ability to succeed in areas once considered beyond their reach. Concerns that more opportunity for females would come at the expense of their male counterparts have proved

FIGURE 1:
Education Pays: Impact of Education on Employment and Earnings, 2016



NOTE: Data are for persons age 25 and over. Earnings are for full-time wage and salary workers.
SOURCE: U.S. Bureau of Labor Statistics, Current Population Survey.

How Title IX Affects Education

Title IX applies to all aspects of education, both in and out of the classroom. Areas of particular concern in terms of providing equal access to education include STEM, CTE, athletics, sexual harassment and assault, single-sex education, and the rights of pregnant and parenting students. The U.S. Department of Education has developed guidance documents on how Title IX applies in each of these areas, as well as on the designation of Title IX coordinators, to guide schools in complying with the law.

SCIENCE, TECHNOLOGY, ENGINEERING, AND MATH

Both research and practice have shown that women and girls are as adept at STEM as their male counterparts. As opportunities to study and work in STEM have increased over the past 45 years, girls and women have gained ground in many fields, particularly biological, environmental, and chemical/material sciences. Opening opportunity has benefited men as well, as some fields traditionally occupied by women, notably in healthcare, have become more broadly accessible.

Yet gender bias still persists at all levels of education, from subtle differences in encouragement to outright discrimination. Such biases contribute to an ongoing gender gap in key areas such as engineering and computer science, preventing women from entering fields where workforce need is high—and where innovation will be crucial for both economic expansion and national security.

Complying with Title IX can close this gap through measures to address gender biases, ensure equal access to STEM-related courses and activities, and safeguard equity in academic admissions and employment. With global competitiveness increasingly linked to building a technologically proficient workforce, ensuring that women and girls have equal access to STEM education is vital for this country's future economic growth.

wage CTE fields can both reduce the pay gap between male and female workers and benefit the economy as a whole.

ATHLETICS

Myths about the requirements and impact of Title IX on school athletics are prevalent. The law requires that schools treat the sexes equally with regard to participation opportunities, athletic scholarships, and the benefits and services provided to male and female teams. It does not require schools to spend the same amount on both sexes or to cut male teams to make room for female sports. In fact, male sports at both the high school and college levels have continued to expand under Title IX.

By opening opportunity, Title IX has had a huge impact on female participation and achievement in sports. Increased participation in school athletics confers a wide range of societal benefits, including better short- and long-term health, lower unintended pregnancy rates, and greater academic and professional accomplishment. It has also played out in unprecedented success for U.S. female athletes competing in the global arena. This success not only affirms the value of Title IX, it negates the claim that girls and women don't deserve equal access to athletics because they don't have the same interest as their male counterparts.

Despite substantial gains since the passage of Title IX, the playing field is still not level for girls and women. Girls are much more likely than boys to enter into sports later in life and drop out of sports earlier in life, and they still have far fewer opportunities to participate in high school and college sports. Continued efforts are necessary to reap the full benefits of equal access to athletics.

SEXUAL HARASSMENT AND ASSAULT

Sexual harassment and assault harm students in many ways, including their ability to succeed academically. Supreme Court rulings have established that sexual harassment and assault of students violates Title IX. Despite the protection of the law and greater attention to this problem in recent years, sexual and gender-based harassment remain pervasive in K–12 schools and on college campuses.

While sexual harassment and assault disproportionately affect girls and women, boys and men also face this issue. One national study found that 40% of boys and 56% of girls in grades 7–12 experienced sexual harassment in school. On campus, more than 20% of women and 5% of men report experiencing rape or sexual assault. Lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) students are particularly vulnerable. In addition to the impact on individual students, sexual harassment and assault create a hostile environment that undermines learning for all.

While some have argued that Title IX protections go too far, the law does not give students the same level of protection granted to employees in the workforce. Strong measures are still needed to protect students and create an environment that supports learning, including accurate tracking of sexual harassment, better enforcement of existing regulations, and funding to help schools develop effective policies to prevent and address problems.

SINGLE-SEX EDUCATION

Separating boys and girls in the classroom may seem like a good way to ensure that the needs of both groups are being met, but in fact separation serves neither group well. Evidence of the benefits of single-sex education is sketchy at best, while the stereotyping that typically occurs can stifle learning for both boys and girls. (If you think classes where boys learn multiplication by playing ball while girls have tea parties are a thing of the past, think again.)

Both the U.S. Constitution and Title IX limit the separation of students by gender in publicly funded educational programs and activities. Although Title IX regulations issued by the

The Path to Continued Progress

Forty-five years after the passage of Title IX, the goal of gender equity in education has not been fully realized. Each chapter of this report includes topic-specific recommendations for improvment. In addition, NCWGE believes that the following overarching recommendations will enable continued progress.

1. **Awareness.** All stakeholders, including students, parents, advocacy groups, and policymakers, should continue to work to extend awareness about the purpose and provisions of Title IX. Education institutions must be fully aware of their responsibilities under the law. They should also put communication mechanisms in place to ensure that all school community members understand students' rights in the areas covered by Title IX.

2. **Information.** Schools at all levels must improve their data collection and reporting to provide an accurate picture of how students are faring. Better tracking in areas such as sexual harassment, school climate, and graduation rates for pregnant and parenting students will help in developing effective policies to ensure a safe and equitable learning environment. In addition, more transparency around participation and spending in athletics, CTE, and STEM will increase understanding of the issues at stake.

3. **Enforcement.** OCR must enforce Title IX. This includes ensuring that qualified Title IX coordinators are in place, conducting compliance reviews, and promptly investigating complaints. Granting agencies should conduct regular and random Title IX compliance reviews of their grantee institutions, ensuring educational equity across all areas of Title IX.

4. **Enhancement.** While Title IX offers strong protection for students, additional guidance in some areas—for example, to ensure the rights of LGBTQ students and more clearly restrict use of single-sex programming—will help guide schools in making sound programming and policy decisions. Greater funding for gender equity efforts, including enforcement of existing legislation, will also help ensure that schools are able to provide a learning environment in which all students can thrive.

WOMEN AND STEM

PREPARING FOR A TECHNOLOGY-DRIVEN ECONOMY

BOTH RESEARCH AND PRACTICE HAVE shown that women and girls are as adept at science, technology, engineering, and math (STEM) as their male counterparts. Given equal opportunity, girls and women can excel in STEM fields. With global competitiveness increasingly linked to building a technologically proficient workforce, ensuring that women and girls have equal access to STEM education is vital for this country's future economic growth.

As opportunities to study and work in STEM have increased over the past 45 years, girls and women have gained ground in many fields, particularly biological, environmental, and chemical/material sciences. Opening opportunity has benefited men as well, as some fields traditionally occupied by women, notably in healthcare, have become more broadly accessible.

Yet gender bias still persists at all levels of education, from subtle differences in encouragement to outright discrimination. Such biases

> Our science, technology, engineering and math (STEM) workforce is crucial to America's innovative capacity and global competitiveness. Yet women are vastly underrepresented in STEM jobs and among STEM degree holders…. That leaves an untapped opportunity to expand STEM employment in the United States, even as there is wide agreement that the nation must do more to improve its competitiveness."
>
> *WOMEN IN STEM: A GENDER GAP TO INNOVATION*, ECONOMICS & STATISTICS ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, 2011.

on a standardized math and science test with population scores on the Implicit Association Test on gender and science—the standard test for detecting unconscious bias, developed by researchers at Harvard. The study shows a strong association between a country's gender bias about science and the gender difference in test scores of students in that country.[5]

This evidence corroborates that gender differences in math and science performance stem from cultural, rather than biological, factors. Where gender bias is low, female performance is correspondingly high.

In addition to hindering performance, gender biases can affect whether girls and women choose to enter and stay in STEM fields. They may prevent female students from studying science and math in school or influence whether teachers encourage them to pursue science and engineering careers. They may also directly or indirectly influence hiring and promotion of women in the STEM workforce.

NEUTRALIZING STEREOTYPES BOOSTS ACHIEVEMENT

Stereotypes about girls' math and science ability can affect their achievement through an effect called "stereotype threat"—the feeling of being judged by a negative stereotype, or fear of reinforcing that stereotype. Stereotype threat is known to impede girls' performance. In one landmark study, girls who were primed to feel inadequate did significantly worse than their male peers on a challenging math test, whereas girls in the control group, who did not face a stereotype threat condition, scored similarly to the boys.[6] In the decade and a half since that investigation appeared, hundreds of additional studies have been published that support this finding.

Recent gains in girls' mathematical achievement demonstrate the impact of culture and learning environments on students' abilities and interests. As learning environments have become more open since the passage of Title IX, girls' achievement has soared. For example, the proportion of girls who score in the top 0.01% of seventh and eighth graders on the math SAT rose from 1 in 13 in the early 1980s to 1 in 3 more recently.[7] This short-term closing of the gender gap provides further evidence that gender differences in math ability are not innate.

POSTSECONDARY EDUCATION

Gaps in women's pursuit of technical fields carry through to postsecondary studies. Across all levels of higher education (less than bachelor's through postgraduate/professional), women received more STEM degrees than men in 2012–13 (63%), but the bulk of these were in healthcare, where women received 82% of all degrees. Among the "core" STEM fields, which do not include healthcare, women earned more life sciences degrees (58%), while men received the vast majority of technician (85%), engineering (80%), and computer science (77%) degrees.[14] (Core STEM fields include engineering, life sciences, physical sciences, computer and information technology, and math.)

With a growing number of students choosing community college as their first college experience, the STEM gender gap on community college campuses across this country is concerning. In 2014, only 21.7% of associate's degrees in STEM were earned by women. Although the total number of women earning such degrees increased over the prior five years—from under 17,000 in 2009 to just over 20,000 in 2014—the percentage of STEM associate's degrees going to women has actually declined slightly since 2009.[15]

> "We look at science as something very elite, which only a few people can learn. That's just not true. You just have to start early and give kids a foundation. Kids live up, or down, to expectations."
>
> MAE JEMISON, FIRST BLACK WOMAN IN SPACE

At the undergraduate level, women are less likely than men to concentrate on a core STEM field. In 2014, just 7.9% of female freshmen indicated that they planned to major in engineering, math, statistics, or computer science, compared with 26.9% of males (Figure 2). In one spot of good news, figures for both groups were at ten-year highs in 2014, with

ENCOURAGING GIRLS IN MATH AND SCIENCE

Following are research-based suggestions for encouraging girls in math and science at the primary and secondary school levels.

1. **Teach students that academic abilities are expandable and improvable.** Students who are more confident about their abilities in math and science are more likely to take elective math and science courses in high school and to choose STEM-related college majors and careers.
2. **Provide students with prescriptive, informational feedback about their performance**. Feedback that focuses on strategies, effort, and the process of learning enhances students' beliefs about their abilities and improves both persistence and performance on tasks.
3. **Expose girls to female role models who have succeeded in math and science.** Exposing girls to female role models (e.g., through biographies, guest speakers, or tutoring by older female students) can help invalidate the stereotype that men are better than women in math and science.
4. **Create a classroom environment that sparks curiosity and fosters long-term interest.** Teachers can 1) choose activities connecting math and science to careers in ways that do not reinforce gender stereotypes, and 2) provide ongoing resources for students who continue to express interest in a topic.
5. **Provide spatial skills training.** Training in spatial skills is associated with performance in mathematics and science.

SOURCE: *Encouraging Girls in Math and Science: IES Practice Guide,* U.S. Department of Education, 2007. See https://ies.ed.gov/ncee/wwc/Docs/PracticeGuide/20072003.pdf.

The loss of women in STEM majors results in a major missed opportunity to expand our technical workforce.

women seeing the biggest one-year uptick in the past decade. The overall trend in women's attainment of STEM bachelor's degrees since 2000 is sobering, however. While women's share of degrees in biological and agricultural sciences has increased slightly, it has remained flat in most STEM fields and has actually fallen in math and computer science (Figure 3).

Retaining women in STEM courses of study is an important priority. Although they are less likely to drop out than their male counterparts, women who start off in a STEM major are more likely to switch to a non-STEM major (Figure 4). The loss of women in STEM majors results in a major missed opportunity to expand our technical workforce.

Culture is likely a bigger culprit here than course content. Studies have found that culture, including harrassment or simply a lack of female graduate students, can affect women's persistence in STEM.[16] One review of student enrollment in STEM courses over a nine-year period found that attrition varied greatly by field. For example, the proportion of women taking computer science declined from 31% in the first semester to just 17% in the fourth semester, while female participation in biology increased over the same period. High attrition in many STEM fields signals a cultural problem that needs to be addressed through

ENSURING GENDER EQUITY IN COLLEGE STEM PROGRAMS

Colleges and universities can ensure equitable access to STEM education with a few simple measures, some of which are required by Title IX:

Admissions. STEM departments can eliminate some prerequisites and offer multi-level first-year courses to expand opportunities for women who may not have taken advanced high school courses or AP tests in STEM.

Recruitment. Colleges can partner with K–12 schools in their community to help all students prepare for higher education in STEM fields, provide mentors, and recruit promising students.

Scholarships and fellowships. By periodically examining financial assistance data, STEM departments can ensure that subtle gender bias has not crept into the awarding of assistantships—e.g., female students primarily getting teaching assistantships and male students receiving research assistantships.

Counseling and appraisal materials. If a school finds that a disproportionate number of students enrolled in a major are men, it must review its policies and materials to ensure that this imbalance is not due to academic advisors steering females away.

Administration of courses. STEM departments can consider how to make better use of their existing class and program evaluation tools to assess whether their program administration treats female and male students equally.

Harassment. If a school is made aware of any harassment based on gender, whether originating from students or from faculty or staff, it must take steps to end the conduct, eliminate the hostile environment, and prevent its recurrence.

SOURCE: Adapted from *Title IX and Access to Courses and Programs in Science, Technology, Math, and Engineering (STEM),* U.S. Department of Education, Office for Civic Rights, 2012. See https://www2.ed.gov/about/offices/list/ocr/presentations/stem-t9-powerpoint.pdf

institutional and attitudinal changes as well as broader participation of women in STEM.

At the postgraduate level, women have continued to gain ground in recent years, although again with wide variation by field. The overall proportion of science and engineering doctoral degrees earned by women grew from 43% in 2000 to 48% in 2013, with the greatest gains in the natural sciences.[17] The number of engineering doctoral degrees earned by women doubled during this period, with their proportion of these degrees climbing from 16% to 22%. Although women have made gains in nearly all fields, they still earned fewer than a third of doctorates awarded in math, physical sciences, and computer science in 2013.

With technology governing much of global industry, and with cybersecurity issues affecting everything from the protection of individuals' data to national safety threats, ensuring that half of the workforce has access to technology learning at all levels is essential. In addition, bringing a diversity of ideas to the technology workplace can strengthen both innovation and quality.

Academia: An Opportunity for Advancement

Since the passage of Title IX, the number of women doctorates employed in academia in STEM fields has increased tenfold, reaching approximately 114,000 in 2013.[18] The share of women in all faculty ranks has risen consistently, reaching 24% of full professors, 38% of associate professors, and 45% of assistant professors in 2013 (Figure 5).

Despite these gains, women are less likely than men to be promoted to full professorship, tenure status, and the highest ranks of academia, such as deans and department chairs.[19] This gap reflects a tradition of institutional practices that make it difficult for women to advance through the ranks of academia.

The academic pipeline for women in STEM fields is perpetually leaking, with the attrition of women outpacing that of men at all levels, from undergraduate school through tenured professorship. Even though many women persist through the attainment of a PhD, attrition continues at each step of career transition and promotion.

Part of the problem is that the tenure track often coincides with prime childbearing age for female academics, which can harm their chances for advancement. Typically, faculty members who do not receive tenure within a certain amount of time after obtaining a PhD will be encouraged to leave, although some institutions allow them to remain at the lower adjunct or assistant professor level. Women who have babies are 29% less likely to enter a tenure-track position than those who don't, while having children has little effect on men's likelihood of attaining promotions or tenure. Overall, women are 25% less likely to attain full professorship than men.[20]

For faculty members who take time off to raise families, the lack of supportive policies is detrimental to their careers and ultimately harmful to the STEM workforce. Implementing flexible options, such as stop-the-tenure-clock policies for all faculty who need to take care of children or other family members, can help create a supportive culture that will filter through all levels of higher education, ultimately improving the country's ability to produce technologically skilled workers.

11% of registered nurses in 2015, up from just 4% in 1983 and 9% in 2006.[23]

In addition, corporations are letting employees take advantage of more flexible work options. In 1991, the Bureau of Labor Statistics found that only 14% of women had flexible work schedules. That number had climbed to 26% in 2007 and to 34% in 2012.[24] This flexibility will give female employees more opportunity to stay in their STEM careers.

As the global marketplace becomes more focused on technology and innovation, it's important to ensure that men and women have equal opportunities to participate and advance through the STEM pipeline. The attrition of women and girls from STEM fields does not benefit their male counterparts; rather, it removes major opportunities to increase our nation's economic competitiveness in science and technology. Institutional and workplace policies that promote the full participation of women are needed in order to take advantage of our nation's capacity for innovation.

WORKING ON WORKPLACE CULTURE

"When we wring our hands and ask why more women do not study STEM in schools, perhaps we should also look at how women are treated in the workplace after we get those STEM credentials." – FEMALE COMPUTER SCIENTIST

"It is disappointing how large, progressive companies still have the good old boy networks and silently expect women not to be in leadership roles." – FEMALE CHEMICAL ENGINEER

"The message I get over and over is that I am capable of getting things done right but I don't deserve the right to be promoted." – FEMALE AEROSPACE ENGINEER

"During my career, my workplace has become much more welcoming for women engineers, but there are still some lingering (and mostly subconscious) issues that arise." – MALE MECHANICAL ENGINEER

"I have noticed a direct correlation between a higher concentration of women in upper management and the attitude engineers show towards women. Having three women bosses right now I find the differing perspective and style quite refreshing." – MALE MECHANICAL ENGINEER

SOURCE: J. C. Williams, S. Li, R. Rincon, and P. Finn, *Climate Control: Gender and Racial Bias in Engineering?* Center for Worklife Law and Society of Women Engineers, 2016. See http://research.swe.org/climate-control.

Improving STEM Education and Research through Title IX

Title IX provisions mandate equal access to STEM courses and activities at the primary, secondary, and college levels as well as equal compensation, lab space, and institutional resources at research universities. In addition, federal agencies that award grants to education institutions are obligated to take steps to ensure that these institutions provide equal opportunities for women and girls in STEM education, including equal consideration in promotion and tenure for faculty.

Many students, and even educators, do not realize that Title IX applies to STEM. This means that compliance often goes unmonitored and infractions unreported. Compliance translates into equal treatment, from giving boys and girls the same level of encouragement in the classroom, to investigating whether substantial underrepresentation of women in STEM courses results from discriminatory practices, to ensuring that research assistantships are allocated fairly.

Increasing awareness of schools' responsibilities under Title IX can help close the STEM gender gap. The U.S. Department of Education and the White House have issued several briefs and other resources to help schools understand and fulfill their obligations.[25] Familiarizing themselves with these materials will allow Title IX coordinators and other school personnel to oversee compliance more effectively. On campuses and in national laboratories, adver-

- Colleges and universities should examine their admissions and scholarship awarding practices to ensure that they do not foster discrimination. To forestall loss of talent, they should also establish standardized guidelines for tenure-track eligibility and offer a stop-the-clock option for women and men with small children.

- Federal, state, and local agencies should establish outreach and retention programs at the elementary, secondary, and postsecondary levels to engage girls and women in STEM activities, courses, and career development.

- All federal science agencies should conduct Title IX and STEM reviews and track grant award data to ensure that their grantee institutions are providing equal opportunities for women and girls in STEM, including education for students and promotion and tenure for faculty. This will help ensure that the country benefits from the work of its brightest minds.

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CAREER & TECHNICAL EDUCATION

A PATH TO ECONOMIC GROWTH

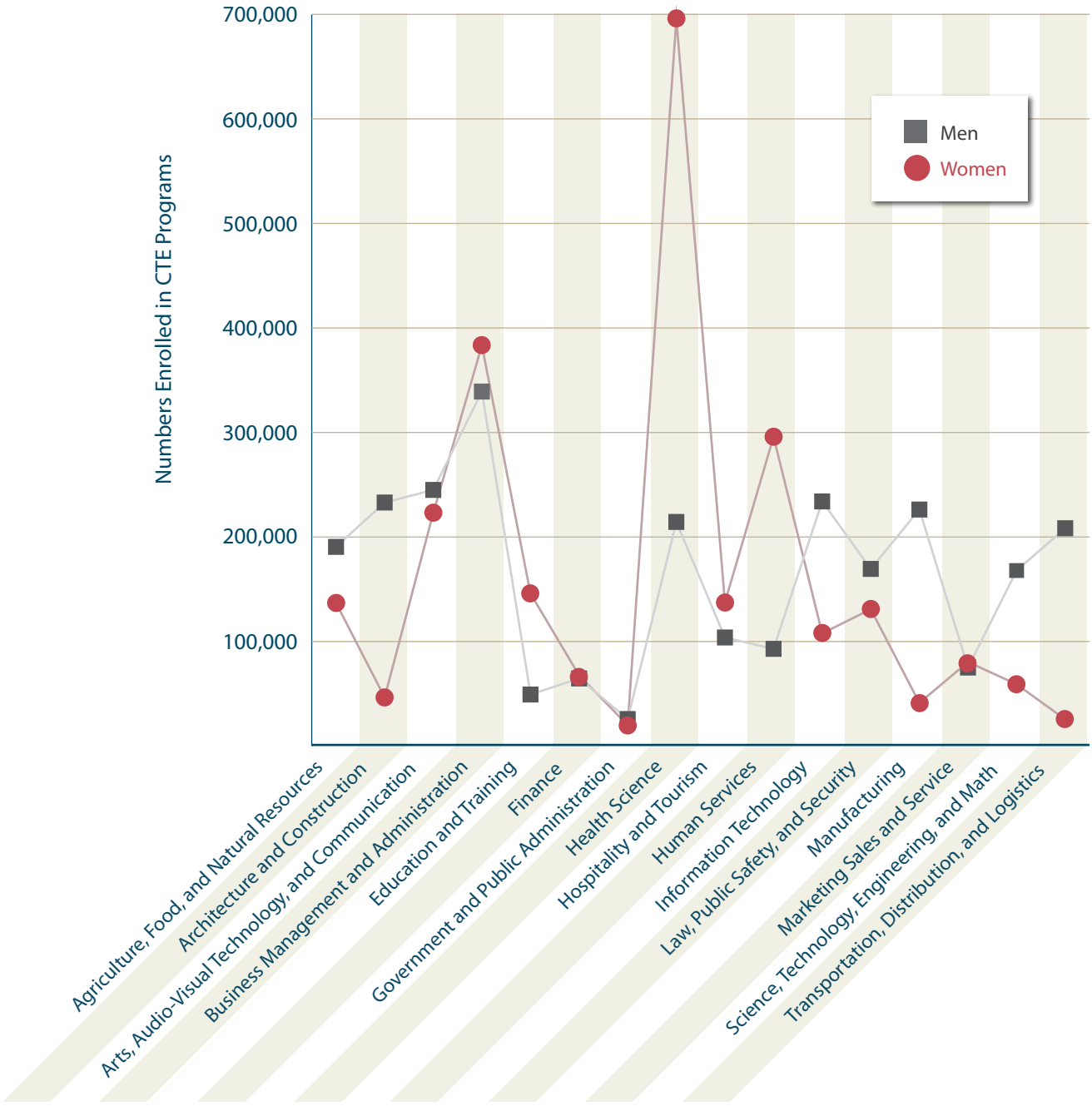
TITLE IX OUTLAWS SEX DISCRIMINATION in career and technical education (CTE), including training programs offered by any school or organization that receives federal funding. Equal opportunity in CTE can expand economic growth by putting training for middle- and high-wage jobs in reach for all capable students, regardless of gender. Despite Title IX protections, however, women still face hurdles in CTE, where the gender divide has women much more likely to study in areas leading to lower-wage occupations.

Measures to counter gender bias and sex stereotyping in CTE can expand opportunities for women in areas traditionally dominated by men, such as information technology (IT) and other technical fields. At the same time, encouraging gender equity in CTE will reduce barriers for men seeking entry into fields traditionally occupied by women, including high-growth areas in healthcare. Eliminating discriminatory practices in CTE therefore has important implications for all students.

Expanding opportunity in CTE is an important strategy for ensuring the future health of the U.S. economy. Measures to help women

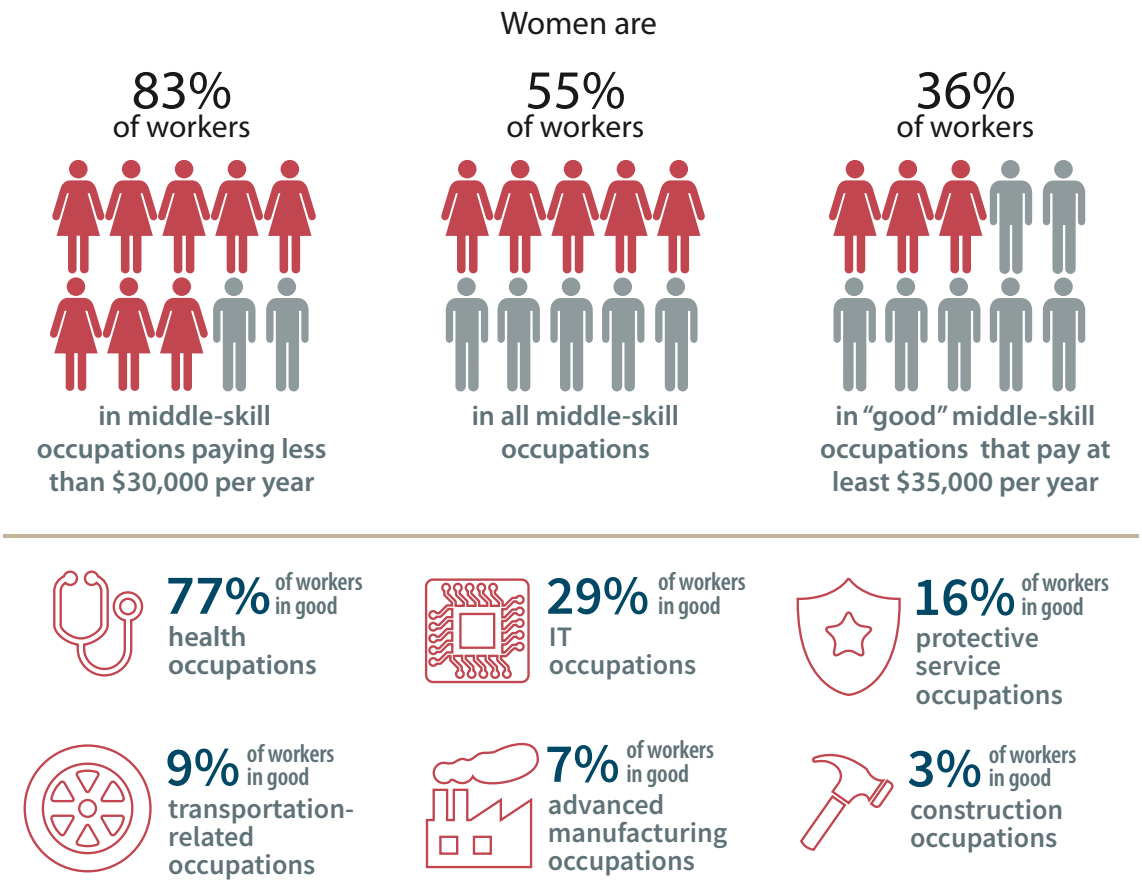
FIGURE 1:

Enrollment of CTE Concentrators in CTE Programs by Gender and Career Cluster Area, Program Year 2013–2014



SOURCE: *Carl D. Perkins Career and Technical Education Act of 2006: Report to Congress on State Performance, Program Year 2013–14.* U.S. Department of Education, Office of Career, Technical, and Adult Education (OCTAE), 2016.

FIGURE 2:
Women's Share of Middle-Skill Occupations, 2014



SOURCE: A. Hegewisch, M. Bendick Jr., B. Gault, and H. Hartmann, *Pathways to Equity: Narrowing the Wage Gap by Improving Women's Access to Good Middle-Skill Jobs.* Institute for Women's Policy Research (IWPR), 2016.

gender. Further, it required schools to take steps to ensure that disproportionate enrollment of students of one sex in a course was not the result of discrimination.

Despite these protections, many hurdles remain for women in CTE. These hurdles keep women from achieving their full earning potential, with implications for the nation's economy as a whole.

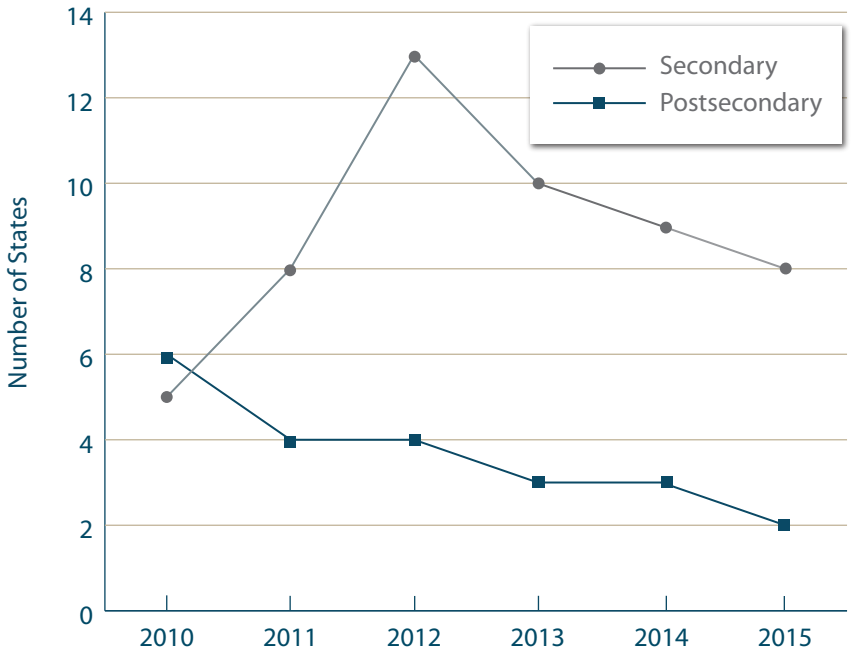
BARRIERS TO EQUALITY

Barriers to equality in CTE range from a lack of role models and information on nontraditional fields to overt discrimination. Students may also face career counseling biased by gender stereotyping, unequal treatment by teachers, and various types and degrees of sexual harassment. Although these issues disproportionately affect girls and women, they can impede boys and men as well.

Girls and women are discouraged from pursuing traditionally male training programs in ways that are both subtle—such as an instructor inadvertently allowing male students to monopolize attention—and not so subtle—such as a guidance counselor telling a student that an electronics course is "not for girls." Those who brave the barriers to take nontraditional courses often face an unwelcoming atmosphere, and many report being harassed.[9]

FIGURE 3:

Number of States with Female Participation of 40% or More in Nontraditional CTE Programs at the Secondary or Postsecondary Level, 2010–2015



SOURCE: IWPR and NAPE analysis of U.S. Department of Education OCTAE data, April 2017.

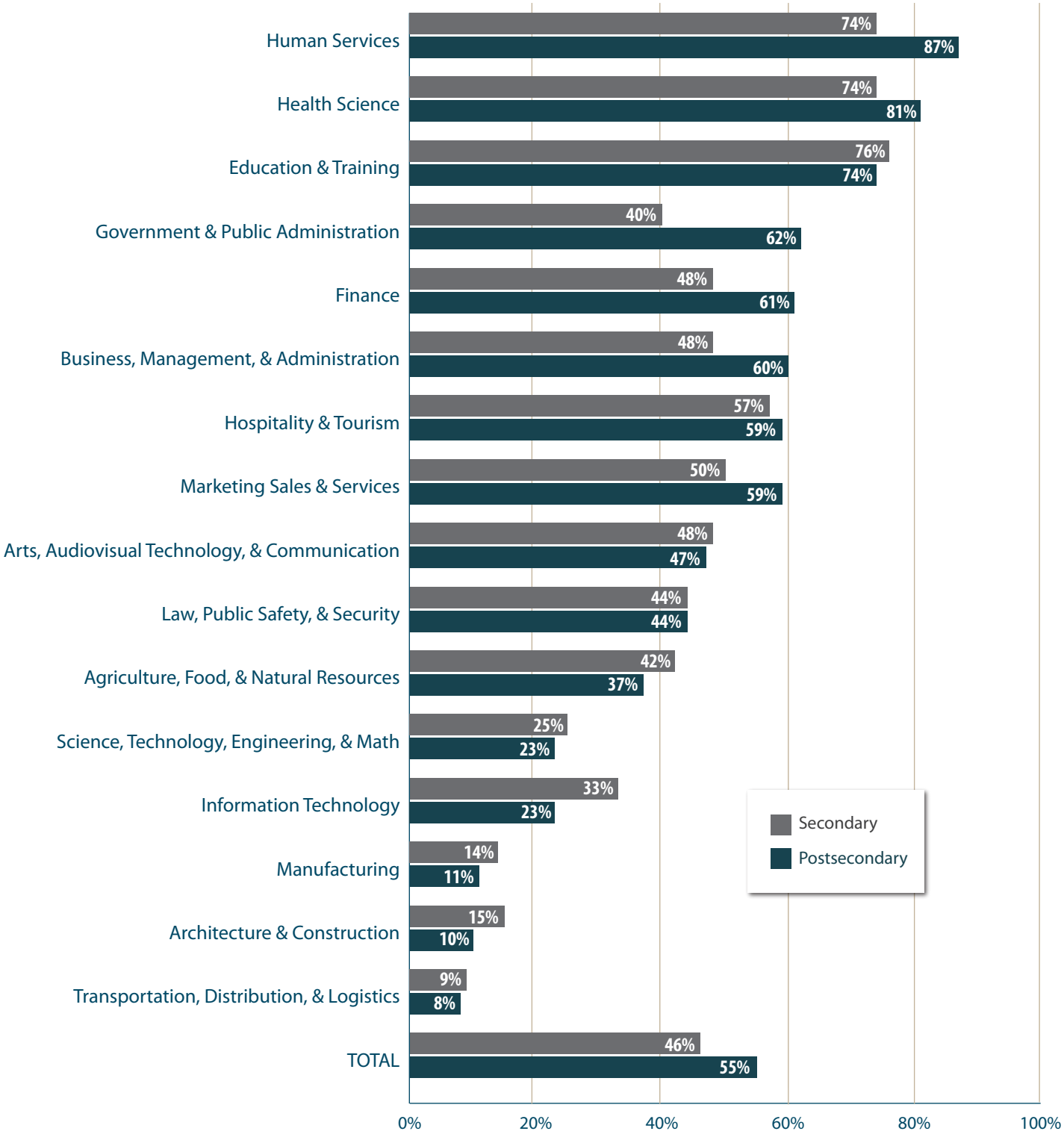
women studying in nontraditional CTE fields increased slightly between 2010 and 2015, the number of states making strong progress has actually declined in recent years. In 2015, just 2 states had female participation of at least 40% in nontraditional CTE fields at the postsecondary level, down from 6 in 2010. At the secondary level, the number spiked from 5 states in 2010 to 13 in 2012 before declining to 8 in 2015 (Figure 3).

Despite women's gains in nontraditional fields as a whole, the rate of female enrollment in certain career clusters remains at stubbornly low levels, with some well beneath the 25% threshold. As shown in Figure 4, women made up a quarter or less of participants in STEM programs nationally (25% at the secondary level and 23% at the postsecondary level), and much lower percentages in manufacturing (14% and 11%, respectively); architecture and construction (15% and 10%); and transportation, distribution, and logistics (9% and 8%).[12]

Experience shows that obstacles to equity in CTE can be overcome by a commitment to change from the institution's leadership. Schools that have taken measures designed to reduce gender stereotyping and expand access across programs have had success in enrolling and retaining students in CTE focused on areas that are nontraditional for their gender.[13] Successful measures include tracking information on program participation and outcomes, assigning staff to

FIGURE 4:

Women's Share of Secondary and Postsecondary Enrollment by Career Cluster, 2014–2015



SOURCE: IWPR and NAPE analysis of U.S. Department of Education OCTAE data, April 2017.

SUCCESSFUL CTE EQUITY PROGRAMS

WELDING AT ROSEBURG HIGH SCHOOL

After implementing NAPE's Program Improvement Process for Equity™ (PIPE), Roseburg High School in Oregon saw a ninefold increase in the number of young women in its welding program (from 4 to 38). Welding has high projected job growth and good earnings; it is part of the region's manufacturing workforce development priority.

Roseburg identified the causes for low female enrollment in welding by surveying some 1,300 students. Reasons given included parents' attitudes, scheduling issues, reaction from friends, and lack of encouragement from counselors. Roseburg responded with a variety of strategies to encourage greater enrollment, including seeking buy-in from welding instructors and organizing open houses to let parents and students explore the facility and learn about career prospects. The school also had students try out all CTE programs before making their enrollment choices.

These measures helped young women feel welcome and provided a low-risk learning environment. Gains in female enrollment have persisted since these changes were made.

MANUFACTURING AT RAISE THE FLOOR

Raise the Floor at Gateway Community and Technical College in Kentucky recruits, trains, supports, and places women in manufacturing jobs. The program began in 2014 to meet projected job openings in manufacturing and to improve opportunity in women's employment.

Raise the Floor connects participants with partner organizations to provide support services, including assistance with child care and transportation, as well as help in applying for public benefits. Participants work with a case manager and an academic counselor, and meet regularly with peers to discuss obstacles and successes.

Out of the 77 students who have completed the program, 60 are employed or in school full-time, including 33 who are employed in manufacturing.

NAPE'S STEM EQUITY PIPELINE

NAPE's STEM Equity Pipeline provides a suite of professional development offerings focused on increasing the participation and completion of women in high school and community college STEM fields and in STEM-related CTE programs. By working with state leadership teams, the project has been successful in influencing state policy, increasing resource investment, and integrating gender equity into professional development for STEM and CTE educators in 20 states.

At local pilot sites, teams of administrators, teachers, counselors, and students conduct a performance gap analysis, identify causes for gaps, and implement research-based strategies to increase women's participation in STEM programs. Examples of outcomes include an increase in female participation from 0% to 33% in pre-engineering; from 0% to 43% in design technology; from 12% to 36% in auto technology; and from 15% to 55% in advanced-level math.

CONNECTICUT REGIONAL CENTER FOR NEXT-GENERATION MANUFACTURING

With funding from the National Science Foundation, the Connecticut College of Technology (COT)—a virtual organization serving 12 community colleges—prepares students for STEM careers in high-demand fields such as lasers, photonics, precision manufacturing, and alternative energy. The program allows high school students to receive credit for dual-enrollment programs in engineering and technology at nearby community colleges.

continued on next page

development, improvement, or expansion of CTE programs.

- Schools, municipalities, and states should track data on program participation and outcomes in order to identify and address performance gaps. To target improvements that will have the most economic impact, gender-specific data should be cross-tabulated with other demographic characteristics, including race, socioeconomic status, disability, and parental status.

- Apprenticeship and pre-apprenticeship programs in construction and other fields with high projected skill shortages should strive to attract and retain women by targeting recruitment efforts, training, and support systems to their needs.

- New legislation should continue to include accountability measures and improvement plans, and should reinstate sanctions, to hold states and municipalities accountable for increasing women's completion of CTE programs that prepare them for high-wage careers.

- Congress should legislate requirements for leadership and investments at the state and local levels to implement research-based strategies for increasing female participation and achievement in nontraditional CTE programs.

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TITLE IX AND ATHLETICS

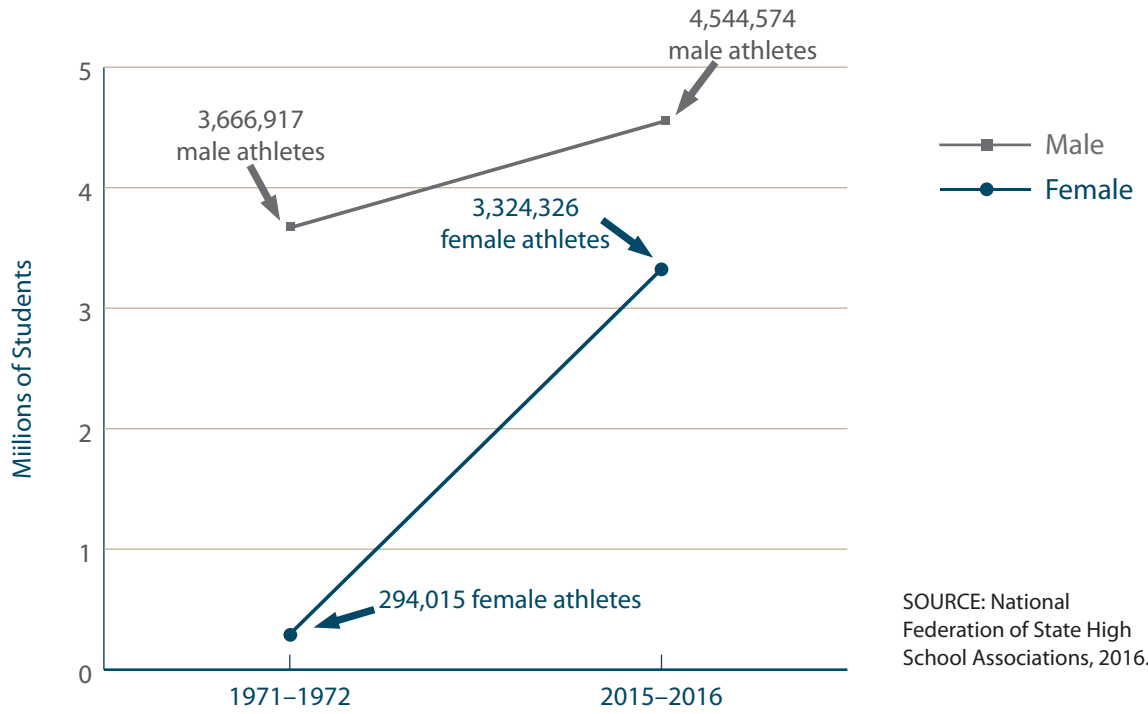
LEVELING THE PLAYING FIELD LEADS TO LONG-TERM SUCCESS

AT THE 2016 SUMMER OLYMPIC Games in Rio de Janeiro, the U.S. Olympic team fielded a record 292 female athletes. These women not only outnumbered their male teammates, they formed the largest group of women ever to compete in Olympic history. The U.S. women earned 61 medals at the games, more than any other group—male or female—from any country. U.S. women performed similarly well in the Paralympic Games, earning 70 of Team USA's 115 medals.

In the wake of the games, many players, coaches, and commentators have noted the impact of Title IX on the success of U.S. women athletes. Figures from the past 45 years of international competition support this connection. In 1972, the year the legislation passed, the U.S. summer Olympic team's 400 athletes included just 84 women; the trend in female participation and success has been upward ever since.[1]

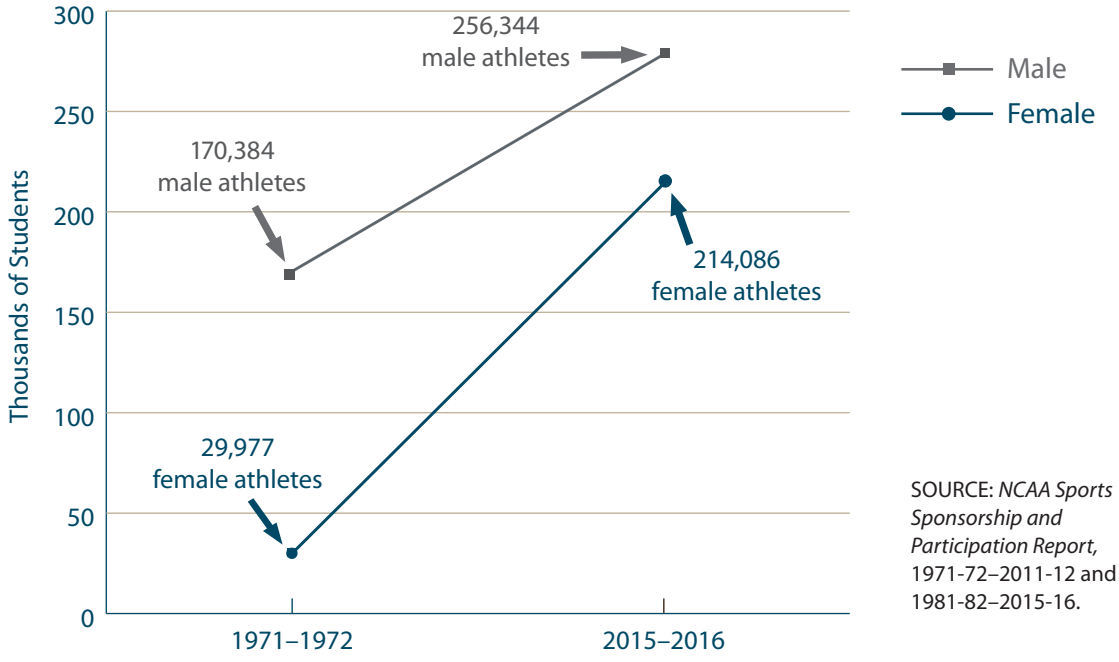
While most have lauded the new heights of achievement reached by U.S. women athletes, a few naysayers have resurrected the complaint that by

FIGURE 1:
Male and Female Participation in High School Sports, 1972–2016



SOURCE: National Federation of State High School Associations, 2016.

FIGURE 2:
Male and Female Participation in College Sports, 1972–2016



SOURCE: *NCAA Sports Sponsorship and Participation Report,* 1971-72–2011-12 and 1981-82–2015-16.

(e.g., financial and transportation needs), they are more likely to participate in sports through school than through private organizations.[10] This makes it even more critical that they have equal access to school-sponsored sports to enable them to be physically active.

The long-term health benefits of participation in school athletics extend well beyond combating obesity. Regular physical activity also decreases a young woman's chance of developing a range of other diseases, including heart disease, osteoporosis, and breast cancer.[11] Given the high social and financial costs of such illnesses, the societal benefits of school sports programs can be enormous.

The direct health benefits of increased activity may come as no surprise, but participation in sports can have less obvious benefits as well. For example, girls and women who play sports have higher levels of confidence and self-esteem and lower levels of depression than those who don't. They also have a more positive body image and experience higher states of psychological well-being.[12]

Sports participation can also affect risk behaviors. High school athletes are less likely to smoke cigarettes or use drugs than their peers who don't play sports.[13] One study found that female athletes are 29% less likely to smoke than non-athletes.[14] Given the high costs of smoking-related illnesses and deaths, these figures are significant. Moreover, adolescent female athletes have lower rates of both sexual activity and unintended pregnancy than their non-athlete counterparts.[15] This is true for white, African American, and Latina athletes.[16]

ACADEMIC AND PROFESSIONAL ACHIEVEMENT

Studies have found that female participation in sports offers a range of academic benefits. Young women who play sports are more likely to graduate from high school, have better grades, and score higher on standardized tests than non-athletes.[17] This pattern of greater academic achievement is consistent across community income levels. A statewide, three-year study by the North Carolina High School Athletic Association found that athletes achieved grade point averages that were nearly

MAKING THE MOST OF OPPORTUNITIES IN ATHLETICS

Increased participation by women and girls in sports since Title IX has led to a new generation of athletes and fans who pack stadiums and spend a growing number of consumer dollars on women's sports. Following are just a few examples of how expanded opportunity in athletics leads to greater participation and success.

- The U.S. women's basketball team won an unprecedented sixth straight gold medal during the 2016 Olympics, once again going undefeated and racking up a total of 49 straight Olympic match wins. The average margin of victory during the 2016 games was nearly 40 points.
- With a silver medal at the 2014 Winter Olympics, the U.S. women's ice hockey team continued its streak of medaling at every Olympics since the sport was introduced in 1998.
- Women's soccer has expanded rapidly as more girls and women have had a chance to participate. Girls now make up 48% of U.S. Youth Soccer membership, and the number of women's NCAA soccer teams has more than tripled over the past 25 years, from 318 in 1991 to 1,034 in 2016.
- Professional women's soccer also continues to grow in popularity. In 2015, the U.S. became the first women's team to win three World Cup titles when it defeated Japan in the final match. That game took the record as the most-watched soccer match—men's or women's—in U.S. history.
- In 2012, the 40th anniversary of Title IX, women outnumbered men on the U.S. Olympic team for the first time and garnered 58 medals, earning the games the media nickname "the Title IX Olympics." In 2016, U.S. women Olympians earned 61 medals—more than nearly all countries' combined men's and women's teams.

SOURCE: Adapted from *The Battle for Gender Equity in Athletics in Colleges and Universities,* National Women's Law Center, 2015.

THE THREE-PART TEST

Under the three-part test, a school is in compliance with the law if:

01

The percentages of spots on teams allocated to males and females are substantially proportionate to the percentages of male and female students enrolled; *or*

02

It has a history and continuing practice of expanding athletic opportunities for the underrepresented sex; *or*

03

Its athletics program fully and effectively accommodates the interests and abilities of the underrepresented sex.

in a Policy Interpretation issued by the Department's Office for Civil Rights (OCR) in 1979[25] and has withstood legal challenges.

Athletic Financial Assistance. Title IX requires that athletic scholarships be allocated in proportion to the number of female and male students participating in intercollegiate athletics.[26] OCR has made clear that schools will be found in compliance with this requirement if the percentage of total athletic scholarship dollars received for each sex is within one percentage point of their levels of participation.[27] In other words, if women comprise 42% of the athletes on campus, the school must provide between 41% and 43% of its athletic scholarship dollars to female athletes.

Other Benefits and Services. Title IX also requires equity in benefits and services. The law does not require that each men's and women's team get exactly the same benefits and services, but it does require that male and female athletes receive equal treatment overall in areas such as locker rooms, equipment, practice and game facilities, recruitment, academic support, and publicity.[28]

Debunking the Myths: No Cuts or Quotas

One feature the law does *not* include is any form of discrimination against or harm to male athletes. Despite this, myths abound about how Title IX affects athletics, particularly at the high school and college levels. Most of these myths reflect the unfounded fear that increasing athletics opportunities for girls and women will correspondingly decrease opportunities for boys and men. In fact, boys and men have continued to make gains in athletics as opportunities for their female counterparts have grown, with corresponding benefits for all students.

Myth 1: Title IX requires quotas. Title IX does not set quotas; it simply requires that schools allocate participation opportunities in a nondiscriminatory way. The three-part test is lenient and flexible, allowing schools to comply even if they do not satisfy the first part. The federal courts have consistently rejected arguments that Title IX imposes quotas.

and effectively accommodating their female students' interests.[32]

In another step forward, courts have held that women's sports must adhere to certain criteria to count under Title IX. In 2010, after one university attempted to eliminate varsity women's volleyball and instead elevate the less expensive competitive cheerleading squad to varsity status, a federal district court in Connecticut held that competitive cheerleading is not yet a sport for the purposes of Title IX.

In its decision, the court cited cheerleading's lack of a central governing body, standardized rules, defined season, or post-season structure, among other issues. While competitive cheerleading certainly requires athleticism of its participants, the court found that the opportunities provided were not consistent with a true varsity experience.[33] A federal appeals court upheld this decision in 2012.

CONTINUING BARRIERS FOR GIRLS AND WOMEN

Despite great gains over the past 45 years, barriers to true equality in school athletics still remain:

- Girls have 1.2 million fewer chances to play sports in high school than boys.[34] In addition, opportunities are not equal among different groups of girls. Fewer than two-thirds of African American and Hispanic girls play sports, while more than three-quarters of Caucasian girls do.

- Girls of color are doubly disadvantaged by race and gender when it comes to high school athletic opportunities. Schools that are heavily minority (90% or more) have fewer resources and often do not allocate athletic opportunities equitably; girls in these schools receive just 39% of the opportunities that girls in heavily white schools receive.[35]

- Three-quarters of boys from immigrant families are involved in athletics, while fewer than half of girls from immigrant families are.[36]

- In addition to having fewer participation opportunities, girls often endure inferior treatment in areas such as equipment, facilities, coaching, scheduling, and publicity. Such inferior treatment violates Title IX.[37]

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ENDING SEXUAL HARASSMENT AND ASSAULT

EFFECTIVE MEASURES PROTECT ALL STUDENTS

SEXUAL HARASSMENT AND ASSAULT NEGATIVELY affect students' well-being and their ability to succeed academically. Supreme Court rulings have established that sexual harassment and assault of students constitutes discrimination on the basis of sex and violates Title IX. Despite the protection of the law and greater attention to this problem in recent years, sexual and gender-based harassment remain pervasive in K–12 schools and on college campuses.

While sexual harassment and assault disproportionately affect girls and women, boys and men also face this issue, and lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) students are particularly vulnerable. Moreover, when one student or group of students faces harassment or violence, it can create a hostile environment that undermines learning for *all* students.

Knowledge is essential for countering this form of discrimination. Students need to know their rights, and schools need to know their responsibilities under the law. All stakeholders, including the public, need to be aware of the extent of the problem, its effects, and the protections put in place to help address it.

health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential."[1]

SEXUAL VIOLENCE

Any form of sexual violence, including rape, constitutes sexual harassment and is prohibited by Title IX as well as other statutes. OCR reaffirmed in a 2011 guidance that rape is *always* severe enough to create a hostile school environment.[2] Through this guidance and a subsequent Q&A document in 2014, OCR further explained schools' responsibilities in responding to sexual violence against students. The latter document outlines requirements for how schools must act to prevent, investigate, and remedy sexual assault, noting that "a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students."[3]

Impact of Sexual Harassment on K–12 Students

Bullying and other forms of sexual harassment are prevalent in K–12 schools. Recent surveys have found that although girls face harassment more frequently than boys, both male and female students are affected in large numbers. LGBTQ students face some of the highest rates of harassment.

Harassment can have serious emotional consequences for these students; it can also cause educational problems such as difficulty concentrating on schoolwork, absenteeism, and poor academic performance.[4] Recognizing and addressing sexual harassment in schools is essential for providing a safe and respectful learning environment in which all students can thrive.

TRACKING THE EXTENT OF THE PROBLEM

The frequency of sexual harassment and bullying reported by many schools does not match what students say is actually happening at their schools. A recent review of the U.S. Department of Education's Civil Rights Data Collection (CRDC) found that 67% of local education agencies (LEAs), which include public school districts, charter schools, and charter school systems, reported *zero allegations* of sexual harassment or bullying during the 2013–14 school year.[5] If these figures are to be believed, two-thirds of schools have completely eliminated sexual harassment and bullying.

Recognizing and addressing sexual harassment in schools is essential for providing a safe and respectful learning environment in which all students can thrive.

National studies refute this finding. One report from the American Association of University Women (AAUW) found that 40% of boys and 56% of girls in grades 7–12 reported experiencing sexual harassment during the 2010–11 school year.[6] In 2015, a large-scale national survey by GLSEN found that 85% of LGBTQ students in middle and high school were verbally harassed in the prior year, and more than a quarter were physically harassed.[7] (More detail on these findings appears below.)

of sexual harassment during the 2010–2011 school year.[10] The majority of those students (87%) said it had a negative effect on them. Nearly all the behavior documented in the survey was peer-to-peer sexual harassment.

Other findings are equally sobering:

- Girls were significantly more likely than boys to face sexual harassment, although the numbers for both were high, with 56% of girls and 40% of boys reporting that they had been sexually harassed.
- Sexual harassment by text, email, social media, or other electronic means affected 30% of all students. Many of the students who were sexually harassed electronically were also sexually harassed in person.
- Verbal harassment was the most frequently cited behavior, reported by 46% of girls and 22% of boys. Physical harassment was also disturbingly common, particularly among girls. Unwelcome touching was reported by 13% of girls and 3% of boys, while 4% of girls and fewer than 1% of boys said they had been forced to do something sexual.
- Being called gay or lesbian in a negative way was reported by girls and boys in equal numbers (18%), although reactions differed, with 21% of boys and 9% of girls identifying it as their worst experience with harassment.
- The survey revealed a cycle of harassment, with many victims reporting that they victimized others. Most students who admitted to sexually harassing another student (92% of girls and 80% of boys) were also targets of sexual harassment themselves.

HARASSMENT OF LGBTQ STUDENTS

LGBTQ students are frequent victims of sex-based harassment in school. Many of these students face harassment that is serious enough to make them stay away from school activities or miss school altogether. A GLSEN national survey of 10,528 students in grades 6 through 12 conducted in 2015 found that the overwhelming majority of LGBTQ students face some form of sex-based harassment:[12]

- A full 85% of LGBTQ students experienced verbal harassment at school based on a personal characteristic—most commonly sexual orientation (71%) or gender expression (55%)—during the prior school year.
- More than a quarter of these students (27%) were physically harassed (e.g., pushed or shoved) at school in the prior year because of their sexual orientation, and 20% were physically harassed because of their gender expression.
- Some 13% were physically assaulted (e.g., punched, kicked, injured with a weapon) because of their sexual orientation, and 9% because of their gender expression.
- Almost half of LGBTQ students (49%) were harassed or threatened by their peers via electronic media.
- Nearly a third of of LGBTQ students (32%) missed at least one day of school in the prior month because they felt unsafe or uncomfortable, and 10% missed four or more days.

High as they are, rates of harassment among LGBTQ students have declined in recent years, thanks to increased awareness and advocacy. Surveys between 2001 and 2015 show consis-

RESOURCES FOR PREVENTING AND ADDRESSING SEXUAL VIOLENCE ON CAMPUS

Title IX Requires Schools to Address Sexual Violence (https://nwlc.org/resources/title-ix-requires-schools-to-address-sexual-violence/) – This fact sheet from the National Women's Law Center sets forth schools' responsibilites under Title IX and provides students, parents, and advocates with information about their rights.

Ending Campus Sexual Assault Toolkit (www.aauw.org/resource/campus-sexual-assault-tool-kit) – This toolkit from the American Association of University Women (AAUW) includes Title IX resources, funding sources for prevention and awareness initiatives, and concrete ways for students, faculty, and staff to fight sexual assault on campus.

RAINN (https://www.rainn.org) – In addition to a 24-hour hotline, the Rape, Abuse & Incest National Network (RAINN) offers information on safety and prevention, help for those who have been assaulted, and public policy resources.

Drawing the Line: Sexual Harassment on Campus (http://www.aauw.org/files/2013/02/drawing-the-line-sexual-harassment-on-campus.pdf) – This AAUW report provides information on the prevalence, impact, and handling of sexual harassment.

Not Alone (www.NotAlone.gov) – An initiative of the U.S. Department of Justice's Office on Violence Against Women, Not Alone provides model campus policies, climate surveys, and other education and prevention resources.

Center for Changing Our Campus Culture (www.changingourcampus.org) – This site offers resources for students, campus administrators, law enforcement, and other stakeholders.

Title IX and Sexual Assault: Know Your Rights and Your College's Responsibilities (http://www.aclu.org/files/pdfs/womensrights/titleixandsexualassaultknowyourrightsandyourcollege%27sresponsibilities.pdf) – This resource, from the American Civil Liberties Union (ACLU), offers examples of case law, ways to work with schools to end assault, and other information.

The Right to Safe Housing on College Campuses for Survivors of Sexual Assault, Stalking, Domestic Violence, and Dating Violence (http://www.aclu.org/womens-rights/right-safe-housing-college-campuses-survivors-sexual-assault-stalking-domestic-violenc) – This ACLU guide offers legal and other guidance on safe housing.

situation has not improved since then. Campus and national surveys, including a 2016 survey by the Bureau of Justice Statistics,[16] consistently find sexual assault rates of 20% or more among women undergraduates.

Sexual violence affects men as well as women. According to a 2015 survey of students on 27 campuses, a significant proportion of all students are exposed to sexual violence:[17]

- Among undergraduates, 23.1% of females and 5.4% of males experience rape or sexual assault through physical force or incapacitation.

Title IX: Vital Protection for All Students

SCHOOLS' RESPONSIBILITIES TOWARD THEIR STUDENTS

A series of Supreme Court rulings in the 1990s recognized that sexual harassment is a type of sex discrimination prohibited by Title IX and that schools may be liable for monetary damages in cases of harassment by staff or students. In 1998, the Court established the standard for recovering damages in such cases: A harassed student must show that a school official with authority to take corrective measures had "actual knowledge" of the harassment and responded with "deliberate indifference"—a higher standard than exists for employees who are sexually harassed.[18]

A year later, the Supreme Court ruled that schools may also be liable for damages under Title IX for peer-on-peer harassment. To recover damages, the harassed student must show that the school had actual knowledge of the harassment and responded with deliberate indifference, and that the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[19]

In addition to filing a lawsuit for money damages, a student who has been harassed can file a suit asking the court to make a school stop a particular act or behavior or can seek a remedy from OCR. OCR has repeatedly made clear in its guidance documents that if a school knows, or should know, that a hostile environment exists, it is "responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence." A school also has a responsibility "to remedy the effects on the victim that could reasonably have been prevented had the school responded promptly and effectively."[20]

Schools have a legal obligation to protect their students by acting to end harassment and provide a safe learning environment. This is similar to employers' responsibilities to their employees, but the standard students have to meet to recover damages for harassment is higher than the one employees have to meet, leaving students with less protection from such harmful behavior. Given the importance of education to the country's social and economic well-being, enforcing the protections in place for students should be a vital priority for school and government officials at the local, state, and national levels.

REQUIRED PROCEDURES FOR RESPONDING TO HARASSMENT

A 2011 guidance document from OCR notes the seriousness of sexual harassment, including sexual violence, and spells out Title IX's procedural requirements for schools in responding to reported incidents:[21]

1. Each institution covered by Title IX is required to create and widely distribute a notice of nondiscrimination, designate at least one employee to coordinate its efforts, and adopt and publish grievance procedures for prompt and equitable resolution of complaints of sex discrimination, including sexual harassment and sexual violence.

2. Schools must ensure that their employees are trained to identify harassment and report it

ADDITIONAL RESOURCES FOR COMBATTING SEXUAL HARASSMENT

Crossing the Line: Sexual Harassment at School. American Association of University Women (AAUW). Available at http://www.aauw.org/research/crossing-the-line/.

Title IX Protections from Bullying & Harassment in School: FAQs for Students. National Women's Law Center (NWLC). Available at http://www.nwlc.org/resource/title-ix-protections-bullying-harassment-school-faqs-students.

Harassment-Free Hallways: How to Stop Sexual Harassment in School. AAUW Educational Foundation. Available at http://history.aauw.org/files/2013/01/harassment_free.pdf.

Know Your Rights: Title IX Requires Your School To Address Sexual Violence. U.S. Department of Education, Office for Civil Rights (OCR). See https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201404-title-ix.pdf and a related NWLC resource at https://nwlc.org/resources/title-ix-requires-schools-to-address-sexual-violence/.

Gender-Based Violence and Harassment: Your School, Your Rights. American Civil Liberties Union (ACLU). Available at http://www.aclu.org/womens-rights/gender-based-violence-harassment-your-school-your-rights.

Sexual Harassment: Not In Our School! Stop Sexual Assault in Schools. Educational video and companion materials available at http://ssais.org/video/.

Cyberbullying and Sexual Harassment: FAQs about Cyberbullying and Title IX. NWLC. Available at https://nwlc.org/resources/cyberbullying-and-sexual-harassment-frequently-asked-questions/.

Pregnancy Harassment *Is* Sexual Harassment: FAQs about Title IX and Pregnancy Harassment. NWLC. Available at www.nwlc.org/sites/default/files/pdfs/titleixpregnancyharassmentfactsheet.pdf.

Questions and Answers on Title IX and Sexual Violence. U.S. Department of Education, OCR. Available at https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

How to File a Title IX Sexual Harassment or Assault Complaint with the U.S. Department of Education. NWLC. Available at https://nwlc.org/resources/how-to-file-a-title-ix-sexual-harassment-or-assault-complaint-with-the-u-s-department-of-education/.

Find Your Title IX Coordinator. AAUW. Available at http://www.aauw.org/resource/find-your-title-ix-coordinator/.

NCWGE Recommendations

- Schools must accurately track sexual harassment so it can be addressed before it becomes severe or pervasive enough to create a hostile environment. Teachers and administrators can work with Title IX coordinators to ensure accurate reporting in the CRDC. Where schools fail in their efforts, state regulators should step in to require adequate tracking and reporting.

- Education institutions at all levels should create clear and accessible sexual harassment

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18. *Gebser v. Lago Vista Independent School Dist.* 524 U.S. 274 (1998).

19. *Davis v. Monroe County Board of Education,* 526 U.S. 629, 650 (1999).

SINGLE-SEX EDUCATION

SEPARATION SERVES NO ONE

SEPARATING BOYS AND GIRLS IN the classroom may seem like a good way to ensure that the needs of both groups are being met, but in fact separation serves neither group well. Evidence of the benefits of single-sex education is sketchy at best, while the stereotyping that typically accompanies teaching in separate classrooms can create an environment that stifles learning for both boys and girls.

Both the U.S. Constitution and Title IX limit the separation of students by gender in publicly funded educational programs and activities. Although Title IX regulations issued by the U.S. Department of Education in 2006 opened the door to some single-sex education, gender separation requires a strong justification, and discrimination based on sex is still unlawful.

Single-sex programs often violate the law by failing to offer equal educational opportunity. Moreover, the rationale for separation is often based on flawed notions about gender differences in brain development and learning. Schools and districts that are thinking about single-sex education as a means of improving teaching and learning should be mindful of the pitfalls of such programs, as well as of their limited value.

Nonetheless, over the objections of a wide coalition of education advocates, in 2006 the Department of Education issued Title IX regulations that eased restrictions. While they lowered the bar, the regulations still required that single-sex classes satisfy a host of conditions before being implemented.

RECENT REGULATORY GUIDANCE

Because the 2006 conditions have been frequently misunderstood, in 2014 the Department of Education issued a lengthy guidance explaining what is allowed and under what conditions.[4] Under the 2006 regulations, schools can exclude boys or girls from a class only if that exclusion is justified on the basis of one of two objectives: 1) improving the educational achievement of students through established policies of providing diverse educational options, or 2) meeting the particular, identified educational needs of students. Critically, as both the 2006 regulations and the 2014 guidance state, these objectives serve as a justification only if "the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective."

> Despite clear guidelines, many schools persist in establishing single-sex classes that fail to meet Constitutional or regulatory requirements.

Few schools have attempted to—or could—demonstrate that superior student achievement is substantially related to sex separation. But even if justified, participation in the classes must be entirely voluntary. In addition, substantially equal coed classes must be available; no student may be denied a coeducational class.

By making it clear that sex separation is very hard to implement and should be used with something akin to surgical precision in a coeducational school, the Department of Education's regulatory guidance has both helped school districts understand the law and improved enforcement. For example, when a high school in Lawrence, Kansas, planned to assign ninth graders to sex-separated classrooms because the principal believed that boys and girls have different learning needs, it took only an hour for the superintendent to shut down the program after receiving a complaint letter from the American Civil Liberties Union (ACLU) citing portions of the guidance. Administrative complaints to the Department of Education about sex separation at schools in other states across the country have similarly resulted in school districts terminating single-sex programs.

Despite these clear guidelines, many schools and districts persist in establishing single-sex classes that fail to meet Constitutional or regulatory requirements, often without any attempt to provide adequate justification. In addition to harming both boys and girls, these practices open schools and school districts to legal action by the Department of Education, the Department of Justice, state education agencies, and private citizens. (See the Challenging Discrimination section for examples of programs that have faced legal challenges.) For that reason, the 2014 guidance recommends that schools "consult with legal counsel prior to offering single-sex classes" to ensure compliance with both the Constitution and federal law.

Other research abounds. Neuroscientist and Chicago Medical School professor Lise Eliot, who has explored gender differences and their biological and social causes, concludes, "the argument that boys and girls need different educational experiences because 'their brains are different' is patently absurd. The same goes for arguments based on cognitive abilities, which differ far more *within* groups of boys or girls than *between* the average boy and girl."[9]

Psychologist Janet Shibley Hyde, another recognized expert on gender differences and similarities, further notes: "Educators should be wary of arguments for single-sex education that rest on assumptions of large psychological differences between boys and girls. These assumptions are not supported by data."[10] A 2011 *Science* article by an interdisciplinary group of researchers, "The Pseudoscience of Single-Sex Schooling," concludes that single-sex education "is deeply misguided, and often justified by weak, cherry-picked, or misconstrued scientific claims rather than by valid scientific evidence."[11]

> "A loud, cold classroom where you toss balls around...might be great for some boys, and for some girls, but for some boys, it would be a living hell."
>
> DIANE F. HALPERN, PROFESSOR OF PSYCHOLOGY, CLAREMONT MCKENNA COLLEGE

MORE EVIDENCE

In addition to the flawed scientific rationale for single-sex education, evaluations of single-sex programs have failed to demonstrate real benefit. A research review conducted at the time of the 2006 regulation changes found that half a century of research across Western countries has shown no dramatic or consistent advantages for single-sex education, either for boys or for girls.[12]

Although there is no doubt that some single-sex education programs have enjoyed successful outcomes, no rigorous studies have linked their successes to the single-sex structure rather than to other factors.[13] For example, studies that have claimed to demonstrate a causal relationship between the single-sex structure and improved outcomes have failed to control for variables such as class size, socioeconomic status, or student ability. Most studies do not have comparable control groups in coed programs, making it impossible to draw any meaningful comparisons at all.

In 2014, the American Psychological Association published a National Science Foundation-funded meta-analysis of 184 studies, representing testing of more than 1.6 million K–12 students, looking at the impact of single-sex versus coeducational schooling across a range of outcomes. The authors conclude that when proper controls are used, studies show that single-sex education provides no benefits over coeducational schooling.[14]

THE UPSHOT

In the absence of evidence of either gender-based learning differences or benefits from single-sex schooling, there is little basis for

- A Wisconsin superintendent justified a plan to create single-sex high school science classes based on "research data" showing that boys like "creative hands-on projects that culminate in something with a different level of understanding,'" while girls "may not even understand what happened in the science lab, but they got the right answers."[21]

Practices like these not only reinforce stereotypes, they also create inflexible learning environments that fail to serve students' individual needs and learning styles and that can be particularly harmful to students who do not conform to gender stereotypes. Neither boys nor girls thrive in such environments.

In addition, research has shown that separating students by gender keeps boys and girls from gaining valuable opportunities to learn from each other.[22] Spending time together not only promotes mutual understanding, it also influences interests and behaviors that can affect academic performance.[23] For example, girls who spend time with boys tend to be more interested in sports and building activities than those who don't, while boys who spend time and space with girls develop better verbal and reading skills.[24]

TEACHING TO STEREOTYPES

Following are examples that highlight how attempts to cater to illusory differences between boys and girls result in stereotyping that can hamper learning for all students.

Wisconsin's Beloit Area School District put boys and girls in separate academic classes and gave teachers training materials that stated:

- "Do NUMBERS for numbers' sake" for boys and "demonstrate RELEVANCE to the real world" for girls when teaching math.
- In social studies, "focus on REAL men" and "highlight technical details and use maps" when teaching boys, but use "art/music/literature" with girls.
- Form "teams" and use "hierarchy" and "competition" to motivate boys, while getting girls to "care" because they are motivated by "being accepted, liked, loved."

Teachers in Florida's Broward, Volusia, and Hernando Counties received training from Stetson University's Hollis Institute, whose training documents include this advice:

- Reassure a girl who is struggling with math that "when her brain is ready she'll be ready."
- Use a "commanding" voice for boys' classes but not for girls, as it would be "too loud or assertive for an all girls' class."

These examples also demonstrate that challenging practices can result in change. In 2015, Beloit Area School District agreed to abandon single-sex elementary classrooms. Broward County has agreed to end sex separation of students; investigations in the other Florida counties are ongoing.

same-gender classroom settings." The district agreed to abandon single-sex classes after an ACLU challenge.[27]

- In Middleton, Idaho, one elementary school taught boys and girls separately in grades 2–4, ostensibly to improve boys' reading scores, among other goals. In 2016, OCR concluded that the district was unable to explain how separating boys and girls would meet its stated learning objectives and therefore had not justified the separation. Moreover, the district had put in place practices that led to unequal opportunity, such as higher student-to-teacher ratios for girls. The district agreed to return to coeducational classrooms, to institute Title IX training for administration and staff, and to remain under Department of Education supervision through 2019–2020.[28]

The Problem with Single-Sex Schools

LIMITED OVERSIGHT

Perhaps because it is clear that separating students by gender in coeducational schools is generally unlawful and fraught with pitfalls, several school districts have recently chosen to create single-sex schools instead. Admissions policies at single-sex elementary and secondary schools are not covered under Title IX, as only a handful of single-sex public schools existed when Title IX legislation was enacted. Consequently, these schools receive less oversight.

Although many single-sex schools have faced no federal scrutiny, the Department of Education does have the authority to act when the creation of single-sex schools favors one group (either girls or boys) over the other, or when the rationale for such schools is based on sex stereotypes. The Department also has some discretion when a district requests federal funding under the Magnet School Assistance Program; it has declined to fund at least one proposed single-sex magnet school on the grounds that its proposal did not satisfy the requirements of the Equal Protection Clause.

AN UNSOUND CHOICE FOR CLOSING THE ACHIEVEMENT GAP

In a disturbing trend, most of these new schools are targeted at minority students in an attempt to address the gap in educational outcomes between minority students and their white counterparts. While the desire to find innovative ways of closing the achievement gap is understandable, a method that has failed to

RESOURCES FOR UNDERSTANDING TITLE IX AND SINGLE-SEX EDUCATION

Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities. U.S. Department of Education, Office for Civil Rights, 2014. Available at https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

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PREGNANT AND PARENTING STUDENTS

SUPPORTING ACADEMIC SUCCESS THROUGH TITLE IX

TITLE IX'S PROMISE OF EQUAL opportunity for girls and women is still far from being fulfilled when it comes to pregnant and parenting students. Title IX prohibits discrimination on the basis of pregnancy or parenting, yet these students frequently face policies that segregate them, exclude them from class or extracurricular activities, or punish them for excused medical absences.

These discriminatory practices can have devastating consequences. Faced with missed work and other obstacles, many pregnant and parenting students drop out of school, thus lowering their chances of finding stable employment that will let them support their families.

Schools can ensure compliance with Title IX by establishing equitable policies, educating the school community about the rights of pregnant and parenting students, and putting support structures in place. Such measures can help young parents—both mothers and fathers—stay in school and succeed.

"points" or other advantages on the basis of class attendance, students must have an opportunity to earn back credit from classes missed because of pregnancy.

Tutoring or other accommodations. If the school provides tutoring or homebound instruction services to other students with medical conditions or temporary disabilities, it must provide such services to pregnant or parenting students on the same basis.

Breast milk expression. Parenting students must be permitted reasonable breaks to express breast milk during educational programming and should have access to a private space that is not a bathroom in which to do so.

School activities. Schools must allow pregnant or parenting students to continue participating in activities and programs outside of class, such as sports, extracurricular activities, labs, field trips, and career rotations. The school can require a doctor's note for pregnant students to participate in activities only if it requires a doctor's note from *all* students who have conditions that require medical care.

Scholarships. Schools cannot terminate or reduce athletic, merit, or need-based scholarships because of pregnancy.

Overcoming Challenges in Education

Pregnant and parenting students face numerous hurdles in enrolling in, attending, and succeeding in school. In addition to the inherent difficulty of juggling schoolwork with parenting responsibilities and issues such as lack of affordable child care, these students often suffer discrimination at the hands of teachers, coaches, or school administrators.

DISCRIMINATION IMPEDES SUCCESS

Research by the Center for Assessment and Policy Development suggests that the most common barriers to education faced by pregnant and parenting students are: 1) required attendance at stand-alone alternative programs of questionable academic quality, and 2) discriminatory leave policies, including flunking students because of birth-related absences.[2] These unlawful practices can prevent pregnant and parenting students from finishing high school and from entering and completing postsecondary education. This form of discrimination thus has a lifelong impact on young parents' ability to earn sufficient wages to support their families.

Schools sometimes push students toward separate programs or facilities for pregnant students out of fear that these students will be a "bad influence" on others, or to avoid having to deal with pregnancy-related health issues. By law, participation in separate programs must be voluntary, yet students report that schools often tell them that they have no choice. Separate programs generally do not include the full range of academic coursework and extracurricular activities; therefore they do not leave these students as prepared to succeed as their classmates.

In other cases schools simply refuse to enroll pregnant students, either directing them elsewhere or actually encouraging them to drop out and get their GED instead of trying to

child care for low-income parents, but funding has declined in recent years, from $16 million and 155 awards in 2010 to $15 million and 86 awards in 2014.[5] Increased funding for this program would help parenting students stay in college through graduation.

Steps Toward Ending Discrimination

Despite clear legal protection for pregnant and parenting students, practices that hinder the ability of these students to succeed in school are widespread. Discrimination and biases persist; many schools continue to enact policies that punish pregnant and parenting students rather than supporting them.

The key to ending such discrimination is knowledge. Students need to know their rights; those responsible for establishing and implementing school policies must understand their obligations under Title IX; and regulators must recognize the social consequences of noncompliance with Title IX in order to support stronger enforcement.

TRACKING AND DISSEMINATING INFORMATION

No reliable data exists on the numbers of pregnant and parenting students or on the numbers of these students who face discrimination in violation of Title IX. Better data on these numbers—which could be gathered via the Department of Education's Civil Rights Data Collection (CRDC) process—would help in crafting strategies for countering discrimination.

Lack of knowledge among schools is another major hurdle. Many schools have not appointed Title IX coordinators, in violation of the statute, so they may not know that Title IX applies to pregnant and parenting students. Others simply do not fully understand their responsibilities to these students under the law. For example, colleges and universities sometimes allow individual instructors to set policies for their classes, including refusing entry to pregnant students, because school administrators fail to recognize that the school is accountable for such discrimination.[6]

Some schools are misled by unlawful policies at the state and local level. At least two state Departments of Education recently had official policies in place that violated Title IX by excluding pregnant and parenting students from receiving services that were made available to those with other medically excused absences. These policies, in Georgia and Michigan, were revised after being challenged.

Students themselves often have no idea that Title IX prohibits discrimination against pregnant and parenting students.[7] These students are particularly vulnerable if their school gives them incorrect information about enrollment, absence, or other policies. Given the high dropout rate among students who become pregnant, ensuring that these students understand their rights with regard to education is essential.

In 2013 the U.S. Department of Education's Office for Civil Rights (OCR) issued a guidance document on the application of Title IX to pregnant and parenting students. The guidance serves as a critical reminder that schools have responsibilities to these students, including making adjustments or accommodations that are "reasonable and responsive to the student's temporary pregnancy status."[8] The guidance also reminds schools that sexual harassment

rights and should ensure that all students are aware of how to make a complaint to OCR if their school fails to comply with Title IX. The work of Title IX coordinators, who oversee compliance at the institution and district level, will be crucial in these efforts.

Creating Systemic Change

Action at multiple levels is needed to bring about systemic change in helping pregnant and parenting students achieve academic success. In addition to disseminating knowledge, two areas where intervention can make a huge impact are federal support—including both

IMPACT OF ENFORCEMENT ON ENDING DISCRIMINATION

As the following examples show, Title IX enforcement can make a huge difference in ensuring education opportunities and access for pregnant and parenting students.

ENFORCEMENT AT THE DISTRICT AND SCHOOL LEVEL

2015 (GA): NWLC represented a pregnant student in an OCR complaint when her school refused to excuse absences for medically needed bed rest. An agreement with the school district allowed the student to make up her work and graduate on time. The district also agreed to change its written policies and to re-train faculty and staff on Title IX.

2015 (IL): NWLC wrote a letter in support of the Northwestern University Student Parent Alliance, which was lobbying for policies to accommodate student parents. In 2016, the university implemented new policies for portable child care grants, paid family leave for graduate students, and a doubling of campus lactation rooms.

2013 (NY): NWLC filed an OCR complaint on behalf of a pregnant student against City University of NY for allowing individual instructors to decide whether students could make up work missed because of pregnancy and for retaliating against a student for challenging the policy. The university agreed to provide Title IX training for staff and to reimburse the student's tuition losses.

ENFORCEMENT THROUGH COURT RULINGS

Several district and federal court cases have addressed whether a school may exclude a pregnant or parenting student from membership in the National Honor Society (NHS) or other programs.

- Multiple federal courts have determined that exclusion of pregnant or parenting students constitutes unlawful discrimination under Title IX.[a]
- Most courts have rejected schools' attempts to defend such exclusion on the grounds of premarital sex. One district court found that denying NHS membership to a pregnant student violated Title IX because a male student who had fathered a child out of wedlock was not similarly excluded.
- In 2016, the U.S. Court of Appeals for the Sixth Circuit found a school in violation of Title IX and awarded $850,000 to a pregnant student who had been discriminated against by her supervisor in a school-sponsored internship.[b]

a. Conley v. Northwest Fla. State College, 145 F.Supp.3d 1073 (N.D. Fla. 2015); *Chipman v. Grant County Sch. Dist.*, 30 F. Supp.2d 975 (E.D. Ky. 1998); *Wort v. Vierling,* No. 82–3169 (C.D. Ill. Sept. 4, 1984). *b.* Varlesi v. Wayne State University, 643 Fed. Appx. 507, 509 (6th Cir. Mich. 2016).

Below are simple measures that both secondary and postsecondary schools can put in place to help pregnant and parenting students succeed in school:

- Create flexible leave options and mechanisms for making up missed work.
- Provide services such as child care, transportation, and tutoring.
- Excuse absences related to the illness of a student's child.
- Allow students time and space to express breast milk.
- Provide added guidance and case management to help students develop short- and long-term education goals, apply for public benefits, and access available health and other social services.
- Offer life skills classes that provide information on parenting as well as comprehensive and medically accurate information on secondary pregnancy prevention.
- Track data on student outcomes.

The 2013 OCR guidance on pregnant and parenting students offers additional strategies for school administrators, teachers, and counselors to support mothers and fathers in school. These include preparing guidance materials to help school personnel respond to the needs of pregnant and parenting students; having Title IX coordinators provide training sessions for students, teachers, and others; and asking pregnant and parenting students for ideas on how districts can help them remain in school.[12]

NCWGE Recommendations

- School administrators should work with Title IX coordinators to make sure that all school personnel understand the rights of pregnant and parenting students.
- Dropout prevention programs should be targeted to meet the needs of students affected by pregnancy and parenting, including specific support measures to help both male and female students remain in school.
- The federal government should use its CRDC process to capture the number of pregnant and parenting students, and should back legislation directing schools to track the academic progress of these students. These measures will create a body of data on where and how efforts to support the education of pregnant and parenting students have succeeded.
- The Department of Education should develop a comprehensive plan for providing schools with technical assistance in protecting the rights of pregnant and parenting students under Title IX, and in conducting compliance reviews to ensure that students are able to complete their education in the school of their choice.
- The federal government should fund programs to enhance support for pregnant and parenting students, including accommodations and services to help them complete their education. Passing the Pregnant and Parenting Students Access to Education Act and increasing funding for affordable, quality childcare under the CCAMPIS program are two ways to achieve this goal.

TITLE IX COORDINATORS

ESSENTIAL CHAMPIONS OF EDUCATIONAL EQUITY

TITLE IX COORDINATORS ARE INTERNAL staff members who are accountable for ensuring that public schools, higher education institutions, and other education providers address the full scope of Title IX, which prohibits sex discrimination in federally funded education programs and activities. As such, Title IX coordinators play a vital role in protecting all students, both male and female, by preventing and addressing unlawful sex discrimination in school.

In overseeing compliance, Title IX coordinators serve as catalysts for equal opportunity in all areas covered in this report—athletics, sexual harassment and assault, single-sex education, pregnant and parenting students, career and technical education, and science, technology, engineering, and math (STEM)—as well as in employment and other aspects of education. They are the primary resource in identifying sex discrimination, resolving grievances, and providing equity information and training. Their work also ensures that education institutions take proactive steps to remain in compliance with Title IX.

counseling that directs students away from certain fields, biases in allocating funding for STEM research or athletics, and failure to address sexual harassment, among others. By limiting opportunity in many aspects of education, these forms of discrimination can have long-term effects that extend beyond school and into the workforce. Yet they can be difficult to combat, even where they clearly violate the law.

In addition, the role of the Title IX coordinator has become more complex as new issues such as cyberbullying arise, as existing issues gain broader recognition, and as the need to address the intersection of sex discrimination and discrimination based on factors such as race or disability becomes more apparent. In some cases, state and federal Title IX guidance has provided strong reinforcement of mandated responsibilities; for example, guidance documents from the U.S. Department of Education have made clear that schools must protect all students by working to prevent and address sexual harassment and assault. Lack of strong federal guidance in other areas leaves students vulnerable and schools uncertain about how best to comply with Title IX.

As the issues surrounding equity in education continue to evolve in ways that affect both male and female students, the need for designated staff to oversee Title IX compliance is higher than ever. By continuing to address sex discrimination, Title IX coordinators can help safeguard education opportunities for all students at a time when education is becoming increasingly important for achieving economic and social stability.

While gender equity work has become more complex, federal and state support for these endeavors continues to diminish.

DECLINING FUNDING FOR GENDER EQUITY WORK

While gender equity work has become more complex, federal and state support for these endeavors continues to diminish. The years following the passage of Title IX saw important federal funding that indirectly supported Title IX coordinators and other equity advocates through measures such as Title IV of the Civil Rights Act of 1964, the 1974 Women's Educational Equity Act (WEEA), the Perkins Vocational Education Act, and other federal education programs.[2]

Funding for gender equity has generally been in decline since the 1990s, however. The WEEA annual appropriation peaked at $10 million in 1980 and remained under $4 million a year from 1987 until the last WEEA funding in 2010.[3] The 1984 Perkins Vocational Education Act provided the most generous federal funding for gender equity, but the bulk of the funding ended in 1998. Other federal programs, such as efforts by the National Science Foundation to increase the participation of women and people of color in STEM, have addressed gender equity to a greater or lesser degree. In recent years, however, funding responsibility for Title IX coordinators has largely rested with school districts or education institutions, which rarely make it an explicit budget item.

Passage of new federal legislation with funding to support the Title IX infrastructure would enhance opportunity in all aspects of education, thus better preparing students for success in school and beyond. One proposed piece of legislation is the Patsy Mink Gender Equity in Education Act, which would fund training for Title IX coordinators, among other activities.[4] In the absence of such legislation, schools can

assistance to Title IX coordinators in all of the district's schools.

- Most state education agency websites have limited information on Title IX–related issues or on Title IX coordinators. School district websites are typically even worse.
- Many Title IX coordinators do not operate independently, and few work on Title IX full time.
- Title IX coordinators often do not receive sufficient support in their work to ensure high-quality, systematic, sustainable, and proactive guidance. Their roles are often seen as reactive—that is, primarily as responding to complaints and protecting their employer from sex discrimination lawsuits.
- There is little systematic oversight of the gender equity aspects of educational programs. This has resulted in school-sanctioned sex discrimination, especially with regard to single-sex programs, as well as inadequate protection of students from sexual harassment and assault.

One solution to some of these issues is to create teams of Title IX coordinators with expertise in different areas serving under a lead coordinator. Reducing turnover by providing incentives to retain experienced Title IX coordinators would also improve their ability to fulfill their role, with benefits accruing to the entire education community.

Resources for Enhancing Effectiveness

To address compliance issues, in 2004 OCR sent letters to all school district superintendents and college presidents about the requirement to appoint Title IX coordinators. OCR and the Department of Justice's Civil Rights Division have also included information on the role of Title IX coordinators in policy guidance documents relating to issues such as single-sex education, sexual harassment and assault, and athletics, among others.

With Title IX compliance still in need of shoring up, the Department of Education and other organizations have developed a host of more recent materials to guide schools in putting in place systems to ensure that all students have equitable access to education opportunities. These resources can help education institutions, their communities, and Title IX coordinators themselves understand the roles and responsibilities of this vital position.

FEDERAL GUIDANCE ON THE ROLE OF THE TITLE IX COORDINATOR

In 2015, OCR released a guidance package to help educators understand the role of Title IX coordinators.[8] The package includes the *Title IX Resource Guide* and a "Dear Colleague" letter on Title IX coordinators, which went out to schools and higher education institutions throughout the country. The letter outlines both obligations and recommendations for schools to maximize compliance. It also emphasizes the importance of making Title IX coordinators accessible to the school community. Key points include:[9]

RESOURCES FOR ACCESSING AND SUPPORTING TITLE IX COORDINATORS

LOCATING TITLE IX COORDINATORS

Find Your Title IX Coordinator. An interactive tool from the American Association of University Women (AAUW) with information on Title IX coordinators in K–12 and higher education, by state. See http://www.aauw.org/resource/find-your-title-ix-coordinator/.

Civil Rights Coordinators Database. OCR has compiled names, titles, and contact information for Title IX and other civil rights coordinators at virtually every public school district in the country. See https://www.ed.gov/civ-rts-coordinators.

Campus Safety and Security Database. OPE's database includes contact information for the security officer, the fire safety officer, and the lead Title IX coordinator at every college and university. See https://ope.ed.gov/campussafety/.

Title IX Coordinators in State Education Agencies. Developed by FMF, this list of Title IX coordinators serving at the state level is designed not only to inform state and school communities but also to help Title IX coordinators exchange information. See http://www.feminist.org/education/NetworkCoordinators_state.asp.

UNDERSTANDING THE WORK OF TITLE IX COORDINATORS

Title IX Resource Guide. U.S. Department of Education, OCR, April 2015. Information on the scope of Title IX, the role and authority of Title IX coordinators, and more. See https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf.

Dear Colleague Letter on Title IX Coordinators. U.S. Department of Education, OCR, April 2015. A reminder of the responsibilities of school districts, colleges, and universities in designating and supporting Title IX coordinators. See https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf.

Reinvigorating the Role of the Title IX Coordinator: A Requirement and Resource. FMF, 2016. Research findings and recommendations for maximizing the effectiveness of Title IX coordinators. See http://www.feminist.org/education/pdfs/Title-IX-Coordinators-Full-9-13-16.pdf.

Title IX Coordinators Web Page. A special section of the FMF Education Equity website, which includes *Essential Resources for Title IX Coordinators,* the state Title IX coordinator finder, research reports, a handout on campus Title IX coordinators, and other resources. See http://www.feminist.org/education/TitleIXcoordinatorsNetwork.asp.

Making Title IX History at the Office for Civil Rights. AAUW, December 2016. A summary of the impact of OCR's recent Title IX work, including data collection on Title IX coordinators. See http://www.aauw.org/article/making-title-ix-history-at-the-ocr/.

Video (part 1): Sexual Harassment: Not in Our School! A training video from Stop Sexual Assault in Schools that includes a parent interview with a Title IX coordinator. See http://www.ssais.org/video.

ments and school districts, all individual schools and other entities that receive federal funding must designate a Title IX coordinator.

- Congress should provide adequate funding for OCR and other federal agencies with Title IX responsibilities to ensure that they can maintain critical services, such as disseminating up-to-date information, providing technical assistance, investigating complaints, and using the CRDC to collect information on Title IX coordinators as a means of ensuring gender equity.

- Congress should pass the Gender Equity in Education Act, which would create an Office for Gender Equity in the U.S. Department of Education and provide support for implementation of Title IX, including training of Title IX coordinators.

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4. For information on this legislation, see https://feminist.org/blog/index.php/2016/07/18/patsy-mink-gender-equity-in-education-act-introduced-in-house-and-senate/.

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6. OCR, *Dear Colleague Letter on Title IX Coordinators,* April 2015. See https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf.

7. S. Klein et al., *Reinvigorating the Role of the Title IX Coordinator,* p. v. FMF, 2016.

8. The guidance package can be found here: https://www2.ed.gov/policy/rights/guid/ocr/title-ix-coordinators.html.

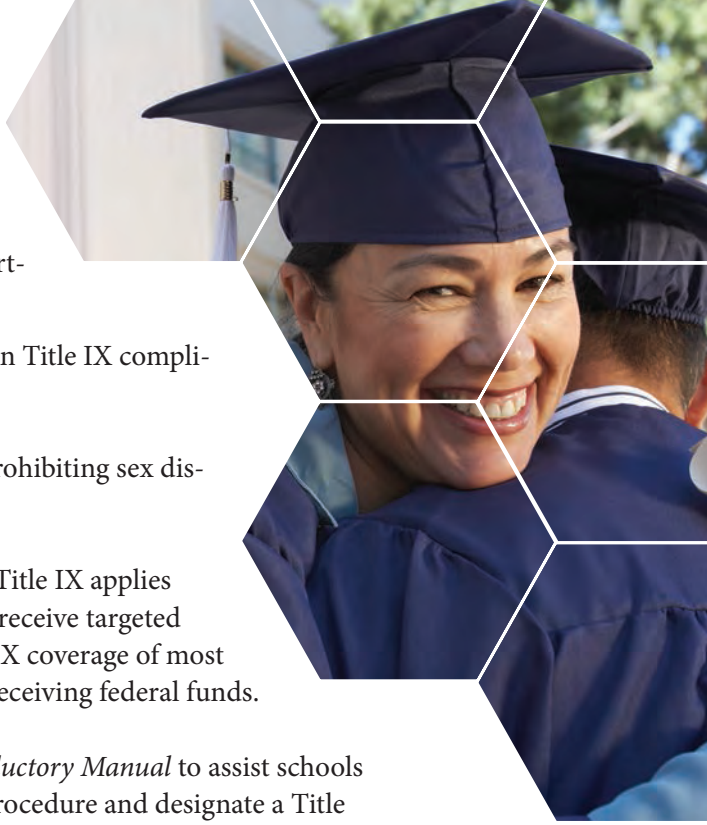
9. Information in this section is summarized from OCR's *Dear Colleague Letter on Title IX Coordinators,* April 2015. https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf.

10. OCR's K–12 Title IX coordinator locator is available at https://www.ed.gov/civ-rts-coordinators.

11. The campus safety database from the Office of Postsecondary Education, which includes information on Title IX coordinators at colleges and universities, can be found at https://ope.ed.gov/campussafety/.

12. AAUW's *Find Your Title IX Coordinator,* a searchable database of Title IX coordinators at K–12 and higher education institutions, can be found at http://www.aauw.org/resource/find-your-title-ix-coordinator.

13. FMF's list of Title IX coordinators working at the state and territory level, along with other resources, is available at http://www.feminist.org/education/NetworkCoordinators_state.asp.



1980 Federal education responsibilities are transferred from HEW to the new Department of Education. Primary oversight of Title IX is transferred to the Department's Office for Civil Rights (OCR).

OCR issues the *Interim Athletics Investigator's Manual* on Title IX compliance to investigators in its regional offices.

1982 The U.S. Supreme Court upholds Title IX regulations prohibiting sex discrimination in employment.

1984 The U.S. Supreme Court rules in *Grove City v. Bell* that Title IX applies only to the specific programs within an institution that receive targeted federal funds. This decision effectively eliminates Title IX coverage of most school athletics programs and other areas not directly receiving federal funds.

1987 OCR publishes *Title IX Grievance Procedures: An Introductory Manual* to assist schools with their obligation to establish a Title IX complaint procedure and designate a Title IX coordinator to receive those complaints.

1988 Congress overrides President Reagan's veto to pass the Civil Rights Restoration Act, which restores Title IX coverage to all of an educational institution's programs and activities if any part of the institution receives federal funds.

1990 OCR updates and finalizes its *Title IX Athletics Investigator's Manual.*

1992 The U.S. Supreme Court rules unanimously in *Franklin v. Gwinnett County Public Schools* that plaintiffs who sue under Title IX may be awarded monetary damages.

The NCAA publishes a Gender Equity Study of its member institutions, detailing widespread sex discrimination in athletics programs.

1994 The Equity in Athletics Disclosure Act passes, requiring federally assisted, coeducational institutions of higher education to disclose certain gender equity information about their intercollegiate athletics programs, allowing better monitoring of Title IX compliance.

1996 OCR issues the "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test," explaining in detail how schools can comply with each prong of the three-part participation test first set forth in the 1979 Policy Interpretation.

The U.S. Court of Appeals for the First Circuit, after an extensive analysis, upholds the lawfulness of the three-part test in *Cohen v. Brown University.*

The U.S. Government Accountability Office issues a report entitled *Issues Involving Single-Gender Schools and Programs,* which concludes that such programs may violate Title IX, the U.S. Constitution, and state constitutions.

of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance" affirming the existing policies.

2005 Lawrence H. Summers, President of Harvard University, draws criticism for proposing that "innate" differences in sex may explain why fewer women succeed in science and math careers. One year later, Summers announces his resignation from Harvard; Drew Gilpin Faust becomes the first female president of Harvard in 2007.

The U.S. Supreme Court rules in *Jackson v. Birmingham Board of Education* that individuals, including coaches and teachers, have a right of action under Title IX if they are retaliated against for protesting sex discrimination.

The Department of Education issues an "Additional Clarification of Intercollegiate Athletics Policy Guidance: Three-Part Test—Part Three," which weakens schools' obligations under Title IX by allowing them to rely on a single email survey to support assertions that they are meeting women's interest in playing sports.

2006 The Department of Education promulgates new regulations expanding the authorization for schools to offer single-sex programs.

The College of Education at Arizona State University releases a study showing that current research into single-sex education is neither conclusive nor of acceptable quality. The study notes that the research "is mostly flawed by failure to control for important variables such as class, financial status, selective admissions, religious values, prior learning or ethnicity."[2]

2009 The Supreme Court holds, in *Fitzgerald v. Barnstable School Committee,* that individuals can bring suits alleging sex discrimination by public entities under both Title IX and the U.S. Constitution.

2010 OCR releases guidance to schools clarifying that, under current civil rights laws, they are responsible for stopping, remedying, and preventing bullying and harassment based on sex, including gender stereotypes.[3] If a school fails to recognize and address discriminatory harassment, it can be held responsible for violating students' civil rights.

The Department of Education rescinds the 2005 "Additional Clarification of Intercollegiate Athletics Policy Guidance: Three-Part Test—Part Three," returning athletics enforcement efforts to the previous standard, which requires schools to evaluate multiple indicators of interest to demonstrate that they are fully and effectively accommodating their female students' interests.

2011 OCR releases guidance clarifying that schools are obliged to prevent and respond to sexual violence under Title IX's prohibition of sex discrimination.[4] The guidance reiterates that sexual harassment of students, including acts of sexual violence, are prohibited under Title IX.

1. See http://www.justice.gov/crt/about/cor/Pubs/eo13160.pdf.

2. G. W. Bracey, *Separate but Superior? A Review of Issues and Data Bearing on Single-Sex Education.* Education Policy Research Unit, Department of Education, Arizona State University, 2006. See http://www.nepc.colorado.edu/files/EPSL-0611-221-EPRU.pdf.

3. Department of Education, Office for Civil Rights (OCR), *Dear Colleague Letter,* October 26, 2010. See http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

4. Department of Education, OCR, *Dear Colleague Letter on Sexual Violence,* April 4, 2011. See http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

5. See https://www.ed.gov/news/press-releases/new-data-us-department-education-highlights-educational-inequities-around-teacher-experience-discipline-and-high-school-rigor.

6. Department of Education, OCR, *Supporting the Academic Success of Pregnant and Parenting Students,* June 2013. See http://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.html.

7. Department of Education, OCR, *Questions and Answers on Title IX and Sexual Violence,* April 29, 2014. See http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

8. Department of Education, OCR, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities,* December 1, 2014. See http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

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MS. FOUNDATION FOR WOMEN
https://forwomen.org/
12 MetroTech Center, 26th Floor
Brooklyn, NY 11201

NATIONAL ALLIANCE FOR PARTNERSHIPS IN EQUITY
http://www.napequity.org
P. O. Box 369
Cochranville, PA 19330

NATIONAL ASSOCIATION OF COLLEGIATE WOMEN ATHLETIC ADMINISTRATORS
https://www.womenleadersincollegesports.org/
2000 Baltimore
Kansas City, MO 64108

NATIONAL CENTER FOR LESBIAN RIGHTS
http://www.nclrights.org
870 Market Street, Suite 570
San Francisco, CA 94102

NATIONAL COUNCIL OF NEGRO WOMEN
http://www.ncnw.org
633 Pennsylvania Avenue, NW
Washington, DC 20001

NATIONAL EDUCATION ASSOCIATION
http://www.nea.org
1201 16th Street NW, Room 613
Washington, DC 20036

NATIONAL ORGANIZATION FOR WOMEN
http://www.now.org
1100 H Street NW, 3rd Floor
Washington, DC 20005

NATIONAL WOMEN'S HISTORY PROJECT
http://www.nwhp.org
3440 Airway Drive, Suite F
Santa Rosa, CA 95403

NATIONAL WOMEN'S LAW CENTER
https://www.nwlc.org
11 Dupont Circle NW, Suite 800
Washington, DC 20036

NATIONAL WOMEN'S POLITICAL CAUCUS
http://www.nwpc.org
PO Box 50476
Washington, DC 20091

SOCIETY OF WOMEN ENGINEERS
http://www.swe.org
203 N La Salle Street, Suite 1675
Chicago, IL 60601

STOP SEXUAL ASSAULT IN SCHOOLS
http://stopsexualassaultinschools.org
1631 NE Broadway #331
Portland, OR 97232

UNITED STATES STUDENT ASSOCIATION
http://www.usstudents.org
1211 Connecticut Avenue NW,
Suite 406
Washington, DC 20036

WOMEN'S LAW PROJECT
http://www.womenslawproject.org
125 S. 9th Street, #300
Philadelphia, PA 19107

WOMEN'S SPORTS FOUNDATION
https://www.womenssportsfoundation.org
Eisenhower Park
1899 Hempstead Turnpike,
Suite 400
East Meadow, NY 11554

YWCA
http://www.ywca.org
2025 M Street NW, Suite 550
Washington, DC 20036

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Federal
Title IX Law

FEDERAL TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

TITLE 20 – Education - 1681 - 1688

CHAPTER 38 - DISCRIMINATION BASED ON SEX OR BLINDNESS

CHAPTER REFERRED TO IN OTHER SECTIONS This chapter is referred to in sections 1132f-1, 1232, 3041, 3042 of this title; title 29 sections 206, 1577; title 42 sections 290cc-34, 300w-7, 300x-7, 708, 1988, 2000d-7, 10406.

Sec. 1681. Sex

(a) Prohibition against discrimination; exceptions

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 education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions in regard to admissions to educational institutions, this section shall not apply

(A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or

(B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations this section shall not apply to membership practices –

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of

which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences - this section shall not apply to –

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for -

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutionsthis section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c)"Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

(Pub. L. 92-318, title IX, Sec. 901, June 23, 1972, 86 Stat. 373; Pub. L. 93-568, Sec. 3(a), Dec. 31, 1974, 88 Stat. 1862; Pub. L. 94-482, title IV, Sec. 412(a), Oct. 12, 1976, 90 Stat. 2234; Pub. L. 96-88, title III, Sec. 301(a)(1), title V, Sec. 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub. L. 99-514, Sec. 2, Oct. 22, 1986, 100 Stat. 2095.)

REFERENCES IN TEXT This chapter, referred to in subsecs. (b) and (c), was in the original "this title", meaning title IX of Pub. L. 92-318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c-6, 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Tables.

AMENDMENTS 1986 - Subsec. (a)(6)(A). Pub. L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954", which for purposes of codification was translated as "title 26" thus requiring no change in text. 1976 -

Subsec. (a)(6) to (9). Pub. L. 94-482 substituted "this" for "This" in par. (6) and added pars. (7) to (9). 1974 - Subsec. (a)(6). Pub. L. 93-568 added par. (6).

EFFECTIVE DATE OF 1976 AMENDMENT Section 412(b) of Pub. L. 94-482 provided that: "The amendment made by subsection (a) [amending shall take effect upon the date of enactment of this Act [Oct. 12, 1976]."

EFFECTIVE DATE OF 1974 AMENDMENT Section 3(b) of Pub. L. 93-568 provided that: "The provisions of the amendment made by subsection (a) [amending this section] shall be effective on, and retroactive to, July 1, 1972."

SHORT TITLE OF 1988 AMENDMENT Pub. L. 100-259, Sec. 1, Mar. 22, 1988, 102 Stat. 28, provided that: "This Act [enacting sections 1687 and 1688 of this title and section 2000d-4a of Title 42, The Public Health and Welfare, amending sections 706 and 794 of Title 29, Labor, and section 6107 of Title 42, and enacting provisions set out as notes under sections 1687 and 1688 of this title] may be cited as the 'Civil Rights Restoration Act of 1987'."

TRANSFER OF FUNCTIONS "Secretary" substituted for "Commissioner" in subsec. (a)(2) pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of Commissioner of Education to the Secretary of Education.

COORDINATION OF IMPLEMENTATION AND ENFORCEMENT OF PROVISIONS
For provisions relating to the coordination of implementation and enforcement of the provisions of this chapter by the Attorney General, see section 1-201(b) of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

REGULATIONS; NATURE OF PARTICULAR SPORTS: INTERCOLLEGIATE ATHLETIC ACTIVITIES
Pub. L. 93-380, title VIII, Sec. 844, Aug. 21, 1974, 88 Stat. 612, provided that the Secretary prepare and publish, not more than 30 days after Aug. 21, 1974, proposed regulations implementing the provisions of this chapter regarding prohibition of sex discrimination in federally assisted programs, including reasonable regulations for intercollegiate athletic activities considering the nature of the particular sports.

SECTION REFERRED TO IN OTHER SECTIONS
This section is referred to in sections 1682, 1687 of this title.

Sec. 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

(Pub. L. 92-318, title IX, Sec. 902, June 23, 1972, 86 Stat. 374.)

DELEGATION OF FUNCTIONS Functions of the President relating to approval of rules, regulations, and orders of general applicability under this section, were delegated to the Attorney General, see section 1-102 of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

SECTION REFERRED TO IN OTHER SECTIONS
This section is referred to in section 1683 of this title.

1683. Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

(Pub. L. 92-318, title IX, Sec. 903, June 23, 1972, 86 Stat. 374.)

CODIFICATION "'Section 1682 of this title'", where first appearing, was substituted for "section 1002" as conforming to intent of Congress as Pub. L. 92-318 was enacted without any section 1002 and subsequent text refers to "section 902", codified as "section 1682 of this title".

Sec. 1684. Blindness or visual impairment; prohibition against discrimination

No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

(Pub. L. 92-318, title IX, Sec. 904, June 23, 1972, 86 Stat. 375.)

Sec. 1685. Authority under other laws unaffected

Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

(Pub. L. 92-318, title IX, Sec. 905, June 23, 1972, 86 Stat. 375.)

REFERENCES IN TEXT This chapter, referred to in text, was in the original "this title", meaning title IX of Pub. L. 92-318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c6, 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Tables.

Sec. 1686. Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

(Pub. L. 92-318, title IX, Sec. 907, June 23, 1972, 86 Stat. 375.)

REFERENCES IN TEXT This chapter, referred to in text, was in the original "this title", meaning title IX of Pub. L. 92-318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c6, 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Tables.

This Act, referred to in text, is Pub. L. 92-318, June 23, 1972, 86 Stat. 235, as amended, known as the Education Amendments of 1972. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of this title and Tables.

Sec. 1687. Interpretation of "program or activity"

For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of –

(1)
(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)
(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(3)
(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);
any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.

> (Pub. L. 92-318, title IX, Sec. 908, as added Pub. L. 100-259, Sec. 3(a), Mar. 22, 1988, 102 Stat. 28.)
>
> REFERENCES IN TEXT This chapter, referred to in text, was in the original "this title", meaning title IX of Pub. L. 92-318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c6, 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Tables.
>
> FINDINGS OF CONGRESS
> Section 2 of Pub. L. 100-259 provided that: "The Congress finds that –

"(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], and title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.]; and

"(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered."

CONSTRUCTION Section 7 of Pub. L. 100-259 provided that: "Nothing in the amendments made by this Act [see Short Title of 1988 Amendment note under section 1681 of this title] shall be construed to extend the application of the Acts so amended [Education Amendments of 1972, Pub. L. 92-318, see Short Title of 1972 Amendment, set out as a note under section 1001 of this title, Rehabilitation Act of 1973, 29 U.S.C. 701 et seq., Age Discrimination Act of 1975, 42 U.S.C. 6101 et seq., and Civil Rights Act of 1964, 42 U.S.C. 2000a et seq.] to ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of this Act [Mar. 22, 1988]."

ABORTION NEUTRALITY This section not to be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal funds to perform or pay for an abortion, see section 8 of Pub. L. 100-259, set out as a note under section 1688 of this title.

Sec. 1688. Neutrality with respect to abortion

Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

(Pub. L. 92-318, title IX, Sec. 909, as added Pub. L. 100-259, Sec. 3(b), Mar. 22, 1988, 102 Stat. 29.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original "this title", meaning title IX of Pub. L. 92-318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c6, 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Tables.

CONSTRUCTION

This section not to be construed to extend application of Education Amendments of 1972, Pub. L. 92- 318, to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see section 7 of Pub. L. 100-259, set out as a note under section 1687 of this title.

ABORTION NEUTRALITY

Section 8 of Pub. L. 100-259 provided that: "No provision of this Act or any amendment made by this Act [see Short Title of 1988 Amendment note under section 1681 of this title] shall be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal Funds [sic] to perform or pay for an abortion."

California Sex Equity Laws

K-12 Education Code

- Section 200 - gender/gender identity nondiscrimination
- Section 210.7 - definition of gender
- Section 221.5 - equal classroom/program opportunity
- Section 221.51 - pregnancy nondiscrimination
- Section 221.6 - mandated CDE Title IX posting
- Section 221.61 - mandated schools' Title IX posting
- Section 221.7 - equal athletic opportunity
- Section 221.8 - Title IX rights list
- Section 221.9 - mandated athletics data reporting
- Section 222 - lactation rights
- Section 222.5 - pregnant/parenting rights
- Section 223 - 501(c) (3) exemption
- Section 224 - American Legion exemption
- Section 224.5 - gender equity training grants
- Section 225 - parent/child activity exemption
- Section 229 - prohibition of preferential treatment
- Section 230 - examples of gender discrimination
- Section 231 - gender-separated facilities allowed
- Section 231.5 - mandated sexual harassment policy

Higher Education Code

- Section 66251 - gender/gender identity nondiscrimination
- Section 66281.5 - mandated sexual harassment policy
- Section 67386 - sexual harassment policy requirements

State of California

EDUCATION CODE

Section 200

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200. It is the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, equal rights, and opportunities in the educational institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefor.

(Amended by Stats. 2017, Ch. 493, Sec. 2. (AB 699) Effective January 1, 2018.)

State of California

EDUCATION CODE

Section 210.7

210.7. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(Amended by Stats. 2011, Ch. 719, Sec. 4. (AB 887) Effective January 1, 2012.)

State of California

EDUCATION CODE

Section 221.5

221.5. (a) It is the policy of the state that elementary and secondary school classes and courses, including nonacademic and elective classes and courses, be conducted, without regard to the sex of the pupil enrolled in these classes and courses.

(b) A school district shall not prohibit a pupil from enrolling in any class or course on the basis of the sex of the pupil, except a class subject to Chapter 5.6 (commencing with Section 51930) of Part 28 of Division 4 of Title 2.

(c) A school district shall not require a pupil of one sex to enroll in a particular class or course, unless the same class or course is also required of a pupil of the opposite sex.

(d) A school counselor, teacher, instructor, administrator, or aide shall not, on the basis of the sex of a pupil, offer vocational or school program guidance to a pupil of one sex that is different from that offered to a pupil of the opposite sex or, in counseling a pupil, differentiate career, vocational, or higher education opportunities on the basis of the sex of the pupil counseled. Any school personnel acting in a career counseling or course selection capacity to a pupil shall affirmatively explore with the pupil the possibility of careers, or courses leading to careers, that are nontraditional for that pupil's sex. The parents or legal guardian of the pupil shall be notified in a general manner at least once in the manner prescribed by Section 48980, in advance of career counseling and course selection commencing with course selection for grade 7 so that they may participate in the counseling sessions and decisions.

(e) Participation in a particular physical education activity or sport, if required of pupils of one sex, shall be available to pupils of each sex.

(f) A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.

(Amended by Stats. 2014, Ch. 71, Sec. 25. (SB 1304) Effective January 1, 2015.)

State of California

EDUCATION CODE

Section 221.51

221.51. (a) A local educational agency shall not apply any rule concerning a pupil's actual or potential parental, family, or marital status that treats pupils differently on the basis of sex.

(b) A local educational agency shall not exclude nor deny any pupil from any educational program or activity, including class or extracurricular activity, solely on the basis of the pupil's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) A local educational agency may require any pupil to obtain the certification of a physician or nurse practitioner that the pupil is physically and emotionally able to continue participation in the regular education program or activity.

(d) Pregnant or parenting pupils shall not be required to participate in pregnant minor programs or alternative education programs. Pregnant or parenting pupils who voluntarily participate in alternative education programs shall be given educational programs, activities, and courses equal to those they would have been in if participating in the regular education program.

(e) A local educational agency shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom in the same manner and under the same policies as any other temporary disabling condition.

(f) For purposes of this section, "local educational agency" means a school district, a county office of education, a school operated by a school district or a county office of education, a charter school, the California Schools for the Deaf, or the California School for the Blind.

(Added by Stats. 2018, Ch. 942, Sec. 2. (AB 2289) Effective January 1, 2019.)

State of California

EDUCATION CODE

Section 221.6

221.6. On or before July 1, 2006, the department shall post on its Internet Web site, in both English and Spanish and at a reading level that may be comprehended by pupils in high school, the information set forth in the federal regulations implementing Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681 et seq.).

(Amended by Stats. 2016, Ch. 86, Sec. 52. (SB 1171) Effective January 1, 2017.)

State of California

EDUCATION CODE

Section 221.61

221.61. (a) On or before July 1, 2017, public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools shall post in a prominent and conspicuous location on their Internet Web sites all of the following:

(1) The name and contact information of the Title IX coordinator for that public school, private school, school district, county office of education, or charter school, which shall include the Title IX coordinator's phone number and email address.

(2) The rights of a pupil and the public and the responsibilities of the public school, private school, school district, county office of education, or charter school under Title IX, which shall include, but shall not be limited to, Internet Web links to information about those rights and responsibilities located on the Internet Web sites of the department's Office for Equal Opportunity and the United States Department of Education Office of Civil Rights, and the list of rights specified in Section 221.8.

(3) A description of how to file a complaint under Title IX, which shall include all of the following:

(A) An explanation of the statute of limitations within which a complaint must be filed after an alleged incident of discrimination has occurred, and how a complaint may be filed beyond the statute of limitations.

(B) An explanation of how the complaint will be investigated and how the complainant may further pursue the complaint, including, but not limited to, Internet Web links to this information on the United States Department of Education Office for Civil Rights' Internet Web site.

(C) An Internet Web link to the United States Department of Education Office for Civil Rights complaints form, and the contact information for the office, which shall include the phone number and email address for the office.

(b) On or before April 1, 2017, and annually thereafter, the Superintendent shall send a letter through electronic means to all public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools informing them of the requirement specified in subdivision (a) and of their responsibilities under Title IX.

(c) A public school that does not maintain an Internet Web site may comply with subdivision (a) by posting the information specified in paragraphs (1) to (3), inclusive, of subdivision (a) on the Internet Web site of its school district or county office of education.

(d) Nothing in this section shall be construed to require a school or local educational agency to establish an Internet Web site if the school or local educational agency does not already maintain one.

(Added by Stats. 2016, Ch. 655, Sec. 2. (SB 1375) Effective January 1, 2017.)

State of California

EDUCATION CODE

Section 221.7

221.7. (a) The Legislature finds and declares that female pupils are not accorded opportunities for participation in school-sponsored athletic programs equal to those accorded male pupils. It is the intent of the Legislature that opportunities for participation in athletics be provided equally to male and female pupils.

(b) Notwithstanding any other provisions of law, no public funds shall be used in connection with any athletic program conducted under the auspices of a school district governing board or any student organization within the district, which does not provide equal opportunity to both sexes for participation and for use of facilities. Facilities and participation include, but are not limited to, equipment and supplies, scheduling of games and practice time, compensation for coaches, travel arrangements, per diem, locker rooms, and medical services.

(c) Nothing in this section shall be construed to require a school district to require competition between male and female pupils in school-sponsored athletic programs.

(Added by renumbering Section 41 by Stats. 1998, Ch. 914, Sec. 3. Effective January 1, 1999.)

State of California

EDUCATION CODE

Section 221.8

221.8. The following list of rights, which are based on the relevant provisions of the federal regulations implementing Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681 et seq.), may be used by the department for purposes of Section 221.6:

(a) You have the right to fair and equitable treatment and you shall not be discriminated against based on your sex.

(b) You have the right to be provided with an equitable opportunity to participate in all academic extracurricular activities, including athletics.

(c) You have the right to inquire of the athletic director of your school as to the athletic opportunities offered by the school.

(d) You have the right to apply for athletic scholarships.

(e) You have the right to receive equitable treatment and benefits in the provision of all of the following:

(1) Equipment and supplies.

(2) Scheduling of games and practices.

(3) Transportation and daily allowances.

(4) Access to tutoring.

(5) Coaching.

(6) Locker rooms.

(7) Practice and competitive facilities.

(8) Medical and training facilities and services.

(9) Publicity.

(f) You have the right to have access to a gender equity coordinator to answer questions regarding gender equity laws.

(g) You have the right to contact the State Department of Education and the California Interscholastic Federation to access information on gender equity laws.

(h) You have the right to file a confidential discrimination complaint with the United States Office of Civil Rights or the State Department of Education if you believe you have been discriminated against or if you believe you have received unequal treatment on the basis of your sex.

(i) You have the right to pursue civil remedies if you have been discriminated against.

(j) You have the right to be protected against retaliation if you file a discrimination complaint.

(Added by renumbering Section 271 by Stats. 2015, Ch. 43, Sec. 3. (AB 1538) Effective January 1, 2016.)

State of California

EDUCATION CODE

Section 221.9

221.9. (a) Commencing with the 2015–16 school year and every year thereafter, each public elementary and secondary school in the state, including each charter school, that offers competitive athletics shall publicly make available at the end of the school year all of the following information:

(1) The total enrollment of the school, classified by gender.

(2) The number of pupils enrolled at the school who participate in competitive athletics, classified by gender.

(3) The number of boys' and girls' teams, classified by sport and by competition level.

(b) The data required pursuant to subdivision (a) shall reflect the total number of players on a team roster on the official first day of competition.

(c) The school shall make the information specified in subdivision (a) publicly available as follows:

(1) If the school maintains an Internet Web site, by posting the information on the school's Internet Web site.

(2) If the school does not maintain an Internet Web site, by submitting the information to its school district or, for a charter school, to its charter operator. The school district or charter operator shall post the information on its Internet Web site, and the information shall be disaggregated by schoolsite.

(d) The materials used by a school to compile the information specified in subdivision (a) shall be retained by the school for at least three years after the information is posted on the Internet pursuant to subdivision (c).

(e) As used in this section, "competitive athletics" means sports where the activity has coaches, a governing organization, and practices, and competes during a defined season, and has competition as its primary goal.

(Added by Stats. 2014, Ch. 258, Sec. 2. (SB 1349) Effective January 1, 2015.)

State of California

EDUCATION CODE

Section 222

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222. (a) A school operated by a school district or a county office of education, the California School for the Deaf, the California School for the Blind, and a charter school shall provide reasonable accommodations to a lactating pupil on a school campus to express breast milk, breast-feed an infant child, or address other needs related to breast-feeding. Reasonable accommodations under this section include, but are not limited to, all of the following:

(1) Access to a private and secure room, other than a restroom, to express breast milk or breast-feed an infant child.

(2) Permission to bring onto a school campus a breast pump and any other equipment used to express breast milk.

(3) Access to a power source for a breast pump or any other equipment used to express breast milk.

(4) Access to a place to store expressed breast milk safely.

(b) A lactating pupil on a school campus shall be provided a reasonable amount of time to accommodate her need to express breast milk or breast-feed an infant child.

(c) A school specified in subdivision (a) shall provide the reasonable accommodations specified in subdivisions (a) and (b) only if there is at least one lactating pupil on the school campus.

(d) A school subject to this section may use an existing facility to meet the requirements specified in subdivision (a).

(e) A pupil shall not incur an academic penalty as a result of her use, during the schoolday, of the reasonable accommodations specified in this section, and shall be provided the opportunity to make up any work missed due to such use.

(f) (1) A complaint of noncompliance with the requirements of this section may be filed with the local educational agency under the Uniform Complaint Procedures set forth in Chapter 5.1 (commencing with Section 4600) of Division 1 of Title 5 of the California Code of Regulations.

(2) A local educational agency shall respond to a complaint filed pursuant to paragraph (1) in accordance with Chapter 5.1 (commencing with Section 4600) of Division 1 of Title 5 of the California Code of Regulations.

(3) A complainant not satisfied with the decision of a local educational agency may appeal the decision to the department pursuant to Chapter 5.1 (commencing with Section 4600) of Division 1 of Title 5 of the California Code of Regulations and shall receive a written decision regarding the appeal within 60 days of the department's receipt of the appeal.

(4) If a local educational agency finds merit in a complaint, or if the Superintendent finds merit in an appeal, the local educational agency shall provide a remedy to the affected pupil.

(Added by Stats. 2015, Ch. 690, Sec. 2. (AB 302) Effective January 1, 2016.)

State of California

EDUCATION CODE

Section 222.5

222.5. (a) A local educational agency shall notify pregnant and parenting pupils of their rights and options available under the law through annual school year welcome packets and through independent study packets.

(b) A local educational agency shall annually notify parents and guardians of pupils at the beginning of the regular school term of the rights and options available to pregnant and parenting pupils under the law.

(c) For purposes of this section, "local educational agency" means a school district, a county office of education, a school operated by a school district or a county office of education, a charter school, the California Schools for the Deaf, or the California School for the Blind.

(Added by Stats. 2018, Ch. 942, Sec. 3. (AB 2289) Effective January 1, 2019.)

State of California

EDUCATION CODE

Section 223

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223. This chapter shall not apply to the membership practices of the Young Men's Christian Association, Young Women's Christian Association, girl scouts, boy scouts, Camp Fire, or voluntary youth service organizations which are exempt from taxation under subdivision (a) of Section 501 of the federal Internal Revenue Code of 1954, whose membership has traditionally been limited to persons of one sex, and principally to persons of less than 19 years of age.

(Amended by Stats. 1998, Ch. 914, Sec. 20. Effective January 1, 1999.)

State of California

EDUCATION CODE

Section 224

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224. The sex discrimination provisions of this article shall not apply to any of the following, provided that these conferences comply with other nondiscrimination provisions of state and federal law:

(a) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference.

(b) Any program or activity of any secondary educational institution specifically for any of the following purposes:

(1) The promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference.

(2) The selection of students to attend any of those conferences.

(Amended by Stats. 1998, Ch. 914, Sec. 21. Effective January 1, 1999.)

State of California

EDUCATION CODE

Section 224.5

224.5. (a) There is hereby established the gender equity train-the-trainer grant program. The Superintendent of Public Instruction shall award grants from funds available for that purpose to the governing boards of school districts and county offices of education for the implementation of programs to train trainers in gender equity.

(b) The Superintendent of Public Instruction shall, with the approval of the State Board of Education, develop criteria for the grant applications . The Superintendent of Public Instruction shall select as grant recipients applicants that have clearly demonstrated all of the following:

(1) Grant moneys will result in the grantee providing ongoing gender training to all staff members, including certificated and classified staff, and maintaining a pool of knowledgeable gender equity trainers.

(2) The applicant has considered other available federal and state funding resources for gender equity training and coordinated those resources, as appropriate with a grant under this section.

(c) A grant application shall include an evaluation plan for determining the extent to which the expected benefits of the trainer program are being realized. The results of the evaluation shall be reported to the governing board of the school district or county board of education, as appropriate.

(d) The Superintendent of Public Instruction shall implement this section only in fiscal years in which sufficient funds have been appropriated for this purpose. To the extent funds are available in multiple years, the Superintendent of Public Instruction shall award grants in a manner that ensures that training is available in all parts of the state.

(e) No more than a total of one hundred thirty thousand dollars ($130,000) of state funds may be expended in any fiscal year for purposes of this section.

(Added by Stats. 2000, Ch. 459, Sec. 2. Effective January 1, 2001.)

State of California

EDUCATION CODE

Section 225

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225. This article shall not preclude father-son or mother-daughter activities at an educational institution, provided that if such activities are offered for students of one sex, opportunities for reasonably comparable activities are offered for students of the other sex.

(Added by Stats. 1982, Ch. 1117, Sec. 1.)

State of California

EDUCATION CODE

Section 229

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229. Nothing contained in this article shall be construed to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in, or receiving the benefits of, any state supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, district, or other area. However, this section shall not be construed to prevent the consideration in any hearing or proceeding under this article of statistical evidence which tends to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any state-supported program or activity by the members of one sex.

(Added by Stats. 1982, Ch. 1117, Sec. 1.)

State of California

EDUCATION CODE

Section 230

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230. For purposes of this chapter, harassment and other discrimination on the basis of sex include, but are not limited to, the following practices:

(a) On the basis of sex, exclusion of a person or persons from participation in, denial of the benefits of, or subjection to harassment or other discrimination in, any academic, extracurricular, research, occupational training, or other program or activity.

(b) On the basis of sex, provision of different amounts or types of student financial aid, limitation of eligibility for student financial aid, or the application of different criteria to applicants for student financial aid or for participation in the provision of student financial aid by others. Nothing in this subdivision shall be construed to prohibit an educational institution from administering, or assisting in the administration of, scholarships, fellowships, or other forms of student financial aid, established pursuant to domestic or foreign wills, bequests, trusts, or similar legal instruments or by acts of a foreign government, which require that awards be made to members of a particular sex; provided, that the overall effect of the award of these sex-restricted scholarships, fellowships, and other forms of student financial aid does not discriminate on the basis of sex.

(c) On the basis of sex, exclusion from participation in, or denial of equivalent opportunity in, athletic programs. For purposes of this subdivision, "equivalent" means equal or equal in effect.

(d) An educational institution may be found to have effectively accommodated the interests and abilities in athletics of both sexes within the meaning of Section 4922 of Title 5 of the California Code of Regulations as that section exists on January 1, 2003, using any one of the following tests:

(1) Whether interscholastic level participation opportunities for male and female pupils are provided in numbers substantially proportionate to their respective enrollments.

(2) Where the members of one sex have been and are underrepresented among interscholastic athletes, whether the school district can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interest and abilities of the members of that sex.

(3) Where the members of one sex are underrepresented among interscholastic athletes, and the institution cannot show a history and continuing practice of program expansion as required in paragraph (2), whether the school district can demonstrate that the interest and abilities of the members of that sex have been fully and effectively accommodated by the present program.

(e) If an educational institution must cut its athletic budget, the educational institution shall do so consistently with its legal obligation to comply with both state and federal gender equity laws.

(f) It is the intent of the Legislature that the three-part test articulated in subdivision (d) be interpreted as it has been in the policies and regulations of the Office of Civil Rights in effect on January 1, 2003.

(g) On the basis of sex, harassment or other discrimination among persons, including, but not limited to, students and nonstudents, or academic and nonacademic personnel, in employment and the conditions thereof, except as it relates to a bona fide occupational qualification.

(h) On the basis of sex, the application of any rule concerning the actual or potential parental, family, or marital status of a person, or the exclusion of any person from any program or activity or employment because of pregnancy or related conditions.

(Amended by Stats. 2003, Ch. 660, Sec. 1. Effective January 1, 2004.)

State of California

EDUCATION CODE

Section 231

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231. Nothing herein shall be construed to prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes, so long as comparable facilities are provided.

(Added by Stats. 1982, Ch. 1117, Sec. 1.)

State of California

EDUCATION CODE

Section 231.5

231.5. (a) It is the policy of the State of California, pursuant to Section 200, that all persons, regardless of their sex, should enjoy freedom from discrimination of any kind in the educational institutions of the state. The purpose of this section is to provide notification of the prohibition against sexual harassment as a form of sexual discrimination and to provide notification of available remedies.

(b) Each educational institution in the State of California shall have a written policy on sexual harassment. It is the intent of the Legislature that each educational institution in this state include this policy in its regular policy statement rather than distribute an additional written document.

(c) The educational institution's written policy on sexual harassment shall include information on where to obtain the specific rules and procedures for reporting charges of sexual harassment and for pursuing available remedies.

(d) A copy of the educational institution's written policy on sexual harassment shall be displayed in a prominent location in the main administrative building or other area of the campus or schoolsite. "Prominent location" means that location, or those locations, in the main administrative building or other area where notices regarding the institution's rules, regulations, procedures, and standards of conduct are posted.

(e) A copy of the educational institution's written policy on sexual harassment, as it pertains to students, shall be provided as part of any orientation program conducted for new students at the beginning of each quarter, semester, or summer session, as applicable.

(f) A copy of the educational institution's written policy on sexual harassment shall be provided for each faculty member, all members of the administrative staff, and all members of the support staff at the beginning of the first quarter or semester of the school year, or at the time that there is a new employee hired.

(g) A copy of the educational institution's written policy on sexual harassment shall appear in any publication of the institution that sets forth the comprehensive rules, regulations, procedures, and standards of conduct for the institution.

(Added by renumbering Section 212.6 by Stats. 1998, Ch. 914, Sec. 13. Effective January 1, 1999.)

State of California

EDUCATION CODE

Section 66251

66251. It is the policy of the State of California to afford all persons, regardless of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code, including immigration status, equal rights and opportunities in the postsecondary educational institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies for the commission of those prohibited acts.

(Amended by Stats. 2018, Ch. 779, Sec. 1. (SB 183) Effective January 1, 2019.)

State of California

EDUCATION CODE

Section 66281.5

66281.5. (a) It is the policy of the State of California, pursuant to Section 66251, that all persons, regardless of their sex, should enjoy freedom from discrimination of any kind in the postsecondary educational institution of the state. The purpose of this section is to provide notification of the prohibition against sexual harassment as a form of sexual discrimination and to provide notification of available remedies.

(b) Each postsecondary educational institution in the State of California shall have a written policy on sexual harassment, including information on the complaint process and the timeline for the complaint process, which shall be available on its Internet Web site. It is the intent of the Legislature that each educational institution in this state include this policy in its regular policy statement rather than distribute an additional written document.

(c) The postsecondary educational institution's written policy on sexual harassment shall include information on where to obtain the specific rules and procedures for reporting charges of sexual harassment and for pursuing available remedies and resources, both on and off campus.

(d) A copy of the postsecondary educational institution's written policy on sexual harassment shall be displayed in a prominent location in the main administrative building or other area of the campus or schoolsite. "Prominent location" means that location, or those locations, in the main administrative building or other area where notices regarding the institution's rules, regulations, procedures, and standards of conduct are posted.

(e) A copy of the postsecondary educational institution's written policy on sexual harassment, as it pertains to students, shall be provided as part of any orientation program conducted for new students at the beginning of each quarter, semester, or summer session, as applicable.

(f) A copy of the postsecondary educational institution's written policy on sexual harassment shall be provided for each faculty member, all members of the administrative staff, and all members of the support staff at the beginning of the first quarter or semester of the school year, or at the time that there is a new employee hired.

(g) A copy of the postsecondary educational institution's written policy on sexual harassment shall appear in any publication of the institution that sets forth the comprehensive rules, regulations, procedures, and standards of conduct for the institution.

(Amended by Stats. 2016, Ch. 107, Sec. 1. (AB 2654) Effective January 1, 2017.)

State of California

EDUCATION CODE

Section 67386

67386. (a) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall adopt a policy concerning sexual assault, domestic violence, dating violence, and stalking, as defined in the federal Higher Education Act of 1965 (20 U.S.C. Sec. 1092(f)), involving a student, both on and off campus. The policy shall include all of the following:

(1) An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. "Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.

(2) A policy that, in the evaluation of complaints in any disciplinary process, it shall not be a valid excuse to alleged lack of affirmative consent that the accused believed that the complainant consented to the sexual activity under either of the following circumstances:

(A) The accused's belief in affirmative consent arose from the intoxication or recklessness of the accused.

(B) The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented.

(3) A policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.

(4) A policy that, in the evaluation of complaints in the disciplinary process, it shall not be a valid excuse that the accused believed that the complainant affirmatively consented to the sexual activity if the accused knew or reasonably should have known that the complainant was unable to consent to the sexual activity under any of the following circumstances:

(A) The complainant was asleep or unconscious.

(B) The complainant was incapacitated due to the influence of drugs, alcohol, or medication, so that the complainant could not understand the fact, nature, or extent of the sexual activity.

(C) The complainant was unable to communicate due to a mental or physical condition.

(b) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall adopt detailed and victim-centered policies and protocols regarding sexual assault, domestic violence, dating violence, and stalking involving a student that comport with best practices and current professional standards. At a minimum, the policies and protocols shall cover all of the following:

(1) A policy statement on how the institution will provide appropriate protections for the privacy of individuals involved, including confidentiality.

(2) Initial response by the institution's personnel to a report of an incident, including requirements specific to assisting the victim, providing information in writing about the importance of preserving evidence, and the identification and location of witnesses.

(3) Response to stranger and nonstranger sexual assault.

(4) The preliminary victim interview, including the development of a victim interview protocol, and a comprehensive followup victim interview, as appropriate.

(5) Contacting and interviewing the accused.

(6) Seeking the identification and location of witnesses.

(7) Providing written notification to the victim about the availability of, and contact information for, on- and off-campus resources and services, and coordination with law enforcement, as appropriate.

(8) Participation of victim advocates and other supporting people.

(9) Investigating allegations that alcohol or drugs were involved in the incident.

(10) Providing that an individual who participates as a complainant or witness in an investigation of sexual assault, domestic violence, dating violence, or stalking will not be subject to disciplinary sanctions for a violation of the institution's student conduct policy at or near the time of the incident, unless the institution determines that the violation was egregious, including, but not limited to, an action that places the health or safety of any other person at risk or involves plagiarism, cheating, or academic dishonesty.

(11) The role of the institutional staff supervision.

(12) A comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and stalking cases.

(13) Procedures for confidential reporting by victims and third parties.

(c) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall, to the extent feasible, enter into

memoranda of understanding, agreements, or collaborative partnerships with existing on-campus and community-based organizations, including rape crisis centers, to refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, and legal assistance, and including resources for the accused.

(d) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall implement comprehensive prevention and outreach programs addressing sexual violence, domestic violence, dating violence, and stalking. A comprehensive prevention program shall include a range of prevention strategies, including, but not limited to, empowerment programming for victim prevention, awareness raising campaigns, primary prevention, bystander intervention, and risk reduction. Outreach programs shall be provided to make students aware of the institution's policy on sexual assault, domestic violence, dating violence, and stalking. At a minimum, an outreach program shall include a process for contacting and informing the student body, campus organizations, athletic programs, and student groups about the institution's overall sexual assault policy, the practical implications of an affirmative consent standard, and the rights and responsibilities of students under the policy.

(e) Outreach programming shall be included as part of every incoming student's orientation.

(Amended by Stats. 2015, Ch. 303, Sec. 115. (AB 731) Effective January 1, 2016.)

Proposed Regulatory Changes

- Department of Education "Dear Colleague" Letter and Q&A on Campus Sexual Misconduct, September 22, 2017
- Department of Education Proposed Rule, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, November 29, 2018
- Comment on Department of Education Proposed Rule, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* – Attorneys General Shapiro (Pennsylvania), Becerra (California), and Grewal (New Jersey), January 30, 2019
- Comment on Department of Education Proposed Rule, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* – Professors Gersen and Halley and The Honorable Nancy Gertner, Harvard Law School, January 30, 2019
- *Doe v. Allee*, 242 Cal. Rptr. 3d 109 (Ct. App. 2019)

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

September 22, 2017

Dear Colleague:

The purpose of this letter is to inform you that the Department of Education is withdrawing the statements of policy and guidance reflected in the following documents:

- Dear Colleague Letter on Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 4, 2011.

- Questions and Answers on Title IX and Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 29, 2014.

These guidance documents interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student-on-student sexual misconduct. The 2011 Dear Colleague Letter required schools to adopt a minimal standard of proof—the preponderance-of-the-evidence standard—in administering student discipline, even though many schools had traditionally employed a higher clear-and-convincing-evidence standard. The Letter insisted that schools with an appeals process allow complainants to appeal not-guilty findings, even though many schools had previously followed procedures reserving appeal for accused students. The Letter discouraged cross-examination by the parties, suggesting that to recognize a right to such cross-examination might violate Title IX. The Letter forbade schools from relying on investigations of criminal conduct by law-enforcement authorities to resolve Title IX complaints, forcing schools to establish policing and judicial systems while at the same time directing schools to resolve complaints on an expedited basis. The Letter provided that any due-process protections afforded to accused students should not "unnecessarily delay" resolving the charges against them.

Legal commentators have criticized the 2011 Letter and the 2014 Questions and Answers for placing "improper pressure upon universities to adopt procedures that do not afford fundamental fairness."[1] As a result, many schools have established procedures for resolving allegations that "lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation."[2]

The 2011 and 2014 guidance documents may have been well-intentioned, but those documents have

[1] Open Letter from Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, WALL ST. J. ONLINE (Feb. 18, 2015), http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf (statement of 16 members of the University of Pennsylvania Law School faculty).

[2] *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014) (statement of 28 members of the Harvard Law School faculty); *see also* ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS, RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT (2017); AMERICAN COLLEGE OF TRIAL LAWYERS, TASK FORCE ON THE RESPONSE OF UNIVERSITIES AND COLLEGES TO ALLEGATIONS OF SEXUAL VIOLENCE, WHITE PAPER ON CAMPUS SEXUAL ASSAULT INVESTIGATIONS (2017).

led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints. The guidance has not succeeded in providing clarity for educational institutions or in leading institutions to guarantee educational opportunities on the equal basis that Title IX requires. Instead, schools face a confusing and counterproductive set of regulatory mandates, and the objective of regulatory compliance has displaced Title IX's goal of educational equity.

The Department imposed these regulatory burdens without affording notice and the opportunity for public comment. Under these circumstances, the Department has decided to withdraw the above-referenced guidance documents in order to develop an approach to student sexual misconduct that responds to the concerns of stakeholders and that aligns with the purpose of Title IX to achieve fair access to educational benefits. The Department intends to implement such a policy through a rulemaking process that responds to public comment. The Department will not rely on the withdrawn documents in its enforcement of Title IX.

The Department refers you to the *Q&A on Campus Sexual Misconduct*, issued contemporaneously with this letter, and will continue to rely on its *Revised Sexual Harassment Guidance*, which was informed by a notice-and-comment process and issued in 2001,[3] as well as the reaffirmation of that *Guidance* in the Dear Colleague Letter on Sexual Harassment issued January 25, 2006.[4] As always, the Department's enforcement efforts proceed from Title IX itself[5] and its implementing regulations.[6]

In the forty-five years since the passage of Title IX, we have seen remarkable progress toward an educational environment free of sex discrimination. That progress resulted in large part from the vigorous enforcement of Title IX by the Office for Civil Rights at the Department of Education. The Department remains committed to enforcing these critical protections and intends to do so consistent with its mission under Title IX to protect fair and equitable access to education.

The Department has determined that this letter is a significant guidance document under the Final Bulletin for Agency Good Guidance Practices of the Office of Management and Budget, 72 Fed. Reg. 3432 (Jan. 25, 2007). This letter does not add requirements to applicable law.[7]

Sincerely,

/s/
Candice Jackson
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

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[3] The *Revised Sexual Harassment Guidance* is available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.
[4] The 2006 Dear Colleague Letter is available at https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.
[5] 20 U.S.C. §§ 1681-88.
[6] 34 C.F.R. § 106.1 *et seq.*; *see also* 34 C.F.R. § 668.46(k) (implementing requirements of the Violence Against Women Act).
[7] If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339).

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

September 2017

Q&A on Campus Sexual Misconduct

Under Title IX of the Education Amendments of 1972 and its implementing regulations, an institution that receives federal funds must ensure that no student suffers a deprivation of her or his access to educational opportunities on the basis of sex. The Department of Education intends to engage in rulemaking on the topic of schools' Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence. The Department will solicit input from stakeholders and the public during that rulemaking process. In the interim, these questions and answers—along with the *Revised Sexual Harassment Guidance* previously issued by the Office for Civil Rights[1]—provide information about how OCR will assess a school's compliance with Title IX.

SCHOOLS' RESPONSIBILITY TO ADDRESS SEXUAL MISCONDUCT

Question 1:

What is the nature of a school's responsibility to address sexual misconduct?

Answer:

Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows or reasonably should know of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately.[2] In particular, when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists and the school must respond.[3]

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[1] Office for Civil Rights, *Revised Sexual Harassment Guidance* (66 Fed. Reg. 5512, Jan. 19, 2001), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [hereinafter 2001 Guidance]; *see also* Office for Civil Rights, Dear Colleague Letter on Sexual Harassment (Jan. 25, 2006), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.

[2] 2001 Guidance at (VII).

[3] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 631 (1999); 34 C.F.R. § 106.31(a); 2001 Guidance at (V)(A)(1). Title IX prohibits discrimination on the basis of sex "under any education program or activity" receiving federal financial assistance, 20 U.S.C. § 1681(a); 34 C.F.R. § 106.1, meaning within the "operations" of a postsecondary institution or school district, 20 U.S.C. § 1687; 34 C.F.R. § 106.2(h). The Supreme Court has explained that the statute "confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs." *Davis*, 526 U.S. at 644. Accordingly, OCR has informed institutions that "[a] university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient." Oklahoma State University Determination Letter at 2, OCR Complaint No. 06-03-2054 (June 10, 2004); *see also* University of Wisconsin-Madison Determination Letter, OCR Complaint No. 05-07-2074 (Aug. 6, 2009) ("OCR determined that the alleged assault did not occur in the context of an educational program or activity operated by the University."). Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities. Under the Clery Act, postsecondary institutions are obliged to collect and report statistics on crimes that occur on campus, on noncampus properties controlled by the institution or an affiliated student organization and used for educational purposes, on public property within or immediately adjacent to campus, and in areas within the patrol jurisdiction of the campus police or the campus security department. 34 C.F.R. § 668.46(a); 34 C.F.R. § 668.46(c).

Each recipient must designate at least one employee to act as a Title IX Coordinator to coordinate its responsibilities in this area.[4] Other employees may be considered "responsible employees" and will help the student to connect to the Title IX Coordinator.[5]

In regulating the conduct of students and faculty to prevent or redress discrimination, schools must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech.[6]

THE CLERY ACT AND TITLE IX

Question 2:

What is the Clery Act and how does it relate to a school's obligations under Title IX?

Answer:

Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX.[7] Each year, institutions must disclose campus crime statistics and information about campus security policies as a condition of participating in the federal student aid programs. The Violence Against Women Reauthorization Act of 2013 amended the Clery Act to require institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault, and stalking, and to include certain policies, procedures, and programs pertaining to these incidents in the annual security reports. In October 2014, following a negotiated rulemaking process, the Department issued amended regulations to implement these statutory changes.[8] Accordingly, when addressing allegations of dating violence, domestic violence, sexual assault, or stalking, institutions are subject to the Clery Act regulations as well as Title IX.

INTERIM MEASURES

Question 3:

What are interim measures and is a school required to provide such measures?

Answer:

Interim measures are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.[9] Interim measures include counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.

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[4] 34 C.F.R. § 106.8(a).
[5] 2001 Guidance at (V)(C).
[6] Office for Civil Rights, Dear Colleague Letter on the First Amendment (July 28, 2003), *available at* https://www2.ed.gov/about/offices/list/ocr/firstamend.html; 2001 Guidance at (XI).
[7] Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, Pub. L. No. 101-542, 20 U.S.C. § 1092(f).
[8] *See* 34 C.F.R. § 668.46.
[9] *See* 2001 Guidance at (VII)(A).

It may be appropriate for a school to take interim measures during the investigation of a complaint.[10] In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education. The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students' evolving needs.

GRIEVANCE PROCEDURES AND INVESTIGATIONS

Question 4:

What are the school's obligations with regard to complaints of sexual misconduct?

Answer:

A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct.[11] OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the school (i) provides notice of the school's grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees; (ii) applies the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties; (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (iv) designates and follows a reasonably prompt time frame for major stages of the complaint process; (v) notifies the parties of the outcome of the complaint; and (vi) provides assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.[12]

Question 5:

What time frame constitutes a "prompt" investigation?

Answer:

There is no fixed time frame under which a school must complete a Title IX investigation.[13] OCR **will** evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.

Question 6:

What constitutes an "equitable" investigation?

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[10] 2001 Guidance at (VII)(A). In cases covered by the Clery Act, a school must provide interim measures upon the request of a reporting party if such measures are reasonably available. 34 C.F.R. § 668.46(b)(11)(v).

[11] 34 C.F.R. § 106.8(b); 2001 Guidance at (V)(D); *see also* 34 C.F.R. § 668.46(k)(2)(i) (providing that a proceeding which arises from an allegation of dating violence, domestic violence, sexual assault, or stalking must "[i]nclude a prompt, fair, and impartial process from the initial investigation to the final result").

[12] 2001 Guidance at (IX); *see also* 34 C.F.R. § 668.46(k). Postsecondary institutions are required to report publicly the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, and stalking, 34 C.F.R. § 668.46 (k)(1)(i), and to include a process that allows for the extension of timeframes for good cause with written notice to the parties of the delay and the reason for the delay, 34 C.F.R. § 668.46 (k)(3)(i)(A).

[13] 2001 Guidance at (IX); *see also* 34 C.F.R. § 668.46(k)(3)(i)(A).

Answer:

In every investigation conducted under the school's grievance procedures, the burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed. A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.

An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.[14]

Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.[15] Restricting the ability of either party to discuss the investigation (e.g., through "gag orders") is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable. Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.[16]

Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.[17] Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.[18]

INFORMAL RESOLUTIONS OF COMPLAINTS

Question 7:

After a Title IX complaint has been opened for investigation, may a school facilitate an informal resolution of the complaint?

Answer:

If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.

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[14] 2001 Guidance at (V)(A)(1)-(2); *see also* 34 C.F.R. § 668.46(k)(2)(ii).
[15] 2001 Guidance at (X).
[16] 34 C.F.R. § 106.31(a).
[17] 2001 Guidance at (VII)(B).
[18] 34 C.F.R. § 668.46(k)(3)(i)(B)(3).

DECISION-MAKING AS TO RESPONSIBILITY

Question 8:

What procedures should a school follow to adjudicate a finding of responsibility for sexual misconduct?

Answer:

The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school's sexual misconduct policy. If the complaint presented more than a single allegation of misconduct, a decision should be reached separately as to each allegation of misconduct. The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.[19]

The decision-maker(s) must offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.[20] The parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.

Any process made available to one party in the adjudication procedure should be made equally available to the other party (for example, the right to have an attorney or other advisor present and/or participate in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses).[21] When resolving allegations of dating violence, domestic violence, sexual assault, or stalking, a postsecondary institution must "[p]rovide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice."[22] In such disciplinary proceedings and any related meetings, the institution may "[n]ot limit the choice of advisor or presence for either the accuser or the accused" but "may establish restrictions regarding the extent to which the advisor may participate in the proceedings."[23]

Schools are cautioned to avoid conflicts of interest and biases in the adjudicatory process and to prevent institutional interests from interfering with the impartiality of the adjudication. Decision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.

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[19] The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases. In a recent decision, a court concluded that a school denied "basic fairness" to a responding party by, among other things, applying a lower standard of evidence only in cases of alleged sexual misconduct. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016) ("[T]he lowering of the standard appears to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove—and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct. The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused."). When a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided. A postsecondary institution's annual security report must describe the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault, or stalking. 34 C.F.R. § 668.46(k)(1)(ii).

[20] 34 C.F.R. § 668.46(k)(3)(i)(B)(3).

[21] A school has discretion to reserve a right of appeal for the responding party based on its evaluation of due process concerns, as noted in Question 11.

[22] 34 C.F.R. § 668.46(k)(2)(iii).

[23] 34 C.F.R. § 668.46(k)(2)(iv).

DECISION-MAKING AS TO DISCIPLINARY SANCTIONS

Question 9:

What procedures should a school follow to impose a disciplinary sanction against a student found responsible for a sexual misconduct violation?

Answer:

The decision-maker as to any disciplinary sanction imposed after a finding of responsibility may be the same or different from the decision-maker who made the finding of responsibility. Disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school's code of student conduct while considering the impact of separating a student from her or his education. Any disciplinary decision must be made as a proportionate response to the violation.[24] In its annual security report, a postsecondary institution must list all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking.[25]

NOTICE OF OUTCOME AND APPEALS

Question 10:

What information should be provided to the parties to notify them of the outcome?

Answer:

OCR recommends that a school provide written notice of the outcome of disciplinary proceedings to the reporting and responding parties concurrently. The content of the notice may vary depending on the underlying allegations, the institution, and the age of the students. Under the Clery Act, postsecondary institutions must provide simultaneous written notification to both parties of the results of the disciplinary proceeding along with notification of the institution's procedures to appeal the result if such procedures are available, and any changes to the result when it becomes final.[26] This notification must include any initial, interim, or final decision by the institution; any sanctions imposed by the institution; and the rationale for the result and the sanctions.[27] For proceedings not covered by the Clery Act, such as those arising from allegations of harassment, and for all proceedings in elementary and secondary schools, the school should inform the reporting party whether it found that the alleged conduct occurred, any individual remedies offered to the reporting party or any sanctions imposed on the responding party that directly relate to the reporting party, and other steps the school has taken to eliminate the hostile environment, if the school found one to exist.[28] In an elementary or secondary school, the notice should be provided to the parents of students under the age of 18 and directly to students who are 18 years of age or older.[29]

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[24] 34 C.F.R. § 106.8(b); 2001 Guidance at (VII)(A).
[25] 34 C.F.R. § 668.46(k)(1)(iii).
[26] 34 C.F.R. § 668.46(k)(2)(v). The Clery Act applies to proceedings arising from allegations of dating violence, domestic violence, sexual assault, and stalking.
[27] 34 C.F.R. § 668.46(k)(3)(iv).
[28] A sanction that directly relates to the reporting party would include, for example, an order that the responding party stay away from the reporting party. *See* 2001 Guidance at vii n.3. This limitation allows the notice of outcome to comply with the requirements of the Family Educational Rights and Privacy Act. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10; 34 C.F.R. § 99.12(a). FERPA provides an exception to its requirements only for a postsecondary institution to communicate the results of a disciplinary proceeding to the reporting party in cases of alleged crimes of violence or specific nonforcible sex offenses. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 99.31(a)(13).
[29] 20 U.S.C. § 1232g(d).

Question 11:

How may a school offer the right to appeal the decision on responsibility and/or any disciplinary decision?

Answer:

If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.[30]

EXISTING RESOLUTION AGREEMENTS

Question 12:

In light of the rescission of OCR's 2011 Dear Colleague Letter and 2014 Questions & Answers guidance, are existing resolution agreements between OCR and schools still binding?

Answer:

Yes. Schools enter into voluntary resolution agreements with OCR to address the deficiencies and violations identified during an OCR investigation based on Title IX and its implementing regulations. Existing resolution agreements remain binding upon the schools that voluntarily entered into them. Such agreements are fact-specific and do not bind other schools. If a school has questions about an existing resolution agreement, the school may contact the appropriate OCR regional office responsible for the monitoring of its agreement.

Note: The Department has determined that this Q&A is a significant guidance document under the Final Bulletin for Agency Good Guidance Practices of the Office of Management and Budget, 72 Fed. Reg. 3432 (Jan. 25, 2007). This document does not add requirements to applicable law. If you have questions or are interested in commenting on this document, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339).

[30] 2001 Guidance at (IX). Under the Clery Act, a postsecondary institution must provide simultaneous notification of the appellate procedure, if one is available, to both parties. 34 C.F.R. § 668.46(k)(2)(v)(B). OCR has previously informed schools that it is permissible to allow an appeal only for the responding party because "he/she is the one who stands to suffer from any penalty imposed and should not be made to be tried twice for the same allegation." Skidmore College Determination Letter at 5, OCR Complaint No. 02-95-2136 (Feb. 12, 1996); *see also* Suffolk University Law School Determination Letter at 11, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) ("[A]ppeal rights are not necessarily required by Title IX, whereas an accused student's appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University."); University of Cincinnati Determination Letter at 6, OCR Complaint No. 15-05-2041 (Apr. 13, 2006) ("[T]here is no requirement under Title IX that a recipient provide a victim's right of appeal.").

DEPARTMENT OF EDUCATION

34 CFR Part 106

[Docket ID ED–2018–OCR–0064]

RIN 1870–AA14

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary of Education proposes to amend regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The proposed regulations would clarify and modify Title IX regulatory requirements pertaining to the availability of remedies for violations, the effect of Constitutional protections, the designation of a coordinator to address sex discrimination issues, the dissemination of a nondiscrimination policy, the adoption of grievance procedures, and the process to claim a religious exemption. The proposed regulations would also specify how recipient schools and institutions covered by Title IX (hereinafter collectively referred to as recipients or schools) must respond to incidents of sexual harassment consistent with Title IX's prohibition against sex discrimination. The proposed regulations are intended to promote 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.

DATES: We must receive your comments on or before January 28, 2019.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by email, or comments submitted after the comment period closes. To ensure that we do not receive duplicate copies, please submit your comments only once. Additionally, please include the Docket ID at the top of your comments.

If you are submitting comments electronically, we strongly encourage you to submit any comments or attachments in Microsoft Word format. If you must submit a comment in Adobe Portable Document Format (PDF), we strongly encourage you to convert the PDF to "print-to-PDF" format, or to use some other commonly-used searchable text format. Please do not submit the PDF in a scanned format. Using a print-to-PDF format allows the U.S. Department of Education (the Department) to electronically search and copy certain portions of your submissions.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov*, including instructions for finding a rule on the site and submitting comments, is available on the site under "How to use *Regulations.gov*" in the Help section.
- *Postal Mail, Commercial Delivery, or Hand Delivery:* The Department strongly encourages commenters to submit their comments electronically. If, however, you mail or deliver your comments about these proposed regulations, address them to Brittany Bull, U.S. Department of Education, 400 Maryland Avenue SW, Room 6E310, Washington, DC 20202. Telephone: (202) 453–7100.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Brittany Bull, U.S. Department of Education, 400 Maryland Avenue SW, Room 6E310, Washington, DC 20202. Telephone: (202) 453–7100. You may also email your questions to *TitleIXNPRM@ed.gov,* but, as described above, comments must be submitted via the Federal eRulemaking Portal, postal mail, commercial delivery, or hand delivery.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of This Regulatory Action

Based on its extensive review of the critical issues addressed in this rulemaking, the Department has determined that current regulations and guidance do not provide appropriate standards for how recipients must respond to incidents of sexual harassment. To address this concern, we propose regulations addressing sexual harassment under Title IX to better align the Department's regulations with the text and purpose of Title IX and Supreme Court precedent and other case law. This will help to ensure that recipients understand their legal obligations including what conduct is actionable as sexual harassment under Title IX, the conditions that activate a mandatory response by the recipient, and particular requirements that such a response must meet so that recipients protect the rights of their students to access education free from sex discrimination.

In addition to providing recipients with clear legal obligations, the transparency of the proposed regulations will help empower students to hold their schools accountable for failure to meet those obligations. Under the proposed regulations, complainants reporting sexual harassment will have greater control over the process. The Department recognizes that every situation is unique and that individuals react to sexual harassment differently; thus, the proposed regulations help ensure that schools provide complainants with clear options and honor the wishes of the reporting individual about how to respond to the situation, including increased access to supportive measures. Where a reporting complainant elects to file a formal complaint triggering the school's grievance process, the proposed regulations require the school's investigation to be fair and impartial, applying mandatory procedural checks and balances, thus producing more reliable factual outcomes, with the goal of encouraging more students to turn to their schools for support in the wake of sexual harassment.

Summary of the Major Provisions of This Regulatory Action

With regard to sexual harassment, the proposed regulations would:

- Define the conduct constituting sexual harassment for Title IX purposes;
- Specify the conditions that activate a recipient's obligation to respond to allegations of sexual harassment and impose a general standard for the sufficiency of a recipient's response;
- Specify situations that require a recipient to initiate its grievance procedures; and
- Establish procedural safeguards that must be incorporated into a recipient's grievance procedures to ensure a fair and reliable factual determination when a recipient investigates and adjudicates a sexual harassment complaint.

In addition, the proposed regulations would: Clarify that in responding to any claim of sex discrimination under Title IX, recipients are not required to deprive an individual of rights that would be otherwise guaranteed under the U.S. Constitution; prohibit the Department's Office for Civil Rights

(OCR) from requiring a recipient to pay money damages as a remedy for a violation of any Title IX regulation; and eliminate the requirement that religious institutions submit a written statement to qualify for the Title IX religious exemption.

Costs and Benefits

As further detailed in the *Regulatory Impact Analysis,* we estimate that the total monetary cost savings of these regulations over ten years would be in the range of $286.4 million to $367.7 million. In addition, the major benefits of these proposed regulations, taken as a whole, include achieving the protective purposes of Title IX via fair, reliable procedures that provide adequate due process protections for those involved in grievance processes.

Invitation to Comment: We invite you to submit comments regarding these proposed regulations and directed questions. To ensure that your comments have the maximum effect on developing the final regulations, *you should identify clearly the specific section or sections of the proposed regulations that each of your comments addresses,* and arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 (explained further below), and their overall goal of reducing the regulatory burden that might result from these proposed regulations. Please let us know of any further ways that we may reduce potential costs or increase potential benefits, while preserving the effective and efficient administration of the Department's programs and activities.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing *Regulations.gov.* You also may inspect the comments in person at 400 Maryland Avenue SW, Room 6E310, Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern Time, Monday through Friday of each week, except federal holidays. Please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: Upon request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Background

Title IX prohibits discrimination on the basis of sex in education programs and activities that receive federal financial assistance. *See* 20 U.S.C. 1681(a). Existing Title IX regulations contain specific provisions regarding (i) the Assistant Secretary's authority to determine remedies necessary to overcome effects of discrimination (34 CFR 106.3), (ii) the effect of other requirements (34 CFR 106.6), (iii) designation of a responsible employee (34 CFR 106.8(a)), (iv) adoption of grievance procedures (34 CFR 106.8(b)), (v) dissemination of policy (34 CFR 106.9), and (vi) exemption for religious schools (34 CFR 106.12). For reasons described in this preamble, the Secretary proposes to amend the Title IX regulations at 34 CFR 106.3, 106.6, 106.8, 106.9, and 106.12, as well as add new §§ 106.30, 106.44, and 106.45.

The Department's predecessor, the Department of Health, Education and Welfare (HEW), promulgated implementing regulations under Title IX effective in 1975.[1] Among other things, those regulations require recipients to create and disseminate a policy of non-discrimination based on sex, designate a Title IX Coordinator, and adopt and publish grievance procedures providing for prompt and equitable resolution of complaints that a school is discriminating based on sex.

When the current regulations were issued in 1975, the federal courts had not yet addressed recipients' Title IX obligations to address sexual harassment as a form of sex discrimination. The Supreme Court subsequently elaborated on the scope of Title IX, ruling that money damages are available for private actions under Title IX based on sexual harassment by a teacher against a student, *Franklin* v. *Gwinnett Cty. Pub. Sch.,* 503 U.S. 60 (1992); that such damages may only be recovered under Title IX when a school official with authority to institute corrective measures has actual notice of the harassment but is deliberately indifferent to it, *Gebser* v. *Lago Vista Ind. Sch. Dist.,* 524 U.S. 274 (1998); and that a school can likewise be liable under Title IX based on sexual harassment by a *student* against a student but only if "the recipient is deliberately indifferent to known acts of student-on-student sexual harassment," "the harasser is under the school's disciplinary authority," and "the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect," *Davis* v. *Monroe Cty. Bd. of Educ.,* 526 U.S. 629, 647, 652 (1999).

In the four decades since HEW issued the 1975 rule, no Title IX regulations have been promulgated to address sexual harassment as a form of sex discrimination; instead, the Department has addressed this subject through a series of guidance documents. *See, e.g.,* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 FR 12034 (March 13, 1997); Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (January 19, 2001) (2001 Guidance); Dear Colleague Letter on Sexual Harassment (January 25, 2006); Dear Colleague Letter: Sexual Violence (issued April 4, 2011, withdrawn September 22, 2017) (2011 Dear Colleague Letter); Questions and Answers on Title IX and Sexual Violence (issued April 29, 2014, withdrawn September 22, 2017) (2014 Q&A); Questions and Answers on Campus Sexual Misconduct (September 22, 2017) (2017 Q&A). The decades since the passage of Title IX have revealed that how schools address sexual harassment and sexual assault (collectively referred to herein as sexual harassment) affects the educational access and opportunities of large numbers of students in elementary, secondary, and postsecondary schools across the nation.

Beginning in mid-2017, the Department started to examine how schools and colleges were applying Title IX to sexual harassment under then-applicable guidance. The Department conducted listening sessions and discussions with stakeholders expressing a variety of positions for and against the status quo, including advocates for survivors of sexual violence; advocates for accused students; organizations representing schools and colleges; attorneys representing survivors, the accused, and institutions; Title IX Coordinators and other school and college administrators; child and sex abuse prosecutors;

[1] 40 FR 24128 (June 4, 1975) (codified at 45 CFR part 86). In 1980, Congress created the United States Department of Education. Public Law 96–88, sec. 201, 93 Stat. 669, 671 (1979); Exec. Order No. 12212, 45 FR 29557 (May 2, 1980). By operation of law, all of HEW's determinations, rules, and regulations continued in effect and all functions of HEW's Office for Civil Rights, with respect to educational programs, were transferred to the Secretary of Education. 20 U.S.C. 3441(a)(3). The regulations implementing Title IX were recodified without substantive change in 34 CFR part 106. *See* 45 FR 30802, 30955–65 (May 9, 1980).

scholars and experts in law, psychology, and neuroscience; and numerous individuals who have experienced school-level Title IX proceedings as a complainant or respondent. The Department also reviewed information that includes white papers, reports, and recommendations issued over the past several years by legal and public policy scholars, civil rights groups, and committees of nonpartisan organizations [2] as well as books detailing case studies of campus Title IX proceedings.[3]

The Department learned that schools and colleges were uncertain about whether the Department's guidance was or was not legally binding. To the extent that guidance was viewed as mandatory, the obligations set forth in previous guidance were issued without the benefit of notice and comment that would have permitted the public and all stakeholders to comment on the feasibility and effectiveness of the guidance. Several of the prescriptions set forth in previous guidance (for example, compulsory use by all schools and colleges of the preponderance of the evidence standard and prohibition of mediation in Title IX sexual assault cases) generated particular criticism and controversy.

Other criticisms of the previous guidance included that those guidance documents pressured schools and colleges to forgo robust due process protections;[4] captured too wide a range of misconduct, resulting in infringement on academic freedom and free speech and government regulation of consensual, noncriminal sexual activity;[5] and removed reasonable options for how schools should structure their grievance processes to accommodate each school's unique pedagogical mission, resources, and educational community.[6]

After personally engaging with numerous stakeholders including sexual violence survivors, students accused of campus sexual assault, and school and college attorneys and administrators, the Secretary of Education delivered a speech in September 2017[7] in which she emphasized the importance of Title IX and the high stakes of sexual misconduct. The Secretary identified problems with the current state of Title IX's application in schools and colleges, including overly broad definitions of sexual harassment, lack of notice to the parties, lack of consistency regarding both parties' right to know the evidence relied on by the school investigator and right to cross-examine parties and witnesses, and adjudications reached by school administrators operating under a federal mandate to apply the lowest possible standard of evidence. Secretary DeVos stated that in endeavoring to find a "better way forward" that works for all students, "non-negotiable principles" include the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined.[8] Quoting an open letter from law school faculty,[9] Secretary DeVos affirmed that "there is nothing inconsistent with a policy that both strongly condemns and punishes sexual misconduct and ensures a fair adjudicatory process."

On September 22, 2017, the Department rescinded previous guidance documents that had never had

[2] *E.g.*, Jacob Gersen and Jeannie Suk, The Sex Bureaucracy, 104 Calif. L. Rev. 881 (2016); John Villasenor, *A probabilistic framework for modelling false Title IX 'convictions' under the preponderance of the evidence standard*, 15 Law, Probability and Risk 223, 223–37 (2016), *https://doi.org/10.1093/lpr/mgw006;* Open Letter from Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, Wall St. J. Online (Feb. 18, 2015), *http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf* (statement of 16 members of the University of Pennsylvania Law School faculty); *Rethink Harvard's Sexual Harassment Policy*, Boston Globe (Oct. 15, 2014), *https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html* (Statement of 28 members of the Harvard Law School faculty); Am. Bar Assn., ABA Criminal Justice Section Task Force on College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct (2017), *https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf;* American College of Trial Lawyers, Task Force on the Response of Universities and Colleges to Allegations of Sexual Violence, White Paper on Campus Sexual Assault Investigations (2017), *https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/task_force_allegations_of_sexual_violence_white_paper_final.pdf;* Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, Fairness For All Students Under Title IX (Aug. 21, 2017), *http://nrs.harvard.edu/urn-3:HUL.InstRepos:33789434. See also* Nedda Black et al., The NCHERM Group, LLC, 2017 NCHERM Group White Paper: Due Process and the Sex Police (2017), *https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf;* Sharyn Potter et al., Prevention Innovations Research Ctr., Univ. of New Hampshire, It's Not Just the What but the How: Informing Students about Campus Policies and Resources (2015), *https://cola.unh.edu/sites/cola.unh.edu/files/departments/Prevention%20Innovations%20Research%20Center/White_Paper_87367_for_web.pdf;* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 Yale L. J. 2106 (2016), *https://www.yalelawjournal.org/feature/gender-violence-costs-schools-financial-obligations-under-title-ix;* Katherine K. Baker et al., Title IX and the Preponderance of the Evidence: A White Paper, *http://www.feministlawprofessors.com/wp-content/uploads/2016/11/Title-IX-Preponderance-White-Paper-signed-11.29.16.pdf* (signed by dozens of law professors and scholars); Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. of Legal Educ. 822 (2017), *https://jle.aals.org/cgi/viewcontent.cgi?article=1517&context=home.*

[3] *E.g.*, K.C. Johnson and Stuart Taylor, Jr., Campus Rape Frenzy, (2017); Laura Kipnis, Unwanted Advances (2017). *See also Annie E. Clark and Andrea L. Pino, We Believe You: Survivors of Campus Sexual Assault Speak Out* (2016); Jon Krakauer, Missoula: Rape and the Justice System in a College Town, (2015).

[4] *E.g.*, Open Letter from Members of the Penn Law School Faculty, *supra* note 2 ("[W]e believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness."). *See also* Bartholet et al., *supra* note 2, at 1 ("In the past six years, under pressure from the previous Administration, many colleges and universities all over the country have put in place new rules defining sexual misconduct and new procedures for enforcing them. While the Administration's goals were to provide better protections for women . . . the new policies and procedures have created problems of their own, many of them attributable to directives coming from [OCR]. Most of these problems involve unfairness to the accused; some involve unfairness to both accuser and accused[.] OCR has an obligation to address the unfairness that has resulted from its previous actions and the related college and university responses"). *See also Plummer* v. *Univ. of Houston*, 860 F.3d 767, 777–78 (5th Cir. 2017) (Jones, J., dissenting) (The 2011 Dear Colleague Letter "was not adopted according to notice-and-comment rulemaking procedures; its extremely broad definition of 'sexual harassment' has no counterpart in federal civil rights case law; and the procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt").

[5] *E.g.*, Kipnis, *supra* note 3, at 33 ("The reality is that a set of incomprehensible directives, issued by a branch of the federal government, are being wielded in wildly idiosyncratic ways, according to the whims and biases of individual Title IX officers operating with no public scrutiny or accountability. Some of them are also all too willing to tread on academic and creative freedom as they see fit"). *See also* Gersen and Suk, *supra* note 2, at 902–03 (Asserting that OCR's guidance requires schools to regulate student conduct "that is not creating a hostile environment and therefore is not sexual harassment and therefore not sex discrimination" and concluding that OCR's guidance oversteps OCR's jurisdictional authority); *see also* Jacob Gersen and Jeannie Suk, *The Sex Bureaucracy*, The Chronicle of Higher Educ. (Jan. 6, 2017) (*https://www.chronicle.com/article/The-College-Sex-Bureaucracy/238805*) (OCR's "broad definition" of sexual harassment has "grown to include most voluntary and willing sexual contact"). *See also* Open Letter from Members of the Penn Law School Faculty, *supra* note 2 ("These cases are likely to involve highly disputed facts, and the 'he said/she said' conflict is often complicated by the effects of alcohol and drugs").

[6] *E.g.*, *Institutional Challenges in Responding to Sexual Violence On College Campuses: Testimony Provided to the Subcomm. on Higher Educ. and Workforce Training*, 114th Cong. 2, 5–6 (2015) (statement of Dana Scaduto, Campus Counsel, Dickinson College, discussing the problems with attempting to impose one-size-fits-all rules that fail to account for the wide diversity of institutions of higher education across the country), *https://edworkforce.house.gov/uploadedfiles/testimony_scaduto.pdf.*

[7] Betsy DeVos, U.S. Sec'y of Educ., Prepared Remarks on Title IX Enforcement (Sept. 7, 2017), *https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement.*

[8] *Id.*

[9] Open Letter from Members of the Penn Law School Faculty, *supra* note 2.

the benefit of the public notice and comment process;[10] left in place the 2001 Guidance that had been subjected to public notice and comment (though not rulemaking); issued the 2017 Q&A as an interim question and answer document to identify recipients' obligations under Title IX to address sexual harassment as a temporary measure to provide necessary information while proceeding with the time-intensive process of notice and comment rulemaking; and announced its intent to promulgate regulations under Title IX following the rulemaking requirements of the Administrative Procedure Act. The Department has continued to hold listening sessions and discussions with stakeholders and experts since the rescission of the previous guidance to inform the Department's proposed Title IX regulations including hearing from stakeholders who believe the Department should adopt the policies embodied in its previous or current guidance. The need to address through rulemaking the serious subject of how schools respond to sexual harassment was well expressed by sixteen law school faculty at University of Pennsylvania Law School:

> Both the legislative process and notice-and-comment rulemaking are transparent, participatory processes that afford the opportunity for input from a diversity of viewpoints. That range of views is critical because this area implicates competing values, including privacy, safety, the functioning of the academic community, and the integrity of the educational process for both the victim and the accused, as well as the fundamental fairness of the disciplinary process. . . . In addition, adherence to a rule-of-law standard would have resulted in procedures with greater legitimacy and buy-in from the universities subject to the resulting rules.[11]

While implementing regulations under Title IX since 1975 have required schools to provide for a "prompt and equitable" grievance process to resolve complaints of sex discrimination by the school, the Department's guidance (both the guidance documents rescinded in 2017 and the ones remaining) fails to provide the clarity, permanence, and prudence of regulation properly informed by public participation in the full rulemaking process. Under the system created by the Department's guidance, hundreds of students have filed complaints with OCR alleging their school failed to provide a prompt or equitable process in response to a report of sexual harassment,[12] and over 200 students have filed lawsuits against colleges and universities alleging their school disciplined them for sexual misconduct without providing due process protections.[13]

The Department recognizes that despite well-intentioned efforts by school districts, colleges and universities, advocacy organizations, and the Department itself, sexual harassment continues to present serious problems across the nation's campuses. The lack of clear regulatory standards has contributed to processes that have not been fair to all parties involved, that have lacked appropriate procedural protections, and that have undermined confidence in the reliability of the outcomes of investigations of sexual harassment allegations. Such deficiencies harm complainants, respondents, and recipients alike.

The framework created under these proposed regulations stems from the Department's commitment to the rule of law and the Department's recognition that it has statutory authority under 20 U.S.C. 1682 to issue regulations that effectuate Title IX's provisions—to protect all students from sex discrimination (here, in the form of sexual harassment) that jeopardizes equal access to education. The proposed regulations would help ensure that the obligations imposed on recipients fall within the scope of the civil rights law that Congress created and, where persuasive, align with relevant case law. Thus, the proposed regulations set forth clear standards that trigger a recipient's obligation to respond to sexual harassment, including defining the conduct that rises to the level of Title IX as conduct serious enough to jeopardize a person's equal access to the recipient's education program or activity, and confining a recipient's Title IX obligations to sexual harassment of which it has actual knowledge.

Within those clarified standards triggering a recipient's Title IX obligations, the proposed regulations instruct recipients to take certain steps that, in the Department's judgment based on extensive interaction with stakeholders, will foster educational environments where all students and employees know that every school must respond appropriately to sexual harassment. The proposed regulations provide that complainants experiencing sexual harassment may report allegations to their school and expect their school to respond in a manner that is not clearly unreasonable and incentivize recipients to give various supportive measures to complainants to restore or preserve the individual's equal access to education as a way of demonstrating that the recipient's response to the complainant's report was not deliberately indifferent.

The proposed regulations require schools to investigate and adjudicate formal complaints of sexual harassment, and to treat complainants and respondents equally, giving each a meaningful opportunity to participate in the investigation and requiring the recipient to apply substantive and procedural safeguards that provide a predictable, consistent, impartial process for both parties and increase the likelihood that the recipient will reach a determination regarding the respondent's responsibility based on objective standards and relevant facts and evidence. By separating a recipient's obligation to *respond to each known report* of sexual harassment from the recipient's obligation to *investigate formal complaints* of sexual harassment, the proposed regulations give sexual harassment complainants greater confidence to report and expect their school to respond in a meaningful way, while requiring that where a complainant also wants a formal investigation to potentially result in discipline against a respondent, that grievance process will be predictable and fair to both parties, resulting in a factually reliable determination about the complainant's allegations.

Significant Proposed Regulations

Rather than proceeding sequentially, we group and discuss the proposed amendments under the substantive or procedural issues to which they pertain. We do not address proposed regulatory changes that are technical or otherwise minor in effect.

In discussing the proposed regulations, we first address how recipients must respond to sexual harassment and the procedures for resolving formal complaints of sexual harassment. Under the response provisions, we address: Adoption of standards from Title IX Supreme Court

[10] Specifically, the Department rescinded the 2011 Dear Colleague Letter and the 2014 Q&A.

[11] Open Letter from Members of the Penn Law School Faculty, *supra* note 2.

[12] *See, e.g.*, OCR's website listing currently pending investigations into sex discrimination, sexual harassment, and sexual violence: *https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/index.html.*

[13] *See* KC Johnson, *Judge Xinis' Outrage*, Acad. Wonderland: Comments on the Contemp. Acad. (Apr. 3, 2018), *https://academicwonderland.com/2018/04/03/judge-xinis-outrage/* (over 200 students have sued their colleges over due process issues since the 2011 Dear Colleague Letter); KC Johnson, *Pomona, the Courts, & Basic Fairness*, Acad. Wonderland: Comments on the Contemp. Acad. (Dec. 8, 2017), *https://academicwonderland.com/2017/12/08/pomona-the-courts-basic-fairness/* (over 90 colleges have lost due process challenges by respondent students since the 2011 Dear Colleague Letter).

precedent and other case law (proposed §§ 106.44(a) and 106.30); responses required in specific circumstances and accompanying safe harbors (proposed § 106.44(b)); emergency removals (proposed § 106.44(c)); and the use of administrative leave (proposed § 106.44(d)). We next turn to grievance procedures for addressing formal complaints of sexual harassment (proposed § 106.45) including: Clarification that the recipient's treatment of both complainant and respondent could constitute discrimination on the basis of sex (proposed § 106.45(a)); general requirements for grievance procedures (proposed § 106.45(b)(1)); notice to the parties (proposed § 106.45(b)(2)); and procedures for investigations (proposed § 106.45(b)(3)). Also within the grievance procedures section we address evidentiary standards for determinations of responsibility (proposed § 106.45(b)(4)(i)); the content of such written determinations (proposed § 106.45(b)(4)(ii)); and the timing of providing the determinations to the parties (proposed § 106.45(b)(4)(iii)). We next address procedures for appeals of written determinations (proposed § 106.45(b)(5)); informal resolution procedures (proposed § 106.45(b)(6)); and recordkeeping procedures (proposed § 106.45(b)(7)).

The proposed regulations also seek to clarify existing Title IX regulations in other areas beyond sexual harassment. Specifically, we state that OCR shall not deem necessary the payment of money damages to remedy violations under part 106 (proposed § 106.3(a)). We address the intersection among Title IX regulations, constitutional rights, student privacy rights, and Title VII of the Civil Rights Act of 1964 (proposed § 106.6). We clarify the provisions governing the designation of a Title IX Coordinator (proposed § 106.8). And we clarify that a recipient that qualifies for the religious exemption under Title IX can claim its exemption without seeking written assurance of the exemption from the Department (proposed § 106.12).

I. Recipient's Response to Sexual Harassment

(Proposed § 106.44)

Statute: Title IX states generally that 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 education program or activity receiving federal financial assistance, 20 U.S.C. 1681(a), but does not specifically mention sexual harassment.

Current Regulations: None.

A. Adoption of Supreme Court Standards for Sexual Harassment

Section 106.44(a) General; Section 106.30

Proposed Regulations: We propose adding a new § 106.44 covering a recipient's response to sexual harassment. Proposed § 106.44(a) would state that a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent. Proposed § 106.44(a) would also state that a recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

We propose definitions for "sexual harassment" and "actual knowledge" in § 106.30. The Department defines "sexual harassment" 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 effectively denies a person equal access to the recipient's education program or activity; or sexual assault as defined in 34 CFR 668.46(a), implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act). We define "actual knowledge" as notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment. The proposed definition of "actual knowledge" also states that imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge, that the standard is not met when the only official of the recipient with 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 authority to institute corrective measures on behalf of the recipient.

Reasons: The Department believes that the administrative standards governing recipients' responses to sexual harassment should be generally aligned with the standards developed by the Supreme Court in cases assessing liability under Title IX for money damages in private litigation. The Department believes that students and institutions would benefit from the clarity of an essentially uniform standard. More importantly, the Department believes that the Supreme Court's foundational decisions in this area, *Gebser* and *Davis*, are based on a textual interpretation of Title IX and on policy rationales that the Department finds persuasive for the administrative context. The Department's proposed regulations significantly reflect legal precedent because, while we could have chosen to regulate in a somewhat different manner, we believe that the standards articulated by the Court in these areas are the best interpretation of Title IX and that a consistent body of law will facilitate appropriate implementation.

First, the Court has held that Title IX governs misconduct by recipients, not by third parties such as teachers and students. As the Court noted in *Gebser*, Title IX is a statute "designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner." *Gebser*, 524 U.S. at 292; *Cannon* v. *Univ. of Chicago*, 414 U.S. 677, 704 (1979) (noting that the primary congressional purpose behind the statutes was "to avoid the use of federal resources to support discriminatory practices"). It is thus a recipient's *own* misconduct—not the actions of employees, students, or other third parties—that subjects the recipient to liability under Title IX.

Second, because Congress enacted Title IX under its Spending Clause authority, the obligations it imposes on recipients are in the nature of a contract. *Gebser*, 524 U.S. at 286; *Davis*, 526 U.S. at 640. The Court has reasoned that it follows from this that recipients must be on clear notice of what conduct is prohibited and that recipients must be held liable only for conduct over which they have control. *Id.* at 644–45.

Third, the text of Title IX prohibits only discrimination that has the effect of denying access to the recipient's educational program or activities. *Id.* at 650–52. Accordingly, Title IX does not prohibit sex-based misconduct that does not rise to that level of severity.

And finally, the Court reasoned in *Davis* that Title IX must be interpreted in a manner that leaves room for flexibility in schools' disciplinary decisions and that does not place courts in the position of second-guessing the disciplinary decisions made by school administrators. *Id.* at 648.

As a matter of policy, the Department believes that these same principles

should govern administrative enforcement of Title IX. To that end, the proposed regulation would provide that actual knowledge—rather than mere constructive knowledge or imputation of knowledge based on a respondeat superior theory—triggers the recipient's duty to respond. Consistent with Title IX's focus on the recipient's own misconduct and with the contractual nature of the duty imposed by Title IX, this standard ensures that the recipient is on clear notice of the discrimination (or alleged discrimination) that it must address. By contrast, as the Court observed in *Gebser,* a constructive knowledge standard would make a funding recipient liable for misconduct of which it was unaware. *Gebser,* 524 U.S. at 287. Further, applying this standard in the administrative enforcement context is consistent with "Title IX's express means of enforcement—by administrative agencies—[which] operates on the assumption of actual notice to officials of the funding recipient." *Id.* at 288.

Similarly, proposed § 106.44(a) adopts the *Gebser/Davis* standard that actual knowledge means "notice of sexual harassment or allegations of sexual harassment to an official of the recipient who has authority to institute corrective measures on behalf of the recipient." Consistent with the text and purpose of Title IX, this standard ensures that a recipient is liable only for its own misconduct. As the Court noted in *Gebser* and *Davis,* it is only when the recipient makes an intentional decision not to respond to third-party discrimination that the recipient itself can be said to "subject" its students to such discrimination. *Gebser,* 524 U.S. at 291–92; *Davis,* 526 U.S. at 642–43. Determining whether someone is an official with authority to take corrective action is a fact-specific inquiry. *See e.g., Doe* v. *Sch. Bd. of Broward Cty., Fla.,* 604 F.3d 1248, 1256 (11th Cir. 2010) ("we also note that the ultimate question of who is an appropriate person is 'necessarily a fact-based inquiry' because 'officials' roles vary among school districts.' ") (quoting *Murrell* v. *Sch. Dist. No. 1, Denver, Colo.,* 186 F.3d 1238, 1247 (10th Cir. 1999)).

For recipients that are elementary and secondary schools, with respect to student-on-student sexual harassment, proposed § 106.30 states that actual knowledge can also come from notice to a teacher. The Department recognizes that the Supreme Court has not held definitively that teachers are "appropriate officials with the authority to take corrective action" with respect to student-on-student sexual harassment; however, in the elementary and secondary school setting where school administrators and teachers are more likely to act *in loco parentis,* and exercise a considerable degree of control and supervision over their students, the Department believes this interpretation is reasonable. *Davis,* 526 U.S. at 646, citing *Veronica Sch. Dist.* v. *Acton,* 515 U.S. 646, 655 (1995) (noting that a public school's power over its students is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults"). Teachers specifically have a "degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child." *New Jersey* v. *T.L.O.,* 469 U.S. 325, 348 (1985) (Powell, J., concurring). Thus, the Department believes that teachers at elementary and secondary schools should be considered to have the requisite authority to impart actual knowledge to the recipient regarding student-on-student conduct that could constitute sexual harassment and to trigger a recipient's obligations under Title IX. Whether in the context of elementary and secondary schools, or institutions of higher education, determining who is an official to whom notice of sexual harassment gives actual knowledge to the recipient will be fact-specific. Notice to a recipients' Title IX Coordinator, however, will always confer actual knowledge on the recipient; therefore, every student has a clearly designated option for reporting sexual harassment to trigger their school's response obligations.

The definition in proposed § 106.30 also states 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 authority to institute corrective measures on behalf of the recipient. *Plamp* v. *Mitchell Sch. Dist. No. 17–2,* 565 F.3d 450, 459 (8th Cir. 2009) ("After all, each teacher, counselor, administrator, and support-staffer in a school building has the authority, if not the duty, to report to the school administration or school board potentially discriminatory conduct. But that authority does not amount to an authority to take a corrective measure or institute remedial action within the meaning of Title IX. Such a holding would run contrary to the purposes of the statute"); *see also Santiago* v. *Puerto Rico,* 655 F.3d 61, 75 (1st Cir. 2011) ("The empty allegation that a school employee 'failed to report' harassment to someone higher up in the chain of command who could have taken corrective action is not enough to establish institutional liability. Title IX does not sweep so broadly as to permit a suit for harm-inducing conduct that was not brought to the attention of someone with the authority to stop it.") (internal citation omitted).

Further, a recipient's actual knowledge must be regarding conduct of the type proscribed under Title IX. The Department intends that the proposed definition of sexual harassment be consistent with the text of Title IX and with the Court's decisions in *Gebser* and *Davis.* The proposed regulation defines sexual harassment as 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 effectively denies a person equal access to the recipient's education program or activity; or sexual assault as defined in 34 CFR 668.46(a) (implementing the Clery Act). In each instance, following the text and purpose of Title IX, the definition thus seeks to include only sex-based discrimination that is sufficiently serious as to effectively deprive a student of equal access to a funding recipient's educational program or activity. Institutions of higher education must comply with both the Clery Act and Title IX. Because the purpose of Title IX is to prohibit a recipient from subjecting individuals to sex discrimination in its education program or activity, the definition of sexual harassment under Title IX focuses on sexual conduct that jeopardizes a person's equal access to an education program or activity. Such sexual harassment includes conduct that is also a crime (such as sexual assault), but Title IX does not focus on crimes per se. By contrast, the Clery Act focuses on particular crimes (stalking, dating violence, domestic violence, sexual assault) and an institution's obligation to disclose information and services to victims, and otherwise respond, to reports of such crimes. Although the Clery Act focuses on crimes that may also meet the definition of "sexual harassment" under the Title IX definition proposed in § 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). The proposed regulations set forth definitions and obligations that further the purpose of Title IX with the goal of ensuring that institutions of higher

education can also comply with their Clery Act obligations without conflict or inconsistency.

Proposed § 106.44(a) also reflects the statutory provision that a recipient is only responsible for responding to conduct that occurs within its "education program or activity." *See* 20 U.S.C. 1681(a) (prohibiting a recipient from subjecting persons in the United States to discrimination "under any education program or activity"). The Title IX statute defines "program or activity" as "all of the operations of" a recipient. *See* 20 U.S.C. 1687. An "education program or activity" includes "any academic, extracurricular, research, [or] occupational training." 34 CFR 106.31. *See also Doe* v. *Brown Univ.*, 896 F.3d 127, 132 n.6 (1st Cir. 2018) ("an institution's education program or activity" may include "university libraries, computer labs, and vocational resources . . . campus tours, public lectures, sporting events, and other activities at covered institutions"). Whether conduct occurs within a recipient's education program or activity does not necessarily depend on the geographic location of an incident (*e.g.*, on a recipient's campus versus off of a recipient's campus). *See e.g., Rost ex rel. K.C.* v. *Steamboat Springs RE–2 Sch. Dist.*, 511 F.3d 1114, 1121 n.1 (10th Cir. 2008) ("We do not suggest that harassment occurring off school grounds cannot as a matter of law create liability under Title IX").

In determining whether a sexual harassment incident occurred within a recipient's program or activity, courts have examined factors such as whether the conduct occurred in a location or in a context where the recipient owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance. *See e.g., Davis,* 526 U.S. at 646 ("Where, as here, the misconduct occurs during school hours and on school grounds—the bulk of G.F.'s misconduct, in fact, took place in the classroom—the misconduct is taking place 'under' an 'operation' of the funding recipient."); *Samuelson* v. *Or. State Univ.*, 725 Fed. Appx. 598, 599 (9th Cir. 2018) (affirming dismissal of plaintiff's Title IX claim against OSU because she "failed to allege that her sexual assault occurred 'under' an OSU 'program or activity' " where plaintiff alleged that she was assaulted "off campus by a non-university student at a location that had no sponsorship by or association with OSU"); *Farmer* v. *Kansas State Univ.*, 2017 WL 980460, at * 8 (D. Kan. Mar. 14, 2017) (holding that a KSU fraternity is an "education program or activity" for purposes of Title IX because "KSU allegedly devotes significant resources to the promotion and oversight of fraternities through its websites, rules, and Office of Greek Affairs. Additionally, although the fraternity is housed off campus, it is considered a 'Kansas State University Organization,' is open only to KSU students, and is directed by a KSU instructor. Finally, KSU sanctioned the alleged assailant for his alcohol use, but not for the alleged assault. Presented with these allegations, the Court is convinced that the fraternity is an 'operation' of the University, and that KSU has substantial control over student conduct within the fraternity.").

Importantly, nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students who report sexual harassment that occurs outside the recipient's education program or activity (or as to conduct that harms a person located outside the United States, such as a student participating in a study abroad program). Notably, there may be circumstances where the harassment occurs in a recipient's program or activity, but the recipient's response obligation is not triggered because the complainant was not participating in, or even attempting to participate in, the education programs or activities provided by that recipient. *See e.g., Doe,* 896 F.3d at 132–33 (affirming judgment on the pleadings and "[f]inding no plausible claim under Title IX" where plaintiff alleged that, while a Providence College student, three Brown University students sexually assaulted her on Brown's campus, and Brown notified the plaintiff that she had a right to file a complaint under Brown's Code of Student Conduct—but not Title IX—because she had not availed herself or attempted to avail herself of any of Brown's educational programs and therefore could not have been denied those benefits).

The Department wishes to emphasize that when determining how to respond to sexual harassment, recipients have flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved. Finally, the Department wishes to clarify that Title IX's "education program or activity" language should not be conflated with Clery Act geography; these are distinct jurisdictional schemes, though they may overlap in certain situations.

Once it has been established that a recipient has actual knowledge of sexual harassment in its education program or activity, it becomes necessary to evaluate the recipient's response. Although the Department is not required to adopt the deliberate indifference standard articulated by the Court, we are persuaded by the policy rationales relied on by it and believe it's the best policy approach. As the Court reasoned in *Davis,* a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of the known circumstances." *Davis,* 526 U.S. at 648–49. The Department believes this standard holds recipients accountable without depriving them of legitimate and necessary flexibility to make disciplinary decisions and to provide supportive measures that might be necessary in response to sexual harassment. Moreover, the Department believes that teachers and local school leaders with unique knowledge of the school culture and student body are best positioned to make disciplinary decisions; thus, unless the recipient's response to sexual harassment is clearly unreasonable in light of known circumstances, the Department will not second guess such decisions. In fact, the Court observed in *Davis* that courts must not second guess recipients' disciplinary decisions. *Id.* As a matter of policy, the Department believes that it would be equally wrong for it to second guess recipients' disciplinary decisions through the administrative enforcement process. Where a respondent has been found responsible for sexual harassment, any disciplinary sanction decision rests within the discretion of the recipient, although the recipient must also provide remedies, as appropriate, to the complainant designed to restore or preserve the complainant's educational access, as provided for in proposed § 106.45(b)(1)(i).

The Department acknowledges that proposed § 106.44(a) would adopt standards that depart from those set forth in prior guidance and OCR enforcement of Title IX. The Department's guidance and enforcement practices have taken the position that constructive notice—as opposed to actual notice—triggered a recipient's duty to respond to sexual harassment; that recipients had a duty to respond to a broader range of sex-based misconduct than the sexual harassment defined in the proposed regulation; and that recipients' response to sexual harassment should be judged under a reasonableness standard, rather than under the deliberate indifference

standard adopted by the proposed regulation. In 2001, the Department asserted that the Court's decisions in *Gebser* and *Davis* and the liability standard set out for private actions for monetary damages did not preclude the Department from maintaining its administrative enforcement standards reflected in the 1997 guidance. *See* 2001 Guidance at iii–iv.

Based on its consideration of the text and purpose of Title IX, of the reasoning underlying the Court's decisions in *Gebser* and *Davis*, and of the views of the stakeholders it has consulted, the Department now believes that the earlier guidance should be reconsidered. Contrary to the text of Title IX and inconsistent with the contractual nature of the obligations the statute imposes pursuant to Congress' Spending Clause authority, the guidance's constructive notice standard made funding recipients liable for conduct of which they were unaware. Similarly, the guidance arguably exceeded the text of the statute by requiring institutions to respond to conduct less severe than that proscribed by Title IX. And, by evaluating schools' responses under a mere reasonableness standard, the guidance improperly deprived administrators of needed flexibility to make disciplinary decisions affecting their students.

The deliberate indifference standard set forth in *Davis* and in proposed § 106.44(a) allows schools predictably to evaluate their response to sexual harassment for purposes of both civil litigation and administrative enforcement by the Department based on a consistent standard. Although the Department is not required to adopt the liability standards applied by the Supreme Court in private suits for money damages, the Department is persuaded by the policy rationales relied on by the Court. Generally, the liability standards of actual knowledge and deliberate indifference are also appropriate in administrative enforcement of Title IX, where a recipient's federal funding is at stake if it fails to comply with Title IX, because such standards are premised on holding recipients accountable for responding to discrimination of which the recipients know and have control. Recognizing that the Department has broad authority under the Title IX statute to issue regulations that effectuate the provisions of Title IX, the Department is retaining and proposes to add in the proposed regulation provisions that would clarify that, in addition to a general deliberate indifference standard, schools must take other actions that courts do not require in private litigation under Title IX (*e.g.*, requiring a designated Title IX Coordinator, requiring written grievance procedures, describing the supportive measures that a non-deliberatively indifferent response may require, requiring a school to investigate and adjudicate formal complaints, and other requirements found in proposed §§ 106.8, 106.44, and 106.45).

B. Responding to Formal Complaints of Sexual Harassment; Safe Harbors

Section 106.44(b) Specific Circumstances; Section 106.30

Proposed Regulations: We propose adding § 106.44(b) to address specific circumstances under which a recipient will respond to sexual harassment. We propose adding paragraph (b)(1) stating that a recipient must follow procedures (including implementing any appropriate remedy as required) consistent with § 106.45 in response to a formal complaint as to allegations of conduct within its education program or activity, and that if the recipient follows procedures consistent with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent and does not otherwise constitute sex discrimination under Title IX. Proposed § 106.30 defines "formal complaint" as a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity, and requesting initiation of the recipient's grievance procedures consistent with § 106.45.

We also propose adding paragraph (b)(2), stating 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; if the Title IX Coordinator files a formal complaint in response to such allegations, and the recipient follows procedures (including implementing any appropriate remedy where required) consistent with § 106.45 in response to the formal complaint, the recipient's response to the reports is not deliberately indifferent.

In addition, we propose adding paragraph (b)(3), which states that, for institutions of higher education, in the absence of a formal complaint, a recipient is not deliberately indifferent when it implements supportive measures designed to effectively restore or preserve access to the recipient's education program or activity. We further proposed that the recipient must also at the same time give written notice to the complainant stating that the complainant can choose to file a formal complaint at a later time despite having declined to file a formal complaint at the time the supportive measures are offered.

We propose adding paragraph (b)(4), which states that where paragraphs (b)(1) through (3) are not implicated, a recipient with actual knowledge of sexual harassment in its education program or activity against a person in the United States must, consistent with paragraph (a), respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

Proposed § 106.30 defines "complainant" as an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint. Additionally, for purposes of this proposed paragraph, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the recipient's actual knowledge under § 106.30.

Proposed § 106.30 defines "respondent" as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Proposed § 106.30 defines "supportive measures" as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge, to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Section 106.30 goes on to explain that such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. Section 106.30 also states that the recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would

not impair the ability of the institution to provide the supportive measures. Furthermore, § 106.30 clarifies that the Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Finally, we propose adding § 106.44(b)(5), which explains that the Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

Reasons: To clarify a recipient's responsibilities under this standard, proposed § 106.44(b) would specify two circumstances under which a recipient must initiate its grievance procedures, and in those situations provide a safe harbor from a finding of deliberate indifference where the recipient does in fact implement grievance procedures consistent with the proposed § 106.45. Those two situations are (i) where a formal complaint is filed, or (ii) where the recipient has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment (in which case the proposed regulations require the recipient's Title IX Coordinator to file a formal complaint if none has already been filed). In response to either of these two situations, if the recipient follows grievance procedures consistent with proposed § 106.45, including implementing any appropriate remedy as required for the complainant, the recipient is given a safe harbor from a finding of deliberate indifference by the Department with respect to its response to the formal complaint, because the recipient's response would not be "clearly unreasonable in light of the known circumstances." *Davis,* 526 U.S. at 648–49, 654. The Department believes that including these safe harbors in the regulations emphasizes a recipient's obligation to respond to known sexual harassment and to ensure a complainant's access to the recipient's education program or activity in situations where a finding of responsibility has been made, while preserving the recipient's flexibility to implement its grievance procedures, provided those procedures comply with the requirements of proposed § 106.45. The safe harbor available in proposed § 106.44(b)(1) would shield the recipient from a finding by the Department that the recipient's response to the formal complaint constituted sex discrimination under Title IX, regardless of whether the complainant claimed that the response was deliberately indifferent, or whether the respondent claimed that the recipient's response otherwise constituted sex discrimination. For institutions of higher education, proposed § 106.44(b)(3) provides a safe harbor against a finding of deliberate indifference where, in the absence of a formal complaint, a school's response to known, reported, or alleged sexual harassment is to offer and provide the complainant supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity. This provision is intended to call recipients' attention to the importance of offering supportive measures to students who may not wish to file a formal complaint that would initiate a grievance process. The Department has heard from a wide range of stakeholders about the importance of a school taking into account the wishes of the complainant in deciding whether or not a formal investigation and adjudication is warranted. The proposed regulation creates a framework where a complainant has the right to file a formal complaint and the school must then initiate its grievance procedures, but in proposed § 106.44(b)(3) the Department also recognizes that for a variety of reasons, not all complainants want to file a formal complaint, and that in many situations a complainant's access to his or her education can be effectively restored or preserved through the school providing supportive measures. The proposed regulation requires that, to be entitled to this safe harbor, the recipient must first inform the complainant in writing of his or her right to pursue a formal complaint, including the right to later file a formal complaint (consistent with any other requirements of the proposed regulation). Proposed § 106.44(b)(3) gives a safe harbor only to institutions of higher education, in recognition that college and university students are generally adults capable of deciding whether supportive measures alone suffice to protect their educational access.

Proposed § 106.44(b)(4) states that even if none of the safe harbor situations is present, the recipient's response to sexual harassment must still meet the general requirement in § 106.44(a) to not be deliberately indifferent, which means the recipient's response must not be clearly unreasonable in light of the known circumstances. Section 106.44(b)(1)–(3) explains what deliberate indifference means in three specific contexts. Section 106.44(b)(4) clarifies that when those three situations are not implicated, the general deliberate indifference standard specific in § 106.44(a) applies to a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States that effectively denies an individual equal access to the recipient's education program or activity.

To define the respective parties involved in a recipient's grievance procedures, proposed § 106.30 defines "complainant" as one who has reported being the victim of sexually harassing conduct. To be considered a "complainant," such a report must be made to the recipient's Title IX Coordinator or other official to whom notice of sexual harassment results in the recipient having actual knowledge as described in § 106.30. This clarifies when a recipient must view a person as a complainant for purposes of offering supportive measures, investigating a formal complaint, and any other response necessary to meet the recipient's obligation to not be deliberately indifferent. Proposed § 106.30 defines "respondent" as an individual who has been the subject of a report of sexual harassment.

Consistent with feedback from many stakeholders, the Department recognizes that often the most effective measures a recipient can take to support its students in the aftermath of an alleged incident of sexual harassment are outside the grievance process and involve working with the affected individuals to provide reasonable supportive measures that increase the likelihood that they will be able to continue their education in a safe, supportive environment.

Also consistent with feedback from stakeholders on the issue of supportive measures and to provide needed clarity, we (1) propose to define them as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge, to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed; (2) propose to specify, in the definition, that the recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures; and (3) further specify that such measures are designed to restore or preserve access to the recipient's education program or activity, without

unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment. For added clarity on supportive measures, proposed § 106.30 contains a non-exclusive list of examples of supportive measures. Recipients are encouraged to broadly consider what measures they can reasonably provide to individual students to ensure continued equal access to educational programs, activities, opportunities, and benefits for a complainant at the time the complainant reports or files a formal complaint, and for a respondent when a formal complaint is being investigated.

We also specify in the proposed definition that the recipient's Title IX Coordinator is responsible for coordinating effective implementation of supportive measures. Many supportive measures involve implementation through various offices or departments within a school; when supportive measures are part of a school's response to a Title IX sexual harassment report or formal complaint, the Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other policy requirements within the recipient's own system does not fall on the student receiving the supportive measure. For example, where a mutual no-contact order has been imposed as a supportive measure, the affected complainant and respondent should know to contact the Title IX Coordinator with questions about how to interpret or enforce the no-contact order; as a further example, where a student receives an academic course adjustment as a supportive measure, the Title IX Coordinator is responsible for communicating with other offices within the school as needed to ensure that the adjustment occurs as intended and without fee or charge to the student. As another example, if counseling services are provided as a supportive measure, the Title IX Coordinator should help coordinate the service and ensure the sessions occur without fee or charge. Proposed § 106.44(b)(5) would provide that the Assistant Secretary will not deem a recipient's determination regarding responsibility that results from the implementation of its grievance procedures to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence. During a complaint investigation or compliance review, OCR's role is not to conduct a de novo review of the recipient's investigation and determination of responsibility for a particular respondent. Rather, OCR's role is to determine whether a recipient has complied with Title IX and its implementing regulations. Thus, OCR will not find a recipient to have violated Title IX or this part solely because OCR may have weighed the evidence differently in a given case. The Department believes it is important to include this provision in the regulations to provide notice and transparency to recipients about OCR's role and standard of review in enforcing Title IX. This provision does not, however, preclude OCR from requiring a recipient's determination of responsibility to be set aside if the recipient did not comply with proposed § 106.45.

C. Additional Rules Governing Recipients' Responses to Sexual Harassment

Section 106.44(c) Emergency Removal

Proposed Regulations: We propose adding § 106.44(c) stating that nothing in § 106.44 precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. Paragraph (c) also states that the paragraph shall not be construed to modify any rights under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 (Section 504), or Title II of the Americans with Disabilities Act (ADA).

Reasons: Recognizing that there are situations in which a respondent may pose an immediate threat to the health and safety of the campus community before an investigation concludes, proposed § 106.44(c) would allow recipients to remove such respondents, 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. This proposed provision tracks the language in the Clery Act regulations at 34 CFR 668.46(g) and would apply to all recipients subject to Title IX. The Department believes that this provision for emergency removals should be applicable at the elementary and secondary education level as well as the postsecondary education level to ensure the health and safety of all students. When considering removing a respondent pursuant to this provision, the proposed regulations require that a recipient follow the requirements of the IDEA, Section 504, and Title II of the ADA. Thus, a recipient may remove a student on an emergency basis under § 106.44(c), but only to the extent that such removal conforms with the requirements of the IDEA, Section 504 and Title II of the ADA.

Section 106.44(d) Administrative Leave

Proposed Regulations: We propose adding § 106.44(d) stating that nothing in § 106.44 precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of an investigation.

Reasons: Because placing a non-student respondent on administrative leave does not implicate access to the recipient's education programs and activities in the same way that other respondent-focused measures might, and in light of the potentially negative impact of forcing a recipient to continue an active agency relationship with a respondent while accusations are being investigated, the Department concludes that it is appropriate to allow recipients to temporarily put non-student employees on administrative leave pending an investigation.

II. Grievance Procedures for Formal Complaints of Sexual Harassment (Proposed § 106.45)

Statute: The statute does not directly address grievance procedures for formal complaints of sexual harassment. The Secretary has the authority to regulate with regard to discrimination on the basis of sex in education programs or activities receiving federal financial assistance specifically under 20 U.S.C. 1682 and generally under 20 U.S.C. 1221e–3 and 3474.

Current Regulations: 34 CFR 106.8(b) states that "A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part."

Section 106.45(a) Discrimination on the Basis of Sex

Proposed Regulations: We propose adding a new § 106.45 addressing the required grievance procedures for formal complaints of sexual harassment. Proposed paragraph (a) states that a recipient's treatment of a complainant in response to a formal complaint of

sexual harassment may constitute discrimination on the basis of sex, and also states that a recipient's treatment of the respondent may constitute discrimination on the basis of sex under Title IX.

Reasons: Deliberate indifference to a complainant's allegations of sexual harassment may violate Title IX by separating the student from his or her education on the basis of sex; likewise, a respondent can be unjustifiably separated from his or her education on the basis of sex, in violation of Title IX, if the recipient does not investigate and adjudicate using fair procedures before imposing discipline. Fair procedures benefit all parties by creating trust in both the grievance process itself and the outcomes of the process.

A. General Requirements for Grievance Procedures

Section 106.45(b)(1)

Proposed Regulations: We propose adding § 106.45(b) to specify that for the purpose of addressing formal complaints of sexual harassment, grievance procedures must comply with the requirements of proposed § 106.45. Paragraph (b)(1) states that grievance procedures must—

- Treat complainants and respondents equitably; an equitable resolution must include remedies for the complainant where a finding of responsibility against the respondent has been made, with such remedies designed to restore or preserve access to the recipient's education program or activity, and due process protections for the respondent before any disciplinary sanctions are imposed;
- Require an investigation of the allegations and an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;
- Require that any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent; and that a recipient ensure that coordinators, investigators, and decision-makers receive training on the definition of sexual harassment and how to conduct an investigation and grievance process—including hearings, if applicable—that protect the safety of students, ensure due process protections for all parties, and promote accountability; and that any materials used to train coordinators, investigators, or decision-makers not rely on sex stereotypes and instead promote impartial investigations and adjudications of sexual harassment;
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;
- Include reasonably prompt timeframes for completion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if the recipient offers an appeal, and including a process that allows for the temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension, and the reasons for the action; good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities;
- Describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility;
- Describe the standard of evidence to be used to determine responsibility;
- Include the procedures and permissible bases for the complainant and respondent to appeal if the recipient offers an appeal; and
- Describe the range of supportive measures available to complainants and respondents.

Reasons: In describing the requirements for grievance procedures for formal complaints of sexual harassment in paragraph (b)(1), the Department's intent is to balance the need to establish procedural safeguards providing a fair process for all parties with recognition that a recipient needs flexibility to employ grievance procedures that work best for the recipient's educational environment.

Proposed § 106.45(b)(1)(i) would require that grievance procedures treat complainants and respondents equitably, echoing the existing requirement in 34 CFR 106.8 that a recipient's grievance procedures provide for "prompt and equitable resolution" of complaints. Stakeholders have urged the Department to protect the interests of both the complainant and the respondent, and to ensure that recipients' procedures treat both parties equitably and fairly throughout the process, including incorporating the protections described throughout proposed § 106.45(b). A fair and equitable grievance process benefits all parties because they are more likely to trust in, engage with, and rely upon the process as legitimate. The Department recognizes that some recipients are state actors with responsibilities to provide protections to students and employees under the Fourteenth Amendment's Due Process Clause. Other recipients are private institutions that do not have constitutional obligations to their students and employees. The due process protections provided under these proposed regulations aim to effectuate the objectives of Title IX by creating consistent, fair, objective grievance processes that make the process equitable for both parties and are more likely to generate reliable outcomes. When presented with an allegation of sexual harassment the recipient must respond in a manner that is not deliberately indifferent, but to evaluate what constitutes an appropriate response, the recipient must first reach factual determinations about the allegations at issue. This requires the recipient to employ a grievance process that rests on fundamental notions of fairness and due process protections so that findings of responsibility rest on facts and evidence. Only when an outcome is the product of a predictable, fair process that gives both parties meaningful opportunity to participate will the recipient be in a position to determine what remedies and/or disciplinary sanctions are warranted. When a recipient establishes an equitable process with due process protections and implements it consistently, its findings will be viewed with more confidence by the parties and the public.

Although both complainants and respondents have a common interest in a fair process, they also have distinct interests that are recognized in paragraph (b)(1)(i). For example, paragraph (b)(1)(i) explains that equitable grievance procedures will provide remedies for the complainant as appropriate and due process protections for the respondent before any disciplinary action is taken. Because a grievance process could result in a determination that the respondent sexually harassed the complainant, and because the resulting sanctions against the respondent could include a complete loss of access to the education program or activity of the recipient, an equitable grievance procedure will only reach such a conclusion following a process that seriously considers any contrary arguments or evidence the respondent might have, including by providing the respondent with all of the specific due process protections

outlined in the rest of the proposed regulations. Likewise, because the complainant's access to the recipient's education program or activity can be limited by sexual harassment, an equitable grievance procedure will provide relief from any sexual harassment found under the procedures required in the proposed regulations and restore access to the complainant accordingly.

Proposed § 106.45(b)(1)(ii) requires that a recipient investigate a complaint and that grievance procedures include an objective evaluation of the evidence. Stakeholders have raised concerns that recipients sometimes ignore evidence that does not fit with a predetermined outcome, and that investigators and decision-makers have inappropriately discounted testimony based on whether it comes from the complainant or the respondent. Paragraph (b)(1)(ii) responds to these concerns by requiring the recipient to conduct an investigation and objectively evaluate all evidence, and by prohibiting the recipient from basing its evaluation of testimony on the person's status as a complainant, respondent, or witness.

Proposed § 106.45(b)(1)(iii) would address the problems that have arisen for complainants and respondents as a result of coordinators, investigators, and decision-makers making decisions based on bias by requiring recipients to fill such positions with individuals free from bias or conflicts of interest. This proposed provision generally tracks the language in the Clery Act regulations at 34 CFR 668.46(k)(3)(i)(C) and would apply to all recipients subject to Title IX. Paragraph (b)(1)(iii) would also require that coordinators, investigators, and decision-makers receive training on (1) the definition of sexual harassment and (2) how to conduct the investigation and grievance process in a way that protects student safety, due process, and accountability. This proposed provision generally tracks the language in the Clery Act regulations at 34 CFR 668.46(k)(2)(ii) and would apply to all recipients subject to Title IX. The Department believes that such training will help ensure that those individuals responsible for implementing the recipient's grievance procedures are appropriately informed at the elementary and secondary education level as well as the postsecondary education level. Recipients would also be required to use training materials that promote impartial investigations and adjudications and that do not rely on sex stereotypes, so as to avoid training that would cause the grievance process to favor one side or the other or bias outcomes in favor of complainants or respondents. Recipients would continue to have the discretion to use their own employees to investigate and/or adjudicate matters under Title IX or to hire outside individuals to fulfill these responsibilities.

Proposed § 106.45(b)(1)(iv) would require that a recipient's grievance procedures establish a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. This requirement is added to ensure impartiality by the recipient until a determination is made. The requirement also bolsters other provisions in the proposed regulation that place the burden of proof on the recipient, rather than on the parties; indicate that supportive measures are "non-disciplinary" and "non-punitive" (implying that the recipient may not punish an accused person prior to a determination regarding responsibility); and impose due process protections throughout the grievance process. Finally, pending the finding of facts sufficient for the recipient to make a determination regarding responsibility, the requirement mitigates the stigma and reputational harm that accompany an allegation of sexual misconduct. A fundamental notion of a fair proceeding is that a legal system does not prejudge a person's guilt or liability.

The proposed regulations recognize that the time that it takes to complete the grievance process will vary depending on, among others things, the complexity of the investigation, and that prompt resolution of the grievance process is important to both complainants and respondents. Proposed paragraph (b)(1)(v) would require recipients to designate reasonably prompt timeframes for the grievance process, including for appeals if the recipient offers an appeal, but also provide that timeframes may be extended for good cause with written notice to the parties and an explanation for the delay. This proposed provision generally tracks the language in the Clery Act regulations at 34 CFR 668.46(k)(3)(i)(A), which the Department believes is important to include for all recipients subject to Title IX. Some recipients felt pressure in light of prior Department guidance to resolve the grievance process within 60 days regardless of the particulars of the situation, and in some instances, this resulted in hurried investigations and adjudications, which sacrificed accuracy and fairness for speed. Proposed paragraph (b)(1)(v) specifies examples of possible reasons for such a delay, such as absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities. For example, if a concurrent law enforcement investigation has uncovered evidence that the police plan to release on a specific timeframe and that evidence would likely be material to determining responsibility, a recipient could reasonably extend the timeframe of the grievance process in order to allow that evidence to be included in the final determination of responsibility. Any reason for a delay must be justified by good cause and communicated by written notice to the complainant and the respondent of the delay or extension and the reasons for the action; delays caused solely by administrative needs are insufficient to satisfy this standard. Moreover, recipients must meet their legal obligation to provide timely auxiliary aids and services and reasonable accommodations under Title II of the ADA, Section 504, and Title VI of the Civil Rights Act of 1964, and should reasonably consider other services such as meaningful access to language assistance.

It is important for individuals to have a clear understanding of the recipients' policies and procedures related to sexual harassment, including the consequences of being found responsible for sexual harassment, and the procedures the recipient will use to make such a determination; otherwise, the parties may not have a full and fair opportunity to present evidence and arguments in favor of their side, and the accuracy and impartiality of the process could suffer as a result. Proposed paragraphs (b)(1)(vi) through (ix) would require that the parties be informed of the possible sanctions and remedies that may be implemented following the determination of responsibility, the standard of evidence to be used during the grievance process, the procedures and permissible bases for appeals if the recipient offers an appeal, and the range of supportive measures available to complainants and respondents. These proposed provisions generally track the language in the Clery Act regulations at 34 CFR 668.46(k)(1) and would apply to all recipients subject to Title IX. The Department believes that requiring a recipient to notify the parties of these matters in advance is equally important at the elementary and secondary education level as it is at the postsecondary education level to ensure the parties are fully informed.

B. Notice and Investigation

Section 106.45(b)(2) Notice of Allegations

Proposed Regulations: We propose adding § 106.45(b)(2) stating that upon receipt of a formal complaint, a recipient must provide written notice to the parties of the recipient's grievance procedures and of the allegations. Such notice must include sufficient details (such as the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's code of conduct, and the date and location of the alleged incident, if known) and provide sufficient time to prepare a response before any initial interview. The written notice must also include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The notice must inform the parties that they may request to inspect and review evidence under § 106.45(b)(3)(viii). Additionally, the notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process. Also, if the recipient decides later to investigate allegations not included in the notice provided pursuant to paragraph (b)(2)(i)(B), the recipient must provide notice of the additional allegations to known parties.

Reasons: To meaningfully participate in the process, all parties must have adequate notice of the allegations and grievance procedures. Without the information included in the written notice required by proposed § 106.45(b)(2), a respondent would be unable to adequately respond to allegations. This notice will also ensure that the complainant is able to understand the grievance process, including what allegations are part of the investigation. The requirement to provide sufficient details (such as the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's code of conduct, and the date and location of the alleged incident, if known) applies whenever a formal complaint is filed against a respondent, whether the complaint is signed by the complainant or by the Title IX Coordinator. The qualifier "if known" reflects that in some cases, a complainant may not know details that ideally would be included in the written notice, such as the identity of the respondent, or the date or location of the incident. If during the investigation the recipient learns these details then the recipient should promptly send the written notice as required by paragraph (b)(2)(i) to the now-identified respondent, as applicable, and/or inform the respondent of the details of allegations that were previously unknown (such as the date or location of the alleged incident). The unavailability of material details, particularly the identity of the respondent, may impede a recipient's ability to investigate and thus impact whether the recipient's response is deliberately indifferent. If, during the investigation, the recipient decides to investigate additional allegations, the recipient must provide notice of those allegations to the parties. This notice would keep the parties meaningfully informed of any expansion in the scope of the investigation. It is also important for recipients to notify parties about any provisions in its code of conduct that prohibit knowingly making false statements or knowingly submitting false information during the grievance process so as to emphasize the recipients' serious commitment to the truth-seeking nature of the grievance process and to incentivize honest, candid participation in it.

Section 106.45(b)(3) Investigations of a Formal Complaint

Proposed Regulations: We propose adding § 106.45(b)(3) stating that the recipient must conduct an investigation of the allegations in a formal complaint. Proposed § 106.45(b)(3) also states that if the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved or did not occur within the recipient's program or activity, the recipient must terminate its grievance process with regard to that conduct, and that when investigating a formal complaint, a recipient must—

- Ensure 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;
- Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;
- Provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate;
- For recipients that are elementary and secondary schools, the recipient's grievance procedures may require a live hearing. With or without a hearing, the decision-maker must, after the recipient has incorporated the parties' responses to the investigative report under § 106.45(b)(3)(ix), ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses. If no hearing is held, the decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, all questioning must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant;
- For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker 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 under § 106.45(b)(3)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an

advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination. All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions. The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant. If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;

- Provide both parties an equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and
- Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under § 106.45) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response.

Reasons: Proposed § 106.45(b)(3) would set forth specific standards to govern investigations of formal complaints of sexual harassment. To ensure a recipient's resources are directed appropriately at handling complaints of sexual harassment, proposed paragraph (b)(3) would require recipients to dismiss a formal complaint or an allegation within a complaint without conducting an investigation if the alleged conduct, taken as true, is not sexual harassment as defined in the proposed regulations or if the conduct did not occur within the recipient's program or activity. This ensures that only conduct covered by Title IX is treated as a Title IX issue in a school's grievance process. The Department emphasizes that a recipient remains free to respond to conduct that does not meet the Title IX definition of sexual harassment, or that did not occur within the recipient's program or activity, including by responding with supportive measures for the affected student or investigating the allegations through the recipient's student conduct code, but such decisions are left to the recipient's discretion in situations that do not involve conduct falling under Title IX's purview.

Proposed paragraph (b)(3)(i) would place the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility on the recipient, not on the parties. Recipients, not complainants or respondents, must comply with Title IX, so the burden of gathering evidence relating to allegations of sexual harassment under Title IX and determining whether the evidence shows responsibility appropriately falls to the recipient. Although a school could contract with a third-party agent to perform an investigation or otherwise satisfy its responsibilities under this section, including to gather evidence, the recipient will be held to the same standards under this section regardless of whether those responsibilities are performed by the recipient directly through its employees or through a third party such as a contractor. Likewise, although schools will often report misconduct under this section to the appropriate authorities, including as required under state law, a report to police or the presence of a police investigation regarding misconduct under this section does not relieve a recipient of its obligations under this section. Nothing in the proposed regulation prevents a recipient from using evidence merely because it was collected by law enforcement.

With the goal of ensuring fairness and equity for all parties throughout the investigation process, proposed paragraphs (b)(3)(ii), (iii), (iv), and (viii) would require recipients to provide the parties with an equal opportunity to present witnesses and other inculpatory and exculpatory evidence; permit the parties to discuss the investigation; provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied by an advisor of their choice with any restrictions on the advisor's participation being applied equally to both parties; provide the parties with equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility; equal opportunity to respond to such evidence; and equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination. Because both parties can review and respond to this evidence, discuss the investigation with others in order to identify additional evidence, introduce any additional evidence into the proceeding, and receive guidance from an advisor of their choice throughout, the process will be substantially more thorough and fair and the resulting outcomes will be more reliable. Proposed paragraph (b)(3)(iv) generally tracks the language in the Clery Act regulations at 34 CFR 688.46(k)(2)(iii) and (iv) and would apply to all recipients subject to Title IX. And, proposed paragraph (b)(3)(viii) is consistent with the Family Educational Rights and Privacy Act (FERPA), under which a student has a right to inspect and review records that directly relate to that student. The Department believes that permitting both parties to be accompanied by an advisor or other individual of their choice (who may be an attorney) is also important at the elementary and secondary education level to ensure that both parties are treated equitably.

To ensure that the complainant and respondent are able to meaningfully participate in the process and that any witnesses have adequate time to prepare, proposed § 106.45(b)(3)(v) would require recipients to provide to the party whose participation is invited or expected written notice of all hearings, investigative interviews, or other meetings with a party, with

sufficient time for the party to prepare to participate in the proceeding. Without this protection, a party's ability to participate in a hearing, interview, or meeting might not be meaningful or add any value to the proceeding. The Department believes that this proposed provision, which is similar to the Clery Act regulation at 34 CFR 688.46(k)(3)(i)(B) with respect to timely notice of meetings, is equally important at the elementary and secondary education level and the postsecondary education level to ensure that both parties are treated equitably.

Cross-examination is the "greatest legal engine ever invented for the discovery of truth." *California* v. *Green*, 399 U.S. 149, 158 (1970) (quoting John H. Wigmore, 5 Evidence sec. 1367, at 29 (3d ed., Little, Brown & Co. 1940)). The Department recognizes the high stakes for all parties involved in a sexual harassment investigation, and recognizes that the need for recipients to reach reliable determinations lies at the heart of Title IX's guarantees for all parties. Indeed, at least one federal circuit court has held that in the Title IX context cross-examination is not just a wise policy, but is a constitutional requirement of Due Process. *Doe* v. *Baum*, 903 F.3d 575, 581 (6th Cir. 2018) ("Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted").

The Department has carefully considered how best to incorporate the value of cross-examination for proceedings at both the postsecondary level and the elementary and secondary level. Because most parties and many witnesses are minors in the elementary and secondary school context, sensitivities associated with age and developmental ability may outweigh the benefits of cross-examination at a live hearing. Proposed § 106.45(b)(3)(vi) allows—but does not require—elementary and secondary schools to hold a live hearing as part of their grievance procedures. With or without a hearing, the complainant and the respondent must have an equal opportunity to pose questions to the other party and to witnesses prior to a determination of responsibility, with each party being permitted the opportunity to ask all relevant questions and follow-up questions, including those challenging credibility, and a requirement that the recipient explain any decision to exclude questions on the basis of relevance. If no hearing is held, each party must have the opportunity to conduct its questioning of other parties and witnesses by submitting written questions to the decision-maker, who must provide the answers to the asking party and allow for additional, limited follow-up questions from each party.

In contrast, the Department has determined that at institutions of higher education, where most parties and witnesses are adults, grievance procedures must include live cross-examination at a hearing. Proposed § 106.45(b)(3)(vii) requires institutions to provide a live hearing, and to allow the parties' advisors to cross-examine the other party and witnesses. If a party does not have an advisor at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination. Cross-examination conducted by the parties' advisors (who may be attorneys) must be permitted notwithstanding the discretion of the recipient under § 106.45(b)(3)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings. In the context of institutions of higher education, the proposed regulation balances the importance of cross-examination with any potential harm from personal confrontation between the complainant and the respondent by requiring questions to be asked by an advisor aligned with the party. Further, the proposed regulation allows either party to request that the recipient facilitate the parties being located in separate rooms during cross-examination while observing the questioning live via technological means. The proposed regulations thereby provide the benefits of cross-examination while avoiding any unnecessary trauma that could arise from personal confrontation between the complainant and the respondent. *Cf. Baum*, 903 F.3d at 583 ("Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment. And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that. But in circumstances like these, the answer is not to deny cross-examination altogether. Instead, the university could allow the accused student's agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker.").

In addition, proposed § 106.45(b)(3)(vi) and (vii) would set forth a standard for when questions regarding a complainant's sexual behavior may be asked, applicable to all recipients. These sections incorporate language from (and are in the spirit of) the rape shield protections found in Federal Rule of Evidence 412, which is intended to safeguard complainants against invasion of privacy, potential embarrassment, and stereotyping. *See* Fed. R. Evid. 412 Advisory Committee's Note. As the Court has explained, rape shield protections are intended to protect complainants "from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior." *Michigan* v. *Lucas*, 500 U.S. 145, 146 (1991). Similarly, proposed § 106.45(b)(3)(vi) and (vii) would prevent harassing or irrelevant questions about a complainant's sexual behavior or predisposition from being asked. Importantly, these proposed paragraphs also ensure that questions about a complainant's sexual behavior can be asked to prove that someone other than the respondent committed the conduct alleged by the complainant, or when evidence about specific incidents of the complainant's sexual behavior with respect to the respondent is offered to prove consent. Federal Rule of Evidence 412 applies these exceptions to the general prohibition against asking about a complainant's sexual behavior, and for the same reasons, such exceptions promote truth-seeking in campus proceedings.

To maintain a transparent process, the parties need a complete understanding of the evidence obtained by the recipient and how a determination regarding responsibility is made. For that reason, proposed § 106.45(b)(3)(viii) would require recipients to provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence upon which the recipient does not intend to rely in making a determination regarding responsibility. The evidence must also be provided electronically and the parties must be given at least ten days to submit a written response; these requirements will facilitate each party's ability to identify evidence that supports their position and emphasize such evidence in their arguments to the decision-maker. The scope of the parties' right to inspect and review evidence collected by the recipient is consistent with students' privacy rights under FERPA, under which a student

has a right to inspect and review records that directly relate to that student.

Proposed § 106.45(b)(3)(ix) would require recipients to create an investigative report that summarizes relevant evidence and provide a copy of the report to the parties, allowing both parties at least ten days prior to any hearing or other time of determination regarding responsibility the opportunity to respond in writing to the report. These requirements will put the parties on the same level in terms of access to information to ensure that both parties participate in a fair, predictable process that will allow the parties to serve as a check on any decisions the recipient makes regarding the inclusion or relevance of evidence. Notwithstanding the foregoing rights of the parties to review and respond to the evidence collected by the recipient, the recipient must at all times proceed with the burden of conducting the investigation into all reasonably available, relevant evidence; the burden of collecting and presenting evidence should always remain on the recipient and not on the parties.

C. Standard of Evidence

Section 106.45(b)(4)(i)

Proposed Regulations: We propose adding § 106.45(b)(4)(i) stating that in reaching a determination regarding responsibility, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

Reasons: The statutory text of Title IX does not dictate a standard of evidence to be used by recipients in investigations of sexual harassment. Past guidance from the Department originally allowed recipients to choose which standard to employ, but was later changed to require recipients to use only the preponderance of the evidence. When the Department issued guidance requiring recipients to use only preponderance of the evidence, it justified the requirement by comparing the grievance process to civil litigation, and to the Department's own process for investigating complaints against recipients under Title IX. Although it is true that civil litigation generally uses preponderance of the evidence, and that Title IX grievance processes are analogous to civil litigation in many ways, it is also true that Title IX grievance processes lack certain features that promote reliability in civil litigation. For example, many recipients will choose not to allow active participation by counsel; there are no rules of evidence in Title IX grievance processes; and Title IX grievance processes do not afford parties discovery to the same extent required by rules of civil procedure.

Moreover, Title IX grievance processes are also analogous to various kinds of civil administrative proceedings, which often employ a clear and convincing evidence standard. *See, e.g., Nguyen* v. *Washington Dept. of Health,* 144 Wash. 2d 516 (2001) (requiring clear and convincing evidence in sexual misconduct case in a professional disciplinary proceeding for a medical doctor as a way of protecting due process); *Disciplinary Counsel* v. *Bunstine,* 136 Ohio St. 3d 276 (2013) (clear and convincing evidence applied in sexual harassment case involving lawyer). These cases recognize that, where a finding of responsibility carries particularly grave consequences for a respondent's reputation and ability to pursue a profession or career, a higher standard of proof can be warranted. Indeed, one court has held that in student disciplinary cases involving serious accusations like sexual assault where the consequences of a finding of responsibility would be significant, permanent, and far-reaching, a preponderance of the evidence standard is inadequate. *Lee* v. *University of New Mexico,* No. 1:17–cv–01230–JB–LF (D. N.M. Sept. 20, 2018) ("Moreover, the Court concludes that preponderance of the evidence is not the proper standard for disciplinary investigations such as the one that led to Lee's expulsion, given the significant consequences of having a permanent notation such as the one UNM placed on Lee's transcript").

After considering this issue, the Department decided that its proposed regulation should leave recipients with the discretion to use either a preponderance or a clear and convincing standard in their grievance procedures. The Department does not believe it would be appropriate to impose a preponderance requirement in the absence of all of the features of civil litigation that are designed to promote reliability and fairness. Likewise, the Department believes that in light of the due process and reliability protections afforded under the proposed regulations, it could be reasonable for recipients to choose the preponderance standard instead of the clear and convincing standard, and thus, it is appropriate for the Department to give them the flexibility to do so.

To ensure that recipients do not single out respondents in sexual harassment matters for uniquely unfavorable treatment, a recipient would only be allowed to use the preponderance of the evidence standard for sexual harassment complaints if it uses that standard for other conduct code violations that carry the same potential maximum sanction as the recipient could impose for a sexual harassment conduct code violation. Likewise, to avoid the specially disfavored treatment of student respondents in comparison to respondents who are employees such as faculty members, who often have superior leverage as a group in extracting guarantees of protection under a recipient's disciplinary procedures, recipients are also required to apply the same standard of evidence for complaints against students as they do for complaints against employees, including faculty. In contrast, because of the heightened stigma often associated with a complaint regarding sexual harassment, the proposed regulation gives recipients the discretion to impose a clear and convincing evidence standard with regard to sexual harassment complaints even if other types of complaints are subject to a preponderance of the evidence standard. Within these constraints, the proposed regulation recognizes that recipients should be able to choose a standard of proof that is appropriate for investigating and adjudicating complaints of sex discrimination given the unique needs of their community.

D. Additional Requirements for Grievance Procedures

Section 106.45(b)(4) Determination Regarding Responsibility

Proposed Regulations: We propose adding § 106.45(b)(4) stating that the decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility applying the appropriate standard of evidence as discussed above.

The written determination must include—

- Identification of the section(s) of the recipient's code of conduct alleged to have been violated;
- 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;

- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;
- 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
- The recipient's procedures and permissible bases for the complainant and respondent to appeal.

The recipient must provide the written determination to the parties simultaneously. If 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.

Reasons: Proposed § 106.45(b)(4) would address the process that recipients use to make determinations regarding responsibility, with requirements designed to ensure that recipients make sound and supportable decisions through a process that incorporates appropriate protections for all parties while providing adequate notice of such decisions. Requiring the decision-maker to be different from any person who served as the Title IX Coordinator or investigator forecloses a recipient from utilizing a "single investigator" or "investigator-only" model for Title IX grievance processes. The Department believes that fundamental fairness to both parties requires that the intake of a report and formal complaint, the investigation (including party and witness interviews and collection of documentary and other evidence), drafting of an investigative report, and ultimate decision about responsibility should not be left in the hands of a single person. Rather, after the recipient has conducted its impartial investigation, a separate decision-maker must reach the determination regarding responsibility; that determination can be made by one or more decision-makers (*e.g.*, a panel), but no decision-maker can be the same person who served as the Title IX Coordinator or investigator.

To foster reliability and thoroughness and to ensure that a recipient's findings are adequately explained, proposed § 106.45(b)(4)(i) would require recipients to issue a written determination regarding responsibility. So that the parties have a complete understanding of the process and information considered by the recipient to reach its decision, proposed § 106.45(b)(4)(ii) would require the notice of determination to include: The sections of the recipient's code of conduct alleged to have been violated; the procedural steps taken from the receipt of the complaint through the determination; findings of fact supporting the determination; conclusions regarding the application of the recipient's code of conduct to the facts; a statement of, and the recipient's rationale for, the result, including a determination regarding responsibility; any sanctions the recipient imposes on the respondent; and information regarding the appeals process and the recipient's procedures and permissible bases for the complainant and respondent to appeal.

Proposed § 106.45(b)(4)(ii)(E) requires that the written determination contain a statement of, and rationale for, the result, including any sanctions imposed by the recipient and any remedy given to the complainant. Proposed § 106.45(b)(4)(iii) requires that this written determination be provided simultaneously to the parties. These provisions generally track the language of the Clery Act regulations at 34 CFR 668.46(k)(2)(v) and (k)(3)(iv) already applicable to institutions of higher education. The Department believes that the benefits of these provisions, including promoting transparency and equal treatment of the parties, are equally applicable at the elementary and secondary level.

Proposed § 106.45(b)(4)(iii) instructs recipients to provide the written determination simultaneously to both parties so that both parties know the outcome and, if an appeal is available, both parties have equal opportunity to consider filing an appeal. If 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 when the appeal process is concluded, or if no appeal is filed, on the date on which an appeal would not be timely under the recipient's designated time frames. Once the determination regarding responsibility has become final, in cases where the respondent is found responsible, the recipient must promptly implement remedies designed to help the complainant maintain equal access to the recipient's educational programs, activities, benefits, and opportunities. In cases where the respondent is found not responsible, no remedies are required for the complainant, although a recipient may continue to offer supportive measures to either party.

Section 106.45(b)(5) Appeals

Proposed Regulations: We propose adding § 106.45(b)(5) stating that a recipient may choose to offer an appeal. If a recipient offers an appeal, it must allow both parties to appeal. In cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent. As to all appeals, the recipient must: (i) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties; (ii) ensure that the appeal decision-maker is not the same person as any investigator(s) or decision-maker(s) that reached the determination regarding responsibility; (iii) ensure that the appeal decision-maker complies with the standards set forth in § 106.45(b)(1)(iii); (iv) give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome; (v) issue a written decision describing the result of the appeal and the rationale for the result; and (vi) provide the written decision simultaneously to both parties.

Reasons: Many recipients offer an appeal from the outcome of a Title IX grievance process. After extensive stakeholder engagement on the subject of school-level appeals, the Department believes that by offering that opportunity to both parties, recipients will be more likely to reach sound determinations, giving the parties greater confidence in the ultimate outcome. Complainants and respondents have different interests in the outcome of a sexual harassment complaint. Complainants "have a right, and are entitled to expect, that they may attend [school] without fear of sexual assault or harassment," while for respondents a "finding of responsibility for a sexual offense can have a lasting impact on a student's personal life, in addition to [the student's] educational and employment opportunities[.]" *Doe*

v. *Univ. of Cincinnati,* 872 F.3d 393, 400, 403 (6th Cir. 2017) (internal quotation marks and citations omitted). Although these interests differ, each represents high-stakes, potentially life-altering consequences deserving of an accurate outcome. *See id.* at 404 (recognizing that the complainant "deserves a reliable, accurate outcome as much as" the respondent). The Department proposes that where a recipient offers an appeal, such appeal should be equally available to both parties, reflecting that each party has an important stake in the reliability of the outcome. Importantly, the proposed regulation notes that in cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent. *See e.g., Davis,* 526 U.S. at 648 ("the dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands."); *Stiles ex rel. D.S.* v. *Grainger Co., Tenn.,* 819 F.3d 834, 848 (6th Cir. 2016) ("Title IX does not give victims a right to make particular remedial demands.") (internal quotations omitted); *Sanches* v. *Carrollton-Farmers Branch Indep. Sch. Dist.,* 647 F.3d 156, 167–68 (5th Cir. 2011) ("Schools are not required to . . . accede to a parent's remedial demands") (internal citations omitted).

Similarly to the initial investigation and adjudication, the recipient must ensure that any appeal process is conducted in a timely manner and gives both parties an equal opportunity to argue for or against the outcome. Like any of the recipient's Title IX Coordinators, investigators, or decision-makers, the appeal decision-maker must be free from bias or conflicts of interest, and must be trained on the definition of sexual harassment and the recipient's grievance process using training materials that promote impartial decision-making and are free from sex stereotypes. When designating reasonable timeframes for the filing and resolution of appeals, recipients should endeavor to permit parties sufficient time to file an appeal and submit written arguments, yet resolve the appeal process as expeditiously as possible to provide finality of the grievance process for the benefit of all parties.

Section 106.45(b)(6) Informal Resolution

Proposed Regulations: We propose adding § 106.45(b)(6) stating that at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient provides to the parties a written notice disclosing—

- The allegations;
- The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

The recipient must also obtain the parties' voluntary, written consent to the informal resolution process.

Reasons: As mentioned previously, the proposed regulations reflect the Department's recognition that recipients' good judgment and common sense are important elements of a response to sex discrimination that meets the requirements of Title IX. The Department also recognizes that in responding to sexual harassment, it is important to take into account the needs of the parties involved in each individual case, some of whom may prefer not to go through a formal complaint process. Recognizing these factors, proposed § 106.45(b)(6) would permit recipients to facilitate an informal resolution process of an allegation of sexual harassment at any time prior to issuing a final determination regarding responsibility, if deemed appropriate by the recipient and the parties. To ensure that the parties do not feel forced into an informal resolution by a recipient, and to ensure that the parties have the ability to make an informed decision, proposed paragraph (b)(6)(i) would require recipients to inform the parties in writing of the allegations, the requirements of the informal resolution process, and any consequences resulting from participating in the informal process. For example, the recipient would need to explain to the parties if one or more available informal resolution options would become binding on the parties at any point, as is often the case with arbitration-style processes, or if the process would remain non-binding throughout, as is often the case with mediation-style processes. Informal resolution options may lead to more favorable outcomes for everyone involved, depending upon factors such as the age, developmental level, and other capabilities of the parties; the knowledge, skills, and experience level of those facilitating or conducting the informal resolution process; the severity of the misconduct alleged; and likelihood of recurrence of the misconduct. Proposed paragraph (b)(6)(ii) would require the recipient to obtain voluntary, written consent from the parties in advance of any informal resolution process in order to ensure that no party is involuntarily denied the protections that would otherwise be provided by these regulations.

Section 106.45(b)(7) Recordkeeping

Proposed Regulations: We propose adding § 106.45(b)(7) stating that a recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of—

- The sexual harassment investigation, including any determination regarding responsibility, disciplinary sanctions imposed on the respondent, and remedies provided to the complainant;
- Any appeal and the result therefrom;
- Informal resolution, if any; and
- All materials used to train coordinators, investigators, decision-makers with regard to sexual harassment.

This provision would also provide that a recipient must create and maintain for a period of three years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not clearly unreasonable, and document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

Reasons: To ensure that the parties, the Department, and recipients have access to relevant information for an appropriate period of time following the completion of the grievance procedure process, proposed § 106.45(b)(7) would address the recordkeeping requirements related to formal complaints of sexual harassment with which recipients must comply. These requirements would benefit complainants and respondents by empowering them to more effectively hold their recipient schools and

institutions accountable for Title IX compliance by ensuring the existence of records that could be used during an investigation by the Department or in private litigation. We believe the required three-year retention period is sufficient to allow the Department and the parties to ensure compliance with the proposed regulations, but we specifically seek comment on the appropriate period for retention in a directed question below. During the record retention period, these records would continue to be subject to the applicable provisions of FERPA, as discussed below.

III. Clarifying Amendments to Existing Regulations

Remedial and Affirmative Action and Self-Evaluation (Current § 106.3(a) and Proposed § 106.3(a))

Statute: The statute does not directly address the issue of particular types of remedies, beyond the statement that compliance may be effected by a withdrawal of federal funding or "by any other means authorized by law." 20 U.S.C. 1682. The Secretary has the authority to regulate with regard to discrimination on the basis of sex in education programs or activities receiving federal financial assistance specifically under 20 U.S.C. 1682 and generally under 20 U.S.C. 1221e–3 and 3474.

Current Regulations: Current § 106.3(a) provides that if the Assistant Secretary for Civil Rights finds that a recipient has discriminated against a person on the basis of sex in an education program or activity, the recipient shall be required to take remedial action that the Assistant Secretary deems necessary "to overcome the effects of such discrimination."

Proposed Regulations: We propose modifying the language to apply to any violation of part 106 and adding language to § 106.3(a) stating that the remedial action deemed necessary by the Assistant Secretary shall not include assessment of damages.

Reasons: The proposed changes would clarify, consistent with the Supreme Court's case law in this area and mindful of the difference between a private right of action opening the door to damages assessed by a court and the Department's role administratively enforcing Title IX without express statutory authority to collect damages, that the Assistant Secretary shall not assess damages against a recipient. *Gebser,* 524 U.S. at 288–89 ("While agencies have conditioned continued funding on providing equitable relief to the victim, the regulations do not appear to contemplate a condition ordering payment of monetary damages, and there is no indication that payment of damages has been demanded as a condition of finding a recipient to be in compliance with the statute") (internal citation omitted).

For example, if a student entitled to speech therapy under her Individualized Education Program (IEP) complains that a school district did not provide the therapy, the Department may permissibly require that the school district reimburse the parents for their reasonable and documented expenses for obtaining services that that the school district was required to provide. *Cf. Sch. Comm. of Burlington* v. *Dep't of Educ.,* 471 U.S. 359, 370 (1985) ("[T]he Town repeatedly characterizes reimbursement as 'damages,' but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."). Likewise, in the context of Title IX, if a recipient allowed male students with athletic scholarships to retain their scholarships even if they are removed from the team or stop participating on the team, but did not allow female students the same ability to retain their scholarship, the Department could require a recipient to come into compliance with Title IX by restoring the relevant scholarship, even though the restoration will require the payment of monies by the recipient. *See, e.g., Romeo Community Schools* v. *United States Dep't of Health, Education & Welfare,* 600 F.2d 581, 583 (6th Cir. 1979) (emphasis added) ("Romeo received a letter from the regional director of HEW demanding that it alter its practices with respect to pregnancy leave to conform to § 86.57(c) and reimburse and adjust the salaries and retirement credits of any employees who had not been permitted to use accrued sick leave while on pregnancy related leave since June 23, 1972. The letter from HEW also required assurances from Romeo that it would comply with § 86.57, and that reimbursement had been made."). Thus, in those narrow instances where a failure to pay a specific amount for a specific purpose constitutes the crux of the violation, the resolution can include a monetary payment and still be an equitable remedy squarely tied to the violation the Department identified. Notably, this proposed modification does not affect the Department's statutory authority to suspend or terminate federal funding from a recipient that has violated Title IX and refused to come into compliance.

Effect of Other Requirements and Preservation of Rights (Current § 106.6 and Proposed § 106.6)

Statute: The statute does not directly address the effect of other requirements or the preservation of rights. The Secretary has the authority to regulate with regard to discrimination on the basis of sex in education programs or activities receiving federal financial assistance specifically under 20 U.S.C. 1682 and generally under 20 U.S.C. 1221e–3 and 3474.

Current Regulations: Current § 106.6 provides that the obligations under the Title IX regulations do not alter obligations not to discriminate on the basis of sex under other specified laws and Executive Orders, and the obligation to comply with Title IX is not obviated or alleviated by State or local laws or by a rule or regulation of any organization, club, or league.

Section 106.6(d) Constitutional Protections

Proposed Regulations: We are proposing to add paragraph (d) to § 106.6 to affirm that nothing in 34 CFR part 106 requires a recipient to: Restrict any rights that are protected from governmental action by the First Amendment of the U.S. Constitution; deprive an individual of rights that would otherwise be protected from governmental action under the Due Process Clauses of the Fifth and Fourteenth Amendments; or restrict any other rights guaranteed against governmental action by the U.S. Constitution.

Reasons: Despite the language in current § 106.6 and the discussions in Department guidance regarding the due process protections for public school students and employees and free speech rights under the First Amendment (2001 Guidance at 22) there appears to be significant confusion regarding the intersection of individuals' rights under the U.S. Constitution with a recipient's obligations under Title IX. In particular, during listening sessions the Department heard concerns that Title IX enforcement has had a chilling effect on free speech. We are proposing to add paragraph (d) to clarify that nothing in these regulations requires a recipient to infringe upon any individual's rights protected under the First Amendment or the Due Process Clauses, or other any other rights guaranteed by the U.S. Constitution. The language also makes it clear that, under the Title IX regulations, recipients—including private recipients—are not obligated by

Title IX to restrict speech or other behavior that the federal government could not restrict directly. Consistent with Supreme Court case law, the government may not compel private actors to restrict conduct that the government itself could not constitutionally restrict. *See e.g., Peterson* v. *City of Greenville,* 373 U.S. 244 (1963); *Truax* v. *Raich,* 239 U.S. 33, 38 (1915). Thus, recipients that are private entities are not required by Title IX or its regulations to restrict speech or other behavior that would be protected against restriction by governmental entities. This protection against governmental restrictions on constitutional rights applies to all the civil rights laws that Department enforces, but we are adding paragraph (d) to the Title IX regulations because the issue arises frequently in the context of sexual harassment. When the Department enforces Title IX and its accompanying regulations, the constitutional rights of individuals involved in a recipient's grievance process will always be considered and protected.

Section 106.6(e) Interaction With FERPA

Proposed Regulations: We are also proposing to add paragraph (e) to § 106.6 to clarify that obligations under this part are not obviated or alleviated by the requirements in the FERPA statute or regulations.

Reasons: In 1994, as part of the Improving America's Schools Act, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state that nothing in GEPA "shall be construed to affect the applicability of . . . title IX of the Education Amendments of 1972 . . . ." 20 U.S.C. 1221(d). The proposed regulations under Title IX should be read to be consistent with a recipient's obligations under FERPA.

Section 106.6(f) Interaction With Title VII

Proposed Regulations: We are also proposing to add paragraph (f) to § 106.6 to clarify that nothing in the proposed regulations shall 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.

Reasons: Employees of a school may have rights under both Title IX and Title VII. To the extent that any rights, remedies, or procedures differ under Title IX and Title VII, this provision clarifies that nothing about the proposed regulations is intended to diminish, restrict, or lessen any rights an employee may have against his or her school under Title VII.

Designation of Coordinator, Dissemination of Policy, Adoption of Grievance Procedures (Current §§ 106.8 and 106.9 and Proposed § 106.8)

Statute: The statute does not directly address the designation of a Title IX Coordinator, the dissemination of policy, or the adoption of grievance procedures. The Secretary has the authority to regulate with regard to discrimination on the basis of sex in education programs or activities receiving federal financial assistance, specifically under 20 U.S.C. 1682 and generally under 20 U.S.C. 1221e–3 and 3474.

Current Regulations: Current § 106.8(a) requires a recipient to designate at least one employee to be the "responsible employee" who has the duty to coordinate the recipient's efforts to comply with and carry out its responsibilities under the regulations, including any investigation of any complaint alleging a recipient's noncompliance with, or actions which would be prohibited by, 34 CFR part 106. Section 106.8(a) also requires recipients to notify all students and employees of the name, office address, and telephone number of such employee or employees.

Title 34 CFR 106.8(b) requires recipients to adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination.

Title 34 CFR 106.9(a)(1) requires recipients to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral for applicants for admission and employment, and unions or professional organizations holding collective bargaining agreements or professional agreements with the recipient that it does not discriminate on the basis of sex in the education program or activity which it operates. Such notice must state that inquiries about the application of Title IX may be referred to the employee designated pursuant to § 106.8, or to the Assistant Secretary.

Title 34 CFR 106.9(b) lists the types of publications where the recipient shall publish its nondiscrimination policy, and 34 CFR 106.9(c) specifies the manner of distribution of such publications.

Proposed Regulations: We are proposing to clarify the requirements of 34 CFR 106.8(a). Proposed § 106.8(a) would state that the designated individual is referred to as the "coordinator," and would alter the required methods for notification. Proposed § 106.8(a) would also remove potentially unclear language in the existing regulation that could be read to require that the coordinator must be the one that handles the investigations and otherwise directly carries out the recipient's responsibilities.

We also propose moving the "notification of policy" requirement in current § 106.9(a)(1) to proposed § 106.8(b)(1). Proposed § 106.8(b)(1) would streamline the list of people whom recipients must notify of its policy of non-discrimination based on sex, and clarify that such a notice must state that inquiries about application of Title IX to the recipient may be made to the recipient's Title IX Coordinator or the Assistant Secretary, or to both.

Proposed § 106.8(b)(2) requires recipients to prominently display their Title IX non-discrimination policy on their website (if any) and in each handbook or catalog that it makes available to the list of people who must be notified in paragraph (b)(1), and prohibits recipients from using or distributing publications stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such different treatment is permitted by this part.

We also propose moving the requirements in current 34 CFR 106.8(b) to proposed § 106.8(c), with modifications as proposed below. Proposed § 106.8(c) would clarify that with respect to sexual harassment, the grievance procedures requirements specifically apply to formal complaints as defined in § 106.30. Proposed § 106.8(c) would also require recipients to provide notice of their grievance procedures to students and employees.

We also propose adding paragraph (d) to § 106.8 to clarify that the policy and grievance procedures described in this section need not apply to persons outside the United States.

Reasons: Proposed § 106.8(a) would reflect the current reality of Title IX compliance—namely, that recipients generally name a Title IX Coordinator and designate that individual to coordinate their efforts to comply with Title IX. It appears that the phrase "and carry out" in the existing regulation could be read to suggest that the Title IX Coordinator must be the one who carries out the recipient's duties under Title IX, rather than allowing the coordinator to coordinate the actions of others in carrying out those duties. Since the phrase is redundant and can be confusing, we propose removing it. In addition, in light of the expansion of

the regulations elsewhere to expressly cover investigations of Title IX complaints, the language specifically including coordination of such investigations in the responsibilities of the designated individual would no longer be necessary, and would therefore be removed.

Proposed § 106.8(a) would also modernize the notification requirements to better ensure that students and employees are aware of how to contact a recipient's Title IX Coordinator. Given the changes in methods of communication since the regulations were issued in 1975, the proposed amendments would require the recipient to notify students and employees of the electronic mail address of the employee or employees designated as Title IX Coordinators, in addition to providing the coordinator's office address and phone number. To alleviate the administrative and financial burden on a recipient to provide a new notice every time it designates an additional or different coordinator, the proposed amendments permit recipients to provide notice of a coordinator's name and contact information or, alternatively, simply a title with an established method of contacting the coordinator that does not change as the identity of the coordinator changes. The Department solicits comments on whether larger institutions of higher education should have a minimum number of individuals with whom individuals can file a complaint of sex discrimination.

Proposed § 106.8(b)(2) would require recipients to prominently display their non-discrimination policy on their websites, if any, and in each handbook or catalog made available to the list of people to whom notice must be sent under paragraph (b)(1). Proposed § 106.8(b)(2) streamlines the list of required publications that must display the recipient's Title IX non-discrimination policy, to reduce the burden on recipients (including the requirement for distribution of written publications included in current § 106.9(c)) while still ensuring that the policy is adequately communicated to all required persons, in light of the reality that most recipients have websites where the non-discrimination policy would have to be prominently displayed. In addition, proposed § 106.8(b)(2) would replace the existing restriction on publications that *suggest* a policy of sex discrimination (either by text or illustration) with a restriction on publications that *state* a policy of sex discrimination. This change would remove the subjective determination of whether the illustrations in a publication could be construed to suggest a policy of sex discrimination and instead focus the requirement on recipients' express statements of policy. As a result, the requirement would be more clear, both for recipients seeking to comply with the requirement and for those enforcing the requirement. Because most recipients have websites on which they must display their Title IX non-discrimination policy pursuant to proposed § 106.8(b)(2), proposed § 106.8(b)(1) streamlines the list of people to whom the recipient must send notice of its policy. Applicants for admission and employment, students, employees, and employee unions and professional organizations must receive the notice under proposed § 106.8(b)(2).

Proposed § 106.8(d) would clarify that the recipient's code of conduct and grievance procedures apply to all students and employees located in the United States with respect to allegations of sex discrimination in an education program or activity of the recipient. The statutory language of Title IX limits its application to protecting "person[s] in the United States." 20 U.S.C. 1681(a).

Educational Institutions Controlled by Religious Organizations (Current and Proposed § 106.12)

Statute: The statute addresses educational institutions controlled by religious organizations, stating that Title IX "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization," 20 U.S.C. 1681(a)(3), and that the term "program or activity" "does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization," 20 U.S.C. 1687.

Current Regulations: Current 34 CFR 106.12(a) provides an exemption for educational institutions controlled by a religious organization, to the extent that application of the regulation would be inconsistent with the religious tenets of the organization. To claim this exemption, § 106.12(b) requires recipients to submit a letter to the Assistant Secretary stating which parts of the regulation conflict with a specific tenet of the religion.

Proposed Regulations: We propose revising § 106.12(b) to clarify that an educational institution may—but is not required to—seek assurance of its religious exemption by submitting a written request for such an assurance to the Assistant Secretary. Further, § 106.12(b) is revised to state that even if an institution has not sought assurance of its exemption, the institution may still invoke its religious exemption during the course of any investigation pursued against the institution by the Department.

Reasons: The current regulations suggest that the recipients may only claim the exemption from paragraph (a) by submitting a letter to the Assistant Secretary. The additional language clarifying that the letter to the Assistant Secretary is not required to assert the exemption brings the regulatory language into alignment with longstanding Department practice. The statutory text of Title IX offers an exemption to religious entities without expressly requiring submission of a letter, and the Department believes such a requirement is unnecessary. The Department should not impose confusing or burdensome requirements on religious institutions that qualify for the exemption.

Exercise of Rights by Parents/Guardians of Students

The Department recognizes that when a party is a minor, has been appointed a guardian, is attending an elementary or secondary school, or is under the age of 18, recipients have the discretion to look to state law and local educational practice in determining whether the rights of the party shall be exercised by the parent(s) or guardian(s) instead of or in addition to the party. For example, if the parent or guardian of a minor student at an elementary or secondary school files a complaint on behalf of the student, and state law and local educational practice recognize the parent or guardian as the appropriate person to exercise that student's legal rights, the student would be a "complainant" under the proposed regulation even though the action of filing the complaint was taken by the parent or guardian instead of the student.

Directed Questions

The Department seeks additional comments on the questions below:

1. *Applicability of the rule to elementary and secondary schools.* The proposed rule would apply to all recipients of federal financial assistance, including institutions of higher education and elementary and secondary schools. The Department is interested in whether there are parts of the proposed rule that will be unworkable at the elementary and secondary school level, if there are additional parts of the proposed rule where the Department should direct

recipients to take into account the age and developmental level of the parties involved and involve parents or guardians, and whether there are other unique aspects of addressing sexual harassment at the elementary and secondary school level that the Department should consider, such as systemic differences between institutions of higher education and elementary and secondary schools.

2. *Applicability of provisions based on type of recipient or age of parties.* Some aspects of our proposed regulations, for instance, the provision regarding a safe harbor in the absence of a formal complaint in proposed § 106.44(b)(3) and the provision regarding written questions or cross-examination in proposed § 106.45(b)(3)(vi) and (vii), differ in applicability between institutions of higher education and elementary and secondary schools. We seek comment on whether our regulations should instead differentiate the applicability of these or other provisions on the basis of whether the complainant and respondent are 18 or over, in recognition of the fact that 18-year-olds are generally considered to be adults for many legal purposes.

3. *Applicability of the rule to employees.* Like the existing regulations, the proposed regulations would apply to sexual harassment by students, employees, and third parties. The Department seeks the public's perspective on whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider.

4. *Training.* The proposed rule would require recipients to ensure that Title IX Coordinators, investigators, and decision-makers receive training on the definition of sexual harassment, and on how to conduct an investigation and grievance process, including hearings, that protect the safety of students, ensures due process for all parties, and promotes accountability. The Department is interested in seeking comments from the public as to whether this requirement is adequate to ensure that recipients will provide necessary training to all appropriate individuals, including those at the elementary and secondary school level.

5. *Individuals with disabilities.* The proposed rule addresses the rights of students with disabilities under the IDEA, Section 504, and Title II of the ADA in the context of emergency removals (proposed § 106.44(c)). The Department is interested in comments from the public as to whether the proposed rule adequately takes into account other issues related to the needs of students and employees with disabilities when such individuals are parties in a sex discrimination complaint, or whether the Department should consider including additional language to address the needs of students and employees with disabilities as complainants and respondents. The Department also requests consideration of the different experiences, challenges, and needs of students with disabilities in elementary and secondary schools and in postsecondary institutions related to sexual harassment.

6. *Standard of Evidence.* In § 106.45(b)(4)(i), we are proposing that the determination regarding responsibility be reached by applying either a preponderance of the evidence standard or the clear and convincing standard, and that the preponderance standard be used only if it is also used for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. We seek comment on (1) whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate; and (2) if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed.

7. *Potential clarification regarding "directly related to the allegations" language.* Proposed § 106.45(b)(3)(viii) requires recipients to provide each party with an equal opportunity to inspect and review any evidence directly related to the allegations obtained as part of the investigation, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, and provide each party with an equal opportunity to respond to that evidence prior to completion of the investigative report. The "directly related to the allegations" language stems from requirements in FERPA, 20 U.S. Code 1232g(a)(4)(A)(i). We seek comment on whether or not to regulate further with regard to the phrase, "directly related to the allegations" in this provision.

8. *Appropriate time period for record retention.* In § 106.45(b)(7), we are proposing that a recipient must create, make available to the complainant and respondent, and maintain records for a period of three years. We seek comments on what the appropriate time period is for this record retention.

9. *Technology needed to grant requests for parties to be in separate rooms at live hearings.* In § 106.45(b)(3)(vii) we require institutions of higher education to grant requests from parties to be in separate rooms at live hearings, with technology enabling the decision-maker and parties to see and hear each other simultaneously. We seek comments on the extent to which institutions already have and use technology that would enable the institution to fulfill this requirement without incurring new costs or whether institutions would likely incur new costs associated with this requirement.

Executive Orders 12866 and 13563

Regulatory Impact Analysis (RIA)

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

Under Executive Order 12866,[14] section 3(f)(1), the changes made in this regulatory action materially alter the rights and obligations of recipients of federal financial assistance under Title IV of the Higher Education Act of 1965 (Title IV). Therefore, the Secretary certifies that this is a significant regulatory action subject to review by OMB. Also under Executive Order 12866 and the Presidential

[14] Exec. Order No. 12866, Regulatory Planning and Review, 58 FR 190 (Oct. 4, 1993), *www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.*

Memorandum "Plain Language in Government Writing," the Secretary invites comment on how easy these regulations are to understand in the *Clarity of the Regulations* section.

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866 and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2019, no regulations exceeding the agency's total incremental cost allowance will be permitted, unless required by law or approved in writing by the Director of the Office of Management and Budget. The proposed regulations are a significant regulatory action under E.O. 12866 but do not impose total costs greater than zero. Accordingly, the Department is not required to identify two deregulatory actions under E.O. 13771.[15]

We have also reviewed these proposed regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these proposed regulations only on a reasoned determination that their benefits justify their costs. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.

In this RIA we discuss the need for regulatory action, the potential costs and benefits, assumptions, limitations, and data sources, as well as regulatory alternatives we considered. Although the majority of the costs related to information collection are discussed within this RIA, elsewhere in this notice under Paperwork Reduction Act of 1995 we also identify and further explain burdens specifically associated with information collection requirements.

1. Need for Regulatory Action

Based on its extensive review of the critical issues addressed in this rulemaking, the Department has determined that current regulations and guidance do not provide sufficiently clear standards for how recipients must respond to incidents of sexual harassment, including defining what conduct constitutes sexual harassment. To address this concern, we propose this regulatory action to address sexual harassment under Title IX for the central purpose of ensuring that recipients understand their legal obligations, including what conduct is actionable as harassment under Title IX, the conditions that activate a mandatory response by the recipient, and particular requirements that such a response must meet in order to ensure that the recipient is protecting the rights of all its students to equal access to education free from sex discrimination.

In addition to addressing sexual harassment, the Department has concluded it is also necessary to amend three parts of the existing regulations that apply to all sex discrimination under Title IX. We propose expressly stating that Title IX does not require recipients to infringe upon existing constitutional protections, that the Department may not require money damages as a remedy for violations under Title IX, and that recipients that qualify for a religious exemption under Title IX need not submit a letter to the Department as a prerequisite to claiming the exemption.

2. Discussion of Costs, Benefits, and Transfers

The Department has analyzed the costs and benefits of complying with these proposed regulations. Due to the number of affected entities, the variation in likely responses, and the limited information available about current practices, particularly at the local educational agency (LEA) level, we cannot estimate the likely effects of these proposed regulations with absolute precision. The Department specifically invites public comment on: Data sources which would provide comprehensive information regarding current practices in Title IX enforcement, information regarding the number of recipients in each analytical group described in section 4.b below, and time estimates for the activities described in 4.c disaggregated by type of recipient. Despite these limitations, we estimate that these regulations would result in a net cost savings of between $286.4 million to $367.7 million over ten years.

3. Benefits of the Proposed Regulations

The proposed regulatory action will result in recipients better understanding their legal obligations to address sexual harassment under Title IX by providing a legal framework for recipients' responses to sexual harassment that ensures all reports of sexual harassment are treated seriously and all persons accused are given due process protections before being disciplined for sexual harassment. The proposed regulatory action will correct problems identified by the Department with the current framework governing sexual harassment (under current regulations and guidance), such as recipients not understanding their duties and responsibilities and a lack of robust due process protections in recipient grievance procedures under Title IX. In addition, the proposed regulatory action will correct capturing too wide a range of misconduct resulting in infringement on academic freedom and free speech.

4. Costs of the Proposed Regulations

These proposed regulations would among other things: Define sexual harassment for Title IX purposes; clarify when a recipient's obligation to investigate a complaint of sexual harassment is activated; define the minimum requirements of grievance

[15] Exec. Order No. 13771, Reducing Regulation and Controlling Regulatory Costs, 82 FR 22 (Jan. 30, 2017), *www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02451.pdf.*

procedures for Title IX purposes; establish a process for informal resolution of sexual harassment claims; and require appropriate documentation of all Title IX complaints and investigations.

Prior to discussing the Department's estimates, we believe it is important to emphasize that these estimates are not an attempt to quantify the economic effects of sexual harassment, broadly, or sexual assault, specifically. Other studies [16] have attempted to quantify such costs and, while incidents of sexual assault may have real economic consequences, these estimates are only intended to capture the economic impacts of this proposed regulatory action. The Department does not believe it is reasonable to assume that these proposed regulations will have a quantifiable effect on the underlying rate of sexual harassment occurring in the education programs or activities of recipients. As a result, we do not attempt to capture costs that arise out of the underlying incidents themselves, but rather those associated with the actions prescribed by the proposed regulations and the likely response of regulated entities to those proposed requirements.

4.a. Establishing a Baseline

To accurately estimate the costs of these proposed regulations, the Department needed to establish an appropriate baseline for current practice. In doing so, it was necessary to know the current number of Title IX investigations occurring in LEAs and institutions of higher education (IHEs) eligible for Title IV federal funding. In 2014, the U.S. Senate Subcommittee on Financial and Contracting Oversight released a report [17] which included survey data from 440 four-year IHEs regarding the number of investigations of sexual violence that had been conducted during the previous five year period. Two of the five possible responses to the survey were definite numbers (0, 1), while the other three were ranges (2–5, 6–10, >10). Responses were also disaggregated by size of institution (Large, Medium, or Small). Although the report does not clearly identify a definition of "sexual violence" provided to survey respondents, the term would appear to capture only a subset of the types of incidents that may result in a Title IX investigation. Indeed, when the Department examined public reports of Title IX reports and investigations at 55 IHEs nationwide, incidents of sexual misconduct represented, on average, 45 percent of investigations conducted. Further, a number of the types of incidents that were categorized as "sexual misconduct" in those reports may, or may not, have been categorized as "sexual violence," depending on the survey respondent. To address the fact that the subcommittee report may fail to capture all incidents of sexual misconduct at responding IHEs, the Department first top-coded the survey data. To the extent that survey respondents treated the terms "sexual misconduct" and "sexual violence" interchangeably, this top-coding approach may result in an overestimate of the number of sexual misconduct investigations conducted at institutions. By top-coding the ranges (*e.g.*, "5" for any respondent indicating "2–5") and assuming 50 investigations for any respondent indicating more than 10 investigations, the Department was able to estimate the average number of sexual misconduct investigations conducted by four-year institutions in each size category. We then divided this estimate by five to arrive at an estimated number of investigations per year. To address the fact that incidents of sexual misconduct only represent a subset of all Title IX investigations conducted by IHEs in any given year, we then multiplied this result by two, assuming (consistent with our convenience sample of public Title IX reporting) that sexual misconduct investigations represented approximately 50 percent of all Title IX investigations conducted by institutions.

Because the report only surveyed four-year institutions, the Department needed to impute similar data for two-year and less-than-two-year institutions, which represent approximately 57 percent of all Title IV-eligible institutions. In order to do so, the Department analyzed sexual offenses reported under the Clery Act and combined those data with total enrollment information from the Integrated Postsecondary Education Data System (IPEDS) for all Title IV-eligible institutions within the United States. Assuming that the number of reports of sexual offenses under the Clery Act is positively correlated with the number of investigations, the Department arrived at a general rate of investigations per reported sexual offense at four-year IHEs by institutional enrollment. These rates were then applied to two-year and less-than-two-year institutions within the same category using the average number of sexual offenses reported under the Clery Act for such institutions to arrive at an average number of investigations per year by size and level of institution. These estimates were then weighted by the number of Title IV-eligible institutions in each category to arrive at an estimated average 2.36 investigations of sexual harassment per IHE per year.[18] To the extent that the number of investigations and the number of Clery Act reports of sexual offenses are not uniformly correlated across types of institutions (*i.e.*, less-than-two-year, two-year, and four-year), this may represent an over- or-under-estimate of the actual number of investigations per IHE per year. We invite the public to provide any pertinent evidence on determining investigations of sexual harassment per IHE per year to improve our baseline estimates.

The Department does not have information on the average number of investigations of sexual harassment occurring each year in LEAs. As part of the Civil Rights Data Collection (CRDC), the Department does, however, gather information on the number of incidents of harassment based on sex in LEAs each year. During school year 2015–2016, LEAs reported an average of 3.23 of such incidents. Therefore, the Department assumes that LEAs, on average, currently conduct approximately 3.23 Title IX investigations each year. We invite public comment on the extent to which this is a reasonable assumption.

4.b. Developing the Model

After the Department issued guidance regarding Title IX compliance in 2011, the Department noted a much larger number of incidents of sexual harassment being reported to and investigated by LEAs and IHEs each year. In 2017, the Department rescinded that guidance and published alternative, interim guidance while this proposed regulatory action was underway. The Department reaffirmed that the interim guidance is not legally binding on recipients. Wiersma-Mosley and DiLoreto [19] did not identify substantial

[16] *See, e.g.*, Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 Am. J. of Preventative Med. 691 (2017).

[17] Claire McCaskill, S. Subcomm. on Financial Contracting Oversight—Majority Staff, Sexual Violence on Campus, 113th Cong. (2014), *https://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf.*

[18] To determine the sensitivity of this estimate to our coding of the survey data, the Department also conducted these analyses by coding the data using medians for each range (*e.g.*, 3.5 for the "2–5" range) with a code of 30 for the ">10" group and by top-coding using a 100 for the ">10" group. These alternative approaches would result in baseline estimates ranging from 1.48 to 4.31 investigations per year per IHE.

[19] Jacquelyn D. Wiersma-Mosley and James DiLoreto, *The Role of Title IX Coordinators on*

Continued

rollback of Title IX activities among IHEs compared to Richards,[20] who found substantial changes relative to Karjane, Fisher, and Cullen.[21] Consistent with those studies, we believe it is highly likely that a subset of recipients have continued Title IX enforcement in accordance with the prior, now rescinded guidance, due to the uncertainty of the regulatory environment, and that it is reasonable to assume that some subset of recipients either never complied with the 2011 DCL or the 2014 Q&A or amended their compliance activities after the rescission of that guidance. We do not, however, know with absolute certainty how many recipients fall into each category, making it difficult to accurately predict the likely effects of this proposed regulatory action.

In general, the Department assumes that recipients fall into one of three groups: (1) Recipients who have complied with the statutory and regulatory requirements and either did not comply with the 2011 DCL or the 2014 Q&A or who reduced Title IX activities to the level required by statute and regulation after the rescission of the 2011 DCL or the 2014 Q&A and will continue to do so; (2) recipients who continued Title IX activities at the level required by the 2011 DCL or the 2014 Q&A but will amend their Title IX activities to the level required under current statute and the proposed regulations issued in this proceeding; and (3) recipients who continued Title IX activities at the level required under the 2011 DCL or the 2014 Q&A and will continue to do so after final regulations are issued. In this structure, we believe that recipients in the second group are most likely to experience a net cost savings under these proposed regulations. We therefore only estimate savings for this group of recipients. To the extent that recipients in the other two groups experience savings, we herein underestimate the savings from this proposed action. We note that we calculate some increased costs for recipients in all three categories.

In estimating the number of recipients in each group, we assume that most LEAs and Title IV-eligible IHEs are generally risk averse regarding Title IX compliance, and so we assume that very few would have adjusted their enforcement efforts after the rescission of the 2011 DCL or the 2014 Q&A or would have failed to align their activities with the guidance initially. Therefore, we estimate that only 5 percent of LEAs and 5 percent of IHEs fall into Group 1.[22] Given the particularly acute financial constraints on LEAs, we assume that a vast majority (90 percent) will fall into Group 2—meeting all requirements of the proposed regulations and applicable laws, but not using limited resources to maintain a Title IX compliance structure beyond such requirements. Among IHEs, we assume that, for a large subset of recipients, various pressures will result in retention of the status quo in every manner that is permitted under the proposed regulations. These institutions are voluntarily assuming higher costs than the regulations require. Nonetheless, our model does account for their decision to do so, and we only assume that 50 percent of IHEs experience any cost savings from these proposed regulations (placing them in Group 2). Therefore, we estimate that Group 3 will consist of 5 percent of LEAs and 45 percent of IHEs. We invite public comment on the extent to which the estimated number of entities in each group is appropriate, or whether recipients would expect costs or costs savings from the proposed regulations, and why.

Unless otherwise specified, our model uses median hourly wages for personnel employed in the education sector as reported by the Bureau of Labor Statistics [23] and an employer cost for employee compensation rate of 1.46.[24]

4.c. Cost Estimates

We assume that, once the Department issues final regulations, all recipients will need to review the regulations. At the LEA level, we assume this would involve the Title IX Coordinator (assuming a loaded wage rate of $65.22 per hour for educational administrators) for 4 hours and a lawyer (at a rate of $90.71 per hour) for 8 hours. At the IHE level, we assume the Title IX Coordinator and lawyer would spend more time reviewing the regulations, at 8 hours and 16 hours, respectively. This results in a total cost of $29,732,680 in Year 1.

We also assume that recipients would be required to revise their grievance procedures to ensure compliance with the proposed regulations. Although the requirements of these proposed regulations closely mirror requirements in other regulations and statutes, we assume that all recipients will need to revise their procedures. We believe that revising grievance procedures at the LEA level will require the work of the Title IX Coordinator for 4 hours and a lawyer for 16 hours. At the IHE level, we assume this would require the Title IX Coordinator devote 8 hours and a lawyer devote 32 hours. In total, we estimate the cost of revising grievance procedures to be approximately $51,603,180 in Year 1.

The proposed regulations also require recipients to post nondiscrimination statements on their websites as required under the existing regulation. We assume, however, that this is already standard practice for many recipients. We assume that 40 percent of LEAs and 20 percent of IHEs [25] will need to do work to post these statements. At the LEA level, we assume that this work will require 0.5 hours from the Title IX Coordinator, 0.5 hours from a lawyer, and 2 hours from a web developer (at $44.12 per hour). At the IHE level, we assume this would require 1 hour from the Title IX Coordinator, 1 hour from a lawyer, and 2 hours from a web developer. We estimate the total cost of posting nondiscrimination statements on the recipient's website will cost $1,347,520 in Year 1.

The proposed regulations also require relevant staff to receive training on the requirements of Title IX. Although recipients may currently engage in annual training of Title IX staff,[26] we assume that all recipients will conduct new or revised training aligned with these proposed regulations. We assume that the training will take 16 hours each for the Title IX Coordinator, the investigator, and a decision-maker at both the LEA and IHE level for a total estimated cost of approximately $14,458,650 in Year 1. We do not

College and University Campuses. 8 Behav. Sci. 1, 5–6 (2018), *available at https://www.mdpi.com/2076-328X/8/4/38/htm* (click on "Full-Text PDF").

[20] Tara N. Richards, *An updated review of institutions of higher education's (IHEs) response to sexual assault: Results from a nationally representative sample,* J. of Interpersonal Violence 1, 11–12 (2016).

[21] Heather M. Karjane, Bonnie S. Fisher, and Francis T. Cullen, Educ. Development Ctr., Inc., Campus Sexual Assault: How America's Institutions of Higher Education Respond 62–94 (2002), *https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.*

[22] If our estimates were revised to increase the number of recipients in this group, our calculated net savings would be reduced. *See* section 4.e. Sensitivity Analysis for more information.

[23] U.S. Dept. of Labor, Bureau of Labor Statistics, *May 2017 National Industry-Specific Occupational Employment and Wage Estimates: Sector 61—Educational Services* (Mar. 30, 2018), *https://www.bls.gov/oes/current/naics2_61.htm.*

[24] U.S. Dept. of Labor, Bureau of Labor Statistics, *Economic News Release: Table 1. Civilian Workers, by Major Occupational and Industry Group* (Sept. 18, 2018), *https://www.bls.gov/news.release/ecec.t01.htm.*

[25] Richards, *supra* note 20, at 11 and Wiersma-Mosley & DiLoreto, *supra* note 19, at 5 found that approximately 80 percent of IHEs (81 percent and 79 percent, respectively) posted their policies and procedures.

[26] Angela F. Amar et al., *Administrators' perceptions of college campus protocols, response, and student prevention efforts for sexual assault,* 29 Violence Vict. 167 (2014).

calculate additional costs in future years as we assume that recipients will resume training of staff one their prior schedule after Year 1.

The proposed regulations require recipients to conduct an investigation only in the event of a formal complaint of sexual harassment. In reviewing a sample of public Title IX documents, the Department noted that larger IHEs were more likely than smaller IHEs to conduct investigations only in the event of formal complaints, as opposed to investigating all reports they received. Consistent with this observation, the Department found that the rate of average investigations relative to the number of reports of sexual offenses under the Clery Act was lower at large (more than 10,000 students) four-year institutions than it was at smaller four-year institutions. As a result, the Department used the Clery Act data to impute the likely effect of these proposed regulations on various institutions. Specifically, we assume that, under these regulations, the gap in the rate of investigations between large IHEs and smaller ones would decrease by approximately 50 percent. Therefore, we estimate that the requirement to investigate only in the event of formal complaints would result in a reduction in the average number of investigations per IHE per year of 0.75. This reduction is equivalent to all IHEs in Group 2 experiencing a reduction in investigations of approximately 32 percent. In addition, the proposed regulations only require investigations in the event of sexual harassment within a recipient's education program or activity. Again, assuming that Clery Act reports correlate with all incidents of sexual harassment (as defined in these proposed regulations), we assume a further reduction in the number of investigations per IHE per year of approximately 0.18, using the number of non-campus, public property, and reported-by-police reports as a proxy for the number of off-campus sexual harassment investigations currently being conducted by IHEs.[27] As a result, we estimate that each IHE in Group 2 will experience a reduction in the number of Title IX investigations of approximately 0.93 per year.[28]

At the LEA level, given the lack of information regarding the actual number of investigations conducted each year, the Department assumes that only 50% of the incidents reported in the CRDC would result in a formal complaint, for a reduction in the number of investigations of 1.62 per year. We invite the public to provide any information on the extent to which this is a reasonable assumption.

To be clear, these estimates are not meant to discourage recipients from investigating at a higher rate. Nor do these estimates of a decrease in investigations predict a decrease in recipient's obligation to respond in some appropriate way to a report of sexual harassment. For example, as noted earlier, nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students who report sexual harassment that occurs outside the recipient's education program or activity.

Although we estimate that the number of investigations under the proposed regulations will decrease at both the IHE and LEA levels, Title IX Coordinators are still expected to respond to informal complaints or reports. Such responses will not be dictated by the recipient's grievance procedures, but may involve talking with the reporting party, discussing options, connecting him or her with relevant on- or off-campus resources, conducting some sort of further investigation, and other supportive measures.[29] Although the proposed regulations require such supportive measures to be offered without fee or charge, we do not estimate specific costs associated with the provision of particular supportive measures. We have chosen not to include such costs for several reasons. First, in many instances, particular services are already offered without fee or cost to students. For example, many IHEs offer free mental health services to students. In such an instance, it is difficult to identify the marginal cost of an additional individual seeking out such already covered services. Second, even if we were able to identify the marginal cost of the provision of such services to the recipient, it would be difficult to accurately capture the portion of that cost attributable to the referral by the Title IX coordinator rather than to the underlying reported harassment. For example, Krebs et al.[30] found that 22 percent of victims of forced sexual assault sought out psychological counseling, 11 percent moved residences, and 8 percent dropped a class. It is difficult to assess what marginal impact these proposed regulations would have on the likelihood of complainants and respondents taking such actions. In the event that a clear fee exists for a particular service that the recipient would waive in accordance with these proposed regulations, we could calculate a cost arising from the lost revenue to the recipient. Due to the lack of adequate information about such fee structures and the highly personalized nature of supportive measures provided to complainants and respondents, we cannot at this time provide such estimates with any precision. We invite the public to provide any information on the relative fees that may be waived by recipients as a result of these proposed regulations and the frequency with which such measures are implemented.

We assume that the provision of supportive measures will take approximately 3 hours per report for Title IX coordinators and 8 hours for an administrative assistant at the LEA level. At the IHE level, we estimate that it would require 3 hours per incident for the Title IX coordinator and 16 hours for an administrative assistant. We therefore estimate that the response to informal complaints will cost approximately $5,356,590 per year.

At the LEA level, we assume that the average response to a formal complaint will require 8 hours from the Title IX Coordinator, 16 hours for an administrative assistant, one hour each for two lawyers (assuming both parties obtain legal counsel),[31] 20 hours from an investigator, and 8 hours from a decision-maker. We also assume that, in 75 percent of LEAs, the Title IX

[27] The Department notes that this likely represents a severe under-estimate of the actual proportion of incidents of sexual harassment that occur off-campus. According to a study from United Educators, approximately 41 percent of sexual assault claims examined occurred off-campus. United Educators, Facts from United Educator's Report *Confronting Campus Sexual Assault* (2015), *https://www.ue.org/sexual_assault_claims_study/*. Nonetheless, it is likely that some subset of these incidents occurred "under" the recipients' "education program or activity" and would still require a response by the recipient. If the Department were to assume 25 percent of those incidents required investigation under the proposed rules and increased its estimate of the number of off-campus incidents that would no longer require investigation to 30 percent (rather than the current 11 percent), the estimated cost savings of these proposed regulations would increase to approximately $359 to $456 million over ten years.

[28] We note that the alternative coding options discussed above would result in an estimated reduction in the number of investigations each year between 0.60 and 1.58.

[29] Amar et al. *supra* note 26, at 174 identified the most common campus services provided at the IHE level were mental health services, health services, law enforcement, and victim assistance/advocacy.

[30] Christopher P. Krebs et al.,The Campus Sexual Assault (CSA) Study: Final Report, Nat'l Inst. of Just. (2007), *https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf*.

[31] This average is based on the assumption that in a significant number of cases at the LEA level, either or both of the parties will choose to proceed without an attorney, or with a non-attorney advisor, such that the average cost for advisors will be two attorney hours.

coordinator also acts as the decision-maker, which would not be allowable under the proposed regulations. Assuming a reduction in the average number of investigations of 1.62 per LEA per year and the use of an independent decision-maker in each investigation, these proposed regulations would result in a cost savings of $57,136,120 per year at the LEA level.

At the IHE level, we assume that the average response to a formal complaint would require 24 hours from the Title IX Coordinator, 40 hours from an administrative assistant, 40 hours each for 2 lawyers (assuming both parties obtain counsel), 40 hours for an investigator, and 16 hours for a decision-maker. We note that, under these proposed regulations, recipients are required to provide parties with advisors to conduct cross-examination if they do not have an advisor present. Given that our estimates assume all parties obtain counsel, we do not believe that this additional requirement would result in an increased cost not otherwise captured by our estimates. Consistent with Wiersma-Mosley and DiLareto, we also assume that the Title IX coordinator serves as the decision-maker in 60 percent of IHEs. Assuming an average reduction of 0.0.93 investigations per year per IHE and the use of independent decision-makers, we estimate these proposed regulations to result in a net cost savings of $41,440,300 per year at the IHE level.

We recognize that some recipients may currently conduct investigations in a manner with a less robust due process framework than what would be required under the proposed regulations. For these recipients, included in Group 1 as described in section 4.b, the regulations may result in an increased cost per investigations. At the LEA level, we assume these regulations would require 2 additional hours from the Title IX coordinator, 4 hours from an administrative assistant, 1 hour each from two lawyers, 10 additional hours from an investigator, and 8 additional hours from a decision-maker per investigation, for a total increased cost of approximately $1,609,200 per year. At the IHE level, we assume that these proposed regulations would require an additional 6 hours from a Title IX coordinator, 10 hours from an administrative assistant, 20 hours each from two lawyers, 20 hours from an investigator, and 16 hours from a decision-maker, for a total increased cost of $2,829,570 per year.

We note that the proposed regulations require a hearing for formal complaints at the IHE level. We do not estimate any additional cost associated with this provision beyond those outlined above, given that the use of hearing boards has become a relatively common practice at the IHE level.[32]

In addition, the proposed regulations allow for formal complaints to be informally resolved. We assume that 10 percent of all formal complaints at the LEA and IHE level would be resolved through informal resolution.[33] In such instances at the LEA level, we assume the Title IX Coordinator and administrative assistant will each have to dedicate 4 hours beyond what they would have for a full adjudication to reflect the potential additional administrative tasks associated with this approach. Nonetheless, we estimate that informal resolution will save half of the time outlined above for lawyers and investigators, and save the full estimated time commitment of decision-makers. At the IHE level, we assume similar time savings for lawyers, investigators, and decision-makers, with Title IX Coordinators and administrative assistants each dedicating an additional 8 hours per case. In total, we assume informal resolution will result in a cost savings of approximately $3,414,980 per year.

The proposed regulations also require grievance procedures to include the opportunity for both parties to appeal if an appeal is offered. Richards indicates that approximately 84 percent of IHEs have an appeals process. For purposes of these estimates, we assume that any recipient in Group 3, as described in section 4.b, currently operates an appeals process. However, all recipients in Groups 1 and 2 would need to institute such a structure. Given that many recipients in Groups 1 and 2 may currently operate an appeals process, this approach would overestimate the costs of these proposed regulations. Based on our review of Title IX documents from various institutions, we assume that approximately 50 percent of investigations taken through to a determination of responsibility will result in an appeal by either party. We assume that, at the LEA level, each appeal will require 4 hours from the Title IX coordinator, 8 hours from an administrative assistant, one hour each from two lawyers, and 8 hours from a decision-maker. At the IHE level, we assume each appeal will require 12 hours from a Title IX coordinator, 20 hours from an administrative assistant, 10 hours each from 2 lawyers, and 8 hours from a decision-maker. In total, we estimate the appeals process will cost approximately $20,770,220 per year. To the extent that IHEs choose not to offer appeals, this calculation would represent an overestimate of actual burden.

The proposed regulations require recipients to maintain certain documentation regarding their Title IX activities. We assume that the proposed recordkeeping and documentation requirements would have a higher first year cost associated with establishing the system for documentation with a lower out-year cost for maintaining it. At the LEA level, we assume that the Title IX Coordinator would spend 4 hours in Year 1 establishing the system and an administrative assistant would spend 8 hours doing so. At the IHE level, we assume recipients are less likely to use a paper filing system and are likely to use an electronic database for managing such information. Therefore, we assume it will take a Title IX Coordinator 24 hours, an administrative assistant 40 hours, and a database administrator ($50.71) 40 hours to set up the system for a total Year 1 estimated cost of approximately $38,836,760.

In later years, we assume that the systems will be relatively simple to maintain. At the LEA level, we assume it will take the Title IX Coordinator 2 hours and an administrative assistant 4 hours to do so. At the IHE level, we assume 4 hours from the Title IX Coordinator, 40 hours from an administrative assistant, and 8 hours from a database administrator. In total, we estimate an ongoing cost of approximately $15,189,260 per year.

In total, the Department estimates these proposed regulations will result in a net cost savings of approximately $286.4 million to $367.7 million over ten years on a net present value basis.

4.d. Other Issues in the Proposed Regulations

The proposed regulations address three topics that do not involve a recipient's response to sexual harassment and which the Department estimates will not result in any net cost or benefit to regulated entities.

First, the proposed regulations emphasize that nothing about enforcement of Title IX shall require the

[32] Amar et al., *supra* note 26, at 172–3 found that approximately 87 percent of institutions used a hearing board which typically involved students, faculty, staff, and administrators. To the extent that these proposed regulations result in IHEs reducing the membership of hearing boards to, for example, a single decision-maker, these regulations would result in additional cost savings not otherwise captured here.

[33] This figure likely represents an underestimate of the actual number that would be resolved informally. Wiersma-Mosley & DiLoreto, *supra* note 19, at 6, report that 34 percent of cases were resolved through informal resolution.

Department or a recipient to violate the constitutional rights of any person. The Departments estimates that there are no costs or cost savings arising from this proposed provision because it does not require any new act on the part of a recipient.

Second, the proposed regulations state that money damages shall not be required by the Department as a remedy for a recipient's violation of Title IX or its regulations. The Department's OCR generally does not impose money damages as a remedy under Title IX; however, occasionally OCR does require a recipient to pay sums of money as reimbursement to remedy a Title IX violation. Although the number of instances in which OCR imposes money damages is minimal, the Department wishes to emphasize through the proposed regulation that any remedy involving payment of money must be linked to bringing the recipient into compliance with Title IX, rather than falling into a category of imposing money damages. There is no cost associated with this proposed regulation because no new act is required of recipients.

Third, the proposed regulations clarify that a religious institution is not required to preemptively submit a written letter to the Department to claim the religious exemption from Title IX provided for by statute. There is no cost associated with the proposed regulation concerning religious institutions because the proposed regulation simply clarifies that such institutions do not need to submit a written letter to the Department to claim the religious exemption available under the Title IX statute, and does not require any new action by recipients.

4.e. Sensitivity Analysis

The Department's estimated costs and benefits for these proposed regulations are largely driven by two assumptions: The number of recipients that will not conduct activities beyond those required for compliance with the final regulations, and the change in the number of investigations conducted each year by each of those recipients. To assess the robustness of our estimates, we have conducted nine different simulations of our model with varying combinations of an upper, lower, and current estimate for each of these two factors. Regarding the upper bound for the number of recipients that will not conduct activities beyond those required for compliance with the final regulations, we assume 100 percent of LEAs and 85 percent of IHEs. For the lower bound, we assume 50 percent of LEAs and 33 percent of IHEs. In both instances, we assume the remainder of recipients are in Group 3. As discussed above, alternative coding of investigation rate data would have resulted in an estimated reduction in the number of investigations per IHE per year ranging from 0.60 to 1.58. Therefore, these estimates served as our upper and lower bound estimates for those institutions with a 25 percent to 75 percent reduction for LEAs. The estimated net present value of each of these alternative models, discounted at seven percent, is included in the table below.[34]

TABLE 1—SENSITIVITY ANALYSIS

		Number of recipients reducing number of investigations		
		Upper bound	Primary estimate	Lower bound
Estimated reduction in investigations per recipient	Upper Bound	($820,648,142)	($431,940,097)	($221,468,788)
	Primary Estimate	(534,363,019)	(286,449,261)	(110,309,915)
	Lower Bound	(388,322,321)	(210,250,875)	(53,605,189)

Based on this analysis, the Department believes that its evaluation of the likely costs and benefits is accurate in assuming these proposed regulations would result in a net cost savings to recipients over a ten year period. Although we believe the estimates presented herein are conservative estimates of savings, even extreme lower bound estimates result in a calculated net cost savings.

5. Regulatory Alternatives Considered

The Department considered the following alternatives to the proposed regulations: (1) Leaving the current regulations and current guidance in place and issuing no proposed regulations at all; (2) leaving the current regulations in place and reinstating the 2011 DCL or the 2014 Q&A; and (3) issuing proposed regulations that added to the current regulations broad statements of general principles under which recipients must promulgate grievance procedures. Alternative (2) was rejected by the Department for the reasons expressed in the preamble to these proposed regulations; the procedural and substantive problems with the 2011 DCL and the 2014 Q&A that prompted the Department to rescind that guidance remained as concerning now as when the guidance was rescinded, and the Department determined that restoring that guidance would once again leave recipients unclear about how to ensure they implemented prompt and equitable grievance procedures. Alternative (1) was rejected by the Department because even though current regulations require recipients to have grievance procedures providing for "prompt and equitable" resolution of sex discrimination complaints, current regulations are entirely silent on whether Title IX and those implementing regulations cover sexual harassment; addressing a crucial topic like sexual harassment through guidance would unnecessarily leave this serious issue subject only to non-legally binding guidance rather than regulatory prescriptions. The lack of legally binding standards would leave survivors of sexual harassment with fewer legal protections and persons accused of sexual harassment with no predictable, consistent expectation of the level of fairness or due process available from recipients' grievance procedures. Alternative (3) was rejected by the Department because the problems with the status quo regarding recipients' Title IX procedures, as identified by numerous stakeholders and experts, made it clear that a regulation that was too vague or broad (*e.g.*, "Provide due process protections before disciplining a student for sexual harassment") would not provide sufficient predictability or consistency across recipients to achieve the benefits sought by the Department. After careful consideration of various alternatives, the Department believes that the proposed regulations represent

[34] We note that a three percent discount rate would result in larger estimated savings over the ten year time horizon.

the most prudent and cost effective way of achieving the desired benefits of (a) ensuring that recipients know their specific legal obligations with respect to responses to sexual harassment and (b) ensuring that schools and colleges take all reports of sexual harassment seriously and all persons accused of sexual harassment are treated fairly.

6. Accounting Statement

As required by OMB Circular A–4, in the following table we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these proposed regulations. This table provides our best estimate of the changes in annual monetized costs, benefits, and transfers as a result of the proposed regulations.

TABLE 2—ACCOUNTING STATEMENT

Category	Benefits	
Clarity, specificity, and permanence with respect to recipient schools and colleges knowing their legal obligations under Title IX with respect to sexual harassment.	Not Quantified.	
A legal framework for schools' and colleges' response to sexual harassment that ensures all reports of sexual harassment are treated seriously and all persons accused are given due process before being disciplined for sexual harassment.	Not Quantified.	
Preserve constitutional rights, assure recipients that monetary damages will not be required by the Department, recognize religious exemptions in the absence of written request.	Not Quantified.	
	Costs	
	7%	3%
Reading and understanding the rule	$3,956,322	$3,384,055
Revision of grievance procedures	6,866,478	5,873,268
Posting of non-discrimination statement	179,305	153,369
Training of Title IX Coordinators, investigators, decision-makers	1,923,912	1,645,626
Response to informal reports	5,336,591	5,336,591
Reduction in the number of investigations	(99,176,416)	(99,176,416)
Increased investigation requirements	4,438,769	4,438,769
Appeal process	20,770,218	20,770,218
Informal resolution of complaints	(3,414,979)	(3,414,979)
Creation and maintenance of documentation	18,335,868	17,880,723

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum "Plain Language in Government Writing" require each agency to write regulations that are easy to understand. The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "section" and a numbered heading; for example, section 106.9 Dissemination of policy.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section of the preamble.

Deregulatory Action

Consistent with Executive Order 13771 (82 FR 9339, February 3, 2017), we have estimated that this proposed rule will result in cost savings. Therefore, this proposed rule would be considered an Executive Order 13771 deregulatory action.

Regulatory Flexibility Act (Small Business Impacts)

This analysis, required by the Regulatory Flexibility Act, presents an estimate of the effect of the proposed regulations on small entities. The U.S. Small Business Administration (SBA) Size Standards define proprietary institutions of higher education as small businesses if they are independently owned and operated, are not dominant in their field of operation, and have total annual revenue below $7,000,000. Nonprofit institutions are defined as small entities if they are independently owned and operated and not dominant in their field of operation. Public institutions and local educational agencies are defined as small organizations if they are operated by a government overseeing a population below 50,000.

Publicly available data from the National Center on Education Statistics' Common Core of Data indicate that, during the 2015–2016 school year, 99.4 percent of local educational agencies had enrollments of less than 50,000 students.

The Department's eZ-Audit data shows that there were 1,522 Title IV proprietary schools with revenue less than $7,000,000 for the 2015–2016 Award Year; [35] however, the Department lacks data to identify which public and private, nonprofit institutions qualify as small. Given the data limitations, the Department proposes a data-driven definition for "small institution" in each sector.

1. Proposed Definition

The Department has historically assumed that all private nonprofit institutions were small because none were considered dominant in their field. However, this approach masks significant differences in resources among different segments of these

[35] U.S. Dept. of Educ., Federal Student Aid, *Proprietary School 90/10 Revenue Percentages, studentaid.ed.gov/sa/about/data-center/school/proprietary* (select "2015–2016 Award Year: Report and Summary Chart" from the dropdown menu; click "Go").

institutions. The Department proposes to use enrollment data for its definition of small institutions of postsecondary education. Prior analyses show that enrollment and revenue are correlated for proprietary institutions. Further, enrollment data are readily available to the Department for every postsecondary institution while revenue is not. The Department analyzed a number of data elements available in IPEDS, including Carnegie Size Definitions, IPEDS institutional size categories, total FTE, and its own previous research on proprietary institutions referenced in ED–2017–OPE–0076i. As a result of this analysis, the Department proposes to use this definition to define small institutions:

- Two-year IHEs, enrollment less than 500 FTE; and
- Four-year IHEs, enrollment less than 1,000 FTE.

Table 3 shows the distribution of small institutions under this proposed definition using the 2016 IPEDS institution file.[36]

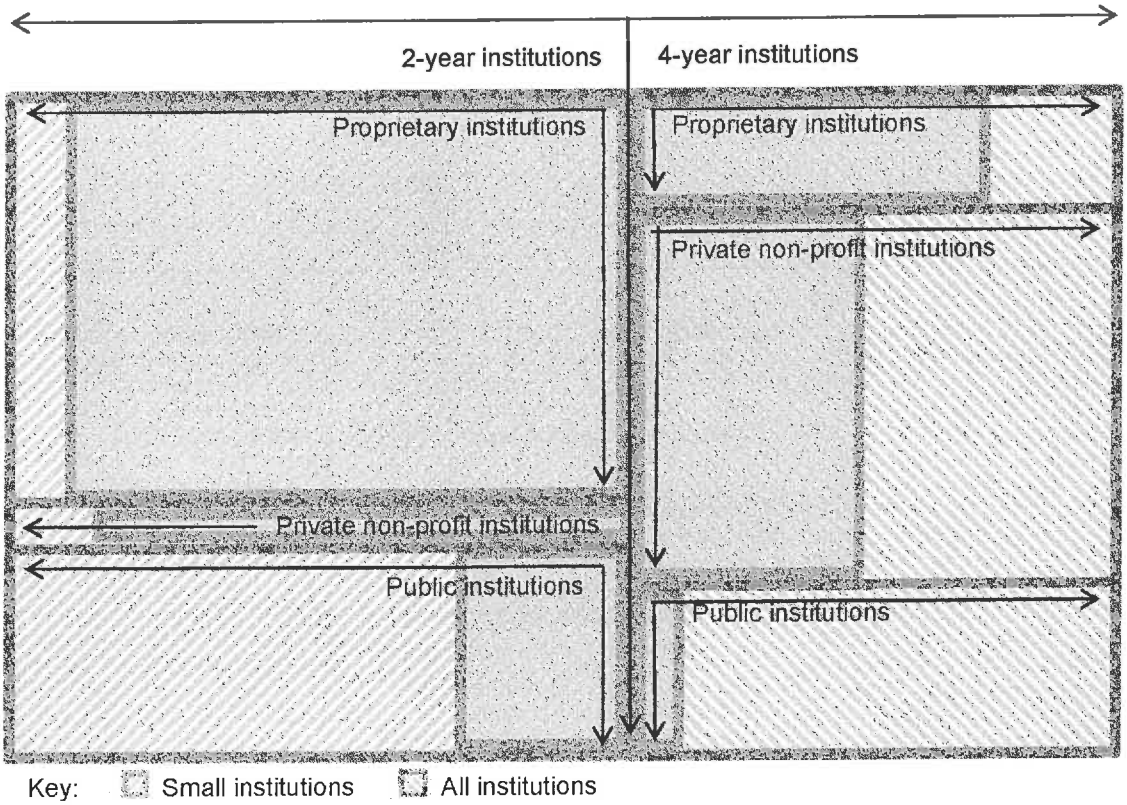
TABLE 3—SMALL INSTITUTIONS UNDER PROPOSED DEFINITION

Level	Type	Small	Total	Percent
2-year	Public	342	1,240	28
2-year	Private	219	259	85
2-year	Proprietary	2,147	2,463	87
4-year	Public	64	759	8
4-year	Private	799	1,672	48
4-year	Proprietary	425	558	76
Total		3,996	6,951	57

Under the proposed definition, the two-year small institutions are 68% of all two-year institutions (2,708/3,962), 68% of all small institutions (2,708/3,996), and 39% of the overall population of institutions (2,708/6,951); whereas, four-year small institutions are 43% of all four-year institutions (1,288/2,989), 32% of all small institutions (1,288/3,996), and 19% of the overall population of institutions (1,288/6,951). Figure 1 shows a visual representation of the universe and the percentage that would be defined as small using the above proposed definition.

[36] *See* U.S. Dept. of Educ., Nat'l Ctr. for Educ. Statistics, Integrated Postsecondary Educ. Data System 2016 Institutional Characteristics: Directory Information survey file (2016), *nces.ed.gov/ipeds/datacenter/DataFiles.aspx* (select "Compare institutions;" select "By Groups" and then "EZ Group" in the drop down menu; select "Title IV Participating" and "U.S. Only" and then click the "Search" button; click "Continue;" select "Browse/Search Variables;" click the plus sign next to "institutional Characteristics" > "Control or Affiliation" > "Institutional Control or Affiliation" and click the check boxes for "2016–2017" and "Control of Institution;" then select "Institutional Characteristics" > "Institution classifications" > "1980–81 to current year" and check the boxes for "2016–2017" and "Sector of institution;" click the plus sign next to "Frequently Used/Derived Variables" > "Fall enrollment/retention rates" > Total, full- and part-time enrollment and fall FTE" and check the boxes next to "Fall 2016–" and "Total enrollment").

Figure 1: Small Institutions as a subset of all institutions



Similarly, small public institutions are 20% of all public institutions (406/1,999), 10% of all small public institutions (406/3,996), and 6% of the overall population of institutions (406/6,951). Small private nonprofit institutions are 53% of all private nonprofit institutions (1,018/1,999), 25% of all small institutions (1,018/3,996), and 15% of the overall population of institutions (1,018/6,951). Finally, and small proprietary institutions are 85% of all proprietary institutions (2,572/1,999), 64% of all small institutions (2,572/3,996), and 37% of the overall population of institutions (2,572/6,951).

The Department requests comment on the proposed definition. It will consider these suggestions in development of the final rule.

2. Impact Estimate Using Proposed Definition

2.a. Impact on Local Education Agencies

As disused in the *Discussion of Costs, Benefits, and Transfers* section of the *Regulatory Impact Analysis,* the Department estimates that these proposed regulations will result in a net cost savings for regulated entities, including LEAs. Although the savings accruing to any particular LEA depend on a number of factors, including the LEA's Title IX enforcement history, its response to the proposed regulations, and the number of formal complaints of sexual harassment the LEA receives in the future, the Department was interested in whether the regulations would have a disproportionate effect on small LEAs—that is, whether small LEAs were likely to realize benefits proportionate to their size and number.

Using data from the 2015–2016 Civil Rights Data Collection, we examined the number of allegations of harassment and bullying based on sex by LEA size. Given the extreme upper end of the enrollment distribution that qualifies an LEA as no longer a small entity for these purposes—less than one percent of all LEAs—it is reasonable to expect that the number of reported incidents of such harassment in small LEAs closely aligns with the average number for all LEAs. On average, LEAs reported 3.23 allegations of harassment or bullying on the basis of sex in the 2015–2016 school year. By comparison, large LEAs (those with more than 50,000 students) reported an average of 112.54 such incidents and small LEAs reported 2.64 allegations on average.

Based on the model described in the *Discussion of Costs, Benefits, and Transfers* section above, the Department estimates that a small LEA that experienced only an 8 percent reduction in investigations annually would experience a net cost savings over the ten year time horizon.

2.b. Impact on Institutions of Higher Education

As with LEAs, the Department estimates that these proposed regulations will result in a net cost savings for IHEs over the ten year time horizon. The amount of savings that any particular IHE will realize, if any, depends on a wide number of factors, including its Title IX compliance history, its response to the proposed regulations, and the number of formal complaints of sexual harassment the IHE receives in the future. Regardless of these variables, the Department did analyze extant data sources to attempt to analyze the likely differential impact across IHEs of various sizes.

As noted in the *Discussion of Costs, Benefits, and Transfers* section of the *Regulatory Impact Analysis,* an analysis of data reported by IHEs under the Clery Act found that smaller institutions

tended to have, on average, fewer such reports per IHE.[37] Applying the definitions noted above, we also found that small entities had far fewer reports than did large entities.[38]

TABLE 4—AVERAGE CLERY ACT REPORTS OF SEXUAL OFFENSES BY SIZE/TYPE OF INSTITUTION

Level	Type	Not small	Small	Total
4-year	Public	12.1	1.1	11.3
4-year	Private	8.7	0.7	4.7
4-year	Proprietary	0.5	0.1	0.2
2-year	Public	0.7	0.2	0.7
2-year	Private	1.2	0.1	0.3
2-year	Proprietary	0.1	0.0	0.0

Assuming that Clery Act reports are correlated with the number of incidents of sexual harassment under Title IX, we would assume that small institutions have a lower number of Title IX complaints each year. As a result, they may experience less cost savings under this proposed rule given the smaller baseline. This lower baseline may, however, be offset slightly by the higher relative number of investigations undertaken at smaller institutions, as noted in the Senate report. Additionally, we note that small institutions also have a higher than average number of Clery Act reports occurring off-campus, indicating that they may also have a larger number of Title IX sexual harassment reports originating off-campus. In examining the model described in the *Discussion of Costs, Benefits, and Transfers Section* above, the Department estimates that, due to the small baseline number of investigations likely conducted by such entities currently, small institutions would need to realize a 37 percent reduction in investigations (equivalent to approximately one fewer investigation every five years) in order to realize a net cost savings across the 10 year time horizon. If the institution did not need to update its grievance procedures, it would only need to recognize a 33 percent reduction (approximately one fewer investigation every six years).

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and the burden of responding, the Department provides the general public and federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This requirement helps ensure that: The public understands the Department's collection instructions; respondents can provide the requested data in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the Department can properly assess the impact of collection requirements on respondents.

The following sections contain information collection requirements:

Section 106.45(b)(7)—Recordkeeping

Section 106.45(b)(7) would require recipients to maintain certain documentation regarding their Title IX activities. LEAs and IHEs would be required to create and maintain for a period of three years records of: Sexual harassment investigations; determinations; appeals; disciplinary sanctions and remedies; informal resolutions; materials used to train coordinators, investigators, and decision-makers; any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment; and documentation of the bases upon which the recipient concluded that its response was not clearly unreasonable and that its measures taken were designed to restore or preserve access to the recipient's educational program or activity. This information will allow a recipient and OCR to assess on a longitudinal basis the prevalence of sexual harassment affecting access to a recipient's programs and activities, whether a recipient is complying with Title IX when responding to reports and formal complaints, and the necessity for additional or different training. We estimate the volume of records to be created and retained may represent a decline from current recordkeeping due to clarification elsewhere in the proposed regulations that no investigation needs to be conducted where allegations, if true, do not constitute sexual harassment as defined under the regulations, and that informal means may be used to resolve sexual harassment complaints, both changes likely resulting in fewer investigative records being generated.

We estimate that recipients would have a higher first-year cost associated with establishing the system for documentation with a lower out-year cost for maintaining it. At the LEA level, we assume that the Title IX Coordinator would spend 4 hours in Year 1 establishing the system and an administrative assistant would spend 8 hours doing so. At the IHE level, we assume recipients are less likely to use a paper filing system and are likely to use an electronic database for managing such information. Therefore, we assume it will take a Title IX Coordinator 24 hours, an administrative assistant 40 hours, and a database administrator 40 hours to set up the system for a total Year 1 estimated cost for 16,606 LEAs and 6,766 IHEs of approximately $38,836,760.

In later years, we assume that the systems will be relatively simple to maintain. At the LEA level, we assume it will take the Title IX Coordinator 2 hours and an administrative assistant 4 hours to do so. At the IHE level, we assume 4 hours from the Title IX Coordinator, 40 hours from an administrative assistant, and 8 hours from a database administrator. In total, we estimate an ongoing cost of approximately $15,189,260 per year.

We estimate that LEAs would take 12 hours and IHEs would take 104 hours to establish and maintain a recordkeeping system for the required sexual harassment documentation during Year 1. In out-years, we estimate that LEAs

[37] We note that although enrollment and the number of Clery Act reports are positively correlated, enrollment alone explains only 26 percent of the observed variation in the number of reports.

[38] We note that this finding is driven largely by institutional size rather than a higher rate of offenses at larger institutions. Across all levels and school types, except for private 4-year institutions, small entities had higher rates of Clery Act reports per enrolled student than did larger ones. Private institutions generally had the highest rates, with private 4-year institutions having the highest rate of Clery Act reports of any category examined.

would take 6 hours annually and IHEs would take 52 hours annually to maintain the recordkeeping requirement for Title IX sexual harassment documentation. The total burden for this recordkeeping requirement over three years is 398,544 hours for LEAs and 1,407,328 hours for IHEs. Collectively, we estimate the burden over three years for LEAs and IHEs for recordkeeping of Title IX sexual harassment documents would be 1,805,872 hours under OMB Control Number 1870–NEW.

Section 106.44(b)(3)

Section 106.44(b)(3) applies only to IHEs and would require that where a complainant reports sexual harassment but does not wish to file a formal complaint, the IHE would have a safe harbor against a finding of deliberate indifference where it offers the complainant supportive measures, but must inform the complainant in writing of the complainant's right to file a formal complaint. This information provided by IHEs to complainants will ensure that complainants receive supportive measures to assist them in the aftermath of sexual harassment and also remain aware of their right to file a formal complaint that requires the IHE to investigate the sexual harassment allegations.

We estimate that most IHEs will need to create a form, or modify a form they already use, to comply with this requirement to inform the complainant in writing. We estimate that it will take Title IX Coordinators one (1) hour in Year 1 to create or modify a form to use for these purposes, that there will be no cost in out-years, and that the cost of maintaining such a form is captured under the recordkeeping requirements of § 106.45(b)(7) described above, for a total Year 1 cost of $441,270. Total burden for this requirement over three years is 6,766 hours.

Section 106.45(b)(2)—Notice of Allegations

Section 106.45(b)(2) would require all recipients, upon receipt of a formal complaint, to provide written notice to the complainant the respondent, informing the parties of the recipient's grievance procedures and providing sufficient details of the sexual harassment allegations being investigated. This written notice will help ensure that the nature and scope of the investigation, and the recipient's procedures, are clearly understood by the parties at the commencement of an investigation.

We estimate that most LEAs and IHEs will need to create a form, or modify one already used, to comply with these requirements. We estimate that it will take Title IX Coordinators one (1) hour to create or modify a form to use for these purposes, and that an attorney will spend 0.5 hours reviewing the form for compliance with § 106.45(b)(2). We estimate there will be no cost in out-years, and that the cost of maintaining such a form is captured under the recordkeeping requirements of § 106.45(b)(7) described above, for a total Year 1 cost of $2,584,310. Total burden for this requirement over three years is 35,058 hours.

Section 106.45(b)(6)—Informal Resolution

Section 106.45(b)(6) would require that recipients who wish to provide parties with the option of informal resolution of formal complaints, may offer this option to the parties but may only proceed by: First, providing the parties with written notice disclosing the sexual harassment allegations, the requirements of an informal resolution process, any consequences from participating in the informal resolution process; and second, obtaining the parties' voluntary, written consent to the informal resolution process.

This provision permits—but does not require—LEAs and IHEs to allow for voluntary participation informal resolution as a method of resolving the allegations raised in formal complaints without completing the investigation and adjudication.

We estimate that not all LEAs or IHEs will choose to offer informal resolution as a feature of their grievance process; of those who do, we estimate that most will need to create a form, or modify one already used, to comply with the requirements of this section. We estimate that it will take Title IX Coordinators one (1) hour to create or modify a form to use for these purposes, and that an attorney will spend 0.5 hours reviewing the form for compliance with § 106.45(b)(6). We estimate there will be no cost in out-years, and that the cost of maintaining such a form is captured under the recordkeeping requirements of § 106.45(b)(7) described above, for a total Year 1 cost of $2,584,310. The total burden for this requirement over three years is 35,058 hours.

COLLECTION OF INFORMATION

Regulatory section	Information collection	OMB control No. and estimated burden [change in burden]
106.45(b)(7)	This proposed regulatory provision would require LEAs and IHEs to maintain certain documentation related to Title IX activities.	OMB 1870–NEW. The burden over the first three years would be $69,215,280 and 1,805,872 hours.
106.44(b)(3)	This proposed regulatory provision would require IHEs who offer supportive measures to notify the complainant of the right to file a formal complaint.	OMB 1870–NEW. The burden over the first three years would be $441,270 and 6,766 hours.
106.45(b)(2)	This proposed regulatory provision would require LEAs and IHEs to provide parties with written notice when investigating a formal complaint.	OMB 1870–NEW. The burden over the first three years would be $2,584,310 and 35,058 hours.
106.45(b)(6)	This proposed regulatory provision would require LEAs and IHEs to provide written notice to parties wishing to participate in informal resolution of a formal complaint.	OMB 1870–NEW. The burden over the first three years would be $2,584,310 and 35,058 hours.

We have prepared an Information Collection Request (ICR) for these proposed requirements. If you want to review and comment on the ICR(s), please follow the instructions listed under the **ADDRESSES** section of this notice. Please note that the Office of Information and Regulatory Affairs (OMB) and the Department of Education review all comments posted at *www.regulations.gov*.

When commenting on the information collection requirements, we consider

your comments on these collections of information in—

- Deciding whether the collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond, which includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Addresses: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *www.regulations.gov* by selecting Docket ID No. ED 2018–OCR–0064 or via postal mail, commercial delivery, or hand delivery. Please specify the Docket ID number and indicate "Information Collection Comments" on the top of your comments if your comment(s) relate to the information collection for this rule. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW, LBJ 216–36, Washington, DC 20202–4537. Comments submitted by fax or email and those submitted after the comment period will not be accepted. **FOR FURTHER INFORMATION CONTACT:** Electronically mail *ICDocketMgr@ed.gov*. Please do not send comments here.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79 because it is not a program or activity of the Department that provides federal financial assistance.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulations in 34 CFR 106.34 and 34 CFR 106.35 may have federalism implications, as defined in Executive Order 13132. We encourage State and local elected officials to review and provide comments on these proposed regulations.

Accessible Format

Individuals with disabilities can obtain this document in an accessible format (*e.g.*, braille, large print, audiotape, or compact disc) on request to the person listed under **FOR FURTHER INFORMATION CONTACT.**

Electronic Access to This Document

The official version of this document is the document published in the **Federal Register**. Free internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys*. You can view this document at that site, as well as all other documents of this Department published in the **Federal Register**, in text or PDF. To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov*. Through the advanced search feature at this site, you can limit your search to documents published by the Department.

List of Subjects in 34 CFR Part 106

Education, Sex discrimination, Civil rights, Sexual harassment.

Dated: November 15, 2018.

Betsy DeVos,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend part 106 of title 34 of the Code of Federal Regulations as follows:

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

■ 1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

■ 2. Section 106.3 is amended by revising the section heading and paragraph (a) to read as follows:

§ 106.3 Available remedies.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has violated this part, such recipient shall take such remedial action as the Assistant Secretary deems necessary to remedy the violation, which shall not include assessment of damages against the recipient. Nothing herein prohibits the Assistant Secretary from deeming necessary equitable relief to remedy a violation of this part.

* * * * *

■ 3. Section 106.6 is amended by revising the section heading and adding paragraphs (d), (e) and (f) to read as follows:

§ 106.6 Effect of other requirements and preservation of rights.

* * * * *

(d) *Constitutional protections.* Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/ Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g and 34 CFR part 99.* The obligation to comply with this part is not obviated or alleviated by the FERPA statute or regulations.

(f) *Title VII of the Civil Rights Act of 1964.* Nothing in this part shall 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.* or any regulations promulgated thereunder.

■ 4. Section 106.8 is revised to read as follows:

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

(a) *Designation of coordinator.* Each recipient must designate at least one employee to coordinate its efforts to comply with its responsibilities under this part. The recipient must notify all its students and employees of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated pursuant to this paragraph (a).

(b) *Dissemination of policy*—(1) *Notification of policy.* Each recipient must notify applicants for admission and employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to employment and admission (unless subpart C of this part does not apply to the recipient) and that inquiries about the application of title IX and this part to such recipient may be referred to the employee designated pursuant to paragraph (a) of this section, to the Assistant Secretary, or both.

(2) *Publications.* (i) Each recipient must prominently display a statement of the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (b)(1) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Adoption of grievance procedures.* A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and of formal complaints as defined in § 106.30. A recipient must provide notice of the recipient's grievance procedures, including how to report sex discrimination and how to file or respond to a complaint of sex discrimination, to students and employees.

(d) *Application.* The requirements that a recipient adopt a policy and grievance procedures as described in this section apply only to exclusion from participation, denial of benefits, or discrimination on the basis of sex occurring against a person in the United States.

§ 106.9 [Removed and Reserved]

■ 5. Section 106.9 is removed and reserved.

■ 6. Section 106.12 is amended by revising paragraph (b) to read as follows:

§ 106.12 Educational institutions controlled by religious organizations.

* * * * *

(b) *Assurance of exemption.* An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of the exemption from the Assistant Secretary.

* * * * *

■ 7. Add § 106.30 to read as follows:

§ 106.30 Definitions.

As used in this subpart:

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment. Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is also the respondent. 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 authority to institute corrective measures on behalf of the recipient.

Complainant means an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint. For purposes of this definition, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the recipient's actual knowledge under this section.

Formal complaint means a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient's grievance procedures consistent with § 106.45.

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Sexual harassment means:

(1) 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;

(2) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) Sexual assault, as defined in 34 CFR 668.46(a).

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that

maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

■ 8. Add §§ 106.44 and 106.45 to read as follows:

§ 106.44 Recipient's response to sexual harassment.

(a) *General.* A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

(b) *Specific circumstances.* (1) A recipient must follow procedures consistent with § 106.45 in response to a formal complaint. If the recipient follows procedures (including implementing any appropriate remedy as required) consistent with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent and does not otherwise constitute discrimination under title IX.

(2) When a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint. If the Title IX Coordinator files a formal complaint in response to the reports, and the recipient follows procedures (including implementing any appropriate remedy as required) consistent with § 106.45 in response to the formal complaint, the recipient's response to the reports is not deliberately indifferent.

(3) For institutions of higher education, a recipient is not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity. At the time supportive measures are offered, the recipient must in writing inform the complainant of the right to file a formal complaint at that time or a later date, consistent with other provisions of this part.

(4) If paragraphs (b)(1) through (3) of this section are not implicated, a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must, consistent with paragraph (a) of this section, respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

(5) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* Nothing in this section precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision shall not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or title II of the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this section precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of an investigation.

§ 106.45 Grievance procedures for formal complaints of sexual harassment.

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX. A recipient's treatment of the respondent may also constitute discrimination on the basis of sex under title IX.

(b) *Grievance procedures.* For the purpose of addressing formal complaints of sexual harassment, grievance procedures must comply with the requirements of this section.

(1) *Basic requirements for grievance procedures.* Grievance procedures must—

(i) Treat complainants and respondents equitably. An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent; such remedies must be designed to restore or preserve access to the recipient's education program or activity. An equitable resolution for a respondent must include due process protections before any disciplinary sanctions are imposed;

(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that coordinators, investigators, and decision-makers receive training on both the definition of sexual harassment and how to conduct an investigation and grievance process, including hearings, if applicable, that protect the safety of students, ensure due process protections for all parties, and promote accountability. Any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt timeframes for conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if the recipient offers an appeal, and a process that allows for the temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) Describe the standard of evidence to be used to determine responsibility;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal if the recipient offers an appeal; and

(ix) Describe the range of supportive measures available to complainants and respondents.

(2) *Notice of allegations*—(i) *Notice upon receipt of formal complaint.* Upon receipt of a formal complaint, a

recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance procedures.

(B) 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. Sufficient details include the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's code of conduct, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must also inform the parties that they may request to inspect and review evidence under paragraph (b)(3)(viii) of this section and inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) *Ongoing notice requirement.* If, in the course of an investigation, the recipient decides to investigate allegations not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties, if known.

(3) *Investigations of a formal complaint.* The recipient must investigate the allegations in a formal complaint. If the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved or did not occur within the recipient's program or activity, the recipient must dismiss the formal complaint with regard to that conduct. When investigating a formal complaint, a recipient must—

(i) Ensure 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;

(ii) Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate;

(vi) For recipients that are elementary and secondary schools, the recipient's grievance procedure may require a live hearing. With or without a hearing, the decision-maker must, after the recipient has incorporated the parties' responses to the investigative report under paragraph (b)(3)(ix) of this section, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses. If no hearing is held, the decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, all such questioning must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant;

(vii) For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker 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 under paragraph (b)(3)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination. All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions. The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant. If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;

(viii) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(ix) Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under this section) or other time of determination

regarding responsibility, provide a copy of the report to the parties for their review and written response.

(4) *Determination regarding responsibility.* (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

(ii) The written determination 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 code of conduct 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 by the recipient 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 bases for the complainant and respondent to appeal, if the recipient offers an appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. If 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.

(5) *Appeals.* A recipient may choose to offer an appeal. If a recipient offers an appeal, it must allow both parties to appeal. In cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent. As to all appeals, the recipient must:

(i) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(ii) Ensure that the appeal decision-maker is not the same person as any investigator(s) or decision-maker(s) that reached the determination of responsibility;

(iii) Ensure that the appeal decision-maker complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(iv) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(v) Issue a written decision describing the result of the appeal and the rationale for the result; and

(vi) Provide the written decision simultaneously to both parties.

(6) *Informal resolution.* At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient—

(i) Provides to the parties a written notice disclosing—

(A) The allegations;

(B) The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and

(C) Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and

(ii) Obtains the parties' voluntary, written consent to the informal resolution process.

(7) *Recordkeeping.* (i) A recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Informal resolution, if any; and

(D) All materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment.

(ii) A recipient must create and maintain for a period of three years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not clearly unreasonable, and document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

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COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
JOSH SHAPIRO
ATTORNEY GENERAL

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
XAVIER BECERRA
ATTORNEY GENERAL

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
GURBIR S. GREWAL
ATTORNEY GENERAL

January 30, 2019

VIA Federal eRulemaking Portal & Mail
The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue S.W.
Washington D.C. 20202

Re: Comment on Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance—Docket ID ED–2018–OCR–0064 (83 Fed. Reg. 61,462 (Nov. 29, 2018))

Dear Secretary DeVos:

On behalf of the Commonwealths of Pennsylvania and Kentucky, the States of New Jersey, California, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia, we write to express our strong opposition to the *Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (the "proposed rule"), published by the Department of Education (the "Department") in the Federal Register on November 29, 2018. This rule seeks to impose procedures for the implementation of Title IX of the Education Amendments Act of 1972 (Title IX). Unfortunately, many of these proposed procedures would thwart the very purpose of Title IX—to provide equal access to educational opportunities. For this reason, we urge you to withdraw this rule.

Proper enforcement of Title IX is an issue of immense importance to our states, our resident students and families, our teachers, and our communities. The ability to learn in a safe environment free from violence and discrimination is critical and something that we as states prioritize and value.

Conduct that violates Title IX may also violate criminal laws, and state attorneys general, along with county and local prosecutors, have the responsibility to investigate and prosecute these violations when warranted. Many of our states prohibit discrimination based on sex.[1] We have a strong interest in vigorous enforcement of these laws and in ensuring that our own enforcement efforts are not undermined by a weaker federal regime.

Title IX applies to public K-12 schools as well as public colleges and universities, so the states are regulated entities under the proposal. And the states themselves regulate, and in many cases provide funding for, private educational institutions within their borders, which will be subject to the proposed rule to the extent they receive federal funds. Most importantly, the states have a profound interest in protecting the well-being of their students and in ensuring that they are able to obtain an education free of sexual harassment, violence, and discrimination.

We represent states in which schools[2] have worked to bring their procedures in line with Title IX's requirements: to provide students an educational environment free from discrimination based on sex, including sexual harassment and violence. The proposed rule imposes new requirements on schools and complainants that would mark a significant departure from that fundamental purpose of Title IX.

In this comment letter, we address aspects of the proposed rule that would be incompatible with Title IX, inappropriate exercises of the Department's authority, and unsupported by the facts. Section I of the comment provides relevant factual and legal background on sexual harassment and violence and its impact on education. Section II addresses the Department's proposal for a general rule to govern schools' obligations to respond to sexual harassment and violence. Section III addresses the proposed definitions of "complainant," "formal complaint," and "supportive measures." Section IV details problems with the Department's proposed formal grievance procedures. Section V requests clarification regarding how the proposed rule will interact with other federal, state, and local laws and policies. Section VI addresses other issues with the proposed rule. Section VII identifies flaws in the

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[1] *E.g.*, Cal. Const., art. I, § 7(a) & (b); Cal. Educ. Code § 220; Cal. Gov't Code § 11135; Minn. Stat. § 363A.13; N.J.S.A. 10:5-12; Pa. Const. art. I, § 28.

[2] For purposes of this letter, "school" is defined consistent with the statute to include "any education program or activity receiving Federal financial assistance," which includes but is not limited to most elementary and secondary schools and institutions of undergraduate and higher graduate education. 20 U.S.C. § 1681, *et. seq.* We use "school" synonymously with the term "recipient" used by the proposed rule.

Department's regulatory impact analysis. And Section VIII speaks to the effective date of any Title IX rule adopted by the Department.

Finally, we are concerned that during the notice and comment process the Department of Education has not proactively released required records under the Administrative Procedure Act (APA). The APA requires federal agencies to reveal "for public evaluation" the "technical studies and data upon which the agency relies" in rulemaking, including reports and information relied on by the agency in reaching its conclusions.[3] We understand that studies relied on by the Department in preparing the Regulatory Impact Analysis[4] have not been made available to the public in contravention of the APA. In addition, tens of thousands of comments already submitted to Regulations.gov are also not available to the public,[5] even though the Notice of Proposed Rulemaking (NPRM) specifically indicates "all public comments about these proposed regulations" will be available for inspection "[d]uring and after the comment period" by accessing Regulations.gov. 83 Fed. Reg. at 61,463. We ask that the Department promptly make this information public and provide sufficient time for a meaningful response.

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[3] *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotations and citations omitted).

[4] *See, e.g.*, 83 Fed. Reg. at 61,485 (discussing "examin[ation of] public reports of Title IX reports and investigations at 55 [institutions of higher education] nationwide").

[5] *Compare* https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001 (stating that approximately 96,800 comments have been submitted as of 2:00 PM ET on January 30, 2019), *with* https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=ED-2018-OCR-0064&refD=ED-2018-OCR-0064-0001 (allowing the public to access only 8,909 comments as of 2:00 PM ET on January 30, 2019).

Table of Contents

I. Title IX Guarantees Students an Equal Education Free of Sexual Harassment[6], Which is Pervasive and Deeply Harmful to Students.

Title IX of the Education Amendments Act of 1972 is a civil rights statute that guarantees students equal access to educational programs and activities free of discrimination based on sex.[7] Since at least 1992, this right has been applied to protect students from sexual harassment and sexual violence that would limit or deny their ability to participate equally in the benefits, services, and opportunities of federally funded educational programs and activities.[8]

Sexual harassment of students occurs far too frequently—at all grade levels and to all types of students. More than 20 percent of girls aged 14 to 18 have been kissed or touched without consent.[9] In grades 7–12, 56 percent of girls and 40 percent of boys are sexually harassed every year, with nearly a third of the harassment taking place online.[10] In college, nearly two thirds of both men and women will experience sexual harassment.[11] More than 1 in 5 women and nearly 1 in 18 men in college were survivors of sexual assault or sexual misconduct due to physical force, threats of force, or incapacitation.[12] The federal government's own studies reaffirm these statistics: the U.S. Department of Justice's Bureau of Justice Statistics found that, on average, 20.5 percent of college women had experienced sexual assault since entering college,[13] while the Centers for Disease Control and Prevention found that one in five women

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[6] Sexual violence and sexual assault can both be forms of sexual harassment. The term "sexual harassment" as used herein includes sexual violence, which courts and the Department have recognized is a subset of actionable conduct under the term "sexual harassment." *See, e.g.*, U.S. Dep't of Educ., Off. for Civil Rights, *Dear Colleague Letter*, at 1 (Apr. 4, 2011, withdrawn Sept. 22, 2017) (the "2011 DCL") ("Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.").

[7] 20 U.S.C. § 1681(a).

[8] *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60 (1992).

[9] Nat'l Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017), https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence.

[10] Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 11 (2011), https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf.

[11] Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005), https://history.aauw.org/files/2013/01/DTLFinal.pdf (noting differences in the types of sexual harassment and reactions to it).

[12] *E.g.*, David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, Association of American Universities 13-14 (Sept. 2015, reissued Oct. 2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf.

[13] *See generally*, Campus Climate Survey Validation Study, Final Technical Report (Jan. 2016), Appx. E, https://www.bjs.gov/content/pub/pdf/App_E_Sex-Assault-Rape-Battery.pdf; *see also* Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–*

have experienced sexual assault in their lifetimes.[14] And harassment is not limited to women: Men and boys are far more likely to be subjected to sexual assault than to be falsely accused of it.[15] Historically marginalized and underrepresented groups—such as girls who are pregnant or raising children, LGBTQ students, and students with disabilities—are more likely to experience sexual harassment than their peers.[16]

Despite the frequency of campus sexual harassment and violence, those subjected to it often refrain from reporting it. In 2016, only 20 percent of rape and sexual assault survivors reported these crimes to the police.[17] Only 12 percent of college survivors[18] and two percent of female survivors ages 14–18[19] reported sexual assault to their schools or the police. One national

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2013, U.S. DOJ, Office of Justice Programs, Bureau of Justice Statistics (Dec. 2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.

[14] Ctrs. for Disease Control & Prevention, *National Intimate Partner and Sexual Violence Survey*, https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf; *see also* Ctrs. for Disease Control & Prevention, *Understanding Sexual Violence Fact Sheet*, https://www.cdc.gov/violenceprevention/pdf/sv-factsheet.pdf (last checked Jan. 21, 2019) (reporting that 1 in 2 women and 1 in 5 men experienced sexual violence other than rape during their lifetimes, about 1 in 5 women have experienced completed or attempted rape, 1 in 21 men have been made to penetrate someone else in their lifetime, and 1 in 3 female rape victims experienced it for the first time between 11-17 years old and 1 in 9 reported that it occurred before age 10).

[15] *E.g.*, Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, Huffington Post (Oct. 16, 2015), https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html.

[16] Nat'l Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017), https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting (56 percent of girls aged 14 to 18 who are pregnant or raising children are touched or kissed without consent); Joseph G. Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN 26 (2018), https://www.glsen.org/article/2017-national-school-climate-survey-1; *AAU Campus Climate Survey*, *supra* note 12, at 13–14 (nearly 25 percent of transgender or gender non-conforming students are sexually assaulted in college); Nat'l Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final_nwlc_Gates_GirlsWithDisabilities.pdf ("[C]hildren with disabilities were 2.9 times more likely than children without disabilities to be sexually abused.").

[17] DOJ, Bureau of Justice Stats., *Criminal Victimization, 2016: Revised*, at 7 (Oct. 2018), https://www.bjs. gov/content/pub/pdf/cv16.pdf.

[18] *Poll: One in 5 Women Say They Have Been Sexually Assaulted in College*, Wash. Post (June 12, 2015), https://www.washingtonpost.com/graphics/local/sexual-assault-poll; *see also Drawing the Line: Sexual Harassment on Campus*, supra note 11, at 2 ("[L]ess than 10 percent of these students tell a college or university employee about their experiences and an even smaller fraction officially report them to a Title IX officer.").

[19] *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence*, supra note 9, at 2.

survey found that of 770 rapes on campus during the 2014–2015 academic year, only 40 were reported to authorities under the Clery Act guidelines.[20] Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough, or because they think that no one would do anything to help.[21] Reporting is even less likely among students of color,[22] undocumented students,[23] LGBTQ students,[24] and students with disabilities.[25]

When not addressed properly, sexual harassment can have a debilitating impact on a student's access to education.[26] For example, 34 percent of college survivors of sexual assault drop out of college,[27] often because they no longer feel safe on campus.[28]

This is why effective Title IX enforcement is crucial: Protecting students from the devastating effects of sexual harassment is a necessary component of an equal education free

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[20] N.J. Task Force on Campus Sexual Assault, *2017 Report and Recommendations*, https://www.nj.gov/highereducation/documents/pdf/index/sexualassaultaskforcereport2017.pdf.

[21] RAINN, *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.

[22] Colleen Murphy, *Another Challenge on Campus Sexual Assault: Getting Minority Students to Report It*, The Chronicle of Higher Education (June 18, 2015) (discussing underreporting by student of color), https://www.chronicle.com/article/Another-Challenge-on-Campus/230977; *see also* Kathryn Casteel, Julie Wolfe & Mai Nguyen, *What We Know About Victims of Sexual Assault in America*, Five Thirty Eight Projects (last checked Jan. 21, 2019), https://projects.fivethirtyeight.com/sexual-assault-victims (reporting results of the 2017 National Crime Victimization Survey (NCVS), finding that 77 percent of incidents of rape and sexual assault were not reported to the police and that 15 percent of the incidents of rape and sexual assault in the NCVS were reported by Hispanic respondents and 13 percent by non-Hispanic black respondent).

[23] *See* Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. Times (Apr. 30, 2017), https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3.

[24] National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf.

[25] Nat'l Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls with Disabilities* 7 (2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final_nwlc_Gates_GirlsWithDisabilities.pdf.

[26] *E.g.*, Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, Vice (Sept. 26, 2017), https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.

[27] Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. Student Retention: Res., Theory & Prac. 234, 244 (2015), https://doi.org/10.1177/1521025115584750.

[28] *E.g.*, Alexandra Brodsky, *How Much Does Sexual Assault Cost College Students Every Year?*, Wash. Post (Nov. 18, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-college-students-every-year/.

from discrimination. In enacting Title IX, Congress intended to ensure that all students, regardless of sex, have equal access to education. Title IX places the obligation on schools—not students—to provide educational programs and activities free from sex discrimination, sexual harassment, and sexual violence. A school's compliance with Title IX is not limited to responding appropriately to individual reports or formal complaints filed by students. Instead, schools have an affirmative legal obligation to stop harassment, eliminate hostile educational environments, prevent recurrence of harassment, and remedy its effects not only on those subjected to sexual harassment, but on the entire student body.[29]

Consistent with the purpose of the law, any Title IX regulation should focus on maximizing student access to an education free of sexual discrimination, harassment, assault, stalking, and domestic violence.[30] Yet the proposed rule does the opposite. It prioritizes reducing the number of Title IX investigations a school conducts, flipping Title IX on its head. It narrows the scope of schools' responsibility, contrary to decades of established law and practice, and ignores the reality of how sexual harassment affects a student's access to education. It will chill reporting of sexual harassment—which is already severely underreported—by imposing onerous burdens on students who seek to report sexual harassment and to vindicate their right to an equal education. It will make the standard for non-compliance so high that only schools who deliberately and intentionally flout the law will be required to take even the most basic remedial and preventative action, leaving many students without recourse or help from their school. And it will allow systemic harassment and toxic campus cultures to flourish by removing schools' well-established obligation to seek out and remedy such violations.

Equally concerning, the proposal blurs the lines between the procedures governing criminal proceedings and those applicable to non-criminal proceedings under Title IX. As a civil rights statute, Title IX is focused on ensuring equal access to educational programs and activities, not denying life and liberty to the guilty. In non-criminal proceedings, both parties are treated equally, with neither side receiving greater procedural protections than the other and with procedures designed to find the truth when the parties dispute the facts. But the proposed rule provides greater protections to respondents, and imposes significant and inappropriate burdens on complainants. Criminal procedures and protections do not apply in the Title IX context.

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[29] *See generally Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288 (1998) ("In the event of a violation, [under OCR's administrative enforcement scheme] a funding recipient may be required to take 'such remedial action as [is] deem[ed] necessary to overcome the effects of [the] discrimination.' §106.3."); U.S. Dep't of Educ., Off. for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 20 (66 Fed. Reg. 5512, Jan. 19 2001) (the "2001 Guidance").

[30] The Violence Against Women Act, 42 U.S.C. 12291, recognizes the need to protect against domestic violence, assault, and stalking. Similarly, it is appropriate for the implementation of Title IX to recognize that domestic violence, assault, and stalking may impermissibly restrict access to educational opportunities on the basis of sexual discrimination.

At the end of the day, Title IX sets the floor—not the ceiling—on what schools must do to provide non-discriminatory education to all their students. Any Title IX regulation should encourage schools to uncover and prevent any harassment that negatively affects a student's access to education—not incentivize schools towards willful ignorance. And any Title IX regulations certainly cannot bar state and local governments and schools from responding more robustly to campus sexual harassment, or interfere with schools' compliance with other applicable federal, state, and local laws and policies that require such a response. Schools must continue to enjoy a right to establish codes of conduct and protections for students that go beyond what Title IX requires.

Working with the Department's Office for Civil Rights (OCR), many schools across the country have developed Title IX procedures that are fair to all parties, that reflect each school's unique circumstances, and that further the statute's anti-discrimination mandate. In many places, the proposed rule subverts these carefully refined policies. The Department's proposal is based on the misguided belief that schools are facing a torrent of frivolous Title IX complaints, but the effect will be to reduce the filing of bona fide complaints. The proposed rule introduces new biases into the process, imposes uniform requirements ill-suited to many schools' circumstances, and undermines the goal of a discrimination-free campus. The Department's proposal would reverse practices endorsed by both Democratic and Republican administrations;[31] contravene Supreme Court and other legal precedent and requirements, including the mandates of the APA; ignore the reality of where campus sexual assault occurs; impose onerous burdens on complainants; and run contrary to Title IX itself and other federal laws. The result will chill reporting of sexual harassment and prevent schools from effectively addressing its insidious effects.

It is vital that the Department's regulations support schools in fulfilling their Title IX obligations. As the Department noted in 2001, a "grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint."[32] But the Department lacks statutory authority to issue regulations, such as the proposed rule, that would impede enforcement of Title IX and limit schools' ability to rid their programs and activities of sex discrimination. Title IX mandates that no student "be excluded from participation in, denied benefits of, or be subjected to discrimination under any education program or activity" on the basis of sex.[33] And the Department's instruction from Congress is to "effectuate" this anti-discrimination mandate.[34] By effectively mandating ceilings to schools' Title IX investigations and tilting grievance

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[31] *E.g.*, 2001 Guidance; U.S. Dep't of Educ., Off. for Civil Rights, *Dear Colleague Letter* (Jan. 25, 2006) (the "2006 DCL"); 2011 DCL.

[32] *E.g.*, 2001 Guidance at 20.

[33] 20 U.S.C. § 1681(a).

[34] 20 U.S.C. § 1682.

procedures against complainants, the rule undermines Title IX under the guise of enforcing it. The Department may not promulgate regulations that limit the effectiveness of the statutory mandate or hinder schools' efforts to combat discrimination even more vigorously than the statute requires.

II. The Department of Education's Title IX Standards Are Contrary to Title IX and Weaken Students' Protections Against Sexual Harassment and Violence.

The Department has proposed a general standard for the sufficiency of a school's response to sexual harassment that would mark a significant retreat from decades-long, bipartisan efforts to combat sexual harassment and its impact on equal access to education. Proposed § 106.44(a) would provide that "[a] recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent." This proposed standard—as well as the proposed definitions of "sexual harassment," "actual knowledge," "program or activity," and "deliberate indifference"—depart from current law and policy without any sound justification. As a result, the proposed rule does not effectuate the anti-discrimination mandate of Title IX as it applies to sexual harassment; rather, the rule would undermine it.

The Department's stated reason for proposing this rule is that "the administrative standards governing recipients' responses to sexual harassment should be generally aligned with the standards developed by the Supreme Court in cases assessing liability under Title IX for money damages in private litigation." 83 Fed. Reg. at 61,466. But the Department's "alignment" of the proposed rule with Supreme Court precedent is only partial and arbitrarily selective, incorrect as a matter of law, and unreasonable as a matter of policy. This proposal is ill-advised and should be withdrawn.

The Department does not point to any unfairness in the previous definition of sexual harassment, the application of constructive knowledge or agency principles, the requirement that schools address off-campus conduct, or the reasonableness standard—all of which have been in place for decades (and many of which continue to apply under Title VII[35]). The Department reverses course and removes protection for student subject to sexual assault based on an unreasoned desire to equate Title IX government investigations with private civil actions for money damages.

The Supreme Court distinguishes between the Department's administrative enforcement of Title IX and its decisions involving monetary damages actions. Unlike private civil money damages cases, the risk of significant monetary damages resulting from an OCR Title IX investigation is substantially reduced. This is because "Title IX requires OCR to attempt to

[35] Title VII of the 1964 Civil Rights Act prohibits employment discrimination based on race, color, religion, sex and national origin. 42 U.S.C. § 2000e *et seq.*

secure voluntary compliance" in the first instance.[36] In contrast, the Court's fear in *Gebser*[37] was allowing private parties "unlimited recovery of damages under Title IX" without actual notice to the schools.[38] In the Department's administrative enforcement scheme, a school is obligated to take corrective action, and rarely, if ever, loses its Title IX funding.[39] This does not raise the possibility of large damages awards or significant risk of losing federal funding, which the *Gebser* court acknowledged as its "central concern."[40] The Court was concerned that because Title IX was adopted under the Spending Clause, by simply accepting federal funds schools would make themselves liable for monetary damages for conduct that they were not only unaware of, but also that they would have remedied had they been made aware.[41] Conversely, "OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation."[42] The Department's application of the standards for private civil suit damages to Title IX enforcement actions ignores the distinctions the Supreme Court has drawn between administrative enforcement actions and cases seeking monetary damages.

A. The Proposed Rule Would Narrow the Definition of "Sexual Harassment" In Ways that Would Undermine the Objectives of Title IX.

1. The Proposed Definition of "Sexual Harassment" Would Significantly Depart from Previous Title IX Policy.

In § 106.44(e)(1), the Department has proposed a narrow definition of "sexual harassment" that represents a significant departure from its longstanding understanding of the term. The Department has done so without providing any meaningful justification for the abrupt change in decades' worth of consistent policy—which went through a notice and comment making process—and practice. Proposed § 106.45(b)(3) also requires schools to cease investigating any complaint of sexual harassment that does not meet the definition.

In its 1997 Guidance, the Department recognized that sexual harassment results from conduct that is "sufficiently severe, persistent, **or** pervasive that it adversely affects a student's

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[36] 2001 Guidance at 15.

[37] *Gebser*, 524 U.S. 274.

[38] *Gebser* 524 U.S at 286.

[39] 2001 Guidance at 14–15.

[40] *Gebser*, 524 U.S at 287. *See also Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999); 20 U.S.C. §§ 1682 & 1683 (identifying that among other things, prior to termination of funds the department shall provide notice of the failure to comply, determine that compliance cannot be secured by voluntary means, file a written report with the committees of the House and Senate and wait thirty days, and provide for judicial review of the decision); 2001 Guidance at 14–15.

[41] *Gebser* 524 U.S. at 287; *See also Davis* 526 U.S. at 639; 2001 Guidance at iii–iv.

[42] 20 U.S.C. §§ 1682 & 1683; 2001 Guidance at iv.

education or creates a hostile or abusive educational environment."[43] After the Supreme Court in *Davis*[44] established a narrower definition of harassment for money damages actions, the Department in its 2001 guidance reinforced its interpretation that Title IX prohibits conduct of a sexual nature that is "severe, persistent, **or** pervasive."[45] It also reinforced the notion that the question of whether sexual harassment occurred requires a flexible analysis.[46] In 2001, the Department further recognized sexual harassment includes "unwelcome sexual advances" and "physical conduct of a sexual nature."[47] The Department has repeatedly emphasized in its guidance that the prohibition on sexual harassment requires schools to investigate "hostile environment" harassment[48] and to "eliminate discrimination based on sex in education programs and activities."[49] A prudential assessment is used to determine whether conduct is sufficiently severe or pervasive.[50] According to the Department, "the more severe the conduct, the less the need to show a repetitive series of incidents."[51] Thus, a single severe incident, or for example, repeated unwelcome sexual comments and solicitations, could create a hostile environment.

The Department now seeks to abandon its long-standing policy, backed by case law, in favor of a definition more restrictive than the Title IX statute and more restrictive than what is set forth in *Gebser* and *Davis*, which was created for the very different context of civil actions involving money damages. In § 106.44(e)(1), it proposes to require that harassment be severe,

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[43] *See* U.S. Dep't of Educ., Off. for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997) (the "1997 Guidance"). As the Supreme Court recognized in *Cannon v. University of Chicago*, Title IX is patterned after Title VI, except for the substitution of the word "sex." 441 U.S. 677, 694-95 (1979). The Department's 1994 "Racial Incidents and Harassment Against Students at Educational Institutions" is another example of this consistent policy, as it sets forth the same definition of harassment for Title VI claims on the basis of race, color, or national origin. 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994) ("A violation of Title VI may also be found if a recipient has created or is responsible for a racially hostile environment --- i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in our benefit from the services, activities or privileges provided by a recipient.").

[44] 526 U.S. 629 (1999).

[45] 2001 Guidance at v.

[46] 2001 Guidance at vi ("We also believe that the factors described in both the 1997 guidance and the revised guidance to determine whether sexual harassment has occurred provide the necessary flexibility for taking into consideration the age and maturity of the students involved and the nature of the school environment.").

[47] 2001 Guidance at 2.

[48] 2001 Guidance at 5–7.

[49] 2001 Guidance at i.

[50] 2001 Guidance at 6.

[51] 2001 Guidance at 6.

pervasive, **and** objectively offensive for administrative enforcement of Title IX claims, thus adding a requirement that the conduct be objectively offensive and removing the possibility that a violation could be found on any one of three bases—the severity, the persistence, or the pervasiveness of the misconduct. In this part, it adopts part of the definition from the Court's requirements for sexual harassment in money damages actions. However, the Department also proposes to require that the harassment "effectively den[y]" the individual access to the school's education program or activity. Proposed § 106.44(e)(1)(ii). This is a sea change from the statute, which states that victims should not "be excluded from" or "denied" the benefits of an educational program or activity and from the Supreme Court's definition, which requires the harassment to "deprive" a victim of access to educational opportunities or benefits to be actionable.[52] By requiring that the harassment "effectively deny" the victim of equal access to educational programs or activities, the Department deviates significantly from its Title IX authority.

In its NPRM, the Department states its belief, without justification, that "responses to sexual harassment should be generally aligned with the standards developed by the Supreme Court" in private litigation for damages. 83 Fed. Reg. at 61,466. The Department extols the virtue of a uniform standard and states that the Court's decisions are rooted in textual interpretation of Title IX. *Id.* However, in doing so, the Department ignores both the uniformity with which sexual harassment has long been defined and enforced under both Title IX and Title VII, as well as the Supreme Court's own acknowledgment that administrative enforcement of Title IX can be more flexible than the Court's decisions regarding private money damages.[53]

The Department also ignores the prudential considerations that the Supreme Court identified in developing the standard for a civil suit for damages where Congress has not spoken on an issue, which are inapplicable in the administrative enforcement context. The *Gebser* court identified that while Congress expressly authorized administrative enforcement of Title IX, it did not expressly authorize either civil actions or the right for individual parties to obtain damages in court. Rather, the Supreme Court identified these rights by implication.[54] The Department cannot

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[52] *Davis*, 526 U.S. at 650.

[53] *Davis*, 526 U.S. at 639 ("Federal Departments or agencies . . . may rely on any . . . means authorized by law . . . to give effect to the statute's restrictions.") (internal quotations omitted); *Gebser* 524 U.S. at 292 (stating that the Department of Education could administratively require the school to promulgate a grievance procedure because "[a]gencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate . . . even if those requirements do not purport to represent a definition of discrimination under the statute.") (internal quotations and citations omitted). *See supra* Section II.

[54] *See Gebser* 524 U.S. at 292 (acknowledging the power of the Department to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate, which are distinct from circumstances giving rise to a civil action for monetary damages); *id.* at 289 (discussing the difference between the "statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance" and a "judicially *implied* system of enforcement" that "permits

lawfully improperly restrict the enforcement and application of Title IX based on its misapplication of Supreme Court precedent.

Moreover, although Title VII does not provide a perfect analogy to Title IX, in this instance, it is instructive. Title VII regulations describe workplace harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[55] The Supreme Court has reaffirmed the unwelcome component of harassment stating that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome."[56] The Supreme Court has also reaffirmed that to create a hostile environment the harassment can be either severe **or** pervasive, such that it either limits or alters the conditions of employment. In adopting the broader definition of sexual harassment for Title VII, the Court recognized that Congress had explicitly authorized a civil action in damages. The Court thereby further reinforced that its decisions in *Gebser* and *Davis* are limited to civil actions in damages, where Congress has not spoken, but do not extend to Federal agency enforcement of the statute, where Congress' clear mandate is to affirmatively "'protect' individuals from discriminatory practices carried out by recipients of federal funds."[57]

We are also concerned because Title VII prohibits gender-based harassment that is not sexual, which the Department has also consistently recognized under Title IX in its policy guidance and its enforcement practices.[58] This interpretation is consistent with the text and purpose of Title IX and Supreme Court cases interpreting Title VII in the employment context.[59] Despite this, the proposed regulations do not specifically address the prohibition against gender-based harassment. Thus, we recommend that, in issuing the final rule, the Department state explicitly that "unwelcome conduct on the basis of sex," in § 106.44(e)(1)(ii), covers all sex-based conduct.

Once again, by disregarding Supreme Court precedent and Title VII in its formulation of the proposed rule, the Department has embraced the notion that students in a school environment

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substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice").

[55] 29 C.F.R. § 1604.11(a).

[56] *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986) (internal quotation marks omitted).

[57] *Gebser*, 524 U.S. at 287.

[58] 2001 Guidance at v; U.S. Dep't of Educ., Off. for Civil Rights, *Dear Colleague Letter Re: Title IX Coordinators* (Apr. 24, 2015), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf ("In addition, a recipient should provide Title IX coordinators with access to information regarding . . . incidents of sex-based harassment. Granting Title IX coordinators the appropriate authority will allow them to identify and proactively address issues related to possible sex discrimination as they arise.").

[59] *See, e.g.*, *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81–82 (1998); EEOC, *Sex-Based Discrimination*, https://www.eeoc.gov/laws/types/sex.cfm ("Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex.").

should be unprotected from sex-based harassment, even though they would be protected in the employee-employer context. The Department lacks authority to carve out exclusions to this landmark civil rights legislation not drafted in statute and inconsistent with courts' precedent.

2. The Proposed Definition of "Sexual Harassment" Would Fail to Account for the Context in Which Sexual Harassment Occurs.

The Department's proposed definition of "sexual harassment" is drafted to preclude schools, in many circumstances, from addressing hostile environment harassment, an important component of the schools' educational responsibilities and the Department's enforcement responsibilities. The requirement that harassment be severe, pervasive, **and** objectively offensive fails to take into account how harassment in a school setting frequently arises in a gradually escalating manner. Isolated and infrequent harassing behavior can become pervasive over time if left uncorrected, but the definition in the proposed rule does not require any remedial action until smaller problems have become larger, more significant ones. Failure to promptly address potential hostile environments could engender distrust in the institutions' ability to address sexual harassment on campus and create situations where the conduct that could have been prevented has exploded into something much more severe and potentially dangerous. This could increase liability under other legal theories, where a school could have stopped the conduct from escalating much sooner. Many schools are concerned that if they are not permitted to address conduct under Title IX until it becomes sufficiently severe, pervasive, and objectively offensive, they will fail to proactively avoid potential liability and fail to respond adequately to many harassing behaviors and will therefore be unsuccessful in establishing a welcome educational environment, free from gender discrimination.

Likewise, the severity requirement may exclude, for example, a situation in which the same group of students repeatedly makes unwelcome sexual comments or derogatory sex-based comments at multiple women walking by a fraternity house, thereby causing each of those women to alter their walking path. Even though the conduct is persistent, the school might not consider the offensive behavior severe enough or pervasive enough to warrant remedial action, given the one-time nature of the act as experienced by each of the women. But under Title IX, a school should address sexual harassment affecting multiple students before the harassing behavior escalates to the point where it is severe, pervasive, **and** objectively offensive for an individual student.[60]

Finally, the Department acknowledges that employee-on-student harassment includes instances where the provision of some aid or benefit is made contingent upon an individual's participation in unwelcome sexual conduct. However, the proposed rule improperly restricts this type of misconduct to employee-on-student conduct only. Students may engage in *quid pro quo*

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[60] 2001 Guidance at 13–14 ("In other cases, the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment—if the harassment is widespread, openly practiced, or well-known to students and staff.").

harassment as well. There are circumstances in which, for example, a student conditions assistance with studying on unwelcome sexual conduct. Likewise, students in positions of authority, such as teaching assistants or resident advisors, as well as students serving on boards, student government, clubs, or other activities, may condition the provision of aid or a school benefit on engaging in unwelcome sexual conduct. Conduct of this type contributes to a hostile sexual environment for students, and is undoubtedly a type of sexual harassment against which Title IX should protect.

3. The Proposed Definition of "Sexual Harassment" Would Chill Reporting.

The rate of student reporting of incidents of sexual harassment in grades K-12 and on college campuses is already exceedingly low.[61] Survivors often fail to report sexual harassment as a result of trauma (13 percent of female sexual assault survivors attempt suicide[62] and 34 percent of college survivors drop out of college),[63] lack of confidence in the institution's protection and procedures, and lack of knowledge in the processes offered.[64]

A heightened requirement for sexual harassment will exacerbate the factors that prevent students from reporting the harassment they experience. Many students would question whether institutions will take their experiences seriously. Some will wonder whether their harassment will be seen as sufficiently severe by the school to warrant a response. And in many cases, individuals subjected to sexual harassment will not know whether the offensive conduct that they experienced was pervasive or an isolated event. The complicated definition of sexual harassment may also confuse students, many of whom already report a lack knowledge about or understanding of the Title IX grievance processes.[65] This restrictive definition turns the purpose of Title IX—to prevent and combat sexual violence—on its head. It fosters confusion and distrust among students and will likely chill reporting of sexual harassment, thus restricting

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[61] *See supra* Section I.

[62] RAINN, *Victims of Sexual Violence Statistics*, https://www.rainn.org/statistics/victims-sexual-violence. By comparison, a national survey estimated that 0.5 percent of adults 18 years or over attempted suicide nationally. *See* American Foundation for Suicide Prevention, *Suicide Statistics*, https://afsp.org/about-suicide/suicide-statistics/.

[63] Senate Health, Education, Labor & Pensions Committee, Letter from Senators Murray and Hassan, Advocates and Survivors of Sexual Assault Urge Secretary DeVos to Withdraw Title IX Rule, Urge Students and Survivors to Make Their Voices Heard (Nov. 28, 2018), https://www.help.senate.gov/ranking/newsroom/press/murray-hassan-advocates-and-survivors-of-sexual-assault-urge-secretary-devos-to-withdraw-title-ix-rule-urge-students-and-survivors-to-make-their-voices-heard.

[64] Rutgers, The State University of New Jersey, Center on Violence Against Women and Children, *#iSpeak Student Experience, Attitudes and Beliefs about Sexual Violence Results, New Brunswick*, 1, 31 (2015) (hereinafter "Rutgers Survey"), https://socialwork.rutgers.edu/centers/center-violence-against-women-and-children/research-and-evaluation/campus-climate-project/reports-findings.

[65] Rutgers Survey, *supra* note 64, at 31–32.

schools' knowledge of harassment on campus and hampering their ability to address and prevent it.

B. The Proposed Rule Would Inappropriately Limit Schools' Obligation to Respond to Sexual Harassment and Violence by Excusing Failures to Respond to Conduct that Does Not Occur "In an Education Program or Activity."

Proposed § 106.44(a) requires a response only to "sexual harassment *in* an education program or activity." Proposed § 106.45(b)(3) similarly requires dismissal of Title IX complaints, even when the conduct alleged would constitute sexual harassment, if the conduct "did not occur *within* the recipient's program or activity." The proposed regulations thereby improperly narrow the scope of Title IX and sexual harassment complaints that will be investigated by focusing on whether the alleged *incident(s)* occurred in an education program or activity, rather than focusing on whether the incident(s) gave rise to *discrimination* in an educational institution's program or activity.

This change in focus directly contradicts the plain language of Title IX. Regardless of whether an incident giving rise to an alleged Title IX violation itself occurs in an education program or activity, Title IX protects students who, based on sex, are "excluded from participation in [or] . . . denied the benefits of . . . any education program or activity receiving Federal financial assistance."[66]

In keeping with the clear statutory text, both courts and the Justice Department have concluded a school may violate Tile IX by failing to respond adequately to alleged misconduct that occurred in a location outside the control of the school if that conduct causes a hostile environment in the education setting. As the U.S. Justice Department itself has explained: "When assessing whether off-campus rape creates a hostile environment on campus, courts have recognized that the pernicious effects of rape by another student are not limited to the event itself and can permeate the educational environment. This is due to the daily potential of the victim student encountering her assailant as they both live and learn at the college."[67]

The Department's proposed change is also an unjustified departure from preexisting and continuously repeated Department policy in effect since at least 2001. In 2001, the Department published guidance after engaging in a notice and comment process, stating that in determining whether a hostile environment exists, the educational institution must determine whether "the conduct denies or limits a student's ability to participate in or benefit from the program based on

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[66] 20 U.S.C. § 1681(a).

[67] Statement of Interest of the United States 12–13, *Weckhorst v. Kan. State Univ.*, No. 16-2255 (D. Kan. filed July 1, 2016), ECF 26 (citations omitted) (collecting cases); *see also id.* at 11–14; Statement of Interest of the United States 12–21, *Farmer v. Kan. State Univ.*, No. 16-2256 (D. Kan. filed July 1, 2016), ECF 32; *Doe 12 v. Baylor Univ.*, 336 F. Supp. 3d 763, 780-81 (W.D. Tex. 2018).

sex."[68] On January 25, 2006, the Department reiterated its support for existing policy by directing educational institutions to rely on the 2001 Guidance for their obligations regarding preventing and remedying sexual harassment.[69]

In 2011, the Department reiterated that schools have an obligation to assess whether there is a nexus between alleged off-campus harassment and the denial of access to an education program or activity. In this regard, the Department stated that "[s]chools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity . . . [b]ecause students often experience the continuing effects of off-campus sexual harassment in the educational setting [and, therefore] schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus."[70] Then on September 22, 2017—in this current administration—the Department stated that, "schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities."[71] This longstanding policy is also consistent with the Supreme Court's interpretation of Title IX.[72] By confining Title IX's jurisdiction to only sexual harassment and assault that occurred in the first instance "within" an education program or activity, § 106.45(b)(3), the proposed regulation ignores this precedent and is flatly inconsistent with the statutory text.[73]

Furthermore, there are a number of situations that underscore the need to evaluate the effect of conduct that occurs off-campus or outside an education program or activity to be consistent with Title IX protections. For example, a student forced to perform a sex act by students from his or her school at an off-campus location should be able to pursue Title IX remedies to protect her or him from further harassment on campus. Similarly, a student who is sexually abused by a teacher or professor near campus or off-campus should be protected by Title IX. In addition, an athlete who was sexually assaulted by a school trainer or doctor at any

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[68] 2001 Guidance at 5.

[69] 2006 DCL at 6.

[70] 2011 DCL at 4.

[71] U.S. Dep't of Educ., Off. for Civil Rights, *Q&A on Campus Sexual Misconduct*, 1 n.3 (Sept. 22, 2017).

[72] *See, e.g.*, *Davis*, 526 U.S. at 644 (the statute "confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs."); *Gebser*, 524 U.S. at 278, 279 (assuming sexual harassment of the student complainant by the teacher under Title IX, even where sexual contact occurred in her home while giving her a book and "never on school property" but during school time).

[73] Requiring a recipient to only respond "to conduct that occurs *within* its 'education program or activity,'" 83 Fed. Reg. at 61,468 (emphasis added), is also directly contradictory to proposed § 106.44(a), which requires a response from "[a] recipient with actual knowledge of sexual harassment *in* an education program or activity." *Id.* (emphasis added).

time should be protected by Title IX. This is so even where the sexual assault occurred off campus—in the homes of the athletes who used the University's facilities, as well as other locations not operated or controlled by the University, such as hotels during events. If the proposed rule becomes final, school districts and Universities would be required to dismiss similarly egregious Title IX complaints simply because they occurred off-campus, even if they result in a hostile educational environment.

The Department's focus on the context in which sexual misconduct itself occurs also contradicts studies showing that off-campus conduct may create a hostile environment on campus, thus leading a student to be denied the benefits of an educational program or activity.[74] Even the studies relied on by the Department to justify the current policy changes, which are used to highlight the costs of sexual assault, do not distinguish between on- and off-campus assault.[75] Universities themselves acknowledge the effect off-campus activities can have on a student's on-campus learning.[76] It is arbitrary to assume that only harassment that occurs *in* an educational program or activity affects a student's access to the educational program or activity.

It is similarly arbitrary to limit Title IX's protections to activity occurring only in an educational program or activity when the Clery Act, 20 U.S.C. § 1092 (f), specifically recognizes that information regarding crimes occurring on "[p]ublic property . . . immediately adjacent to and accessible from the campus" is relevant to understand the crime statistics for the campus.[77] The Department attempts to clarify that "Title IX's 'education program or activity' language should not be conflated with Clery Act geography [because] these are distinct jurisdictional schemes," but this is a distinction without any obvious or appropriate purpose. It does not make sense to alert potential students to, for example, a rape that may occur outside the specific confines of an educational program or activity if that same incident would never affect the student's access to the educational program or activity.

In sum, the inquiry as to whether conduct that occurs off-campus or outside a school's program and activities creates a hostile environment under an education program or activity on the basis of sex is fact-specific and requires a school's careful assessment. The language of the

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[74] *See, e.g.*, Christopher P. Krebs, Ph.D., et al., *The Campus Sexual Assault (CSA) Study,* National Institute of Justice 5–19 (Oct. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf (finding two-thirds of campus sexual assaults occur off-campus but can still severely impact a student's access to the educational program).

[75] 83 Fed. Reg. at 61,485 (citing Cora Peterson et al, *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. of Preventative Med. 691 (2017)).

[76] *See, e.g.*, Isa Gonzalez, *Title IX Coordinator Discusses How Proposed Education Dept. Reforms Could Impact UD*, Flyer News (Dec. 17, 2018) (quoting University of Dayton's Title IX coordinator as explaining "[e]ven [for] students who live in landlord housing or near the campus footprint, their experience is often as if they are a residential student."), https://tinyurl. com/ybboqxn2.

[77] 34 C.F.R. § 668.46.

proposed regulation ignores this, in contravention of existing and long-held Department policy, as well as judicial, OCR, and Justice Department interpretations.

C. The "Actual Knowledge" Standard is Too Restrictive.

1. The Proposed Rule Undermines the Purpose of Title IX and Creates an Improper Incentive to Willfully Ignore Sexual Harassment Because it Requires Schools to Respond Only if They Have "Actual Knowledge" of the Harassment.

Previous Department policy required schools to address all student-on-student sexual harassment allegations if the school knew or reasonably should have known about them.[78] The Department has also long-imputed notice to a school when "any employee with authority to take action to redress the harassment, who has the duty to report to appropriate school officials . . . or an individual who a student could reasonably believe has this authority or responsibility" has notice of the harassment.[79] Finally, the Department has required agency principles (i.e., vicarious liability) to apply to most instances of employee-on-student harassment.[80] As the Department has previously recognized, including the "good judgment and common sense of teachers and school administrators" is key to judging compliance with Title IX.[81]

Now, absent adequate justification, the Department proposes to eliminate these elements of notice. Under proposed § 106.44(e)(6), a school lacks actual knowledge unless allegations are brought to the attention of an employee with the authority to institute corrective measures (or when a formal complaint is filed with the Title IX Coordinator). Teachers at the K-12 level are deemed officials with the authority to institute corrective measures, but not at the university level. Furthermore, the proposed rule eliminates vicarious liability for employee-on-student sexual harassment, requiring the "actual knowledge" standard in this context as well. In all contexts, if the respondent is the only one with notice, actual knowledge is not imputed to the school.

By defining "actual knowledge" narrowly and ignoring situations in which a school clearly ought to have known of sexual harassment, the proposed rule virtually abandons Title IX's overriding goal of addressing hostile environments, eliminating sexual harassment, and creating an educational environment free from discrimination on the basis of sex. The actual knowledge requirement shifts the burden from schools to students. Instead of requiring schools to address instances of sexual harassment of which they are aware because an employee who a student would reasonably believe has the authority to report or assist has received notice, the proposed rule would flip Title IX on its head and require students to report sexual harassment to

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[78] 2001 Guidance at 13.

[79] *Id.*

[80] 2001 Guidance at 10.

[81] 2001 Guidance at ii.

authority figures whom they are generally hesitant to seek out or of whom they may not be aware.

The proposed rule creates an improper incentive structure for schools that discourages them from uncovering allegations and instead incentivizes them to shield themselves from learning about wrongdoing. In the very different context of civil suits for damages, the dissent in *Gebser* warned specifically about this phenomenon, stating that as long as schools "can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability."[82] The ongoing prospect of administrative enforcement of Title IX, even in the absence of "actual knowledge" of harassment, has deterred schools from ignoring problems. The Department now proposes to do away with that incentive. Instead, the proposed rule could create a situation where multiple employees, such as teachers (at the university level), resident advisors, campus medical personnel, school resource officers, or guidance counselors are fully aware of allegations of sexual harassment, but absent an explicit obligation to report to an official with authority to institute corrective measures, the school would not have a responsibility to investigate or take remedial action.

It is clear that in crafting the proposed rule, the Department ignored the evidence that students subjected to sexual harassment hesitate to report to officials with authority to take corrective action, due to various barriers, including lack of knowledge of reporting procedures, fear of being disbelieved, or fear of facing negative repercussions and additional harassment.[83] Campus climate surveys demonstrate that those subjected to sexual harassment often report to close acquaintances, and officials may find students reluctant to formally report.[84] Only 17 percent of students in one survey reported disclosing sexual harassment incidents to formal campus resources, while 77 percent disclosed to close friends and 52 percent reported to roommates.[85] However, the Department now requires students to directly report to specific authorities or file formal complaints. The proposed rule should not disregard such clear evidence that reporting on campus is complex and requires schools to be more vigilant in addressing sexual harassment.

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[82] *Gebser* 524 U.S. at 298.

[83] Rutgers Survey, *supra* note 64, at 32.

[84] *Id.*

[85] Rutgers Survey, *supra* note 64, at 31–32.

2. Constructive Knowledge and Agency Principles Should Apply to the School's Notice of Sexual Harassment and Violence.

The Department has not demonstrated any unfairness with the constructive knowledge or agency principles it has long-implemented, and there is no adequate justification for reversing course now.[86]

The Department has long required that a school should investigate, if a school knew or reasonably should have known of sexual harassment, whether by employees, students, or third parties.[87] This standard provides the required flexibility for universities since a constructive knowledge standard considers the school's size, its available resources, the public nature of the harassment, and the status of the individuals to whom the harassment was reported. Importantly, the "should have known" standard does not impute knowledge for isolated instances that a school, taking reasonable care, would not be aware of. However, a constructive notice standard prevents schools from willfully ignoring obvious signs of harassment, such as graffiti in public places,[88] systemic abuse of power by a teacher, constant unwelcome cat-calling, or other abusive behavior of a sex-based nature at known locations. Requiring schools to act on constructive knowledge ensures investigations into a hostile environment or culture of harassment, which is a primary purpose of Title IX. Constructive knowledge has been the Department's long-standing position in Title IX cases, and the Department has put forward no convincing rationale for abandoning this eminently sound approach.[89]

In the proposed rule, the Department also reverses course on agency principles, upending years of federal government positions on this important issue and even flouting Supreme Court

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[86] If the Department nevertheless adopts the proposed "actual knowledge" standard, it should adopt mandatory, prompt reporting requirements for all non-confidential employees, so that Title IX Coordinators and other officials with authority to institute corrective measures are notified of sexual harassment more quickly. Mandatory reporters should include those individuals are considered "responsible employees" under current policy. *See* 2001 Guidance at 13. At the same time, students should have people to confide in, while knowing that their discussions will be kept confidential. Following best practices and prior Department guidance and practice schools should be required to make public (1) the individuals to whom students can report confidentially with no fear of being required to file a formal complaint and (2) the individuals who are required to report harassment to officials with corrective authority. *E.g.*, U.S. Dep't of Educ., Off. for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, at D-4, E-13, 16, 22 (Apr. 29, 2014, withdrawn Sept. 22, 2017) (the "2014 Q&A"). Converting Department policy into a proposed rule could help to mitigate (but not resolve) the problems with the proposed "actual knowledge" standard.

[87] 2001 Guidance at 13–14.

[88] 2001 Guidance at 14

[89] *See* 2001 Guidance at 14 ("If a school otherwise knows or reasonably should know of a hostile environment and fails to take prompt and effective corrective action, a school has violated Title IX even if the student has failed to use the school's existing grievance procedure or otherwise inform the school of the harassment.")

guidance.[90] Agency principles should continue to apply to employee-on-student harassment, just as they do to supervisor-on-employee harassment. The Department previously explained that notice to a school is triggered when the employee is or appears to be acting in the context of carrying out his or her responsibility to students.[91] In *Gebser*, the U.S. Department of Justice stated that it is appropriate to hold a school responsible in such instances because "the teacher was aided in accomplishing the harassment by his agency relationship with the recipient or his apparent authority."[92] In light of this, it is particularly disturbing that the proposed rule exempts the school from actual knowledge when the only person with actual knowledge is also the respondent. This requirement would apply to the K-12 context as well. It sets up a scenario in which a student would have no valid Title IX claim when any school employee, including a school leader such as a superintendent, principal, or vice principal, repeatedly harasses or sexually assaults them in class or during school-related activities, unless the misconduct was known by another responsible school official.[93] This proposed rule must be stricken. As indicated in prior guidance, a school should be required to address conduct by an individual taking advantage of the position of authority and concomitant access to students afforded to them by the education institution, regardless of the school's notice.[94]

The 2001 guidance articulated the standards and possible scenarios for applying agency principles in situations involving employee-on-student harassment.[95] The guidance appropriately recognized that the application of vicarious liability to schools would require a determination that the employee was acting or appearing to act in the context of the employee's duties, and it set out multiple potential factors to consider before imposing liability.[96] That careful approach, based on evidence and experience, should not be reversed without ample justification. Requiring schools to take action based on constructive knowledge and agency principles also provides an opportunity to protect schools from later dealing with situations that could have been resolved with much less damage had the school acted more quickly to alleviate the problems.

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[90] *Franklin*, 503 U.S. 60 (implying that agency principles may be appropriate in the Title IX context).

[91] 2001 Guidance at 10.

[92] *Gebser*, 524 U.S. 274, No. 96-1866, Statement of Interest of the United States, 9 (filed Jan. 16, 1998).

[93] *See, e.g. Salazar v. South San Antonio Independent Sch. District*, 2017 WL 2590551 (5th Circuit), cert. denied, 138 S. Ct. 369 (holding that district could not be liable under Title IX for principal of elementary schools repeated sexual molestation of an elementary school student, because the principal who engaged in the molestation was the only one aware of the conduct).

[94] 2001 Guidance at 10.

[95] 2001 Guidance at 10-12.

[96] 2001 Guidance at 10-11.

Once again, Title VII is instructive. Under Title VII, the definition of "employer" includes any "agent of the employer,"[97] and courts routinely look to agency principles to determine employer liability for employee harassment.[98] Here, as in other areas of the proposed regulations, the Department sets up a scenario in which school employees are afforded better protection from harassment than students, who are far more vulnerable due to their age and experience. If a school can be held liable for monetary damages for supervisor-on-employee harassment under Title VII, then surely the Department of Education should require schools to at least respond to employee-on-student harassment under Title IX. Furthermore, schools arguably have more responsibility to protect their K-12 students, because they act *in loco parentis* while students are in attendance. [99]

The Department has failed to articulate intervening circumstances, facts, or evidence that would justify a reversal from the application of consistent agency policy and decisions to employee-on-student harassment. The proposed rule change should not be adopted.

D. The Proposed Rule Would Adopt a "Deliberative Indifference" Standard That Is Not Appropriate for Administrative Enforcement of Title IX.

Since at least 1997, the Department has understood Title IX to require schools to act reasonably in taking steps to end sexual harassment and prevent its recurrence.[100] Specifically, schools are required to act in a "reasonable, commonsense" manner in addressing sexual harassment and to take "prompt and effective" steps once they have knowledge of harassment.[101] Moreover, the existing regulations, in effect since 1975, have required schools to have procedures that provide a "prompt and equitable" response to any complaint of sex discrimination, a requirement that the Department has consistently enforced for decades and applied to all forms of sex discrimination, including sexual harassment.[102]

Under the proposed rule, even a school that responds unreasonably, untimely, and ineffectively to sexual harassment may avoid repercussions, so long as the school's response is not "deliberately indifferent." Proposed § 106.44(a). And "only" a "response to sexual harassment" that is "intentionally" and "clearly unreasonable in light of the known circumstances" will be considered "deliberately indifferent." *Id.*

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[97] 42 U.S.C. § 2000e(b).

[98] *Vinson* at 72 ("[W]e do agree with the EEOC that Congress wanted court to look to agency principles for guidance in this area.")

[99] *Veronia School District 47J v. Acton*, 515 U.S. 646, 656 (1995) (discussing that the duty is both "custodial and tutelary").

[100] 1997 Guidance.

[101] 2001 Guidance at iii, 15

[102] 34 C.F.R. 106.8(b).

The Department has failed to justify such a policy change. The NPRM does not point to any instances in which schools were burdened or unfairly penalized as a result of the reasonableness standard. To the contrary, the proposed rule neglects the purpose of the Department's administrative enforcement of Title IX, which is to provide schools with an opportunity to correct prior actions in response to sexual harassment and address a hostile environment moving forward (before they incur liability for damages).[103] Rarely does administrative enforcement lead to the dramatic step of withholding Title IX funding; rather, the Department's role is to "make schools aware of potential Title IX violations and to seek voluntary corrective action."[104] Without some basis for demonstrating that the reasonable care standard was inadequate or overly burdensome for schools, it is inconsistent with the intent of Title IX to adopt a standard that is less protective of students who experience discrimination.

Although the Department purports to draw its "deliberately indifferent" standard from case law, it misses the mark. Courts have concluded that "[r]esponses that are not reasonably calculated to end harassment are inadequate."[105] And a failure to investigate alleged sexual harassment can be unreasonable in light of the circumstances, even absent a formal complaint.[106] Again, the requirement that schools not act with deliberate indifference in response to complaints, as adopted by the courts for money damages actions, is immaterial to the Department's administrative enforcement of Title IX.[107] The Department should intervene to ensure schools are responding appropriately to sexual harassment allegations well before the school would be liable for money damages in a civil suit for its failure to act.

In addition, students should receive protection from sexual harassment at least equal to the protection afforded employees in the workplace. Under Title VII, employers (including schools) are liable for acts of sexual harassment in the workplace unless the employer "can show that it took immediate and appropriate corrective action."[108] Students are generally more vulnerable to sexual harassment than adult employees, particularly in grades K-12, since they are both minors and subject to compulsory school attendance requirements.[109] Under the proposed

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[103] *See North Haven Bd. of Ed. v. Bell,* 456 U.S. 512, 521 (1982) (reiterating that the text of Title IX should be accorded "'a sweep as broad as its language.'").

[104] 2001 Guidance at iii–iv (stating that if OCR finds violations of Title IX, it must first "attempt to secure compliance by voluntary means.").

[105] *See Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669 (2d Cir. 2012) (holding that a university did not engage in efforts that were "reasonably calculated to end [the] harassment").

[106] *E.g.*, *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 696 (4th Cir. 2018) (holding a school administrator responsible for a claim of retaliation under Title IX, and stating that the retaliation spanned a sufficient period that the University should have taken "reasonable steps to address it").

[107] *See supra* Section II.

[108] 29 C.F.R. §§ 1604.11

[109] *See supra* Section I.

rule, an employee who is sexually harassed can sue a school *for money damages* if the school fails to take immediate and appropriate corrective action, but the Department of Education cannot take even non-monetary enforcement action against a school that fails to protect a student from sexual harassment unless the school's response failed the much higher "deliberate indifference" standard. Furthermore, graduate students who teach and other student employees of a school may fall under a complicated enforcement scheme, depending on whether they are considered "employees" or "students." The Department should not create this artificial disparity in the enforcement of sexual harassment prohibitions, which would indicate to students that the Government takes student safety less seriously than employee safety. If anything, the Department should afford students greater protection from sexual harassment due to their vulnerabilities.

E. Safe Harbor Provisions Are Inappropriate and Schools Must Investigate Any Potential Hostile Environment.

The proposed rule provides several safe harbor provisions for schools. Taken together with the deliberate indifference standard, the safe harbor provisions severely curtail the Department's ability to meaningfully enforce Title IX's anti-discrimination objectives. Curtailing OCR's ability to independently review comprehensively how schools handle sexual harassment complaints is contrary to its mandate to investigate compliance with Title IX. The new rule would incentivize schools to do the bare minimum in enforcement of Title IX, contrary to the statutory mandate to provide educational programs and activities that are free from harassment.

The safe harbor provisions take various forms. The first, proposed § 106.44(b)(1), provides schools a safe harbor from a finding of deliberate indifference if they carry out grievance procedures consistent with those outlined in the rule in response to a formal complaint. 83 Fed. Reg. at 61,469. Any failure to fairly and adequately implement those procedures in a manner that is equitable, timely, or effective is seemingly irrelevant. Such a safe harbor erodes schools' responsibility to investigate hostile educational environments. This is of particular concern in the K-12 context where most complaints are taken verbally and informally by a dean, vice principal or other administrator who plays multiple roles.

The other safe harbors are equally untenable. Proposed § 106.44(b)(2) provides a safe harbor to a school where, upon actual knowledge of multiple complaints against the same respondent, the Title IX coordinator files a complaint on the complainant's behalf and the school follows the proposed grievance procedures. The proposed rule, in § 106.44(b)(3), also provides a safe harbor from a finding of deliberate indifference if a school that has actual knowledge of sexual harassment, absent a formal complaint, merely offers the complainant supportive measures. 83 Fed. Reg. at 61,469. Finally, in proposed § 106.44(b)(5), the Department also prevents OCR from a finding of deliberate indifference solely because OCR would have come to a different responsibility conclusion. 83 Fed. Reg. at 61,470.

Title IX imposes an affirmative obligation on schools to ensure that students are not subject to discrimination on the basis of sex. As a result, the Department has long recognized that

schools have an obligation to take reasonable steps to prevent harassment "whether or not the student who was harassed makes a complaint or otherwise asks the school to take action."[110] Consistent with this recognition, the 2001 Guidance made it clear that a school's obligation to investigate and respond to a report of harassment does not depend on the filing of a formal complaint: "Once a school has notice of possible sexual harassment of students—whether carried out by employees, other students, or third parties—it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again."[111] Federal courts have reaffirmed schools' affirmative obligation to protect their students from harassment.[112]

The proposed rule fails to recognize the obligation of schools to address harassment in the absence of a formal complaint (unless, of course, a complainant receives written notice of the available resolution options and, voluntarily and without coercion, decides not to pursue the complaint). By implication, therefore, it suggests that a school's Title IX responsibilities are triggered only when a student begins the formal complaint process. This, of course, is false: nothing in the language of Title IX supports such a narrow view of a school's obligations. To the contrary, Title IX prohibits discrimination on the basis of sex in education programs receiving federal funds, period. So at a minimum, a school that is put on notice of evidence of harassment, through whatever means, has an obligation to investigate and, if it determines that harassment is occurring, take steps to address it and provide notice of the outcome of its process. Any rule purporting to implement Title IX must make this fact clear: once a school has actual knowledge of harassment, it must investigate—even if the student has not reported it to the school.

Any final rule must also make clear that schools are obligated to investigate and address systemic problems of which they are made aware. The Department has regrettably stepped away from its own obligation to identify systemic violations of Title IX.[113] It should not compound this error by limiting the obligations of schools to investigate such violations. Incidents of harassment rarely occur in a vacuum: too often, they are fueled by the presence of a toxic culture or hostile environment that enables such abuses. Title IX's prohibition on discrimination on the basis of

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[110] 2001 Guidance at 15.

[111] *Id.*

[112] *Feminist Majority Found.*, 911 F.3d at 692 ("We are satisfied that the University was obliged to investigate and seek to identify those students who posted the threats and to report the threats to appropriate law enforcement agencies."); *see also Abbott v. Pastides*, 900 F.3d 160, 173 (4th Cir. 2018) (observing that "universities have obligations not only to protect their students' free expression, but also to protect their students").

[113] *E.g.*, Adam Harris, *Memo Outlines Education Dept. Plans to Scale Back Civil-Rights Efforts*, The Chronicle of Higher Education (June 15, 2017), https://www.chronicle.com/blogs/ticker/memo-outlines-education-dept-plans-to-scale-back-civil-rights-efforts/118937.

sex thus requires schools that are made aware of systemic discrimination to respond, and to do so in a manner commensurate to the scope of the problem. By failing to affirmatively state that schools have such an obligation, the proposed rule rewrites Title IX in a way that is inconsistent with its plain language and clear purpose.

In the same vein, creating a safe harbor for merely providing supportive measures to a student subjected to sexual harassment (or a parent complainant) who was not informed of or was otherwise unaware of the procedural step of filing a formal written and signed complaint is particularly unjust. Under the proposed rule, a school with knowledge of sexual assault against a student cannot be found to have responded inadequately as long as it offered the survivor a change of class schedule or some other similarly meager support. Deeming a school to have fully satisfied its Title IX obligations by providing only supportive measures to individuals subjected to sexual harassment who do not file formal complaints is likely to chill reporting and reduce investigations into a hostile educational environment, as individuals subjected to sexual harassment will find the process inadequate and will likely lose trust in the institution's processes.

Additionally, any provision on supportive measures must ban schools from pressuring students subjected to sexual harassment into accepting supportive measures in lieu of an investigation or grievance mechanism. The Department should prohibit even subtle incentives to accept supportive measures over formal adjudications. Any indication of students being steered or pressured into accepting only supportive measures or being discouraged from pursuing other options (such as local law enforcement) should be thoroughly investigated by OCR and remediated by the school.

Finally, the safe harbors remove OCR's discretion in Title IX enforcement. OCR's independent weighing of the evidence surely is a relevant factor in determining whether a school has been or is being deliberately indifferent (or unreasonable). Suppose, for example, OCR finds that, despite adopting the proper procedures for addressing formal complaints, the school's decision-makers always find in favor of complainants, or always find in favor of respondents. Absolute safe harbors remove OCR's ability to determine a school's liability if there is a pattern or practice of shielding respondents or favoring complainants. The Assistant Secretary, after a thorough investigation, should have the discretion to decide whether a school's determination of responsibility was discriminatory, or whether a school's overall climate is a discriminatory one.

The Department should remove the safe harbor provisions from the proposed rule.[114]

[114] While we strongly oppose the existence of any safe harbor in any final rule, if the Department nevertheless continues to include them, we strongly recommend any safe harbor incentivize schools to provide additional protections.

III. The Department Should Adopt Policies for Complaints that Maximize Reporting.

A. The Department's Proposed Definition of "Complainant" Is Too Restrictive.

Proposed § 106.44(e)(2) defines "complainant" as "an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint."[115] This definition raises many problems.

Importantly, the proposed definition of "complainant," in conjunction with the proposed definition of "formal complaint" (which must be "a document signed by a complainant or by the Title IX Coordinator"), effectively preclude third parties from filing formal complaints of sexual harassment, which triggers the recipient's obligation under the proposed rule to initiate an investigation or proceedings to address the allegations.[116] This is a departure from prior guidance, which recognized that a school must investigate and take appropriate remedial action "regardless of whether the student [subjected to sexual harassment], student's parent, or a third party files a formal complaint."[117]

The proposed shift in policy regarding who may file a formal complaint of sexual harassment ignores the realities of how sexual harassment is reported on campus. Only a small percentage of campus sexual violence is formally reported, for reasons previously articulated.[118] And instances of sexual harassment are often communicated to close confidants, who may report such incidences to appropriate officials. In K-12 schools, instances of sexual harassment or violence are often reported by a parent or guardian on behalf of a student or another student or employee witness to the sexual harassment. By eliminating the requirement that schools initiate investigations in response to information reported by third parties, the Department's proposal will result in more harassment going unacknowledged and unaddressed. The proposed definition

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[115] "For purposes of this definition, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the recipient's actual knowledge under [the proposed rule]." These comments address this part of the definition of "complainant" in their discussion of the "actual knowledge" standard.

[116] In some States, a parent or guardian could file a formal complaint on behalf of a minor child, but on this issue, the Department's proposed rule would defer to state law and local educational practice. *See* 83 Fed. Reg. at 61,482.

[117] 2014 Q&A at D-2, 15–16. Existing Department guidance also recognizes that, in some instances, the survivor may not want the school to proceed with an investigation and appropriately established several factors for a school to weigh in balancing whether to move forward over a survivor's objections. The factors to weigh include the survivor's wishes along with the school's duty to provide a safe and nondiscriminatory environment for all students, the seriousness of the alleged harassment, the age of the student harassed, whether there have been other reports of harassment against the alleged harasser, and the rights of the accused individual to receive information about the accuser and the allegations, where a formal proceeding with sanctions may result. 2001 Guidance at 17-18.

[118] *See supra* Section I & Section II.C.

should be modified to clarify that a third party, such as a witness, parent, guardian, or school employee, may file a formal complaint.[119]

More broadly, the proposed rule will yield results that cannot be squared with schools' obligations under Title IX and the case law applying it. Schools have a legal obligation to take reasonable steps to prevent and eliminate sexual harassment, including hostile environment harassment.[120] Yet the proposed rule places the burden on individuals subjected to sexual harassment to report harassment in a particular manner. In addition, a hostile environment "can occur even if the harassment is not targeted specifically at the individual complainant. For example, if a student, group of students, or a teacher regularly directs sexual comments toward a particular student, a hostile environment may be created not only for the targeted student, but also for others who witness the conduct."[121] Similarly, a school's repeated failure to respond appropriately to allegations of sexual assault may contribute to a hostile environment for students who have not themselves been the subject of an assault. It is not clear from the Department's proposal whether students who have witnessed but who have not been "targeted" by harassment may qualify as individuals who may file a formal complaint. Consistent with existing policy, the Department should clarify that these individuals may file formal complaints.

B. The Definition of "Formal Complaint" Creates a Barrier to Filing for Complainants, Particularly Underage Students, and Does Not Provide for Reasonable Accommodation.

Proposed § 106.44(e)(5) defines the "formal complaint," which must be filed to trigger most of the protections set forth in the remainder of the regulation, as "a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment . . . and requesting initiation of the recipient's grievance procedure." *Id.* This requirement is inconsistent with the objective of the statute because it creates an unnecessary barrier to obtaining the protections against discrimination promised unequivocally by Title IX's text. It is also a departure from the existing regulations, which require a recipient to establish procedures for addressing "*any action* which would be prohibited by" the regulation.[122] As applied, a recipient could dismiss a meritorious complaint of which it has notice or fail to take action solely for immaterial technical reasons, such as the complaint not being signed or failing to include specific language "requesting initiation" of the grievance procedures.

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[119] We recognize that schools reasonably may respond differently to complaints filed by those subjected to sexual harassment and complaints filed by third parties, but the appropriateness of a school's response should be fact-specific. *See* 2001 Guidance at 18 (identifying "factors" that "will affect the school's response" when "information about harassment is received from a third party (such as from a witness to an incident or an anonymous letter or telephone call)").

[120] *E.g.*, 2001 Guidance at 5–14.

[121] 2001 Guidance at 6 & n. 43 (collecting cases).

[122] 34 C.F.R. § 106.8(b) (emphasis added).

Furthermore, the proposed regulation ignores the reality in elementary and secondary schools throughout the nation that complaints of sexual harassment are most often brought to the attention of administrators verbally by children, many of whom will be unaware of the proposed regulation's prescriptions. As such, the proposed regulation will too often result in K-12 students being deprived of their rights under Title IX based on the mere technicality of not filling out and signing a written document. In this regard, we note that the Department has included no cost estimate for training students (or their parents and guardians) on the new sweeping changes in the regulations. They will nonetheless be responsible for meeting these procedural requirements to obtain any relief.

In addition, the proposed rule runs afoul of other federal civil rights laws because it fails to specify that reasonable accommodations in the grievance process shall be provided for individuals whose disabilities may inhibit their ability to read, write, and sign a complaint.[123] Moreover, for a complainant who is under 18, as many in the schools affected by this regulation are, the proposed regulations do not address how schools will implement this requirement if a parent later disagrees with a child complainant's decision to file or is not consulted prior to filing. The change also creates unnecessary administrative costs, paperwork, and delay because schools must create or receive a signed document before executing their clear responsibilities under the law to investigate and, as necessary, stop the harassment, prevent its recurrence, and remedy its effects.

C. "Supportive Measures" Should be Responsive to a Complainant's Needs.

Under prior guidance, the Department acknowledged that Title IX may require a school to take "interim measures" to protect a complainant and other students before the conclusion of an investigation.[124] In § 106.44(e)(4), the proposed rule would introduce the new term "supportive measures" and would provide that implementing supportive measures may itself be an adequate response in some cases of sexual harassment.

The proposed rule provides a safe harbor to a school that "offers and implements supportive measures *designed to* effectively restore or preserve the complainant's access to the recipient's education program or activity," without regard to whether the supportive measures are actually (or even reasonably) effective in accomplishing that objective. Further, for supportive measures to be effective, a school must acknowledge the crucial role of the complainant and, as needed, the respondent in crafting such measures and work with the parties to design appropriate measures after assessing what is needed to stop the harassment, prevent its recurrence, and address its effects. The Department should clarify that although schools should not be required to provide every measure the student requests, they should give due

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[123] *See generally* Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Americans with Disabilities Act of 1990 as amended, 42 U.S.C. § 12131, *et. seq.*

[124] 2001 Guidance at 16, 18 ("It may be appropriate for a school to take interim measures during the investigation of a complaint.")

consideration to what the student who was harassed deems appropriate supportive measures in light of the circumstances, so that access to programs and activities can be assured.

The proposed rule would provide that supportive measures offered to a complainant or respondent should be designed to avoid "unreasonably burdening the other party." 83 Fed. Reg. at 61,496. By comparison, Department policy issued between 2001 and 2014 consistently emphasized that, in adopting interim measures, schools should minimize the burden on the student who was harassed. For example, the 2001 Guidance stated that such measures should "be designed to minimize, as much as possible, the burden on the student who was harassed."[125] The 2014 Guidance stated that schools should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case."[126]

We agree that schools should endeavor to avoid "unreasonably burdening" alleged perpetrators, but we believe this principle requires elaboration. The Department should clarify that, consistent with prior policy, there should be a presumption against imposing unnecessary burdens on the complaining student when devising supportive measures. By crafting appropriate and individualized measures, this can be done even while protecting the due process rights of the respondent during the pendency of the investigation.

And the Department should likewise make clear that schools retain their local flexibility to deal immediately with potentially predatory or violent situations, even in ways that significantly burden one or more students, and even before a formal complaint has been filed or there has been an adjudication of responsibility, when necessary to meet their responsibilities for student safety and well-being. In such situations, to ensure the safety and well-being of its students, a school may need to impose a temporary and immediate suspension on a student, subject to the right for that student to have a prompt hearing with a right to return to the educational environment.

IV. The Proposed Grievance Procedure Fails to Provide a Fair and Equitable Process for Resolving Formal Title IX Complaints.

In 2001, the Department recognized that "[s]trong policies and effective grievance procedures are essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it."[127] This is why the Department has consistently required school grievance procedures to provide for "prompt and equitable resolution of sex discrimination complaints."[128] In many places, the proposed rule fails to meet

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[125] 2001 Guidance at 16.

[126] 2014 Q&A at G-2, 33.

[127] 2001 Guidance at iii.

[128] 2001 Guidance at 14.

this standard: it improperly tilts the proceedings in favor of the respondent, it prevents schools from imposing reasonable controls that protect confidentiality and ensure fair proceedings, and it burdens schools and students alike with untenable hearing requirements. In other places, the proposed rule requires clarification to ensure a truly equitable process. As such, the proposed grievance procedures must be substantially revised in order to comply with Title IX.

A. Credibility Determinations Should Not Be Based Solely on Person's Status.

To ensure that all evidence is evaluated objectively, the proposed rule states that "credibility determinations may not be based on a person's status as a complainant, respondent, or witness." Proposed § 106.45(b)(1)(ii). We agree that all evidence must be considered fairly and objectively by recipient schools. But fact-finders should not be categorically prohibited from considering any factor—including the person's status and motivations for offering their testimony—when determining credibility. As the EEOC has recognized in the employment context, no single factor is determinative of credibility.[129] Instead, the final rule should state that "credibility determinations may not be based solely on a person's status as a complainant, respondent, or witness."

B. The Presumption of Non-Responsibility Improperly Tilts the Process in Favor of the Respondent.

The proposed rule states that there is a "presumption" that the respondent is "not responsible" for the alleged sexual harassment. §§ 106.45(b)(1)(iv) & (b)(2)(i)(B). The presumption appears aimed at protecting respondents in a manner akin to the presumption of innocence in criminal cases. But the grievance procedures are non-criminal in nature, so a criminal presumption by another name is not appropriate. Relatedly, but more fundamentally, the presumption contradicts the regulation's stated goal of promoting impartiality by inherently favoring the respondent's denial over the complainant's allegation. Instead the allegation and the denial must be treated neutrally, as competing assertions of fact whose truth can only be determined after an investigation. The problem would be even starker if any final regulation were to retain recipients' ability to choose a "clear and convincing" evidence standard (which we contend is not appropriate). The presumption of non-responsibility and the "clear and convincing" standard of evidence likely would, in practice, compound one another and raise an exceedingly high bar to any finding of responsibility for sexual harassment.

Accordingly, there should be no presumption regarding the respondent's responsibility.

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[129] EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), https://www.eeoc.gov/policy/docs/harassment.html.

C. The Department Should Provide Prompt Timeframes and Should Not Encourage Good Cause Delay for Concurrent Law Enforcement Proceedings.

Since 1980, the regulations have required that schools provide a "prompt" resolution to any allegation of discrimination prohibited by this part.[130] Department policy interpreting the regulations has also required grievance procedures for resolving allegations of sexual harassment to be completed "promptly."[131] Proposed § 106.45(b)(1)(v) would require schools to establish "reasonably prompt timeframes for conclusion of the grievance process." According to the preamble, the Department has selected the language "reasonably prompt" to track "the language in the Clery Act regulations at 34 C.F.R. § 668.46(k)(3)(i)(A)." 83 Fed. Reg. at 61,473. We are concerned that schools will likely construe "reasonably prompt" as imposing a more relaxed timeliness obligation than "promptly." Other than a desire to provide consistency with the Clery Act, the Department does not provide an adequate justification for a change that may result in further delays in completion of the resolution process for both parties to a sexual harassment investigation, each of whom have a significant interest in a prompt resolution. The Department should strike "reasonably," so that change in wording does not constitute a departure from its long-established guidance without adequate justification.

In addition, we urge the Department to reaffirm, in issuing any final rule, the goal of completing investigations of formal complaints in a 60-day timeframe,[132] subject to the institutions' need for flexibility for practical concerns and to protect due process rights. Timely resolution of grievance procedures is vital for complainants who may be re-victimized as the process drags on without resolution or relief. As the Department has recognized, "OCR experience" had shown that "a typical investigation takes approximately 60 calendar days following receipt of the complaint," although "the complexity of the investigation and the severity and extent of the harassment" can necessitate a longer process.[133] In the proposed rule, the Department notes that "[s]ome recipients felt pressure in light of prior Department guidance to resolve the grievance process within 60 days." But nowhere does the Department claim that OCR's experience has changed. Rather than abandon this timeline, the Department should provide schools with guidelines for timeliness that continue to recognize that grievance procedures can vary in length based on the complexity of the investigation, the severity of the harassment, and factors outside of the schools' control, such as the unavailability of witnesses.[134]

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[130] *See* current 34 C.F.R. § 106.8(b), proposed § 106(c).

[131] *E.g.*, 2001 Guidance at 19; 2011 DCL at 8.

[132] Of course, other stages such as appeals will have a separate prompt timeframe, as OCR has consistently recognized.

[133] 2011 DCL at 12; *see also* 2014 Q&A at 31.

[134] *E.g.*, state administrative procedures that require multiple stages but are still completed within a prompt timeframe.

Such a definition will also provide clear notice to schools of the Department's expectations for a prompt resolution.

Finally, the Department provides in proposed § 106.45(b)(1)(v) that schools many temporarily delay the process for good cause, which can include "concurrent law enforcement activity." For several reasons, any final rule should be clear that concurrent law enforcement activity, without more, is not good cause to delay Title IX proceedings. First, "because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively."[135] Conduct may restrict a student's access to education even though it does not rise to the level of a criminal violation. Second, as we discuss more fully elsewhere, schools generally have an independent obligation under Title IX to investigate and resolve complaints of sexual harassment—regardless of any parallel criminal investigation.

Generally, school and law enforcement officials should de-conflict their investigations to avoid prejudicing each other's investigation. Although concurrent law enforcement activity should not be considered sufficient grounds for delaying Title IX proceedings, some limited circumstances would support good cause for a temporary delay. For example, a school may find good cause to delay a portion of a Title IX investigation at the request of a prosecutor to protect the integrity of a criminal investigation, or "a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence."[136] But "once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation."[137] And schools should not refrain from providing supportive measures in the interim.

Therefore, if the Department finalizes its proposal, § 106.45(b)(1)(v) should be revised to reflect that "concurrent law enforcement activity" may be grounds for delaying Title IX proceedings only when there is good cause beyond the mere existence of concurrent law enforcement activity. That said, any final rule should also clarify that schools must tell complainants of their right to file a concurrent criminal complaint and not dissuade them from doing so.

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[135] 2001 Guidance at 21 & n.110 (citing *Academy School Dist. No 20*, OCR Case No. 08-93-1023 (school's response determined to be insufficient in a case in which it stopped its investigation after complaint filed with police); *Mills Public School Dist.*, OCR Case No. 01-93-1123 (not sufficient for school to wait until end of police investigation)).

[136] 2011 DCL at 10 & n.25.

[137] *Id.* (noting that in "one recent OCR sexual violence case, the prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances").

D. When Issuing a Notice Upon Receipt of a Formal Complaint, Schools Should be Required to Protect Confidentiality and Preserve the Integrity of the Investigation.

In § 106.45(b)(2)(i)(B), the proposed rule defines the notice a school must provide upon receipt of a formal complaint. We agree that due process requires that a respondent have access to information about the complained-of conduct in order to have a meaningful opportunity to prepare an effective response. But by requiring schools in all circumstances to send written notices that identify the complainant and detail the allegations, the proposed rule fails to address the potential confidentiality concerns of both the complainant and the respondent. For example, a written notice sent to the parties that names the complainant and details the allegations could be leaked or forwarded to unrelated third parties. This could damage the respondent's reputation,[138] invite retaliation against the complainant, threaten both parties' access to education, and, depending on the information disclosed regarding the complainant's medical information related to sexual violence, violate state and federal health care privacy laws.[139]

We are also concerned by the proposal's mandate that the required notice be provided "[u]pon receipt of a formal complaint," proposed § 106.45(b)(2)(i)(B), and then supplemented on an "ongoing" basis, "[i]f, in the course of an investigation, the recipient decides to investigate allegations not included in the notice provided pursuant to paragraph (b)(2)(i)(B)." § 106.45(b)(2)(ii). As long as the respondent receives the necessary information early enough to have a meaningful opportunity to prepare a response, schools should retain some discretion as to when they provide a respondent information about allegations being investigated. For example, a school may wish to conduct a preliminary investigation to determine whether the new allegations are credible or whether alleged systemic conduct is occurring. Schools may also need to delay notice to avoid prejudicing the investigation.

To avoid these problems, any final rule should instead advise schools to provide the respondent with prompt written notice of the filing of a formal Title IX complaint, including the specific allegations against her or him, the applicable grievance procedures and conduct code sections, a prompt timeframe for providing access to relevant information about the allegations, and an opportunity to respond. This would allow schools to continue to protect both parties by, for example, sending respondents only an initial written notice about the existence of a complaint and specific allegations, and then providing him or her with relevant information in person, including additional details about the alleged conduct and the identity of the complainant. Any final rule should also allow schools to protect respondents and complaints in other ways, such as by barring them from disclosing personally identifiable information except as necessary to prepare a response.

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[138] *E.g.*, 2001 Guidance at 18 ("Publicized accusations of sexual harassment, if ultimately found to be false, may nevertheless irreparably damage the reputation of the accused.").

[139] *E.g.*, 2001 Guidance at 17–18.

Any final rule should also allow schools to withhold the identity of the complainant in certain circumstances. We agree that in many circumstances, the respondent must be informed of the complainant's identity to prepare an adequate response. But there are circumstances in which a school may not need to identify a complainant who has requested confidentiality, such as when the complaint involves harassment in a public setting (e.g., a teacher saying something to a whole class or systemic problems at a fraternity). In addition, when a school moves forward with a complaint on behalf of a student who has requested confidentiality, the school can still provide prospective relief, such as sexual harassment training and guidance that can meets it obligations to prevent harassment and address its effects. Students who have declined to pursue a formal investigation should not be identified against their will if appropriate corrective measures can still be pursued.

Finally, any final rule should require any notice to include a warning that retaliation against the complainant, including by making statements or spreading rumors intended to intimidate or dissuade him/her from filing or pursuing a Title IX complaint, constitutes an independent Title IX violation.

E. Schools Should be Allowed to Place Limited, Reasonable Restrictions on Discussions by the Parties.

In § 106.45(b)(3)(iii), the proposed rule bars schools from restricting the parties from discussing the allegations under investigation. We agree that parties cannot be barred from disclosing information needed to prepare a response or prepare for an interview or hearing. But there are several circumstances in which a school may need to place reasonable limitations on the ability of both parties to discuss the allegations. For example, a school may be able to respect a complainant's request for confidentiality by requiring the respondent to not disclose the complainant's identity unless necessary to prepare his or her response. In addition, schools should be allowed to limit (in the short term) discussions to preserve the integrity of the investigation, such as limiting conversations between parties and witnesses to prevent witness tampering. Finally, effective interim supportive measures should continue to include a school's ability to restrict the respondent from contacting the complainant or otherwise harassing or retaliating against him or her during the pendency of the investigation. Therefore, any final rule should state that the school must not restrict the ability of either party to discuss the allegations under investigation as necessary to prepare a response or prepare for an interview or hearing.

F. The Proposed Hearing Procedures Will Chill Reporting, Burden Schools, and Harm Both Complainants and Respondents.

Proposed § 106.45(b)(3)(vi) allows K-12 institutions to conduct live hearings at their discretion. Live hearings place a sharp spotlight on both parties. K-12 students—particularly those in elementary and middle school—will typically lack the maturity necessary to participate. They also have greater vulnerability to potential traumatization or re-traumatization. In addition, allowing live hearings raises serious privacy concerns for children, particularly with respect to

student witnesses. The final rule should not allow live hearings in the K-12 context unless otherwise required by state law.

If live hearings do take place in K-12 schools, the final rule should include minimum protections for student parties and witnesses who testify, and require schools to protect the confidentiality of the participants and the process. Given the privacy considerations for underage minors and potential for re-traumatization, the complaining and responding student should never be required to testify in the same room or to face each other in any cross-examination. The regulation should also provide exceptions for student testimony and participation where the student's maturity level would make in-person participation inappropriate.

In § 106.45(b)(3)(vii), the proposed rule requires all institutions of higher education to conduct live hearings at which each party's advisor must be allowed to conduct cross-examination of the other party. As we discuss below, any final rule should not mandate live hearings, return advisors to a supporting role only, and only allow party questioning via neutral third parties.

First, although some states require them, live hearings can pose problems. Schools may have a legitimate interest in avoiding circumstances that may subject the complainant to further harassment. Particularly in cases of sexual violence, requiring the complainant to face the respondent risks re-traumatizing a survivor. In addition, live hearings can be burdensome on institutions. They are typically overseen by faculty members or school staff who, no matter how dedicated they are to a fair process, are not professional mediators or judges. Months or even years can pass between hearings, which can undermine the efficacy of training, while the presence of attorneys for either party risks intimidating the panel and overtaking the proceedings. And finding a time when the panel members, the parties, and all witnesses are available can delay proceedings. To avoid these problems, some schools instead have the fact-finder or investigator conduct hearings with, or take sequential evidence from, all parties and witnesses, with the parties able to submit questions in advance. This allows for the solicitation of live testimony and enables the fact-finder to personally evaluate the speaker's credibility.[140]

Therefore, the final rule should permit investigations via methods other than live hearings, subject to constitutional due process protections.

Second, requiring cross-examination by a party's advisor during a live hearing will create serious problems to both the school and the parties. The opportunity for the parties to pose questions is an important element of fact-finding. Indeed, the ability to pose questions of witnesses and the other party protects both respondents and complainants. But the Department's shift to cross-examination by advisors has created even greater problems—problems that will

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[140] *E.g.*, *Doe v. Univ. of S. California*, 241 Cal. Rptr. 3d 146, 163 (Cal. Ct. App. 2018) (holding that "[w]here a university's determination turns on witness credibility, the adjudicator must have an opportunity to assess personally the credibility of critical witnesses," but not finding due process violation in the university's decision to not hold a live hearing).

inhibit the Department's stated goals of discovering the truth and reducing the burden on schools. 83 Fed. Reg. at 61,476.

Advisor-led cross-examination will be untenable. Some parties may choose to bring in attorney advisors. This risks disparate treatment if, for example, the complainant has an attorney advisor and the respondent has an institution-provided faculty member advisor. In cases in which the school is required to provide the advisor, schools are concerned that they could later be challenged for failing to provide an adequate advisor. Attorney-advisor cross-examination also risks intimidating the non-lawyer faculty or staff member(s) who typically oversee Title IX hearings. To ensure that the fact-finder can run a fair and effective hearing, schools may feel the need to hire attorneys to serve as dedicated Title IX fact-finders, which would impose an even greater expense and burden on institutions. In addition, cross-examination by an advisor of the party's choice—which could be an attorney, a family member, or a fellow student—risks harassing the respondent, retraumatizing the complainant, and further deterring survivors from filing formal complaints.[141]

To avoid these problems, any final rule should permit the practice already widely used in schools that hold live hearings. Each party should be allowed to bring to a hearing or interview an advisor of his or her choice who serves only a supportive function. The complainant and respondent should be allowed to pose questions through a neutral third party, such as the fact-finder overseeing the hearing. This would balance the need for each party to ask questions of the other party, the need for the fact-finder to evaluate how the parties respond to live questions, and the need to protect all parties from trauma, intimidation, and further harassment. The Department must also ensure that adjudicators are sufficiently empowered to control the proceedings and place some reasonable limitations on the questioning of the parties and witnesses. By making relevance the only ground for excluding questions, 83 Fed. Reg. at 61,476, the Department's proposal would result in protracted and unwieldy hearings that would impose additional costs on schools and parties (costs not reflected in the Department's regulatory impact analysis). Such hearings may not ultimately protect respondents and complainants from abusive or harassing questioning or, most importantly, facilitate the discovery of truth.

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[141] *See, e.g.*, Tom Lininger, *Bearing the Cross*, 74 Fordham L. Rev. 1353, 1357 (2005) ("As a general matter, victims willingness to report crimes varies inversely with their fear of embarrassment during cross-examination."); Anoosha Rouhanian, *A Call for Change: The Detrimental Impacts of Crawford v. Washington on Domestic Violence and Rape Prosecutions*, 37 B.C.J.L. & Soc. Just. 1, 35 (2017); William J. Migler, *An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings*, 20 Chap. L. Rev. 357, 370 (2017); H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning Up the "Greatest Legal Engine Ever Invented"*, 27 Cornell J.L. & Pub. Pol'y 145, 176 (2017).

G. Schools Should Not be Required to Provide Parties With Access to All Collected Evidence.

In § 106.45(b)(3)(viii), the proposed rule details how institutions must prepare investigative reports and provide the parties with access to evidence. These provisions raise several serious concerns.[142]

First, no platform exists that is wholly immune from "downloading or copying the evidence." Among many other vulnerabilities, the relevant evidence could easily be photographed using a smartphone camera. The final rule should not require schools to provide such sensitive information in a way that exposes both the respondent and the complainant.

Second, providing all parties access to "any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility" is overbroad. Schools should not be required to provide the parties with access to evidence that is privileged and confidential, such as "communications between the complainant and a counselor or information regarding the complainant's sexual history."[143] Schools also cannot provide parties with access to evidence that it itself cannot use, such as an illegal voice recording in a state such as Pennsylvania that requires two-party consent.[144] Nor should a school provide either party with evidence that was collected as part of the investigation but which is irrelevant.

Nor can schools be required to provide access to information where doing so is barred by the Family Educational Rights and Privacy Act (FERPA). The Department mischaracterizes the law when it asserted in the preamble that this provision "is consistent" FERPA, "under which a student has a right to inspect and review records that directly relate to that student." 83 Fed. Reg. at 61,475. FERPA does not allow one student to review information about other students. 34 C.F.R. § 99.12(a). And not every piece of evidence obtained as part of an investigation is necessarily "directly related to" *each* student who is a party to an investigation for the purposes of FERPA.[145] For example, a complainant's full medical history, even if obtained as part of an investigation to ascertain the extent of alleged physical injuries, is both irrelevant to the specific

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[142] *See, e.g.*, Richard Reed, *Feds concerned about loophole that may have enabled UO to get alleged rape victim's records,* The Oregonian (June 13, 2015), https://www.oregonlive.com/education/index.ssf/2015/06/feds_voice_concern_about_looph.html (discussing disclosure of student's confidential counseling records regarding an alleged rape on campus and the impact on the survivor and other legal liability).

[143] 2011 DCL at 11 n.29.

[144] Digital Media Law Project, *Recording Phone Calls and Conversations*, http://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations (last checked Jan. 18, 2019).

[145] 20 U.S.C. § 1232g(a)(4)(A)(i).

allegation at issue and not at all "directly related" to the respondent. Likewise, "if a school introduces an alleged perpetrator's prior disciplinary records to support a tougher disciplinary penalty, the complainant would not be allowed access to those records."[146]

Therefore, any final rule should permit schools to place reasonable limitations on a respondent's access to information.

H. The Standard of Proof Should Remain Preponderance of the Evidence.

Proposed regulation § 106.45(b)(4)(i) requires the recipient to:

> [A]pply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

Although the proposed regulation expressly provides an "option" regarding the standard that may be used, requiring that the preponderance of the evidence standard only be used if it is also used in other specific contexts could effectively eliminate the preponderance of the evidence standard in Title IX proceedings. This proposal is presented under a veneer of treating complaints equitably, but would, in fact, often create an inequitable situation at odds with Title IX's text and intent, exceed the Department's authority under Title IX, and be strikingly unfair to those subjected to sexual harassment and sexual violence.

First, the idea that a heightened standard of proof should apply to claims of sexual harassment and violence in school disciplinary processes misapprehends these proceedings' fundamental purpose. While of great consequence to all parties involved, these are not criminal proceedings. In criminal proceedings, a heightened standard of proof is constitutionally mandated and appropriate given the retributive nature of criminal sanctions, as well as the potential of loss of life or liberty. In contrast, student disciplinary proceedings must be viewed in light of the institutions' educational missions. As stated in a publication by the Association for Student Conduct Administration, "[t]he goal is to protect the academic environment."[147] That goal is undermined by a standard that "says to the victim/survivor, 'Your word is not worth as

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[146] 2011 DCL at 11.

[147] Chris Loschiavo & Jennifer Waller, PhD, *Preponderance of the Evidence Standard: Use in Higher Education Campus Conduct Processes*, 1, 3, Association for Student Conduct Administration, https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf.

much to the institution as the word of accused' or, even worse, that the institution prefers that the accused student remain a member of the campus community over the complainant."[148]

Second, the "preponderance of the evidence" standard in this context is widespread and has been in use for decades. In fact, the Department has required schools to employ this standard since at least 1995, under both Democratic and Republican administrations.[149] Further, contemporaneous surveys showed that the majority of colleges and universities employed this standard even before the Department's 2011 guidance.[150] Tellingly, multiple rounds of comments on Title IX guidance in the past 20 years yielded no complaints about, or even mention of, the preponderance of evidence standard.[151]

While the proposed rule pushes back on the analogy to civil litigation as one of its rationales for employing the clear and convincing standard, 83 Fed. Reg. at 61,477, the Department cannot dispute that the preponderance of the evidence standard is typical in civil lawsuits, including ones in which civil rights violations—such as Title IX and Title VII—are alleged.[152] The 2001 Guidance noted that "[w]hile *Gebser* and *Davis* made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX."[153] The Department's proposed rule turns Title IX on its head, making it harder for a victim of sex discrimination to obtain relief than a respondent. In this regard, a respondent will now be able to sue a school for a "due process" violation of Title IX and only have to prove the

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[148] *Id.* at 4.

[149] Katherine K. Baker, et al., *Title IX & the Preponderance of the Evidence: A White Paper*, Feminist Law Professors 1, 10 (Aug. 7, 2016), http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf (citing Letter from Gary D. Jackson, Reg'l Civil Rights Dir., Off. for Civil Rights, U.S. Dep't of Educ., to Jane Jervis, President, The Evergreen St. Coll. (Apr. 4, 1995) (Clinton Administration); Letter from Howard Kallem, Chief Att'y, D.C. Enforcement Off., Off. for Civil Rights, U.S. Dep't of Educ., to Jane Genster, Vice President and General Counsel, Georgetown Univ. (Oct. 16, 2003) (George W. Bush Administration)).

[150] *Id.* at 7 (citing two studies showing that shortly before 2011 DCL, (1) 80 percent of schools with a standard of evidence used the preponderance standard and (2) 61 percent of college and university administrators surveyed used the preponderance standard).

[151] *Id.* at 9–10.

[152] *See, e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (noting that under the "conventional rule of civil litigation," the preponderance of the evidence standard generally applies in cases under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252–55 (1989) (approving preponderance standard in Title VII sex discrimination case) (plurality opinion); *id.* at 260 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment).

[153] 2001 Guidance at vi; *see also Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

case by a preponderance of the evidence, whereas the complainant would have to prove sexual harassment in the first instance by the higher clear and convincing standard.

Further, as acknowledged in the NPRM, the Department's own OCR uses a preponderance of the evidence standard. 83 Fed. Reg. at 61,477. OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX.[154]

The "preponderance of the evidence" standard is the only standard of proof that can provide for an "equitable resolution" of student harassment complaints,[155] as required under Title IX.[156] Absent a statutory instruction to the contrary, the Department has no authority to depart from the usual allocation of risk between parties to grievance proceedings. In discussing appellate rights, the Department recognizes that each party in grievance proceedings is equally deserving of an accurate outcome. 83 Fed. Reg. at 61,478–79. This recognition makes the Department's proposal to use a standard other than preponderance of the evidence—which privileges one party's interests over others' and the search for truth—all the more inexplicable.

To be sure, this proposed regulation applies by its terms to complaints against employees as well, and some colleges and universities have policies for faculty under which a higher standard of proof is used. But schools have a qualitatively different relationship with their employees than their students. In the modern university context, courts "have increasingly recognized a college's duty to provide a safe learning environment both on and off campus."[157] This most obviously manifests itself in the student housing context, where students are almost entirely dependent on the university for security, and have little to no power to enhance their security themselves.[158] The proposed regulation's requirement that schools can only use a preponderance of the evidence standard for student complaints if they use that same standard for

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[154] U.S. Dep't of Educ., *Case Processing Manual,* Art. III, § 303, https://www2. ed.gov/about /offices/list/ocr/docs/ocrcpm.pdf. Notably, this Manual was updated under this Administration (in November 2018) and retained the preponderance of the evidence standard.

[155] *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983) ("A preponderance-of-the-evidence standard allows both parties to 'share the risk of error in roughly equal fashion.' Any other standard expresses a preference for one side's interests.") (internal quotation marks omitted). *See also Steadman v. SEC*, 450 U.S. 91, 96 (1981) (same).

[156] *See* 34 C.F.R. §106.8(c) (construing Title IX to require equitable resolution of grievances).

[157] Kristen Peters, Protecting the Millennial College Student, 16 S. Cal. Rev. L. & Soc. Just. 431, 448 (2007); *see also Duarte v. State*, 88 Cal. App. 3d 473 (Cal. 1979) (noting that students "in many substantial respects surrender[]the control of [their] person[s], control of [their] own security to the university"); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335–36 (Mass. 1983) (holding that "[p]arents, students, and the general community . . . have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.").

[158] *See Mullins*, 449 N.E.2d at 335.

complaints against employees ignores the fundamental fact that schools are obliged to protect their students in different ways than their employees, which is especially true for students who are minors.[159]

The proposed rule prohibits schools from having a different standard of proof for allegations of sexual harassment than it does for other infractions that carry the same potential sanctions. The reasons provided for this change further highlight the inherent one-sidedness underlying the proposal to alter the standard of proof. Here, the Department only discusses the "heightened stigma often associated with a complaint regarding sexual harassment," 83 Fed. Reg. 61,477, but fails to recognize the trauma associated with being subjected to sexual harassment or violence, and how this could be exacerbated by applying an evidentiary standard of proof favoring the accused over the individual subjected to sexual harassment or violence.

The proposed rule will have the effect of deterring complainants from filing administrative school complaints and instead encourage additional costly civil litigation, an additional cost impact for which the Department fails to account. Assuming that the Department's proposed regulations are adopted, a complainant filing a civil lawsuit under Title IX would now be required to meet the same extremely high burdens—e.g., standards for deliberate indifference, actual knowledge, and sexual harassment—in school as in court. But the court case would be adjudicated under the preponderance of the evidence standard, a lower burden of proof than would be available in many school grievance proceedings under the proposed rule. In addition, the complainant would be able to obtain damages in court, something that the Department's proposed rule explicitly prohibits in the administrative context.

The problem is that civil adjudication is only an alternative for students with means to pursue it. Students without the financial means would be uniformly disadvantaged in pursuing sexual harassment complaints. Additionally, where school proceedings are perceived unfair or unduly burdensome, some students may choose to pursue criminal actions, which can be re-traumatizing for a person subjected to sexual harassment and more stigmatizing for the accused.

Finally, the proposed rule may also prove unworkable for many institutions that will be unable to meet two masters. To meet the second requirement of consistency between faculty and student complaints, colleges and universities will most frequently be required to adopt the higher standard of proof, clear and convincing, since tenured faculty often are entitled by law and contract to an application of the higher standard. But to meet the first requirement of consistency between conduct code violations with similar maximum penalties, many colleges and universities that handle all conduct code violations using a preponderance of the evidence standard would be required to adopt the higher standard of proof. The Department's rule will thus likely require colleges and university to enact far reaching changes to conduct violation policies and practices that extend well beyond the scope of the Department's authority to regulate under Title IX, inappropriately reaching conduct that has nothing to do with

[159] *See supra* note 99.

discrimination on the basis of sex—for example, cheating and simple battery. Further, the Department provides no explanation for why these proceedings—faculty disciplinary standards and code of conduct complaints—are more appropriate analogues to Title IX's disciplinary proceedings than Title VII or sexual harassment civil proceedings in court.

I. The Written Determination Must Include Steps to Eliminate Any Hostile Environment.

Proposed § 106.45(b)(4)(ii) provides a summary of what the final written determination must include. Any final rule should confirm that the written determination must also include assurances that the school will take steps to prevent recurrence of harassment, correct its discriminatory effects, and prevent any retaliation against the complainant.[160] As we have discussed, the effects of harassment can go beyond the complainant and the respondent. The Department has long recognized that Title IX requires schools to "eliminate any hostile environment that has been created," which may require implementing corrective measures throughout the education community.[161]

J. The Department Should Clarify that both Complainants and Respondents Have Equal Access to the Appeal Process.

As currently written, § 106.45(b)(5) states that "[i]n cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent." This could be read to suggest that a complainant can only appeal the remedies provided and not the substantive findings. To avoid a rule that could be read to favor one party over another, any final rule should clarify that both complainant and respondent should be given equal grounds for appeal. In addition, the final rule should clarify that even if a complainant is not entitled to a particular sanction, complainant can still appeal and seek a different sanction than the one imposed.

K. Any Informal Resolution Must Empower Complainants and Seek Restorative Justice.

In § 106.45(b)(6), the Department proposes to allow informal resolution of any sexual harassment complaint. The use of informal resolution has been shown to have powerful remedial benefits in the criminal justice system.[162] But any use of informal resolution under Title IX must be voluntary and only initiated after the parties have full notice of their options, including the right to proceed with a formal resolution process. In addition, informal resolution should allow

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[160] 2001 Guidance at 17.

[161] 2001 Guidance at 16.

[162] *E.g.*, Common Justice, *Common Justice Model*, https://www.commonjustice.org/common_justice_model (last checked Jan. 29, 2019).

for an option to access voluntary restorative justice. And schools should have the option not to offer informal resolution in cases of sexual violence or assault, which may raise more difficult issues that some schools may not have the resources to adequately address.

To that end, any final rule that allows schools to offer an informal resolution process must require them to provide complainants and respondents with written notice of the options for informal resolution at the outset, but not pressure students to pursue an informal resolution. Confirmation that the parties received written notice of the availability of informal resolution should be maintained by the school. Any final rule should also state that any informal resolution process must involve a trained staff member. With voluntary written consent of both parties, a face-to-face meeting may be part of an informal process, but at no point should a complainant be required to resolve the problem alone with the respondent.[163] Both parties must receive written notice of the outcome of the informal resolution process, including any remedies and sanctions. Finally, both parties must be informed of the right to discontinue the informal process at any time and file a formal complaint.[164]

L. The Recordkeeping Retention Period Should Be Extended.

Sections 106.45(b)(7)(i)–(ii) of the proposed rule set forth a requirement that all recipients "create, make available to the complainant and respondent, and maintain for a period of three years records of" any sexual harassment investigation, the results of that investigation, any appeal from that investigation, and all training materials relating to sexual harassment. The explicit requirement to retain such records is a positive step that will help improve consistency in investigations and allow the Department to assess compliance with Title IX.

But the Clery Act requirement to report all crimes that occurred within the last three years has little to do, as a matter of policy or law, with how long recipients should *retain records* of sexual harassment and sexual assault after they have been reported. It does not follow that the period of *retention* for such records should be tied to the Clery Act's limitation period for *reporting* specific campus crimes.[165]

In fact, when interpreting the Clery Act's requirement to "Retain Records," the Department has explicitly held that all three years of records relied upon for annual reporting must be kept for another three years *after* the publication of that year-end report—or "in effect,

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[163] 2001 Guidance at 21.

[164] *Id.* In some cases, informal resolution may also require the existence of a safety guardrail to ensure that the school has made a sufficient inquiry to determine the scope of likely harm to the complainant and others in the school community and the extent of the injuries to fashion appropriate redress.

[165] *See* The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"), 20 U.S.C. § 1092(f); 34 C.F.R. 668.46(c)(1) (requiring schools to annually report all crimes which occurred in the prior three calendar years by the end of the following year).

seven years."[166] The proposed regulation asserts that it "tracks the language in the Clery Act," thereby implying that this proposed change is consistent with current law. 83 Fed. Reg. at 61,471, 61,473, 61,475, 61,476, 61,478. However, as demonstrated above, the proposed three-year retention requirement is inconsistent with the Clery Act's seven-year retention requirements. The retention period in the proposed regulations therefore should be, at minimum, seven years.

In addition, as a practical matter, a three-year recordkeeping requirement could undermine criminal prosecutions related to the incidents at issue. For example, several states have no statute of limitations for rape or certain other serious sexual offenses.[167] In other states, the statutes of limitations for sexual offenses far exceed the three-year recordkeeping requirement.[168] And sexual offenses against minors are often subject to significantly lengthened statutes of limitations.[169]

The proposed regulations therefore would permit recipients to discard vital records that could help the criminal prosecution of sexual assault and rape well before the statute of limitations for such crimes has run, thereby potentially letting the perpetrators of these serious crimes go free. Given that so many related crimes have statutes of limitations substantially longer than the three-year requirement in the proposed regulations, the retention policy is inadequate, and should be extended in any final rule.

V. The Department Should Not Adopt a Title IX Rule that Adversely Affects Schools' Ability to Go Beyond Title IX's Requirements in Addressing Sexual Harassment and Violence, Including Their Ability to Comply with Other Applicable Laws.

A. Title IX Cannot, And Does Not, Restrict The Ability of States and Schools To Provide Broader Protections Against Sex Discrimination.

The proposed rule's new general standard and definitions of terms, as discussed above,[170] would narrow schools' obligations to respond to sexual harassment and assaults and decrease the

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[166] U.S. Dep't of Educ., *The Handbook for Campus Safety and Security Reporting* 9–11 (2016 Ed.); *see also id.* at 6–11 ("As with all other Clery Act-related documentation, your institution is required to keep emergency test documentation for seven years.").

[167] *See, e.g.*, Cal. Penal Code §§ 261, 799; N.J.S.A. 2C:1-6a(1).

[168] Any "major sexual offense" committed in the state of Pennsylvania can be prosecuted within twelve years of its occurrence. 42 Pa.C.S.A. § 5552(b)(1).

[169] In California, for example, assaults against minors can be prosecuted at any point up until the victim's 40th birthday. Cal. Penal Code § 801.1(a)(2). In Pennsylvania, assaults against minors can be prosecuted until the victim's 50th birthday. 42 Pa.C.S.A. § 5552(c)(3). In New Jersey, "criminal sexual contact" involving minor victims may be prosecuted up to five years after the victim turns 18. N.J.S.A. 2C:1-6b(4).

[170] *See supra* Section II.

protections afforded to those subjected to sexual harassment and assault. In addition, this newly-narrowed definition of sexual harassment could potentially have negative consequences in other contexts. Section 106.45(b)(3) of the proposed regulation holds that whenever "the conduct alleged by the complainant would not constitute sexual harassment as defined in section 106.44(e) . . . , the recipient *must dismiss* the formal complaint with regard to that conduct." (emphasis added). One reading of this requirement would dictate that no recipient could attempt to address sexual harassment or assault if the basis of those claims did not fit within the newly-narrowed federal definition provided in the proposed regulations, even where the recipient's own policy or state law would nevertheless prohibit the actions alleged by the complainant. We believe that the proposed rule at § 106.45(b)(3), if finalized, must be revised to state, consistent with other parts of the proposed regulation,[171] that Title IX cannot, and does not, restrict the ability of states and schools to provide broader protections against sex discrimination. Further, we believe that the Department should ensure that schools can continue to enforce additional civil rights protections.

Even if the proposed rule allows broader protections against sex discrimination, mandating that schools dismiss Title IX complaints that fall outside of the regulations' scope will still burden schools by requiring them to create two separate procedures: one for Title IX sexual harassment and one for conduct that may constitute sexual harassment under other applicable law or policies but not under the Department's interpretation of Title IX. 83 Fed. Reg. at 61,475 (noting that "a recipient remains free to respond to conduct that does not meet the Title IX definition of sexual harassment"). Yet the Department has long held that Title IX does not require a school "to provide separate grievance procedures for sexual harassment complaints."[172] Indeed, many schools prohibit sexual harassment in the school's code of student conduct.[173]

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[171] Other sections of the proposed regulation accurately reflect that Title IX does not preempt the field of sex discrimination. *See, e.g.*, 83 Fed. Reg. at 61,475 ("a recipient remains free to respond to conduct that does not meet the Title IX definition of sexual harassment"); (responses could include "responding with supportive measures for the affected student or investigating the allegations through the recipient's student conduct code" and that "such decisions are left to the recipient's discretion in situations that do not involve conduct falling under Title IX's purview").

[172] 2001 Guidance at 19.

[173] *E.g.*, Uni. of Pittsburgh, *Title IX—Policies and Procedures*, https://www.titleix.pitt.edu /policies-procedures (Jan. 17, 2019); San Francisco Unified School District (SFUSD), *Administrative Regulation 5145.3* (Aug. 8, 2016), http://www.sfusd.edu/en/assets/sfusd-staff/Equity/Nondiscrimination, %20Harassment%20-%20AR%205145.3%20-%20English%20(8.8.16).pdf (defining harassment on the basis of sex as "[a]cts of verbal, nonverbal, or physical aggression, intimidation, or hostility that are based on sex, gender identity, or gender expression, regardless of whether they are sexual in nature, where the act has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment ...."); Rutgers, the State University of New Jersey, *Policy Prohibiting Discrimination and Harassment,* Section 60.1.12 (rev. Jul. 5, 2016), http://catalogs.rutgers.edu/generated/ejbppp_current/pg67.html (including indirect harassment and hostile environment created by generalized harassing behaviors); The George Washington Univ., *The Sexual and*

Moreover, it's unclear what a school would do differently when considering a non-Title IX sexual harassment complaint, given that the Department purports to believe that its grievance proposals constitute the floor of fair and equitable proceedings.

If the Department were, however, to impose regulations that inhibit state laws or recipient codes of conduct that are more protective of those subjected to sexual harassment for behavior that falls outside of the Department's narrowed definition of sexual harassment under Title IX, those regulations would be inconsistent with civil rights law and Title IX generally. In creating the Department of Education, Congress explicitly announced its intention "to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs," and specifically not to "to increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the

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Gender-Based Harassment and Interpersonal Violence Policy (July 1, 2018), https://my.gwu.edu/files/policies/SexualHarassmentFINAL.pdf (defining gender-based harassment to include "harassment based on gender, sexual orientation, gender identity or gender expression, which may include acts of aggression, intimidation or hostility, whether verbal or non-verbal, graphic, physical or otherwise ...."); Georgetown Univ., *Code of Student Conduct 2018-2019*, Section 33, https://studentconduct.georgetown.edu/code-of-student-conduct (defining sexual harassment "as any unwelcome conduct of a sexual nature, including sexual advances, request for sexual favors, or other verbal or physical conduct of a sexual or gender-based nature when: [1] Submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment or academic relationship; or [2] Submission to or rejection of such conduct is used as a basis for making an employment or academic decision affecting an individual; or [3] Such conduct has the purpose or effect of interfering with an individual's work or academic performance, denying or limiting an individual's ability to participate in or benefit from the University's education programs, or creating an intimidating, hostile, or offensive environment for work or academic pursuit"); Howard Univ., *Code of Student Conduct* (Apr. 18, 2015), Section VI.23, http://www.howard.edu/secretary/documents/StudentCodeofConductApprovedApril182015.pdf (same); D.C. Code § 38-1802.04(C)(1A)(5) ("title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) ... shall apply to a public charter school"); District of Columbia Public Charter School Board, *Resources for Transgender and Gender-Nonconforming Students* (last checked Jan. 24, 2019), https://www.dcpcsb.org/resources-transgender-and-gender-nonconforming-students ("Title IX protects all students, including transgender and gender-nonconforming students, from sex discrimination. Title IX encompasses discrimination based on a student's nonconformity with sex stereotypes and gender identity, including a student's transgender status"); Office of the State Superintendent of Education, *Civil Rights and Gender Equity Methods of Administration (MOA) Coordination*, https://osse.dc.gov/service/civil-rights-and-gender-equity-methods-administration-moa-coordination ("Under federal law, all students in the District are protected against discriminatory actions based upon a student's sex, race, ethnic origin or disability. [Career and Technical Education] [(]CTE[)] students and families should expect the following: ... Your school and school district must post the federal laws that explicitly note your rights that protect you against any type of discrimination that would prevent deter you from equal access to enrolling and completing CTE courses; ... [and] Your school and school district must draft grievance policies, let you know how to file a grievance, and who the contact person is ...."); Wash. Admin. Code § 478-121-155 (2017) (prohibiting, in the Student Conduct Code for the University of Washington, sexual harassment).

States.[174] Moreover, federal laws that are designed to protect citizens are presumed to allow for the enactment of state and local legislation that is more protective, barring explicit *congressional* intent to the contrary.[175] For example, Title VII, which prohibits discrimination in employment in certain contexts, does not bar states from prohibiting discrimination in employment in other contexts that are not covered by Title VII.

Nothing within Title IX's text or history suggests Congress intended the unusual result of impeding state and local efforts to protect those subjected to sexual harassment more broadly than Title IX or preventing schools from proactively avoiding Title IX liability (or for that matter, impeding their efforts to comply with other federal laws that may apply, such as Title VII).

B. State Laws Provide Greater Protections for Students In Their States.

As might be expected, states already have enacted laws that provide greater protections than those required by Title IX.

For example, California defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting," so long as the conduct would have "the purpose or effect of having *a negative impact* upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment."[176] This definition goes beyond the definition in the proposed regulation, which would require that the objectionable conduct "effectively den[y]" the complainant of equal access to the educational program or activity. 83 Fed. Reg. at 61,496. California also provides clear protection against discrimination for sex-based and gender-based harassment, including harassment on the basis of gender identity and sexual orientation. Sexual harassment can be proved based on a showing of severity or pervasiveness, which, as discussed provides additional protections not in the proposed rule.

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[174] 20 U.S.C. § 3403(a).

[175] *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1543 (D.C. Cir. 1984) ("[F]ederal legislation has traditionally occupied a limited role as the floor of safe conduct; before transforming such legislation into a ceiling on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance, . . . courts should wait for a clear statement of congressional intent."); *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 617 (7th Cir. 2003) ("[M]any federal regulatory laws, establish a floor, but not a ceiling, on state and local regulation.").

[176] Cal. Ed. Code § 212.5(c); *see also* Cal. Educ. Code 48900.2 (sexual harassment must "be sufficiently severe **or** pervasive to have a negative impact upon the individual's academic performance or to create an intimidating, hostile, or offensive environment").

Another example is the state of Oregon, which has a number of laws that protect the civil rights of students.[177] By statute and regulation, Oregon prohibits discrimination on the basis of sex,[178] and also prohibits sexual harassment of students by staff and other students.[179] Higher

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[177] The Oregon Attorney General represents both the Oregon Department of Education and the Higher Education Coordinating Commission, which have roles in addressing discrimination in Oregon's colleges and universities.

[178] Oregon Revised Statute (ORS) 659.850(1) prohibits discrimination defined as: "... any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability. "Discrimination" does not include enforcement of an otherwise valid dress code or policy, as long as the code or policy provides, on a case-by-case basis, for reasonable accommodation of an individual based on the health and safety needs of the individual." It further provides in (2) that: "A person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly."

[179] Oregon Administrative Rule (OAR), Chapters 589-021; ORS 342.704. The latter provides in relevant part:

(1) (b) Sexual harassment of students includes:

(A) A demand for sexual favors in exchange for benefits; and

(B) Unwelcome conduct of a sexual nature that has the purpose or effect of unreasonably interfering with a student's educational performance or that creates an intimidating, offensive or hostile educational environment; ...

(c) All complaints about behavior that may violate the policy shall be investigated;

(d) The initiation of a complaint in good faith about behavior that may violate the policy shall not adversely affect the educational assignments or study environment of the student; and

(e) The student who initiated the complaint and the student's parents shall be notified when the investigation is concluded.

(2) The State Board of Education shall adopt by rule minimum requirements for school district policies on sexual harassment of staff by students and other staff including, but not limited to, requirements that:

(a) All staff and students are subject to the policies;

(b) Sexual harassment of staff includes:

(A) A demand for sexual favors in exchange for benefits; and

(B) Unwelcome conduct of a sexual nature that has the purpose or effect of unreasonably interfering with a staff person's ability to perform the job or that creates an intimidating, offensive or hostile work environment;

(c) All complaints about behavior that may violate the policy shall be investigated;

Education Coordinating Commission (HECC) regulations, which apply to both private career schools and post-secondary universities, prohibit schools from "otherwise limiting any student in their enjoyment of a right, privilege or opportunity," which likely includes harassment claims.[180] Aggrieved students can file a complaint with HECC, which then reviews the complaint and determines whether it is valid.[181] Once HECC issues its order, such order would be subject to a contested case hearing through the Oregon Office of Administrative Hearings.[182]

All universities in Oregon are also required to have a written sexual assault protocol,[183] but many of the proposed rule's provisions would create inconsistencies. The protocol applies to

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(d) The initiation of a complaint in good faith about behavior that may violate the policy shall not adversely affect any terms or conditions of employment or work environment of the staff complainant; and

(e) The staff member who initiated the complaint shall be notified when the investigation is concluded.

[180] OAR 715-011-0050(8).

[181] OAR 715-011-0075

[182] OAR 715-011-0085.

[183] ORS 350.255 provides:

(1) Each public university listed in ORS 352.002 (Public universities), community college and Oregon-based private university or college shall adopt a written protocol to ensure that victims of sexual assault receive necessary services and assistance in situations where:

(a) The alleged victim of the sexual assault is a student at the university or college and the alleged sexual assault occurred on the grounds or at the facilities of the university or college; or

(b) The alleged perpetrator of the sexual assault is a student at the university or college, or a member of the faculty or staff of the university or college, regardless of where the alleged sexual assault occurred.

(2) A written protocol adopted under subsection (1) of this section must ensure that each victim who reports a sexual assault is provided with a written notification setting forth:

(a) The victim's rights;

(b) Information about what legal options are available to the victim, including but not limited to:

(A) The various civil and criminal options the victim may pursue following an assault; and

(B) Any campus-based disciplinary processes the victim may pursue;

(c) Information about campus-based services available to the victim;

(d) Information about the victim's privacy rights, including but not limited to information about the limitations of privacy that exist if the victim visits a campus health or counseling center; and

(e) Information about and contact information for state and community-based services and resources that are available to victims of sexual assault.

(3) A written notification provided under subsection (2) of this section must:

situations in which the alleged victim is a student and the assault occurred on the grounds or at the facilities of the university or if the alleged perpetrator is a student or member of faculty of the university, regardless of the location. As such, under Oregon law, universities have the ability to regulate activities of students that occur off-campus.[184] Under Oregon law, the complainant may provide notice to the university generally in order to trigger a review required by state standards; the complainant need not inform an official with authority to take corrective action as required under the proposed rule. Under Oregon law, public universities, including community colleges, and Oregon-based private universities and colleges, regardless of religious affiliation, are required to follow the sexual harassment and assault protocol.[185] Accordingly, in Oregon, the Department's proposed rule will drastically narrow the scope of Title IX investigations by imposing bottlenecks on almost every phase of the process, including the physical locations subject to the law, the level of formality of the notice required to initiate a grievance process, the applicable definition of "harassment," and the standard by which culpability must be determined. As a result, the proposed rule conflicts with Oregon's multiple discrimination statutes.

Another example is the state of Washington, which provides broad civil rights protections to individuals subjected to harassment and violence on the basis of sex and sexual orientation through its Law Against Discrimination (WLAD).[186] Because the Department's proposed Title IX regulation does not mention sexual orientation, Washington's law arguably provides greater civil rights protections. Further, because the purpose of the law is to deter and to eradicate discrimination in Washington, it requires liberal construction, and "nothing contained in the law shall 'be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights[.]'"[187]

Similarly, the state of Nevada, like California, defines sexual harassment more broadly than the proposed rule contemplates. Nevada's sexual harassment codes and guidelines are

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(a) Be written in plain language that is easy to understand;

(b) Use print that is of a color, size and font that allow the notification to be easily read; and

(c) Be made available to students:

(A) When a sexual assault is reported;

(B) During student orientation; and

(C) On the Internet website of the university or college.

[184] ORS 350.255.

[185] *Id.*

[186] Wash. Rev. Code § 49.60; Wash. Rev. Code § 49.60.030(1) ("The right to be free from discrimination because of … sex, … sexual orientation, is recognized as and declared to be a civil right."); *see also* Const. art. XXXI, §§ 1–2 (amend. 61) (equality of right shall not be denied or abridged on account of sex).

[187] *Marquis v. City of Spokane*, 922 P.2d 43, 49 (Wash. 1996).

designed to permit State agencies and organizations to be proactive and discipline or remove an employee before his/her actions subject the State to liability.[188] Further, Nevada's Clark County School District, like California, includes a broader definition of sexual harassment than the proposed regulation, identifying prohibited conduct as "sufficiently severe, persistent, **or** pervasive to limit a student's ability to participate in or benefit from an educational program or to create an intimidating, hostile, or offensive educational or work environment."[189]

Likewise, the University of Nevada, in Las Vegas and Reno, defines sexual harassment more broadly than the proposed rule, explaining sexual harassment incudes "sexual advancements, requests for sexual favors, and other visual, verbal or physical conduct of a sexual or gender bias nature" in situations including when "[t]he conduct has the purpose or effect of substantially interfering with an individual's academic or work performance, or of creating an intimidating, hostile or offensive environment in which to work or learn."[190]

The proposed rule's conflict with a number of current proactive laws and policies that deal with sexual harassment in many of our states, together with the decreased protections the proposed rule would afford to victims of sexual harassment, is yet another reason we oppose the proposed rule.

VI. Other Areas That Should Be Addressed Before Any Final Rule is Adopted.

A. Any Final Rule Should Reinstate the Longstanding Prohibition of Policies That "Suggest" Sex Discrimination.

Section 106.8(b)(2)(ii) of the proposed regulation unnecessarily, and without adequate justification, narrows the types of discriminatory publications that a recipient is prohibited from using and distributing to its applicants, students, and employees. The current regulation states that a recipient cannot "use or distribute a publication . . . which *suggests*, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex."[191] For many years, this section has addressed the use and distribution of materials by recipient

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[188] *E.g.*, Nevada Admin. Code 284.0995.

[189] Clark County School District Regulation, *Discipline: Harassment*, https://ccsd.net/district/policies-regulations/pdf/5141.2_R.pdf; *see also* Washoe County School District's policy, https://www.washoeschools.net/site/default.aspx?PageType=3&ModuleInstanceID=1853&ViewID=7b97f7ed-8e5e-4120-848f-a8b4987d588f&RenderLoc=0&FlexDataID=6800&PageID=1189 ("Sexual Harassment is a form of sexual discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive educational or work environment. The term sexual harassment includes sexual violence under Title IX of the Educational Amendments.").

[190] *See* University of Nevada, Las Vegas, *Policy Against Sexual Harassment,* § 4(c), https://www.unlv.edu/hr/policies/harassment#7 (last checked Jan. 28, 2019).

[191] 34 C.F.R. 106.9(b)(2) (emphasis added).

educational institutions that promote and perpetuate sex stereotypes through images or pictures, thereby discouraging applicants of one sex or another from applying or participating in a career path or type of class or program. The proposed change limits the prohibition to only publications that explicitly "state" a school's policy of engaging in different treatment on the basis of sex. This change is fundamentally inconsistent with Title IX's goals, for at least two reasons.

First, the proposed change is contrary to clearly established Supreme Court precedent that explicitly recognizes the right to be protected from discrimination and harassment based on sex, including sex stereotyping.[192] The Department has provided no statistical or other evidence to show that the rationale for this important provision has changed, or that sex-stereotyping no longer needs to be remedied in our educational institutions.[193] Nor has it provided any justification for retreating from clearly-established Supreme Court law on this issue.

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[192] *See Price Waterhouse*, 490 U.S. at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype of their group . . ."); *Oncale.*, 523 U.S. at 80 (recognizing that harassment on the basis of sex can include harassment of a female in "sex-specific and derogatory terms" motivated by "general hostility to the presence of women"); *see also* 2001 Guidance at 3 (recognizing that "gender-based harassment, which may include acts of verbal . . . hostility based on sex or sex-stereotyping . . . is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program.").

[193] The published policies and other distributed materials of a school can be particularly susceptible to "suggestions" of sex stereotyping, even where they do not "state" discriminatory rules. A prospective student is often introduced to an educational institution and its course offerings through the visual images in its publications issued by mail or posted on its website. Both male and female students continue to be subjected to sex stereotyping in the forms of visual images, statements, and conduct that discourages them from engaging in, limits, or denies their access to vocational and education career paths based on sex. This includes male students discouraged from engaging in dance or theater because these occupations are not sufficiently "masculine," and female students discouraged from participating in science or engineering based on stereotypical conceptions of a woman's ability to do math and science. *See, e.g.*, Rachael Pells, *Sexism in schools: 57% of teachers admit to stereotyping girls and boys*, Independent (Feb. 8, 2017), https://www.independent.co.uk/news/education/education-news/sexism-schools-poll-teachers-stereotypes-boys-girls-stem-subjects-sciences-maths-tech-a7567896.html (also noting that female employees in the US account for less than a quarter of STEM workers, despite making up almost half the overall workforce); Daniel Reynolds, *You Throw Like a Girl: Gender Stereotypes Ruin Sports for Young Women*, Healthline (July 2, 2018) (girls receive less encouragement from teachers and family members to be physically active and participate in sports; as a result, girls ages 8 to 12 are 19 percent less active, according to 2016 study), https://www.healthline.com/health-news/gender-stereotypes-ruin-sports-for-young-women#1; Claire Cain Miller, *Many Ways to Be a Girl, but One Way to Be a Boy: The New Gender Rules*, N.Y. Times (Sept. 14, 2018) (three quarters of girls 14 to 19 said they felt judged as a sexual object or unsafe as a girl, and three-quarters of boys said strength and toughness were the male character traits most valued by society), https://www.nytimes.com/2018/09/14/upshot/gender-stereotypes-survey-girls-boys.html; Suzanne Vranica, *Stereotypes of Women Persist in Ads*, Wall St. J. (Oct. 17, 2003).

Second, the proposed change is fundamentally inconsistent with the plain language of § 1681(a), which states that no person shall be "excluded from participation in [or] be denied the benefits of . . . any education program or activity receiving Federal financial assistance."[194] As the Supreme Court has recognized, Title IX protects students "not only . . . from discrimination, but also . . . from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving federal financial assistance'."[195] Therefore, a school can violate Title IX where a student is denied access to educational benefits and opportunities on the basis of gender, even in the absence of a facially discriminatory policy.[196]

The proposed change is inconsistent with and unsupported by the plain language of Title IX because it only prohibits explicit intentional discrimination while allowing implicit discrimination, which can nevertheless deny students a fair and equal education. Courts have consistently recognized and upheld Title IX regulations that prohibit policies found to have a discriminatory effect on one sex.[197] Indeed, this proposed change itself constitutes a discriminatory policy in violation of Title IX.

Moreover, prohibiting policies that "suggest" discrimination is not unique to the Title IX context; the Fair Housing Act and its implementing regulations have similarly been interpreted to prohibit publications advertising housing that "suggests" that a particular race would be disadvantaged.[198]

Finally, the proposed regulation's stated justification—that it would "remove subjective determination" from evaluating violations and make the requirement "more clear"—cannot excuse a result that harms the intended beneficiaries of Title IX—those subjected to discrimination on the basis of sex. 83 Fed. Reg. at 61,482. The justification also rings hollow, since, for more than thirty years, courts and administrators of Title IX have applied this regulation and others to address sex-stereotyping without apparent difficulty. The Department

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[194] 20 U.S.C. § 1681(a).

[195] *Davis*, 526 U.S. at 650; *see also Vinson*, 477 U.S. at 64 (stating in the employment context that Title VII's arguably narrower discriminatory prohibitions "evince[] a congressional intent to strike at the entire spectrum of disparate treatment of men and women").

[196] *See Davis*, 526 U.S. at 650 ("The statute makes clear that . . . students must not be denied access to educational benefits and opportunities on the basis of gender.").

[197] *See Mabry v. State Bd. of Cmty. Colleges & Occupational Educ.*, 813 F.2d 311, 317 n.6 (10th Cir. 1987) (compiling "regulations implementing Title IX [that] prohibit some facially neutral policies."); *Sharif by Salahuddin v. New York State Educ. Dep't*, 709 F. Supp. 345, 361 (S.D.N.Y. 1989) ("Several Title IX regulations specifically prohibit facially neutral policies. . . . with a discriminatory *effect* on one sex.").

[198] *See, e.g., Corey v. Sec'y, U.S. Dep't of Hous. & Urban Dev. ex rel. Walker*, 719 F.3d 322, 326 (4th Cir. 2013) (interpreting Fair Housing Act, 42 U.S.C. 3604(c) (prohibiting any publication which "indicates" discrimination); *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991) (same).

provides no support, empirical or otherwise, for its position that schools or courts have been hampered by a lack of clarity in this rule.

In sum, the stated basis for such a dramatic change is unsupported and inconsistent with Title IX's plain statutory language and objectives, established case law, and congressional intent.

B. The Proposal to Eliminate the Requirement that Institutions Invoke the Statute's Religious Exemption in Writing Raises Concerns of Fair Notice to Students.

The Department proposes to amend § 106.12 to eliminate the current requirement that an educational institution "shall" advise OCR "in writing" if it wishes to invoke Title IX's statutory exemption for educational institutions controlled by religious organizations to the extent application of Title IX "would not be consistent with the religious tenets of such organization."[199] The proposed amendment is unnecessary and raises a concern that students at some institutions will not know their rights under Title IX until it is too late.

The proposed amendment is unwarranted because schools' burden in notifying the Department regarding religious exemptions is minimal. The Department characterizes the current rule as "confusing," 83 Fed. Reg. at 61,482, but identifies no basis for confusion. And schools have successfully asserted religious exemption in letters to the Department hundreds of times over the past several decades.

In addition, we are concerned that the proposed amendment will lead to more students unknowingly enrolling in schools that believe themselves to be exempted from Title IX but do not claim the exemption publically, only to learn of their school's position after they seek to assert their Title IX rights. Students should know before they matriculate whether (and to what extent) their school intends to comply with Title IX, and they should be able to assume that they will enjoy Title IX's full protections unless the school has informed them otherwise. No student should learn, only after becoming a victim of discrimination, that their school considered itself exempt from the relevant requirements of Title IX. Even worse, under the proposal, a school seemingly could wait to assert its exemption from Title IX until after it initiates grievance procedures and a complainant undergoes cross-examination and has personal information shared with the respondent and others.

If the Department eliminates the current rule's letter requirement, the Department should require schools to disclose their Title IX exemption status to current and prospective students in writing and bar schools from claiming an exemption after the fact if they have affirmatively represented that they comply with Title IX.

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[199] 20 U.S.C. § 1681(a)(3).

C. Restriction of Remedies to Exclude "Damages" and Lack of Definition Inconsistently Limits Remedial Scheme Which Was Intended to Strike at the Entire Spectrum of Discrimination on the Basis of Sex.

Even in circumstances where an egregious violation of Title IX might warrant relief to an individual subjected to sexual violence and assault, proposed § 106.3(a) removes the ability of the Department to assess "damages," a remedy long available under common law. 83 Fed. Reg. at 61,495. In addition, the proposed regulation fails to define "damages," potentially leaving it open to an overly broad interpretation with a great impact on the intended beneficiaries of the statute, those subjected to sex discrimination. Therefore, the scope and impact of the change proposed by the Department on intended beneficiaries of the statute, and on the Department's ability to address and remedy noncompliance has not been adequately explained.

Specifically, the proposed change is contrary to the plain language of the statute, which authorizes the use of "any other means authorized by law."[200] The change inconsistently limits the Department's authority to provide remedies for noncompliance to only those means authorized in equity. The statutory enforcement language in Title IX mirrors language from the Civil Rights Act of 1964. But there, the drafters identified precisely where remedies would be limited.[201] Congress did not provide such a limit here. Yet the Department would impose one for the first time, more than 45 years after the passage of Title IX. This undermines Title IX's purpose and improperly usurps Congress's role.

Furthermore, OCR's public resolution agreements reflect that where noncompliance is found, the Department has historically provided compensatory or remedial services (e.g., counseling, tutoring, and academic support) to overcome or remedy the effects of harassment on the student, including, as warranted, funding for tuition where a student withdraws from the institution because a recipient has created, encouraged or permitted a hostile environment on the basis of sex.[202] Without a definition of damages, we are concerned that the proposed change may

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[200] 20 U.S.C. § 1682.

[201] 42 U.S.C. 2000a-3 (limiting relief to "preventative relief" only).

[202] *Southern Methodist University*, OCR Complaint Nos. 06-11-2126; 06-13-2081; 06-13-2088, https://www2.ed.gov/documents/press-releases/southern-methodist-university-agreement.pdf (in sexual harassment/sexual violence matter, requiring University to reimburse complainant for all university-related expenses (tuition/fees, housing/food, and books) incurred for the fall semester minus any scholarship and grant assistance received, and all counseling expenses incurred over a two-year period); *Tufts University*, OCR Complaint No. 01-10-2089, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01102089-b.html (in sexual harassment/sexual violence matter, voluntary resolution agreement includes reimbursement to the student complainant for educational and other reasonable expenses, incurred during a year time period, and a complaint review which, as appropriate, would provide remedies, such as referrals to counseling); *Princeton University*, OCR Complaint No. 02-11-2025, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/02112025.html (in sexual harassment/sexual violence matter, voluntary resolution agreement includes reimbursement for appropriate University-related expenses, as well as expenses for counseling, that Students 1-3 incurred

be used to impermissibly limit the authority granted by Congress to the Department to utilize "any other means authorized by law," thereby resulting in remedies and regulations that are inconsistent with the statute and its objectives, which include providing "individual citizens effective protection against [discriminatory] practices" and "overcom[ing] the effects" of such discrimination.[203]

D. Any Final Rule Should Include Guidelines for Confidentiality.

Issues relating to the confidentiality of information are critical to any discussion of how to effectively investigate and remedy sexual harassment and assault. As a result, any rule implementing Title IX should separately address schools' obligations with respect to requests by complainants to keep information confidential.[204] A school must, for instance, take all reasonable steps to honor a request from a complainant to keep his or her identity confidential. They should, however, notify the complainant that maintaining confidentiality may limit the schools' ability to effectively investigate and respond to allegations of harassment and that, depending on the nature of the complaint, certain information—including the identity of the complainant—must be disclosed if the student wishes to file a Title IX complaint. The school should inform the student of the actions it will take regardless of whether the student wishes to go forward with a formal complaint, including that it will take reasonable steps to prevent retaliation.

Furthermore, any final rule should make clear that a request by a student to maintain confidentiality does not free the school of its obligation to investigate and respond to the allegation. Rather, the school must still "investigat[e] the complaint to the extent possible,"[205] and it must also take reasonable actions to prevent recurrences of the conduct alleged by the complainant.

As discussed in Section IV.D, it may be possible to conduct a full investigation without revealing the name of the complainant. In other matters, a complete investigation may not be possible, but the school can nonetheless take certain actions, including seeking to identify whether there have been other complaints regarding the same individual and implementing measures that reiterate and reinforce Title IX prohibitions and provide remedies for the complainant that do not impact the due process rights of the respondent. And under all

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from the date each first reported alleged sexual assault/violence to the date of the resolution); *City University of New York, Hunter College*, OCR Complaint No. 02-13-2052, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/02132052.html (in sexual harassment/sexual violence matter, voluntary resolution agreement includes assessing whether complainant in case 1-3 and 5-7 and 9-12 suffered effects as a consequence of College not offering counseling or other interim measures or from any hostile environment created and take steps to address these effects).

[203] 20 U.S.C. § 1682; *Gebser*, 524 U.S. at 286, 288.

[204] *See* 2001 Guidance at 17–18.

[205] 2001 Guidance at 18.

circumstances, a school should consider whether other corrective action short of disciplining the accused individual may be appropriate.[206]

Finally, any final rule should make clear that, independent of specific requests by individuals to maintain confidentiality, schools have an affirmative obligation to preserve the confidentiality of all documents and evidence utilized in investigations of Title IX complaints.

E. Schools Have Continuing Obligations Following a Finding of Responsibility or Following an Independent Investigation.

The proposed regulations fail to explain the obligations Title IX imposes on schools following a finding of responsibility. Rather, the proposed regulations seem to imply that a school's duties upon such a determination extend no further than disciplining the students determined to be responsible, and then only if the determination was made through a formal proceeding. *E.g.*, Proposed § 106.45(b)(4). But schools' obligations go much further.

First, as discussed in Section II.E, a school has an independent obligation to protect its students by preventing and remedying harassment, even in the absence of a formal report. A school must take steps to end the harassment, if it is ongoing, and to prevent future harassment by the same individual. If the conduct was enabled by or reflects a toxic culture or other systemic problems, the school must address such systemic issues.

Furthermore, schools must address the effects of the harassment, which may include appropriate remedial actions for the complainant or the broader community.[207] It is for this reason that the safe harbor provisions addressed above[208] are inconsistent with Title IX to the extent that they erode schools' continued responsibilities to their students.

Critically, any regulations should also specify that a school's obligation to respond following a determination of harassment is not time-limited, and that the school must take steps to ensure that its remedial efforts are successful and to identify whether further efforts are necessary. The full extent of this obligation will depend in part on the nature and severity of the conduct at issue, but in all circumstances the school should understand that it maintains an obligation to take reasonable steps to address the ongoing impact of a violation of Title IX.

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[206] *See* 2001 Guidance at 18 ("Examples include conducting sexual harassment training for the school site or academic department where the problem occurred, taking a student survey concerning any problems with harassment, or implementing other systemic measures at the site or department where the alleged harassment has occurred.").

[207] *See, e.g.*, *Gebser*, 524 U.S. at 288–89; *Feminist Majority Found.*, 911 F.3d at 696.

[208] *See supra* Section II.E.

F. The Proposed Rule Fails to Sufficiently Address the Family Educational Rights and Privacy Act (FERPA).

As noted in Part IV.G, the proposed regulations do not adequately address the Family Educational Rights and Privacy Act (FERPA).[209] For example, FERPA generally forbids disclosure of information from a student's "education record" without consent of the student (or the student's parent).[210] The regulations need to address whether proposed regulation § 106.45(b)(3)(v)'s requirements that recipients provide each "party whose participation is invited or expected [at a hearing] written notice of the date, time, location, participants, purpose of all hearings, investigative interviews, or other meetings with a party" can include information about the sanction that will be implemented. Additionally, the proposed regulations and their accompanying justification focus only on the rights of respondents to have access to their educational records. *See, e.g.*, 83 Fed. Reg. at 61,475 (citing a student's "right to inspect and review records that directly relate to that student" pursuant to FERPA); 83 Fed. Reg. at 61,476 ("[t]he scope of the parties' right to inspect and review evidence collected by the recipient is consistent with students' privacy rights under FERPA, under which a student has a right to inspect and review records that directly relate to that student."). Equally important, however, and completely unaddressed by the proposed regulations, is the right of the complainant to have their educational records kept private.[211] The interplay of these competing rights should be addressed in any final regulations, particularly in light of Title IX's mandate that grievance procedures be equitable.[212]

VII. The Regulatory Impact Assessment Fails to Accurately Assess the Effect of the Proposed Rule.

The Department asserts the proposed regulations were issued "only on a reasoned determination that their benefits justify their costs," 83 Fed. Reg. at 61,484. However, even a cursory review of the Department's costs analysis reveals its inadequacy. The Department acknowledges that it "cannot estimate the likely effects of these proposed regulations with absolute precision." 83 Fed. Reg. at 61,484. While we agree it is difficult to precisely estimate the costs of the proposed regulations, a minimal review of the Department's analysis shows the costs of the proposed regulations are much higher than it estimates.

A. Ignored Costs.

The Department states the economic analysis explicitly excludes economic consequences of sexual assault incidents themselves, stating that it is "only intended to capture the economic

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[209] 20 U.S.C. § 1232g.

[210] 20 U.S.C. § 1232g (b)(1).

[211] 20 U.S.C. § 1232g (b)(1).

[212] *See* 34 C.F.R. § 106.8(c) (requiring grievance procedures adopted pursuant to Title IX provide for "equitable resolution" of student complaints).

impacts of this proposed regulatory action." 83 Fed. Reg. at 61,485. The Department's statement is self-contradictory. The proposed regulatory action is exclusively aimed at changing the laws and regulations governing sexual assault and harassment, which have concrete and obvious economic costs. The analysis cannot possibly capture the economic impacts of the proposed regulatory action if it excludes from any analysis the actual economic costs incurred by students subjected to sexual harassment and violence—the very students the regulations govern. To provide a cost estimate that even marginally reflects the realities of the regulation, the costs of sexual assault and harassment must be considered. For example, the cost of rape in the United States has been estimated to be $122,461 per survivor, or $3.1 trillion over all survivor's lifetimes, and these costs are borne by survivors, society, and the government.[213] In addition to considering the costs of sexual assault and harassment, the Department should consider the economic impact on students who will lose access to their education as a result of being denied justice under these proposed regulations.

However, even setting aside the rippling costs of students subjected to sexual harassment whose sexual assaults would be excluded from Title IX's purview, there are additional costs that the proposed regulation ignored.

1. Allegations that Do Not Meet the Proposed Stringent Requirements May Still Resurface as Costly Lawsuits.

While the Department finds savings in narrowing Title IX's scope, it ignores the costs stemming from the exclusion of allegations that would no longer fall within that scope. The Department anticipates a decreased number of investigations under the drastically scaled-down requirements in covered conduct/location, as well as the reduction in "responsible employees" to whom conduct may be reported. However, in order to seek justice for themselves, students will be forced file their allegations in court or with law enforcement. It is unreasonable to assume that the proposed changes will simply make these allegations disappear, especially amidst nationwide trends of increasing filings of sexual harassment and assault claims.[214]

The Department has the ability to assess, based on a review of prior and existing cases, how many will not be addressed or resolved under the proposed regulations. But it failed to undertake this task or provide the public with accurate and adequate information about the

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[213] Peterson et al., *Lifetime Economic Burden of Rape Among US Adults,* 52 Am. J. of Preventative Med. 691 (2017). These costs were not unknown to the Department, as the Department cited this study in their analysis. 83 Fed. Reg. at 61,485 n.16. The Department nevertheless disregarded these costs by assuming they would be unaffected by the proposed regulations. *Id.* at 61,485.

[214] *See* Jamie D. Halper, *In Wake of #MeToo, Harvard Title IX Office Saw 56 Percent Increase in Disclosures in 2018, Per Annual Report*, The Harvard Crimson (Dec. 14, 2018), https://www.thecrimson.com/article/2018/12/14/2018-title-ix-report; U.S. Equal Employment Opportunity Commission, *EEOC Releases Preliminary FY 2018 Sexual Harassment Data*, (Oct. 4, 2018), https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm (stating "charges filed with the EEOC alleging sexual harassment increased by more than 12 percent from fiscal year 2017").

impact. Nevertheless, it is reasonable to anticipate that because the Department has narrowed its jurisdiction, the nation will see both an increase in Title IX complaints in civil and criminal courts, as well as an increase in costly lawsuits alleging non-Title IX causes of action.

2. The Department Should Consider the Relationship Between Uninvestigated Allegations and Short- and Long-Term Absences.

Complainants whose Title IX allegations are not investigated may also have increased absences, which would decrease receipt of tuition and attendance-related funding by institutions of higher education (IHEs) and local educational agencies (LEAs). The Department did not include lost tuition costs for complainants who drop out or take a leave of absence from colleges or universities, or any decrease in attendance-related funding for LEAs, despite such absences being clearly contemplated as possible supportive measures for sexual misconduct complainants.[215] According to the Campus Climate Survey Validation Study, over 8 percent of rape victims and 1.6 percent of sexual battery victims dropped classes and changed their schedule, and over 21 percent of rape victims and 5.9 percent of sexual battery victims considered taking time off school, transferring, or dropping out.[216] These absences may have direct and indirect costs, which warrant the Department's consideration.[217]

3. Costs to Transgender Students.

Finally, the Department fails to even the mention the term "transgender" in the proposed regulations.[218] This overt exclusion may make transgender students less likely to report on-campus sexual harassment or sexual assault to the designated "coordinator." According to a recent survey of transgender people, 17 percent of K-12 students and 16 percent of college or

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[215] *Sample Language for Interim and Supportive Measures to Protect Students Following an Allegation of Sexual Misconduct,* White House Task Force to Protect Students from Sexual Assault 1, 6 (Sept. 2014), https://www.justice.gov/archives/ovw/page/file/910296/download.

[216] Krebs et al, *Campus Climate Survey Validation Study Final Technical Report*, Bureau of Justice Statistics Research and Development Series 1, 114 (Jan. 2016), https://www.bjs.gov/content/pub/pdf/ccsvsftr.pdf.

[217] U.S. Dep't of Educ., et al., *Dear Colleague Letter Regarding Chronic Absenteeism* at 1 (Oct. 7, 2015), https://www2.ed.gov/policy/elsec/guid/secletter/151007.html ("A growing and compelling body of research demonstrates that chronic absence from school . . . is a primary cause of low academic achievement and a powerful predictor of which students will eventually drop out of school.").

[218] The Department withdrew its May 13, 2016 Dear Colleague Letter on Transgender Students less than a year after its joint issuance with the U.S. Department of Justice's Civil Rights Division (U.S. Dep't of Educ., Office for Civil Rights, & U.S. DOJ, Civil Rights Division, *Dear Colleague Letter*, 1 (Feb. 22, 2017)).

vocational school students who were out or perceived as transgender reported leaving school because of mistreatment.[219]

B. Unreasonably Low Estimate of Percentage of Title IX Complaints Based on Sexual Harassment or Sexual Violence.

The Department's assumption that sexual harassment and sexual assault make up only 50 percent of Title IX complaints (83 Fed. Reg. at 61,488) is unreasonably low, relies on an unclear baseline, and ignores the nationwide uptick in sexual harassment complaints discussed above. As we have explained, sexual harassment is pervasive.

In addition to the low initial baseline, studies show there is an upward trend of sexual harassment-related Title IX complaints.[220] The Department's own OCR reported that there was a 277 percent increase and an 831 percent increase in its receipt of sexual violence complaints at the K-12 and postsecondary levels, respectively, since Fiscal Year 2011.[221] This upward trend means, at a minimum, that averaging prior years' complaints is not a fair extrapolation of sexual harassment-related Title IX claims.

C. The Department Provides Unreasonably Low Cost Estimates for Implementing the Proposed Rule.

The Department significantly underestimates the amount of time that will be required by Title IX coordinators to review any final rule and to revise local grievance procedures accordingly. The Department estimates that for LEAs, the Title IX Coordinator and a lawyer will spend 4 hours and 8 hours, respectively, reviewing any final regulations. 83 Fed. Reg. at 61,486. For IHEs, the Department estimates review would take 8 and 16 hours, respectively. 83 Fed. Reg. at 61,487. Given the dramatic nature of the changes contained in the proposed regulations, and the extensive and nuanced changes that will be required of recipients' own policies, it is unreasonable to assume that Title IX coordinators will require only a day or less to review, and that educational institutions' attorneys will only take two days or less to review. Further, the Department severely underestimates the time that will be required to revise grievance procedures to comply with any new regulations. The Department assumes that for LEAs, Title IX Coordinators will spend 4 hours and lawyers will spend 16 hours on revising grievance procedures. 83 Fed. Reg. at 61,486. The Department estimates these times will be doubled for IHEs. *Id.* This includes no time for stakeholder input on grievance procedure revisions and

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[219] S.E. James, et al, *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality 1, 11 & 136 (Dec. 2016), http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

[220] Celene Reynolds, *The Mobilization of Title IX across U.S. Colleges and Universities, 1994-2014,* 00 Social Problems 1 (Mar. 2018), https://doi.org/ 10.1093/socpro/spy005.

[221] U.S. Dep't of Educ., Off. for Civil Rights, *Securing Equal Educational Opportunity: Report to the President and Secretary of Education* (Dec. 2016), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf.

underestimates the amount of time required to revise procedures. Finally, the Department anticipates it will only take a single hour for Title IX coordinators to create or modify a "safe harbor" form for complainants who report sexual harassment but who do not want to file a formal complaint. 83 Fed. Reg. at 61,494. It is unreasonable to assume that a significant document intended to serve as a "safe harbor" would be created in only one (1) hour by a Title IX Coordinator, and that an attorney would not even review it. These cost estimates are arbitrary and unreasonably low.

The Department also assumes the Title IX Coordinator, investigator, and a decision maker will each spend 16 hours in training. 83 Fed. Reg. at 62,486. It is concerning that the Department would contemplate only that a single investigator and a single decision-maker would or should attend the training. 83 Fed. Reg. at 61,486. Especially since the Department is anticipating limiting the number of people who can accept formal complaints, it will be essential to provide training to all staff who interact with students regarding how to counsel students on the appropriate channels for instigating formal complaints. It will also be essential to provide training for students, parents and guardian on how to properly file complaints, so that they do not lose their rights due to an inconsequential procedural mistake. Further, the Department does not accurately represent the costs for training hearing officers and panels during live hearings, where they will need to be versed in evidentiary procedure and taking examination and cross-examination. In addition, the Department "do[es] not calculate additional costs in future years as [it] assume[s] that recipients will resume training of staff one[sic] their prior schedule after Year 1." 83 Fed. Reg. at 61,487. This limitation to one year of training costs and to training only individuals who can receive formal complaints underscores the Department's inappropriate focus away from the protection of students who are meant to be protected by Title IX.

There are also several ways in which the Department inappropriately underestimates the costs of investigations. First, the Department estimates "a reduction in the average number of investigations per IHE per year of 0.75." 83 Fed. Reg. at 61,487. It is unreasonable to assume this reduction, given that reports are, as described above, increasing, and the proposed regulations create significant additional avenues for complaints filed by respondents. Second, while the Department assumes an approximate reduction of 0.18 of the number of IHE investigations by disregarding off-campus sexual harassment (83 Fed. Reg. at 61,487), the Department fails to allocate time for the investigation that would need to occur for the jurisdictional analysis to establish where the incident occurs.

In addition to underestimating the time it will take for a recipient to investigate Title IX complaints, the Department underestimates the cost for the parties' representation in the investigative process. For responses to a formal complaint at the LEA level, the Department assumed that both parties would obtain legal counsel who would work for one hour and, in the alternative, estimated an average cost non-attorney advisor cost would be two attorney hours. 83 Fed. Reg. at 61,487. The calculated cost the Department associated with the representation is flawed in two respect. First, the Department assumes a rate of $90.71 per hour. 83 Fed. Reg. at

61,486. The Department provides no basis for this assumed rate for an attorney, which is significantly lower than the average hourly rate of attorneys.[222] Second, it is unreasonable to assume adequate representation could occur with representation by an attorney for only one hour (or two hours for a non-attorney) for a hearing, particularly one involving a complex investigation of a sexual assault.

Finally, the Department fails to appropriately estimate the costs of the live hearings required under the proposed regulations. The Department will require live hearings at IHEs, but fails to consider many of the increased costs this requirement will entail. For example, the Department does not estimate any costs for transcription and translation services that may be needed. Further, the Department estimates that in 60 percent of IHEs, the Title IX Coordinator also serves as the decision-maker. 83 Fed. Reg. at 61,488. Only allowing costs for an additional adjudicator in 40 percent of hearings is arbitrary and in direct contradiction to proposed regulation § 106.45(b)(4) which precludes the decision-maker from being the same person as the Title IX Coordinator of the investigation.

VIII. The Department Should Delay the Effective Date of the Rule.

If the Department adopts a final rule along the lines of its proposal, it should give schools adequate time to respond before the rule takes effect. We believe that an effective date no earlier than three years from the date of the final rule would be appropriate.

A compliance window of three years or more is warranted because the proposed rule represents a stark departure from the substantive and procedural standards that educational institutions have been applying for years. Schools will need time to overhaul their procedures, hire new staff, train employees, and disseminate information to students. Smaller schools in particular will require an extended period to come into compliance. For reasons discussed above, the Department's new rule will cause confusion among students, staff, and other stakeholders however quickly they are implemented, but the confusion will only be compounded if the Department does not allow schools enough time to respond appropriately.

Adopting an earlier effective date would be inconsistent with the Department's recent approach to other regulations that would apply to fewer schools than the proposed Title IX rule, and that would not require such significant programmatic changes. For instance, the Department has seen fit to allow schools until July 2019 to comply with provisions of its 2014 Gainful

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[222] *See, e.g.*, Jay Reeves, *Top 10 Hourly Rates by City*, Lawyers Mutual Byte of Prevention Blog, (Apr. 6, 2018), https://www.lawyersmutualnc.com/blog/top-10-lawyer-hourly-rates-by-city (listing lawyer rates by practice area ranging from $86/hour to $340/hour); Hugh A. Simons, *Read This Before You Set Your 2018 Billing Rates*, Law Journal Newsletters (Nov. 2017), http://www.lawjournalnews letters.com/2017/11/01/read-this-before-you-set-your-2018-billing-rates/ (indicating first year associates cost their employers approximately $111/hour). Further, it is unreasonable to assume adequate representation could occur with representation by an attorney for only one hour (or two hours for a non-attorney).

Employment rule[223] and its 2016 Borrower Defense rule,[224] and delayed the effective date of the 2016 Program Integrity and Improvement rule until July 2020.[225] Setting aside the reasonableness of the Department's decisions with respect to these other regulations, it would only be appropriate for the Department to adopt a similar compliance period for Title IX rule that would have more far-reaching consequences for many more schools.

IX. Conclusion

Proper enforcement of Title IX has an immense impact on our states, our colleges and universities, our K-12 schools, and most importantly, our students. Title IX requires schools to provide an education that is free from sexual harassment, violence, and discrimination. Our educational institutions, relying on prior guidance from the Department, have spent many years developing procedures and policies to address these issues, and they have made great strides in fostering more open and inclusive educational environments. The proposed rule, however, is a step backward, rather than a step forward, in achieving Title IX's goals. It would inject confusion and bias into the Title IX adjudicatory process. Survivors of sexual harassment and violence would face significant reporting obstacles under the new rule, further undermining the already too low sexual violence and harassment reporting rates. The proposed rule is not consistent with Title IX as written and fails to further its goals. It should be withdrawn.

Respectfully submitted,

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania

GURBIR S. GREWAL
Attorney General
State of New Jersey

XAVIER BECERRA
Attorney General
State of California

KATHLEEN JENNINGS
Attorney General
State of Delaware

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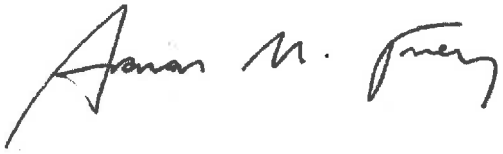
[223] *See* 83 Fed. Reg. 28,177 (June 18, 2018).

[224] *See* 83 Fed. Reg. 6,458 (Feb. 14, 2018); 83 Fed. Reg. 34,047 (July 19, 2018).

[225] 83 Fed. Reg. 31,296 (July 3, 2018).

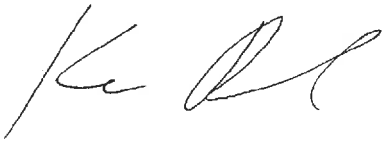
KARL A. RACINE
Attorney General
District of Columbia



AARON M. FREY
Attorney General
State of Maine

CLARE E. CONNORS
Attorney General
State of Hawai'i

BRIAN FROSH
Attorney General
State of Maryland



KWAME RAOUL
Attorney General
State of Illinois

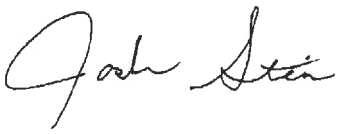
KEITH ELLISON
Attorney General
State of Minnesota

TOM MILLER
Attorney General
State of Iowa

AARON D. FORD
Attorney General
State of Nevada

ANDY BESHEAR
Attorney General
Commonwealth of Kentucky

HECTOR BALDERAS
Attorney General
State of New Mexico



JOSH STEIN
Attorney General
State of North Carolina

ELLEN ROSENBLUM
Attorney General
State of Oregon

PETER F. NERONHA
Attorney General
State of Rhode Island

T.J. DONOVAN
Attorney General
State of Vermont

BOB FERGUSON
Attorney General
State of Washington

Comment on Proposed Title IX Rulemaking

Docket No. ED-2018-OCR-0064, RIN 1970-AA14

Nondiscrimination on the Basis of Sex in Education Programs or Activities

Receiving Federal Financial Assistance

Federal Register Vol. 83, No. 230, p. 61462, November 29, 2018

Submitted January 30, 2019

Respectfully,

Jeannie Suk Gersen
John H. Watson Professor of Law
Harvard Law School

The Honorable Nancy Gertner
Judge, United States District Court, District of Massachusetts (ret.)
Senior Lecturer, Harvard Law School

Janet Halley
Royall Professor of Law
Harvard Law School

Institutional affiliations are provided for identification purposes only.

Thank you for the opportunity to comment on the Department of Education's Proposed Rule, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* designated "the Proposed Rule" in the following Comment.

We are professors at Harvard Law School who have researched, taught, and written on Title IX, sexual harassment, sexual assault, and feminist legal reform. We were three of the signatories to the statement of twenty-eight Harvard Law School professors, published in the Boston Globe on October 15, 2014, that criticized Harvard University's newly adopted sexual harassment policy as "overwhelmingly stacked against the accused" and "in no way required by Title IX law or regulation."

We strongly support vigorous enforcement of Title IX to ensure that students enjoy educational programs and activities unburdened by sexual harassment. We believe in sanctions for sexual harassment only under a clear definition of wrongful conduct and after a process that is fair to all parties. With these dual objectives in mind, we have reviewed the Proposed Rule and agree with some aspects and disagree with others. We agree (with some suggested amendments) with the Rule's treatment of the burden of proof, the rejection of the single-investigator model, and the requirement of a live hearing process. We believe that the rules we endorse do not undermine the critical goal of enforcing Title IX. We have serious concerns about the provisions on cross examination and the definition of sexual harassment, and propose revisions that will be more protective of complainants. We strongly object to provisions encouraging schools to file complaints when they have multiple allegations against a single potential respondent but no formal complainant: the inquiry there should be refocused on the threat of harm and take into account the complainants' as well as the respondents' interests. We also strongly object to the deliberate indifference standard for schools' ultimate responsibility to respond to sexual harassment.

Here is a Table of Contents to the Comment as a whole:

PART ONE:

DUE PROCESS

While we share the concerns that animated the Dear Colleague Letter of 2011, too often, schools went way beyond the few clear directives contained in it and in the 2014 Q&A, in their fear of attracting negative attention from the Office for Civil Rights. The result was a perfect storm of due process violations and a loss of legitimacy for important Title IX enforcement.

With the Proposed Rule, the Department commits itself to reforming unfair Title IX processes. We discuss the provisions related to due process in this Part.

Neutral and Independent Decision-makers

Provisions: Sections 106.8(a), 106.45(b)(1)(iii), and 106.45(b)(4)(i)

Summary of Provisions: Section 106.8 provides that schools must appoint at least one person to serve as a Title IX Coordinator. Section 106.45(b)(1)(iii) provides that anyone appointed as a Title IX Coordinator, investigator, or decision-maker must be without any "conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent." Section 106.45(b)(4)(i) provides that "decision-maker(s) … cannot be the same person(s) as the Title IX Coordinator or investigator[.]"

Discussion: These provisions make it clear that the provision of neutral and independent decision-makers and a division of roles among them are fundamental aspects of due process. At many schools across the country, however, the Title IX Coordinator counsels complainants on how to make their cases, disavows any similar responsibility to counsel respondents, conducts investigations, makes all findings of fact, decides on responsibility, assigns sanctions, and even hears appeals from their own prior work! Many of these systems provide no hearing, so that the "single investigator" has plenary power on the question of responsibility, and either is or answers to a Title IX Coordinator. The Title IX Coordinator, meanwhile, is under political pressure to generate rising numbers of cases decided favorably to complainants.

There must be a division of roles between the Title IX Coordinator and the neutral and independent investigator and the decision-maker in a particular case. The separation is needed to provide accountability and checks, and to discourage bias and error at successive stages of the process. The role of advocate for either side must be divided completely from the roles of investigation and adjudication.

Section 106.8(a) provides that the Title IX Coordinator's job is to coordinate the school's compliance with Title IX. Section 106.45(b)(1)(iii) divides the roles of the Title IX Coordinator from those of the investigator and the decision-maker, and stipulates that all three of them must be without conflict of interest and bias. Finally, Section 106.45(b)(4)(i) partly delivers on the promise of Section 106.45(b)(1)(iii) by providing that the Title IX Coordinator cannot be the

same person as the decision-maker(s). Commentary (p. 80) clearly indicates that the Department is fashioning the Title IX Coordinator as the person who *coordinates*: he or she may not decide cases.

This is a good first step, and we applaud it.

We do not think, however, that it goes far enough to provide for the decision-maker's independence from the Title IX Coordinator. Making sure that they are two separate human beings does not address the possibility that one may be the job supervisor, job-performance evaluator, or employer of the other. Where any of these relationships pertain, a conflict of interest exists, and the no-conflict-of-interest requirement of Section 106.45(b)(1)(iii) *cannot* be satisfied.

We therefore recommend that the *Title IX Coordinator should not be an employment supervisor of the decision-maker in the school's administrative hierarchy.* If investigators or decision-makers are independent contractors, the Title IX Coordinator should not have a role in hiring or firing them. This division of roles has the additional benefit that it gives the decision-maker the power to check bias against complainants *or* respondents in the Title IX Coordinator's office.

The Proposed Rule should consider adding the following measures to bolster neutrality and independence: remove the role of counseling potential complainants from the office that coordinates the process of investigation and adjudication; require that respondents be given support similar to that provided to complainants; provide that investigators must have some degree of institutional independence; require appeals to be provided; stipulate that appeals must be handled by neutral decision-makers who are independent of any prior investigators or decision-makers.

Recommendation: Require that the decision-makers must not be answerable in the institution's administrative hierarchy, or as an independent contractor to, the Title IX Coordinator. Consider ways of further providing independence and neutrality in the process.

General Rules Requiring Due Process, Equity, and Non-Discrimination

Provisions: Section 106.45(a) and (b)(1)

Summary of provisions: These subsections provide that:

- schools can be found to discriminate on the basis of sex by mistreating either the complainant or the respondent;
- schools must follow the provisions of this section whenever they receive a formal complaint of sexual harassment;
- the parties are to be treated equitably;
- all relevant evidence must be evaluated objectively;
- coordinators, investigators, and decision-makers must be without conflicts of interest; must receive nonbiased training; may not rely on sex stereotypes; and must be impartial;

- respondents are presumed not responsible;
- timeframes must be promoted and delays for good cause must be explained in written notice to all parties;
- the school must disclose the range of possible sanctions, the standard of evidence to be used; describe any appeal process; and indicate the availability of supportive measures.

Discussion: These provisions are highly welcome and should provide lodestar guidance throughout Title IX enforcement leading to a new culture of fairness.

We would only add that, with respect to training, commentary should clarify that "trauma-informed training" can lead to bias in the investigative and adjudicative processes. The following conclusions of the University of California Post SB 169 Working Group should guide the Department:

> "Trauma-informed" approaches have different meanings in different contexts. Trauma-informed training should be provided to investigators so that they can avoid re-traumatizing complainants during the investigation. This is distinct from a trauma-informed approach to evaluating the testimony of parties or witnesses. The use of trauma-informed approaches to evaluating evidence can lead adjudicators to overlook significant inconsistencies on the part of complainants in a manner that is incompatible with due process protections for the respondent. Investigators and adjudicators should consider and balance noteworthy inconsistencies (rather than ignoring them altogether) and must use approaches to trauma and memory that are well grounded in current scientific findings.[1]

Dismissal of Meritless Formal Complaints

Provision: 106.45(b)(3)

Summary of Provision: This section provides that, where the conduct alleged in a formal complaint does not fit within the definition of sexual harassment or did not take place within a program or activity of the recipient school,[2] the formal complaint must be dismissed.

Discussion: Schools have not known what to do when faced with a facially meritless complaint: one that, even if supported by ample evidence, would not constitute a valid sexual harassment . complaint. They have sometimes let the machinery run in an excess of caution. As a result, respondents were subjected to disciplinary proceedings that could not possibly, properly, lead to their being held responsible. We support a clear rule that will require schools to dismiss non-meritorious complaints *ab initio.*

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[1] Wendy Brown, Carlos R. Moreno and Lara Stemple, Report of the Post SB 169 Working Group, p. 3.
[2] On the limitation of these regulations to recipient schools' programs and activities, see Part Three below.

Even with this rule, respondents named in non-meritorious complaints may be required to disclose in their job, licensing and professional school applications that they have been accused in a campus disciplinary proceeding regarding sexual harassment. To avoid this, the rule should be amended to state that the formal procedure commences only after a decision not to dismiss on the grounds stated in this subsection.

Recommendation: Add language stipulating that the formal process commences only after the school decides not to dismiss under this rule.

Emergency Removal of Accused Students and Administrative Leave of Faculty and Staff

Provision: Section 106.45(c) and (d)

Summary of Provisions: The first of these provisions provides for emergency removal from a school's programs and activities of a student respondent only after a determination that there is an immediate threat to the health or safety of others and only where the school provides the respondent with notice and an opportunity to contest this decision. The provision stipulates that it shall not be construed to modify the respondent's rights under federal disability law. For employees, the second provision simply allows schools to place employees on administrative leave.

Discussion: We applaud the Department's requirement of sound grounds for the severe remedy of barring a student respondent from all educational programs, the requirement of some due process protections in this decision, and the "savings clause" calling attention to the fact that the respondent may have rights under IDEA, Section 504 of the Rehabilitation Act, or title II of the ADA. We do not understand why parallel protections are withheld from employees.

Recommendation: To Section 106.45(d), add all of sentence one in Section 106.45(c), from "on an emergency basis" to the end of the sentence; add "This provision shall not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973, or Title I of the Americans with Disabilities Act."

Notice

Provision: Section 106.45(b)(2)

Summary of Provision: Section 106.45(b)(2) requires that the parties must be provided with notice of the grievance-procedure rules; of the allegations with required levels of particularity; of the right to inspect evidence; and with updated notice in case of newly added allegations.

Discussion: Notice and an opportunity to be heard are the bedrock of due process. But too often, schools launch investigations without providing the accused basic information about the accusations against them, requiring them to answer questions about they know not what. This rule is an important reform.

Burden of Production and Proof Placed on the School

Provision: Section 106.45(b)(3)(i)

Summary of Provision: This subsection provides that the school, not the complainant and not the respondent, bears the burden of proof and the burden of gathering evidence.

Discussion: It is entirely appropriate that complainants not be assigned the burden of production or the burden of proof. They are seeking equal access to education; it is the school that should provide it. Removing these burdens from the shoulders of the respondent is an important part of the accused's presumption of innocence.

Full Provision of Evidence During the Investigative Process

Provision: Section 106.45(b)(3)(viii)

Summary of Provision: This subsection requires that schools disclose to parties in the formal process all evidence obtained during the investigation if it is directly related to the allegations, even if the school does not intend to rely on it in its investigative report or adjudicative process. It also requires that this evidence be conveyed through an electronic file sharing program that allows the parties to view documents on the computer screen for only 10 days, but not to download or copy them.

Discussion: We applaud the rule requiring full disclosure of evidence to both parties.

However, we believe that the non-downloading provision is unfair to both parties. In cases with even slightly complex evidentiary records, downloading is an absolute necessity. Parties cannot analyze their cases or assert their interests if they cannot collate, search, quote from, and compare documents. Downloading is essential to both parties' ability not only to make their case but also, if necessary later in time, to complain to the Department or to sue schools on meritorious claims that their rights have been violated.

The Department's justification for this provision makes loose reference to FERPA rights of *access* to documents. Nothing in FERPA demands or allows this arbitrary *limitation* on making crucial documents accessible to parties' analysis.

Recommendation: Delete the second sentence of this subsection.

Appropriate Limits to Inquiry into the Prior Sexual History of the Parties

Provision: Section 106.45(b)(3)(vi) and (vii)

Summary of Provision: These subsections – one applicable in primary and secondary education and the other in higher education – exclude evidence of the complainant's sexual history, except

for two categories of admissible sexual-history evidence: first, evidence intended to show that the wrong person is accused, and second, evidence of specific incidents intended to show consent. For institutions of higher education, which must provide a hearing with cross-examination, the Proposed Rule situates these restrictions and permissions within the rules about cross-examination. There is no provision protecting the respondent from improper inquiry into sexual history.

Discussion: It is not clear why these rules apply only at the adjudication stage, or why, within the rules about hearings at institutions of higher education, they apply only during cross-examination. The complainant's and the respondent's interests in the protections offered here are more general, and should apply in investigations, and, in hearings, not only during but also before and after cross-examination. These rules should be consolidated and moved to a generally applicable section of Section 106.45.

It is unclear to us why this provision protects only the complainant. The respondent also has a vital interest in privacy and in security from character assassination through the gathering of irrelevant evidence of sexual history. Omitting protection of the respondent here contradicts the effort to treat the parties equitably.

The second category of permitted evidence – specific incidents intended to show consent – omits the element of unwelcomeness, which is an essential element of any hostile environment claim. The category of evidence contemplated here would be just as relevant to showing welcomeness or unwelcomeness as to showing consent or non-consent. This omission seems to be a simple oversight. This part of this subsection should be amended include the unwelcomeness element of hostile-environment sexual harassment.

Recommendation: In Section 106.45(b)(3)(vii), delete the entire sentence beginning "All cross examination must exclude" and ending "to prove consent"; and remove the equivalent provision from Section 106.45(b)(3)(vi). Introduce a new rule about prior sexual history, modified to omit the limitation to cross-examination, in Section 106.45(a) or (b)(1). Further modify it to protect both the complainant and the respondent from improper inquiry into prior sexual history. After "… show consent," add "or non-consent, or to show the welcomeness or unwelcomeness of the sexual conduct alleged to be unwelcome."

Live Hearing and Elimination of the Single-Investigator Model in Higher Education

Provision: Section 106.45(b)(3)(vii)

Summary of Provision: This subsection requires a live hearing in the formal process in institutions of higher education. Commentary specifically indicates that the single-investigator model may not be used.

Discussion: We applaud this requirement. Many institutions follow the "investigator only" or "single investigator" model, wherein the investigator is also the adjudicator. In this model, there

is no hearing. One person conducts interviews with each party and witness, and then makes the determination whether the accused is responsible. No one knows what the investigator hears or sees in the interviews except the people in the room at the time. Neither accuser nor accused can guess what additional evidence to offer, or what different interpretations of the evidence to propose, because they are completely in the dark about what the investigator is learning and are helpless to fend off the investigator's structural and personal biases in the evidence-gathering.

The single-investigator model also precludes the parties from probing the credibility of one another and of witnesses. As courts are increasingly concluding, only a live hearing allows parties to probe, and decision-makers to assess, the credibility of the parties and of witnesses.[3]

Finally, the single-investigator model collapses the evidence-gathering role with the role of deciding on the ultimate question of responsibility. Essentially, the single investigator is asked to review his or her own work for its fairness, completeness, lack of bias, and neutrality. This is a fundamental breach of the norms of due process that require neutral and independent decision-makers with a sufficient division of roles to provide a check on the fairness of each step in the process.

The hearing requirement will enhance the fairness and legitimacy of Title IX enforcement.

Cross-examination

Provision: Section 106.45(b)(3)(vii)

Summary of Provision: This subsection requires cross-examination of the parties and witnesses in hearings held by institutions of higher education. It specifies that the person who conducts cross-examination will be the advisor of the adverse party, not the party him- or herself, and that the statements of any party or witness who refuses to submit to cross-examination must be disregarded. Parties who don't have advisors will be provided with one, who must be "aligned" with that party.[4] Videoconferencing must be provided at the request of either party.

Discussion: We have some serious concerns about this provision. We think it is implausible that the overall legal mandate of Title IX includes an actual *requirement* of cross-examination in Title

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[3] *Doe v. Baum,* 903 F.3d 575, 578 (6th Cir. 2018), reh'g en banc denied, Oct. 11, 2018; *Doe v. University of Cincinnati*, 872 F. 3d 393, 299-402 (6th Cir. 2017); *Doe v. University of Southern California (USC)*, 29 Cap. App. 5th 1212 (2018), reh'g denied Dec. 27, 2018; *Doe v. Claremont McKenna College*, 25 Cal. App. 5th 1055, 1070) (2018); *Doe v. University of Michigan*, 325 F.Supp.3d 821, 830 (E.D. Mich. 2018); *Doe v. Alger*, 228 F.Supp.3d 713, 730 (W.D. Va. 2016); *Lee v. The University of New Mexico*, Case 1:17-cv-01230-JB-LF, pp. 2-3 (D. NM. Sept. 20,2018); *Doe v. University of So. Miss.*, No. 2:18-cv—00153 (S.D. Miss. Sept. 26, 2018); *Doe v. Penn. State University*, No. 4:18-CV-00164, (M.D. Pa. Aug. 21, 2018); *Doe v. Regents of University of California*, 28 Cal. App. 5th 44 (2018); *Doe v. Allee*, __ Cal. Rptr.3d __ (2019) (2nd Appl District, Div. 4). See also Brown, Moreno and Stemple, Report of the UC Post SB 169 Working Group, p. 2.

[4] Note that the Proposed Rule contains a typo in this sentence. It currently reads: "… the recipient must provide that party an advisor aligned with that party *for to* conduct cross-examination." (Emphasis added.)

IX school-based proceedings. The truth-seeking benefits of cross-examination in courtroom trials are well accepted, and we support proper cross-examination of parties and witnesses in sexual misconduct cases in court. But school-based hearings are not courtroom trials, and lack the formal rules and trained professionals that make cross-examination appropriate and essential in court proceedings. The Department's Executive Summary indicates that the motive for assigning cross-examination to the parties' advisor is to "balance[] the importance of cross-examination with any potential harm from personal confrontation between the complainant and the respondent by requiring questions[.]" But of course similar harm – to the complainant *and* to the respondent – can result from harsh questioning by the opposing party's advisor. Whether or not they are attorneys, parties' advisors, unchecked by the myriad rules and the legally trained judges that keep cross-examination controlled in courtroom trials, may unleash unfair and hurtful techniques that would harm parties' educational access. Unlike in a court, the risk of harm to educational opportunity in the overall context of school-based hearings likely outweighs the benefits that traditional cross-examination offers. We believe that the Proposed Rule has not yet found the balance sought.

There is a suitable alternative that aims at the desired truth-seeking objective, yet achieves a better balance of the competing interests here. That alternative is used in the Harvard Law School Procedures for Student/Student Sexual Harassment Cases and is endorsed by the American Bar Association Criminal Justice Section and by the University of California Post SB 169 Working Group.[5] According to this procedure, both parties are invited to submit questions to the presiding decision-maker, who proceeds to ask them. The rule must stipulate that all questions submitted must be asked unless they are irrelevant, excluded by a rule of evidence clearly adopted in advance, harassing, or duplicative. This procedure should be called "submitted questions" not "cross examination."

We think that the risks of cross-examination within school-based hearings are so acute, and the mandate of Title IX in this respect is so uncertain, that schools should not be required to undertake it in the context of school-based hearings. The submitted-questions procedure that we propose provides ample opportunity for the parties to probe each other's and witnesses' credibility and consistency.

We disagree with the provision requiring the decision-maker to disregard the statements of a party who refuses to submit to cross-examination (or to answer submitted questions). This provision may have extremely harsh consequences for respondents, who may be instructed by

[5] Harvard Law School Sexual Harassment Resources and Procedures for Students, available at https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf; American Bar Association Criminal Justice Section, ABA Criminal Justice Section Task Force on College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct 6 (June 2017) ("The complainant and respondent may not question one another or other witnesses directly, but should be given an ongoing opportunity during the proceeding to offer questions to be asked through the decision-maker, who will determine whether to ask them. The investigator should be available for questioning by the decision-maker(s) and the parties."); Brown, Moreno and Stemple, Report of the U.C. Post SB 169 Working Group, p. 8 n. 20.

counsel not to answer questions in order to preserve criminal trial rights. Disregarding this person's other statements may severely distort the accuracy of the final decision. And in a proceeding in which the credibility of the complainant is crucial to the outcome, the refusal of that party to comply with required questioning can quite appropriately throw the entire case against the respondent into doubt. This is a complex terrain and we see no need for a one-size-fits-all rule. Decision-makers should be permitted to draw a negative inference from refusals to provide answers to questions when that appears to be equitable under the circumstances.

We applaud the commitment to ensure that parties without advisors will be provided one who is "on their side" for any questioning, and, like the several courts that have considered the issue,[6] we think videoconferencing is a suitable way to reduce the level of personal distress inherent in the hearing.

Recommendations: Require schools to implement the submitted-questions procedure rather than requiring or encouraging cross-examination. In the submitted-questions procedure, require that the decision-maker ask all questions submitted unless they are irrelevant, excluded by a pre-existing rule of evidence, harassing, or duplicative. Delete the sanction for not submitting to cross-examination and substitute for it decision-maker authority to draw a negative inference from non-cooperation where the decision-maker deems that to be equitable under the circumstances.

Standard of Evidence

Provision: Section 106.45(b)(4)(i)

Summary of Provision: This subsection allows schools discretion to use a preponderance-of-the evidence standard or a clear-and-convincing-evidence standard in determining whether a respondent is responsible. But it makes the preponderance standard permissible *only if* the recipient school uses it for student conduct code violations other than sexual harassment but that carry the same maximum sanction. Furthermore, the school can use either standard only if it *also* uses that standard in cases involving complaints against employees, including faculty.

Discussion: The Department explains its reasoning for allowing schools the option of preponderance of the evidence or clear and convincing evidence as follows. First, given the other procedural protections required in the Proposed Regulations, Title IX proceedings will be similar enough to civil litigation to justify using its evidentiary standard, the preponderance standard; but the Department is unwilling to require the use of preponderance, because the clear-and-convincing standard comports with the gravity of the accusations and their possible consequences for the respondent. Accordingly, the Department is leaving the choice of standard to recipient schools. We think this reasoning is sound.

We share the concern that using a lower evidentiary standard for Title IX cases than for other types of discipline that can lead to the same severity of sanction would, effectively, tolerate sex

[6] See, e.g, *Doe v. Claremont McKenna College*, 25 Cal. App. 5th at 1070.

discrimination. We also believe that using a higher evidentiary standard for Title IX than a school uses, for instance, for racial harassment, could be, in effect, racially discriminatory. And we agree that an institution can check its commitment to the standard it selects by ensuring that it is willing to use that standard widely, including in the discipline of powerful constituencies.

We believe, however, that the proviso on employees should be limited, like the one on students, to discipline that can lead to the same or similar severity of sanction, so that the comparison across complex institutions is both cogent and administrable.

Availability of Informal Resolution

Provision: Section 106.45(b)(6):

Summary of Provision: This provision allows recipient schools to use informal dispute resolution methods provided that both parties consent after being fully informed of any rules precluding them from opting into formal proceedings or other important consequences attached to informal resolution.

Discussion: Restrictions on informal resolution have had several problematic consequences. Would-be complainants often declined to come forward with complaints because they were offered only two roads forward: the full formal process leading to possibly severe punishment for the respondent, or counseling for themselves. These students often said: "I don't want the respondent to be punished; I just want them to realize how bad this event was for me." Students fully prepared to confess, apologize, and take their sanction were sometimes ground through the formal process for no good reason. Additionally, often both parties would have preferred informal resolution; a rule that pushed them to adopt an adversarial posture vis a vis each other meant that the conflict persisted, and even escalated, when it could have been settled.

Informal resolution presents dangers as well as opportunities, however, inasmuch as the fairness protections offered by formality are missing. We urge the Department to monitor the evolution of informal resolution methods once they are permitted, to ensure that they do not evolve to produce unfairness for either complainants or respondents.

Acknowledgement of Other Rights

Provision: Section 106.6.

Summary of Provision: This section provides that nothing in the Proposed Rule will require a recipient school to violate the First Amendment or the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, or to restrict other federal constitutional rights. It also provides that it should not be read to derogate from rights under Title VII.

Discussion: We believe these savings clauses are important additions to the Proposed Rules.

In addition, we have long been concerned that Title IX is having a disproportionate negative impact on men of color, which makes the protections of due process and other legal rights all the more important. There may be other demographic groups that are being subjected to a disproportionate level of allegations, disproportionate sanctions, or other unfairness. We recommend the approach recently adopted by the UC Post SB 169 Task Force: "an optional, confidential exit survey about the parties' demographic characteristics" including "race, sex, sexual orientation, gender identity, disability, nationality, or other status."[7]

PART TWO:

DEFINITION OF PROHIBITED CONDUCT

Many schools have unclear and overbroad definitions of sexual harassment. We welcome definitions that are clear, not under-inclusive or over-inclusive, and justifiable as preserving equal access to education on the basis of sex.

We do not comment on the proposed definition of quid pro quo sexual harassment, which is entirely conventional. We do have concerns about the definitions of hostile environment sexual harassment and about the way in which sexual assault is included.

Hostile-Environment Sexual Harassment

Provision: Section 106.44(e)

Summary of Provision: The definition of hostile environment sexual harassment reads as follows: "[u]nwelcome conduct on the basis of sex that is so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient's education program or activity" (emphasis added).

Discussion: The Department should provide a uniform, clear definition of hostile-environment sexual harassment. The Proposed Rule's definition, however, is both too narrow and too broad.

The Rule should require conduct that is severe *or* pervasive, not conduct that is severe *and* pervasive. To be sure, the language in the Proposed Rule is taken directly from the Supreme Court's Title IX case *Davis v. Monroe County Board of Education*. But there, the Court was crafting a distinctly narrowing definition of sexual harassment for a very specific purpose: to limit private parties' access to civil lawsuits against school boards for money damages.[8] As the

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[7] Brown, Moreno and Stemple, Report of the U.C. Post SB 169 Working Group, p. 5.

[8] *Davis v. Monroe County Board of Education,* 526 U.S. 629, 650-2 (1999) ("…funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."; "Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect" – that is, "to have the systematic effect of denying the victim equal access to an

Davis Court acknowledged by citing *Meritor Savings Bank v. Vinson,* a Title VII case, the standard legal definition of sexual harassment is broader than the one used in *Davis*. The *Meritor* definition requires unwelcome sexual conduct that is sufficiently severe *or* pervasive so as to impair a person's access to the protected activity.[9]

Meritor's broader definition of hostile environment sexual harassment is thus the baseline legal definition, as the *Davis* Court recognized.[10] The Court, moreover, has repeatedly affirmed the broader definition.[11] The Department has announced that it wants to adhere to Supreme Court law here. The Proposed Rule has simply drawn its definition from the wrong Supreme Court case: it should properly look to *Meritor*'s definition, not *Davis*'s.

The stakes are high. It is easy to imagine sexual misconduct that is severe but not pervasive: a single rape, for instance. And it is equally easy to imagine sexual conduct that is pervasive but not independently severe: sending someone hundreds of text messages asking them to go out on a date, for instance. To require the unwelcome conduct to be both severe and pervasive is under-inclusive in important ways.

At the same time, the Proposed Rule's definition of hostile environment sexual harassment is over-inclusive. As the Supreme Court and the Department have repeatedly affirmed,[12] a hostile

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educational program or activity" – "we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.").

[9] *Meritor Savings Bank, FSB v. Vinson,* 477 U.S.57, 67 (1986) "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"), cited in *Davis,* 526 U.S. at 651.

[10] *Davis,* 526 U.S. at 651-53.

[11] *Harris v. Forklift Systems, Inc,* 510 U.S. 17, 21-22 (1993) ("Conduct that is not severe or abusive enough to create an objectively hostile or abusive work environment … is beyond Title VII's purview."); *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 81 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment … is beyond Title VII's purview").

[12] *Harris v. Forklift Systems, Inc,* 510 U.S. 17, 21-22 (1993) ("Conduct that is not severe or abusive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview."); *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 81 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive –is beyond Title VII's purview"; "And there is another requirement that prevents Title VII from expanding into a general civility code …. [That requirement] … forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment"; "We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances."; "We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace – such as male-on-male horseplay or intersexual flirtation – for discriminatory 'conditions of employment."). See also Department of Education Office for Civil Rights Q&A, April 2014, p. 1 (" … OCR considers a variety of related factors to determine if a hostile environment has been created; and also considers the conduct in question *from both a subjective and an objective perspective. Specifically, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the*

environment claim, to be valid, must be objectively reasonable. The Proposed Rule's definition includes no reference to this requirement. "Objective offensiveness," adopted from the *Davis* Court's definition, is no substitute for the general requirement that the claims regarding the elements of the hostile environment be not only subjectively valid but also objectively reasonable. Again, the stakes are high: many complaints come to Title IX officers from students who sincerely believe that they have experienced sexual harassment, thus meeting any subjective test, but which cannot survive reasonableness scrutiny.[13] Objective reasonableness under all the circumstances is a necessary guard against arbitrary enforcement.

Recommendations: Define hostile environment sexual harassment as "unwelcome sexual conduct that is sufficiently severe *or* pervasive that it effectively denies a person equal access to the recipient's education program or activity"; require that hostile environment claims be objectively reasonable.

Sexual Assault, as Defined in 34 CFR 667.46(a)

Provision: The Proposed Rule includes new, third form of sexual harassment: "[s]exual assault, as defined in 34 CFR 667.46(a)."

Summary of Provision: In addition to quid-pro-quo sexual harassment and hostile-environment sexual harassment, the Proposed Rule appends to its sexual-harassment definition the category of "sexual assault," which it defines here the same way as in the Department's regulations promulgated under the Clery Act.

Discussion: The relationship between sexual harassment and sexual assault has been confusing to commentators, school administrators, and the public for quite some time. It seems clear that the *Meritor* definition of sexual harassment includes any conduct worthy of the name sexual assault, but there is some risk that the narrower *Davis* definition would not include even highly repugnant and severe sexual assaults, if they occurred only once. (We think this is an important reason to use the *Meritor* definition, as we explain in the prior sub-part.) But even with the *Meritor* definition of hostile-environment sexual harassment, possible non-inclusion of sexual assault is a real concern. We therefore agree that it is prudent to include sexual assault explicitly in the definition of sexual harassment.

However, because the term sexual assault refers obliquely to hundreds of highly inconsistent state criminal statutes and is often used in an entirely colloquial, non-legal sense, there is no consensus on what it is. Debates about sexual assault presume that the conduct being described is normatively intolerable, but the conduct that many people think the term includes is conduct that many others find to be unobjectionable, even desirable -- even when they imagine

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alleged victim's position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment …. "; emphasis added).

[13] Shera V. Avi-Yonah and Jamie D. Halper, "Students Filed Title IX Complaints Against Kavanaugh to Prevent Him from Teaching at Harvard Law," *The Harvard Crimson*, October 2, 1019, available at https://www.thecrimson.com/article/2018/10/2/students-file-title-ix-against-kavanaugh/

themselves to be the recipients of that conduct. Specifying *what it is* is of the highest importance for fair, focused enforcement going forward.

We do not believe that the Proposed Rule's approach to this problem achieves this goal. 34 CFR 667.46(a) is part of regulations promulgated under the Clery Act to require that schools make disclosures of institutional information to students, including data about crimes of sexual assault. It defines sexual assault for this reporting purpose as "[a]n offense that meets the definition of rape, fondling, incest, or statutory rape in the FBI's UCR [Uniform Crime Reporting] Program and included in Appendix A of this subpart." The FBI's Uniform Crime Reporting Program is *another* reporting system, designed to aggregate crime data across the nation for periodic national reports. These definitions are designed to aggregate statistics on categories of crimes on a nationwide basis, to make them comparable from year to year, from state to state, from school to school, and from one large class of misconduct to other large classes of misconduct, not to provide lucid guidance about acceptable and unacceptable behavior for purposes of discipline or punishment.

It is no wonder, then, that the definitions of sexual assault found in 34 CFR 667.46(a) fail to provide meaningful guidance on what conduct schools must include in their Title IX enforcement efforts. Rape, for instance, is defined by the FBI to involve sexual penetration without consent, and does not include non-penetrative sexual assaults. Non-penetrative acts are presumably covered by "fondling," which is defined as nonconsensual touching of private body parts, but it leaves undefined what parts of the body are "private." There is no definition of consent. In short, the present text will lead to serious confusion, and the need for clarity on sexual assault is too important to leave schools to muddle through in this way.

Furthermore, the new sexual assault category introduces a large new over-inclusiveness problem. The FBI's definition of sexual assault includes statutory rape, defined as "Sexual intercourse with a person who is under the statutory age of consent." Including this category of crimes in the definition of sexual harassment under Title IX thus sweeps in *all* sexual intercourse engaged in by students who are underage in their jurisdictions, no matter how much it is wanted, consented to, and reciprocated; no matter how harmless it is to their educational opportunity; and no matter how socially equal the parties to the sexual encounter are. Many states' age of consent is 18, and many young people under this age are sexually active, most often with other young people. Under the Proposed Rule, if a school acquires actual knowledge that a student has had intercourse while underage with another underage student, this provision could lead it to sanction them both for sexual harassment – without regard to severity or pervasiveness, and without regard to detriment to educational access, much less denial of educational opportunity because of sex. The rule threatens to turn Title IX enforcement in high schools and among first-year college students into a repressive monitor of youth sexuality.

We respectfully propose the following definition of sexual assault, which we believe includes the most important elements of the states' many criminal provisions on this subject:

> Sexual assault is the penetration or touching of another's genitalia, buttocks, anus, breasts, or mouth without consent.

> A person acts without consent when, in the context of all the circumstances, he or she should reasonably be aware of a substantial risk that the other person is not voluntarily and willingly engaging in the conduct at the time of the conduct.

Note that this definition includes both penetration and touching; that it specifies the body parts involved quite clearly; and that it frames the violation as penetration or touching without consent. The consent requirement is clearly defined: the factfinder must conclude that, under all the circumstances, the accused should reasonably have been aware of a substantial risk that the other person was not voluntarily and willingly engaging in the sexual conduct in question. This is the modal understanding of non-consent today. And, as one of us has extensively shown, the embrace of "affirmative consent" as a growing aspirational concept on college campuses is dangerously over-inclusive for the focused purposes of discipline or punishment.[14] Though debates in this area will never be entirely settled, our proposed definition of sexual assault, we believe, represents a faithful rendering of the state of the law today. It is sufficiently clear to give notice to the public of what conduct they must not commit; it is administrable; it is sufficiently inclusive to capture wrongful conduct, and it is sufficiently limited to prevent its use to punish non-wrongful conduct. Including it in the definition of sexual harassment under Title IX will usefully enhance the clarity of the entire regime.

Finally, the new element of sexual assault should be firmly tethered to the central mission of Title IX: the preservation of students' equal access to education. We propose a simple solution, to specify "sexual assault that effectively denies a person equal access to the recipient's education program or activity."

Recommendation: We urge that the Rule replace the definition of sexual assault with the following:

> Sexual assault is the penetration or touching of another's genitalia, buttocks, anus, breasts, or mouth without consent.
>
> A person acts without consent when, in the context of all the circumstances, he or she should reasonably be aware of a substantial risk that the other person is not voluntarily and willingly engaging in the conduct at the time of the conduct.

Include language specifying that the third form of sexual harassment is "sexual assault that effectively denies a person equal access to the recipient's education program or activity."

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[14] Janet Halley, "The Move to Affirmative Consent," 42 *Signs* 257 (2016), available at http://signsjournal.org/currents-affirmative-consent/halley/.

PART THREE:

SCHOOL'S LEGALLY REQUIRED RESPONSE TO ALLEGATIONS OF PROHIBITED CONDUCT

The Proposed Rule limits a school's responsibility to respond to allegations of sexual harassment to conduct in its programs and activities. It provides that schools will be held to be in violation of Title IX only if they respond with deliberate indifference to allegations of sexual misconduct of which they have actual knowledge. It also provides that schools will not be held to have responded with deliberate indifference if they bring themselves within one of three safe harbors.

Conduct in a Program or Activity of the School

Provision: Section 106.44(a)

Summary of Provision: This provision, and the related commentary, provide that the school's Title IX responsibilities extend to conduct committed anywhere within its educational programs and activities but not beyond them. The commentary explains that it extends to activities at off-campus private entities like fraternities if the school actively "devotes significant resources to the promotion and oversight of" those entities or otherwise explicitly includes those entities in its programs and activities.

Discussion: We believe that this inappropriately narrows Title IX enforcement. Where one student is sexually harassed by another student in an off-campus setting that is not connected to any official program or activity of the school, the *effects* of that violation may arise on campus and produce a highly discriminatory impact on the victim's access to education. This will be the case when both the victim and the perpetrator share the common environment of the school's programs and activities. Consider a simple hypo: a student is raped by another student in a fraternity that is entirely without any support or oversight from the school. They arrive the next day in the same chemistry class, and have assigned seats right next to each other. To enable equal access to education, Title IX requires the school to supply supportive measures to this hypothetical victim, and to sanction the hypothetical assailant. (Of course, a fair procedure is needed to determine whether the facts presumed in this hypo pertain.)

The Department's commentary depends on an argument that schools should not be held responsible for settings over which they have no control. But schools do not enjoy complete control over many settings even *within* their programs and activities. They can engage in prevention activities but they cannot completely prevent wrongful conduct; they can deter but not preclude misconduct. Furthermore, the devotion of resources has no necessary relationship to effective oversight. The Department's focus on resource provision and control are legal fictions. The focus should be on access to education, and that turns on education-constricting effects on the educational experience of an individual due to the alleged offender's discriminatory conduct.

Recommendation: This provision should be revised to provide that schools must provide Title IX remedies when a complainant's educational opportunity is concretely impaired by conduct in the school's educational programs and activities, or by the conduct of the school's students, staff, or faculty.

The Safe Harbors

Provision: Section 106.44(b)

Summary of Provision: The Proposed Rule provides three safe harbors from a finding of deliberate indifference: when, in response to a formal complaint, a school follows the procedures spelled out in section 106.45 (discussed in our Part One and Part Two above); when, upon gaining actual knowledge of multiple reports of sexual harassment by the same respondent, it files a formal complaint; and when, faced with a potential complainant who declines to file a formal complaint, it nevertheless offers that person supportive measures.

Discussion: We strongly object to the drafting of the second safe harbor. This provision assures schools that they will not be held to have acted with deliberate indifference if, when they have actual knowledge of multiple allegations against a single respondent but no formal complaint against that person, the school files a complaint. There are severe costs to doing this. Overriding the decision of alleged victims in this way exposes them to a very serious change in their educational experience and violates their autonomy. It also imposes a heavy detriment upon the respondent – who now has been accused in a campus sexual wrongdoing procedure and will have to disclose this fact on many academic, licensing, and employment applications – without any consideration of whether the accusations against him or her have any likelihood of being supported by adequate evidence. Note that students occasionally mount political campaigns against particular individuals involving multiple, non-meritorious Title IX complaints: schools should not be pressured by the government to convert these into formal complaints in order to avail themselves of a safe harbor. Finally, it is not the multiplicity of accusations – which, in an age of social media, may proliferate even without substantive merit – but the gravity of the threat to *any* alleged victim who is unwilling to come forward and/or to public wellbeing that justifies overriding the autonomy of alleged victims and changing so substantially the social position of the respondent.

The array of such situations is so varied that the Department should not push schools to uniformly file formal complaints.

This provision should be revised to provide a safe harbor for schools that respond promptly, effectively, and equitably when they reasonably conclude, after an appropriate preliminary investigation, that a substantial and ongoing threat of significant harm to a single alleged victim, to multiple alleged victims, or to public safety is indicated by allegations of which they have actual knowledge but where there is no one willing to file a formal complaint.

Recommendation: Revise Section 106.44(a)(2) to provide a safe harbor for schools that respond promptly and effectively when they reasonably conclude, after an appropriate preliminary

investigation, that a substantial and ongoing threat of severe or pervasive harm is posed to a single alleged victim, to multiple alleged victims, or to public safety but where there is no one willing to make a formal complaint.

The Deliberate Indifference Standard

Provision: Section 106.44(a).

Summary of Provision: Where the safe harbors do not apply, schools will be held to have violated Title IX only when they have actual knowledge of sexual harassment allegations and respond in a manner that is not deliberately indifferent. Deliberate indifference is equated to acting clearly unreasonably under the known circumstances.

Discussion: We strongly object to this standard.

Here again the Department imports into general sexual harassment law another element of the special narrowing language that the Supreme Court adopted in *Davis v. Monroe County* in order to limit schools' exposure to lawsuits for money damages.[15] See the discussion of *Davis* in Part Two above. The Proposed Rule now promises that schools' entire enforcement obligation corresponds with its *Davis* liability exposure.

This is far too permissive. It substantially undercuts recipient schools' responsibility to adhere to the requirement of Title IX itself:

> 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 education program or activity receiving Federal financial assistance[.][16]

Anti-discrimination law imposes an obligation on those it regulates not to discriminate. It is not enough to hold them responsible only when they engage in egregious institutional misconduct.

Much of the public outcry about the Proposed Rule arises from the needless complexity of the deliberate indifference/safe harbors structure of this provision, and the perception of many that *all* a school would need to do to comply is to refrain from being deliberately indifferent to sexual wrongdoing in its programs and activities. We urge that the "deliberate indifference" or "clear unreasonableness" standard be abandoned and replaced with a simple unreasonableness standard, that the safe harbors be presented as requirements, and that the Department affirm its commitment to robust nondiscrimination in federally funded educational institutions.

Recommendations: Delete Section 106.44(a)'s deliberate indifference standard and replace it with a statement that schools will be held to have violated Title IX when they have responded

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[15] *Davis*, 119 S.Ct. at 650 ("We thus conclude that funding recipients are properly *held liable in damages* only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.") (emphasis added).

[16] 20 U.S. Code Section 1681.

unreasonably to sexual harassment allegations. Recast the safe harbors of Section 106.44(b) as obligations of recipient schools.

PART FOUR:

DIRECTED QUESTIONS

In this Comment, above, we have provided answers to several of the Department's Directed Questions:

Directed Question 3. Applicability to employees. See Emergency Removal of Accused Students and Administrative Leave of Faculty and Staff, above, p. 7.

Directed Question 4. Training. See General Rules Requiring Due Process, Equity, and Non-Discrimination, above, p. 5.

Directed Question 5. Individuals with disabilities. See Emergency Removal of Accused Students and Administrative Leave of Faculty and Staff, above, p. 7.

Directed Question 6. Standard of Evidence. See Standard of Evidence, above, p. 12.

Inquiries please contact:

Jeannie Suk Gersen, jsg@law.harvard.edu

Nancy Gertner, ngertner@law.harvard.edu

Janet Halley, jhalley@law.harvard.edu

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOHN DOE, Petitioner and Appellant, v. KEGAN ALLEE, Ph.D., et al., Respondents.	B283406 (Los Angeles County Super. Ct. No. BS157112)

APPEAL from a judgment of the Superior Court of Los Angeles County, Howard L. Halm, Judge. Reversed.

Hathaway Parker, Jenna E. Parker and Mark M. Hathaway for Petitioner and Appellant.

Young & Zinn, Julie Arias Young, Karen J. Pazzani; Cole Pedroza, Kenneth R. Pedroza and Cassidy C. Davenport for Respondents.

John Doe, formerly an undergraduate student at the University of Southern California (USC), appeals from the trial court's denial of his petition for writ of administrative mandate, by which Doe sought to set aside his expulsion. (Code Civ. Proc., § 1094.5 (§ 1094.5).) Doe was expelled after respondents Kegan Allee, Ph.D., sued in her official capacity as Title IX Investigator for USC,[1] and, ultimately, Ainsley Carry, Ed.D., in his official capacity as USC's Vice Provost for Student Affairs, found that Doe engaged in nonconsensual sex with another USC student, Jane Roe,[2] in violation of the university's Student Conduct Code.

Doe argues that he was denied a fair hearing because respondents (principally Dr. Allee) were biased, and because USC's student disciplinary procedure is fundamentally flawed, in that it provides no mechanism for a party accused of sexual misconduct to question witnesses before a neutral fact finder vested with power to make credibility determinations. While we conclude that Doe failed to meet his burden of proving respondents were actually biased against him, we nonetheless conclude that USC's disciplinary procedure failed to provide a fair hearing, In that regard, we hold that when

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[1] Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.) (Title IX), forbids sex-based discrimination in all schools, colleges and universities that receive federal funding. (See 20 U.S.C. §§ 1681–1688.) Title IX does not specifically address sexual assault, but the United States Supreme Court has held that a school may be liable for discrimination and face, among other things, a loss of federal funding, if it mishandles a student's sexual assault claim. (See *Davis v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629, 633, 647–648.)

[2] To preserve privacy, we refer to the accused and accusing students as Doe, and Roe, respectively, and to witnesses by their initials or first name.

a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross–examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (such as means provided by technology like videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments. USC's disciplinary review process failed to provide these protections and, as a result, denied Doe a fair hearing. On that basis, we reverse.[3]

BACKGROUND

I. *USC's Sexual Misconduct Policy*

USC's Student Conduct Code (SCC)[4], prohibits nonconsensual "sexual misconduct."[5] The SCC prohibits sexual activity if "[t]here is no affirmative,

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[3] Because we reverse on this ground, we do not consider Doe's other challenges to the judgment.

[4] The record contains two (slightly different) versions of pertinent disciplinary provisions of the SCC. We refer to the version contained in the administrative record.

[5] Sexual misconduct is broadly defined as (1) "Engaging in any unwelcome sexual advance . . . or other unwanted . . . non-consensual sexual conduct"; (2) "Sexual touching, fondling and/or groping, including intentional contact with the intimate parts of another, causing another to touch one's intimate parts, or disrobing or exposure of another without permission[;]" (3) "Attempted intercourse, sexual contact, sexual touching, fondling and/or

conscious and voluntary consent, or consent is not freely given." (§ E.2.III.) "Affirmative consent" means a conscious and voluntary agreement to engage in sexual activity. It requires each party "to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence. . . . Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. . . . [T]he fact of past sexual relations between [the persons involved], should never by itself be assumed to be an indicator of consent." Finally, it is not a valid excuse that the accused believed the complainant affirmatively consented to the sexual activity if that belief "arose from the . . . recklessness of the accused," or the accused failed to "take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented." (§ E.2 III.4.)

II. *Investigations and Discipline in Cases Involving Allegations of Student Sexual Misconduct*

Student sexual misconduct complaints are directed to USC's Title IX Office. If a student chooses to proceed with an investigation, a trained Title IX investigator is assigned to investigate.

1. *Investigation and Adjudication*

The SCC guarantees students a "fair, thorough, neutral and impartial investigation of the incident." Both the student who reports misconduct and the accused student have equal rights throughout the investigation and

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groping[; and]" (4) "Non-consensual vaginal or anal penetration . . . with a body part (e.g., penis, tongue, finger, hand, etc.) or object, or oral penetration involving mouth to genital contact."

appeal process. (§§ 17.03(D), (M).) The burden of proof rests at all times with the reporting party to show, by a preponderance of evidence, a violation of the SCC. (§ 17.04(D).)

At the outset of a Title IX investigation, the accused student is given written notice that a complaint has been filed, specifying the alleged violation and the basis for the charge. (§ 17.03(A).) The investigator meets separately with the reporting student and the accused student, to explain their rights, the investigative and appeals processes, and to identify available resources. (§§ 17.02(B), 17.03(E).) At these meetings each party may present relevant information, including the names of witnesses and video or documentary evidence, and any information a party believes is relevant. (§ 17.02(C).) The parties may read the investigator's summaries of interviews and respond to that information. (§§ 17.03(F), (G).) Each party may bring an advisor to the meetings to serve in a solely supportive role (i.e., the advisor may not speak or disrupt the party's meeting with the investigator). (§ 17.02(F).) The parties may provide the investigator with "supplemental information" up to the point at which the investigator's findings have been made. They may also, upon request, inspect documents and information gathered during the investigation. (§§ 17.02(C), 17.03(F).) The investigator may conduct additional investigation and witness interviews "as appropriate," and review available pertinent evidence. (§ 17.02(D).) No in person hearing is conducted and the accused student has no right to confront his or her accuser. (§ 17.03.) Once the investigation is complete, the Title IX investigator makes findings of fact and concludes, based on a preponderance of evidence, whether the accused student violated the SCC. If so, in consultation with the Title IX Coordinator, the investigator imposes the sanction that he or she deems appropriate. (§§ 17.02(D), 17.06(A).) Sanctions for sexual misconduct range

from disciplinary warnings to suspension, expulsion or revocation of a degree. (§§ 17.06(E)(1)–(16).)

2. *Appeal*

Either party may appeal the result of the Title IX investigation within two weeks of receipt of the investigator's written decision. (§ 17.07(A),(F), (I).) Appeals are reviewed by the Student Behavior Appeals Panel (SBAP), an anonymous three-member panel appointed by the Vice Provost for Student Affairs (Vice Provost), trained to hear sexual misconduct cases, at least one member of which is a faculty member. (§ 17.07(G).) The SBAP is advised by a non-voting individual trained in USC's procedures and Title IX requirements. (§ 17.07(I).) Appeals are decided solely on the basis of documents. No oral argument is permitted.[6] (§ 17.07(A), (E).) The SBAP may exclude from consideration any evidence it deems inadmissible, including character evidence. (§ 17.07(G).)

On appeal, the SBAP may: uphold the Title IX investigator's decision; remand for further investigation; reverse specific factual findings which are

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[6] The SCC identifies four grounds for appeal: (1) new evidence has become available which is sufficient to alter the decision and which the appellant was not aware of or could not reasonably have been obtained at the time of the original review; (2) the sanction imposed is grossly disproportionate to the violation found; (3) procedural errors occurred which had a material impact on the fairness of the investigation; and (4) the conclusion and sanction are not supported by the findings, or the findings are not supported by the evidence in light of the whole record. (§ 17.07(E).) However, the "Appeal Request Cover Sheet" that Doe submitted with his appeal provided only three grounds for appeal. Two are identical to numbers (1) and (2) above. The third states: "That the investigator failed to follow university rules or regulations while reviewing the cited behavior." (§§ 17.07D–1, 17.07D–2 & 17.07D–3.)

not supported by the evidence in light of the whole record; reverse the investigator's conclusions regarding policy violations, if not supported by the findings; or increase or decrease a sanction. If new evidence has been submitted which the SBAP determines should be considered, it may return the matter to the investigator for reconsideration in light of that evidence. If the SBAP determines that procedural errors occurred that materially impacted the fairness of the investigation, it may return the matter to the investigator with instructions to remedy the error. (§ 17.07 (K).) The SBAP may not substitute its opinion as to credibility for that of the investigator, nor may it make new factual findings. (§ 17.07(L).) The SBAP may not reweigh evidence and, if the record contains substantial evidence to support a finding of fact, must defer to that finding. The SBAP may not change a sanction unless it is unsupported by the findings or grossly disproportionate to the violation committed. The SBAP may not substitute its judgment for that of the investigator because it disagrees with the investigator's findings or the sanction imposed. (*Ibid.*)

Once the SBAP concludes its review, its recommendation is forwarded to the Vice Provost, who has unfettered discretion to accept or modify that recommendation based on his or her review of the record. The Vice Provost's decision is final. (§ 17.07(H), (M).)

III. *The Factual Background*

1. *The October 24, 2014 Incident and Roe's Report*[7]

Shortly after midnight on October 24, 2014, Doe, a freshman attending USC on a football scholarship, and Roe, a senior and student athletic trainer, engaged in sexual intercourse in Doe's campus apartment. Doe believed the encounter was consensual. Roe claimed it was not. On November 5,[8] Roe made a report of sexual misconduct to USC's Title IX Office, and met with respondent Kegan Allee, Ph.D., the Title IX investigator assigned to the investigation.

Roe reported that, on the evening of October 23, she had planned to attend a party with her roommates, and had a couple of mixed drinks with a roommate. At 11:30 p.m., after plans to attend the party fell through, Roe sent Doe, an acquaintance, a text asking what he was "up to," and agreed to go to his place to smoke marijuana. She was "tipsy" when she arrived at Doe's place at about midnight, and she and Doe walked to a taco stand.[9] Roe said Doe was "aggressively touchy," i.e., "grabbing [her breasts] from behind [her] or grabbing at [her] crotch" over her shorts while they walked, and she "push[ed] him away."

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[7] Our recitation is drawn from Dr. Allee's Summary Administrative Report (SAR) of her investigation, her notes of interviews with Roe, Doe and witnesses, and documentary and photographic evidence collected during the investigation.

[8] Unspecified date references are to calendar year 2014.

[9] Roe and Doe disagree about whether she went briefly into his apartment before they walked to the taco stand.

Roe and Doe returned to his apartment to smoke some weed. Witness D.N., Doe's cousin and roommate, was in the living room with his girlfriend while Roe was at the apartment, although it was dark and D.N. did not believe that Roe saw him. D.N. told Dr. Allee that Roe was "in a good mood" when she and Doe returned to the apartment at about 1:00 a.m. and went into Doe's bedroom.

Roe told Dr. Allee that she went over to Doe's "just to smoke." "[She] was somewhat tipsy and high, so cross–faded. [She] wasn't hammered, but [she] was not sober. [Roe] was at the foot of the bed when [they] were smoking and [Doe] was up by the pillows. After [they] smoked [Doe] got touchy again. It's kind of a blur. [Roe] remember[s] certain details that frighten [her]. At some point [Doe] just pulled down his sweatpants and put [Roe's] hand on his penis. [Roe] pulled [her] hand away. [She] was really confused and disturbed. Then [Doe] grabbed onto [Roe's breast] again and [she] couldn't pull his hand away" because Doe is "a football player, so he's really strong." Roe told Dr. Allee that she "mentally gave up" when she was unable to remove Doe's hand from her breast. Dr. Allee asked if it was "painful," and Roe said she "had some bruising" on her breast.

Roe reported that Doe committed forcible sexual acts, including nonconsensual vaginal penetration with his penis. He ripped off her shorts (but left all her other clothes on). She tried to pull herself away by holding onto the headboard, but Doe pulled her hands down. Roe tried to push against his chest, but could not push him away. Doe pulled Roe's hands down over her head, using one hand to hold them down. Roe told Dr. Allee that "throughout the entire thing it was easier to say 'I can't' because I know I'm not allowed to for job purposes.'" In response, Doe placed his hand "aggressively" over her mouth, "shush[ing]" her, and said, "[n]o one has to

know." This frightened Roe because she was not worried about people knowing, but that she did not want to be engaging in this conduct.

Doe flipped Roe over onto her stomach and continued to have sex with her from behind. He pulled her head back by the hair, which "really hurt[]" and caused her to say "Ow." He stuck several fingers in her mouth.[10] It had not hurt when Doe put his hand over her mouth, but it "wasn't gentle." She was unsure whether he did it to keep her quiet. He told her to suck on his fingers or maybe to get them wet. She was gagging because he was hurting her, and then his fingers were in her mouth. Doe pulled out to finish and it looked like he planned to ejaculate on her face or torso. When he let go of her, Roe "freaked out [and] went between his legs, scooting out quickly." Doe ejaculated on the sheets.[11]

Afterwards, Roe quickly put on her shorts, and grabbed her phone from the floor. Doe asked why she had moved, and she said "Because I didn't want it." Doe told her they "should do this again or [she] should come over again soon, and [Roe] left."

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[10] Doe disputed Roe's claim that he placed her hand on his penis against her will, or took her hands off the headboard and held them down. He acknowledged putting his hand over her mouth, but said he did it in a non–aggressive manner and because she was "moaning loud," and he did not want to wake up D.N.'s girlfriend, asleep in the living room. Doe acknowledged having put his fingers in Roe's mouth, and said Roe "willingly sucked on them like a penis." He agreed he had pulled Roe's hair during sex, and said she "moan[ed]" pleasurably in response.

[11] Roe told Dr. Allee that some ejaculate landed on her shirt, which she saved as evidence. Dr. Allee told her to how to preserve the evidence. Roe did not produce the evidence during the investigation.

Roe told Dr. Allee that she was "just repulsed." There had been no kissing or foreplay, and her thong underwear never came off; Doe simply pushed it aside. Doe "never bothered" to use the condom Roe had seen when she first entered his room. Roe believed that "if [the sexual encounter] was consensual, he could have taken the time to pick it up and put it on." She said that Doe had used force: "When he yanked my hair that hurt, but even before I wasn't able to push him off, and I was trying. I remember feeling like I was pushing a boulder. I don't remember some parts because I was laying there in my own head sometimes asking, 'Is this actually happening?' I was very confused."

Roe went to bed when she got home. That afternoon, she called K.J., whom she was dating and told him what had happened the night before.[12] At first, K.J. said it was "rape and [Roe] should report it," but as the conversation went on, he changed his mind, and said her account of the sexual activity "sounded consensual." Roe then called an ex–boyfriend, B.H.[13]

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[12] Roe did not identify this witness, and there is no indication that Dr. Allee asked her to. Doe subsequently identified him as K.J., a USC student and member of the track and field team. In a witness statement submitted on Doe's behalf during the appeal, K.J. said he "questioned the veracity of whether the incident was non–consensual based on the questions and answers [he] exchange[d] with [Roe] as it seemed to be consensual."

[13] Dr. Allee contacted B.H. as part of her investigation. In response, he sent her an email stating, "My former girlfriend [Roe] called me on October 25 for emotional support, telling me she was the victim of sexual assault. I am sorry that I have nothing further to add to your investigation."

Roe, who was crying and upset, told her roommates, E.C., H.M. and H.D. what had happened with Doe. H.M., took photos of "small little bruises" she saw on Roe's thighs, chest and arm (Roe gave the photos to Dr. Allee). Roe told Dr. Allee her roommates knew she wasn't interested in Doe. E.C. had specifically asked Roe the night before "if she'd hook up with [Doe]." Roe said "no." The roommates teased her before she went over about hooking up with Doe. To prove that she had not, Roe texted H.M. regularly while she was with Doe, until "everything happened and [she] couldn't text anymore." Roe gave screenshots of those texts to Dr. Allee. None of Roe's texts expressed discomfort about the way Doe touched her.

Dr. Allee interviewed all of Roe's roommates. E.C. said Roe "seemed really upset" on the afternoon of October 24. Roe had told her she had gone to hang out at Doe's apartment, and had not planned to hook up. She was "drinking and smoking weed" on the couch, when Doe "got on top of her."[14] Roe's roommates encouraged her to report the sexual assault, but Roe was "concerned about ruining [Doe's] life or getting him kicked off the [football] team."[15]

H.M. said Roe was "rambling" and "really upset" on October 24. She told H.M. that Doe "held her down and against her will." H.M. said, "That's

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[14] No one else told Dr. Allee that Roe drank while at Doe's house.

[15] E.C. and Roe were college roommates for three years. A redacted portion of Dr. Allee's summary of notes from her interview with E.C. states that E.C. had asked Roe if she planned to "hook up" with Doe, because Roe had "hooked up with multiple football players," before and been "reprimanded for unprofessional conduct." Roe and other trainers had had to sign a contract agreeing not to "hook up" with football players.

called rape.'" Roe had "small little bruises" inside the thigh and on her arm. H.M. and H.D. each told Dr. Allee they would have noticed the bruises on Roe's arm had the bruises been present on October 23. H.M. encouraged Roe to go to the hospital, "but she wasn't ready."

On October 28, Roe went to the Student Health Center to be tested for sexually transmitted diseases. After Roe explained what happened, medical staff contacted the Los Angeles Police Department, who wrote a report. Roe declined to participate in a criminal investigation.

2. *Doe Is Informed of Roe's Allegations of Sexual Misconduct and Immediately Subjected to Interim Sanctions*

On November 7, Doe was notified of a report of sexual misconduct made against him regarding an incident at his apartment on October 24. As a result of that incident, Doe was alleged to have violated numerous provisions of the SCC, including prohibitions against sexual misconduct.[16]

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[16] Specifically, Doe was alleged to have violated sections:
11.32.B (Endangering Others): "Conducting oneself in a manner that endangers the health or safety of other members . . . within the university community."
11.36.A (Physical Harm): "Causing physical harm to any person in the university community."
11.36.B (Apprehension of Harm): "Causing reasonable apprehension of harm to any person in the university community."
11.41 (Illegal Use of Narcotics or Paraphernalia): "Use, possession or dissemination of illegal drugs or drug-related paraphernalia in the university community."
11.51.A (Harassing or Threatening Behavior): "Comments or actions which are individually directed and which are harassing, intimidating or threatening or interfere with work or learning, for the person at which they are directed and for a reasonable person."
11.53.A (Sexual Misconduct 1): "Engaging in any unwelcome sexual advance, request for sexual favors, or other unwanted verbal or non-consensual sexual

Doe was instructed to meet with Dr. Allee by November 14, with or without an advisor, and told he could make a written request to review the report against him, provided he gave at least 24 hours advance notice. Also on November 7, respondent Ainsley Carry, Ed.D., USC's Vice Provost, notified Doe that, effective immediately, USC was taking interim action against him because the allegations described conduct that endangered the safety and well being of the USC community. Doe was permitted only to attend classes in which he was enrolled and to use campus dining facilities. He was prohibited from having visitors at his housing assignment, and from attending any USC–sponsored event. Further, Doe, who was attending college on an athletic scholarship, was prohibited from any involvement with the USC football team, except on the practice field and in the locker room; he could not participate in any game.

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conduct . . . within the university community . . . , when the conduct, has the effect of unreasonably interfering with an individual's academic or work performance or creating an intimidating, hostile or offensive academic, work or student living environment."

11.53.B (Sexual Misconduct 2): "Sexual touching, fondling and/or groping, including intentional contact with the intimate parts of another, causing another to touch one's intimate parts, or disrobing or exposure of another without permission. Intimate parts? [*sic*] may include the breasts, genitals, buttocks, groin, mouth, or any other part of the body that is touched in a sexual manner."

11.53.C (Sexual Misconduct 3): "Attempted intercourse, sexual contact, sexual touching, fondling and/or groping."

11.53.D (Sexual Misconduct 4): "Non-consensual vaginal or anal penetration, however slight, with a body part (e.g., penis, tongue, finger, hand, etc.) or object, or oral penetration involving mouth to genital contact."

3. *Doe's First Interview with Dr. Allee*

a. *The October 9 Incident*

On November 11, Doe met alone with Dr. Allee. When asked if he knew what the meeting was about, Doe said "With [Roe], right?" Doe asked to read Roe's statement, but before doing so began to describe an encounter he had with Roe on October 9. Roe and her friends had approached him on fraternity row, and she invited him to go swimming. Doe had gone with Roe to her apartment while the women changed, because he needed to charge his phone.

At Roe's apartment, Doe went with Roe into her room to charge his phone. He "hugged [Roe] and started kissing her neck and grabbin' on her [as she sat on his lap] and she was grabbin' on [him]." Roe did not tell him to "stop" or move his hands away, so he kissed her neck and touched her inner thighs. Roe left for about 10 minutes, and when she returned, said they were no longer going swimming.

Doe and Roe laid down on her bed. She wore a bikini bottom and a T–shirt. He removed his shirt and pants and started "fingering"[17] Roe for a couple of minutes. Roe was moaning, which made Doe believe he would "get some play." However, when Roe abruptly said she did not feel well, Doe stopped. Roe told Doe he "could stay the night," but he declined and left. Doe had smelled alcohol on Roe's breath on October 9, but she had not "seem[ed]

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[17] Dr. Allee did not ask Doe to clarify what he meant by "fingering," which she defined as "digital penetration." In his appeal, Doe denied having digitally penetrated Roe on October 9, and said Dr. Allee misconstrued his words. He also said Roe fondled his penis on that occasion, which made him believe she consented to sexual touching.

faded." Roe sent Doe a text on October 10. She said she had "blacked" out, but had a vague memory of him being at her house, and asked "what happened last night?" In response, Doe said, among other things, that Roe had been "faded" and they "mess[ed] around" in her room, but did not have intercourse or kiss. He said he had left when she started feeling sick. Doe gave Dr. Allee screen shots of his text exchange with Roe.

b. *The October 24 Incident*

With regard to the October 24 encounter, Doe told Dr. Allee that, after the party plans fell through, Roe come over to smoke a blunt. When she arrived, D.N. and his girlfriend were in the living room, so Roe and Doe went into his room. Roe chose not to smoke. Doe smoked a little, then they walked to a taco stand. Doe had been "feelin' [Roe]," as they walked, by which he meant grabbing her breasts and rubbing her thighs. Roe did not push his hands away.

When Doe and Roe returned to Doe's bedroom, they lay down and talked. He removed her clothes until she was "completely naked," then took off his clothes. Doe "[f]inger[ed]" Roe and grabbed her breasts while she fondled his penis. He got on top of Roe, and she said "No, you don't have a condom." Doe stopped the sexual activity to put on a condom. He had placed a condom nearby earlier, believing he would "get hit" that night, since he and Roe had "messed around before." As Doe retrieved the condom Roe remained naked on his bed, with her legs spread. After Doe put on the condom, he and Roe had consensual sex in different positions, including with her on top. Roe seemed to be "enjoying [herself] facially," and was "[l]ip biting, moaning, kissing [his] neck," and scratching his back during the sexual encounter. Doe ejaculated inside Roe while wearing a condom. Afterward, he helped Roe find her clothes, gave her a hug and she left.

Dr. Allee invited Doe to read Roe's differing account of the October 24 sexual encounter. He did, and took issue with several points. He disputed that Roe said "no," and said if she had done so he would "get off and leave." The only time she said "no" was because he was not wearing a condom, and she could have left when he stopped to put one on. She did not. Doe denied that Roe had smoked any marijuana at his house, and denied pulling down his pants to place Roe's hand on his penis. He described Roe's report as "crazy!" As for whether he used a condom, after reading Roe's account, Doe said "Oh, that's right. My fault. I did take the condom off. I pulled out and took the condom off, but it wasn't [as Roe described it]." He explained that he tried to ejaculate on her face and have her swallow it, but she moved and told him she did not want him to ejaculate on her face. They laughed about it, and "[she] wasn't scared for her life." According to Doe, "[i]t was a funny thing to us."[18]

Doe said Roe may have held on to the bed frame, but denied taking her hands off of it or holding them down. He said she probably held on during intercourse because his bed slides. He also acknowledged placing a hand over Roe's mouth. He had not done so aggressively, only to say "'be quiet'" because Roe was moaning loudly and he did not want to wake D.N. or his girlfriend, who were asleep in the living room. Doe put his fingers in Roe's

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[18] During a second interview on January 22, 2015, Doe explained that, although he first said he had ejaculated inside Roe, he later recalled standing on his bed after taking off the condom and throwing it away, to ejaculate on Roe's face. Later still, after reviewing a statement in which D.N. said he had seen a used condom in Doe's room, Doe explained that he did not know where the condom was thrown when he took it off, but was certain he wore one and that he threw it away.

mouth, and she willingly sucked on them. He admitted pulling her hair, using it to hold her and thrust from behind. He did not flip Roe over; she willingly assumed that position. Doe did not remember her complaining of any pain or saying "ow," only moaning and possibly saying "uh."

When asked what Roe said or did to make him believe she wanted to have sex, Doe said, "When I was fingering her she was grabbin' on my [penis]. I thought that was clear." She also told him he wasn't wearing a condom, and was kissing his neck and scratching his back. Doe also emphasized that he felt "like the last time [the two] hung out [they] were past flirting. Past messin' around. Two weeks later she's comin' over at [12:30] in the morning."

Dr. Allee showed Doe a file of additional information she had gathered, which included screen shots of (1) texts between Roe and someone named "Mia." Doe believed these texts confirmed his theory that Roe was afraid she would be fired if it became known that she had engaged in sex with him;[19] (2) texts between Roe and someone named "Julia"; (3) texts between Roe and H.M.; (4) texts between Roe and Doe from October 21-24; (5) texts between Roe and Doe's teammate, S.V.; (6) photographs of the police report; and (7) photographs of bruises on Roe's legs, arm and breast. Dr. Allee asked if there were any witnesses Doe wanted her to talk to. He said "nobody was in the

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[19] The SAR does not reflect that Doe raised this theory during his meeting with Dr. Allee on November 11. However, Dr. Allee's notes from that meeting state that, after reading Roe's texts to Mia, Doe expressed his belief that Roe "got scared that she had sex with [Doe] and was going to get fired because [he knew he] didn't force her to have sex." Several lines of redacted material follow this statement in Dr. Allee's notes. Dr. Allee does specifically mention–and reject–this theory in explaining her reasons for finding Roe more credible than Doe.

room[,]" but, after asking Dr. Allee for examples of people who might be helpful, indicated that she should talk to Roe's roommates and to D.N. Doe provided Dr. Allee screenshots of his text exchanges with Roe.

4. *Dr. Allee's Subsequent Meetings With Roe and Doe*

Dr. Allee had a second meeting with Roe (and an advisor) on January 15, 2015 and questioned her about the interaction with Doe on October 9. Roe told her, "I was pretty drunk. I don't fully remember. I was leaving a party at ZBT and I ran into him and his friends on the sidewalk. Collectively we all decided to go swimming. . . . So we all go back to my apartment so the girls could get bathing suits. My memory is pretty blurry. I remember feeling sick and throwing up in my bathroom and we never went swimming." Roe remembered Doe was at her apartment, but knew they "didn't hook up because [she had] confirmed that the next day." Doe told her they "'messed around," which she assumed meant he "was just flirting with [her]." Roe showed Dr. Allee the same text exchange as Doe had shown the investigator.

Dr. Allee told Roe that Doe claimed to have "digitally penetrated [her] that night [October 9]." In reaction to this news, Roe's "chest, throat, and face flushed bright red with splotches of white; her whole body started visibly shaking; she started sobbing," and cried for several minutes. When Roe regained her composure, she told Dr. Allee she "didn't remember any of that." With Roe's consent, Dr. Allee opened a second case against Doe regarding the incident on October 9.[20]

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[20] Although the question of Roe's capacity to consent was at issue, Dr. Allee did not ask Roe or anyone to quantify how much alcohol Roe consumed on October 9. The only witnesses Dr. Allee questioned on this point were Doe, who was asked only if Roe had been drinking on October 9, and Roe's roommate, H.D., who provided no details about Roe's state of intoxication.

During the January 15, 2015 meeting, Roe was adamant that Doe had not used a condom on October 24, and said she "wouldn't have . . . had a million tests done if" he had. She denied scratching Doe's back during sex, kissing him, grabbing his penis or being on top of him. She disputed Doe's account that she went inside his apartment before they walked to get food, as well as his claim that she had not smoked any marijuana. She took four or five hits while in Doe's bedroom. Roe denied sucking Doe's fingers. Instead, she claimed he put his hand over her mouth when she said "ow," and she "felt like [she] was gagging." She also denied willingly flipping over. She never wanted to engage in sex in the first place, but Doe was strong and able to turn her over. Roe denied that she made up the sexual assault because she feared she would be fired. She told Dr. Allee that she knew several "trainers [who] have hooked up with athletes and are fine."

On January 22, 2015, Doe (and an advisor) had a second and final meeting with Dr. Allee. Doe was told Roe had initiated a second case against him regarding the incident on October 9, and claimed that she had no "knowledge about that incident because she was drunk." Doe told Dr. Allee that, when they were in Roe's apartment on October 9, Roe was "grabbin' on [his] penis so of course [he] start[ed] fingering her[,]" and "got on top of her." However, when Roe told him she felt unwell, he said "it's cool," got off, kissed her forehead and left.

Regarding the October 24 sexual encounter, Dr. Allee asked how Doe knew Roe wanted him to pull her hair, to which Doe responded, "I didn't. We were in doggy position. I just assumed she'd like it." Similarly, when asked how he knew Roe wanted to swallow his ejaculate or to have him ejaculate on

her face, Doe said, "I didn't, but if she didn't want to she could get out of the way and she did."

Doe reiterated that Roe did not smoke at his apartment. He first said he remembered smoking a blunt before going out for food, later said he did not smoke until he and Roe returned, and ultimately decided he smoked before going for food because he was not "sober" when walking to the taco stand.

5. *Additional Witnesses*

Around October 28, Roe texted a witness identified only as "Mia," asking what might happen to an athletic trainer who reported a sexual assault perpetrated by a student athlete. Roe described her alleged sexual assault in details consistent with her report to Dr. Allee. Roe told Mia she was "afraid [Doe]'s going to tell someone we hooked up and then it'll get back to the trainers." Although this is not mentioned in the SAR, Roe's text exchange with Mia also indicates that Roe was worried she might be fired, or be unable to attend graduate school, because she might be unable to get letters of recommendation if the incident became known. There is no indication that Dr. Allee tried to identify or contact Mia.

Doe also sent a text to someone identified only as "Julia," a friend of H.M.'s who had gone through a "similar situation." There is no indication that Dr. Allee tried to identify or contact Julia.

A few days later, Roe sent a text to S.V., a football player. She asked how he would "respond if one of [his] teammates raped someone?", and described a series of events similar to those she had described to Mia.[21]

On November 17, Dr. Allee interviewed D.N., who was with his girlfriend in the living room of the Doe's apartment when the sexual activity between Doe and Roe occurred on October 24. D.N. saw Roe and Doe come into the apartment at about 1:00 a.m., and Roe appeared to be in a good mood. D.N. and his girlfriend heard Roe "moaning," which sounded to him like "normal sex sounds," "pleasure" and "[l]ike somebody enjoying it." D.N.'s girlfriend had asked him if this was an "everyday thing." D.N. told Dr. Allee that the sex and moaning went on for "a while" and, at some point he fell asleep. Later, he "woke up to go to the bathroom and heard [Roe and Doe] talking." D.N. did not see Roe leave the apartment.

D.N. was not surprised the next day when Doe said he and Roe had had sex, because Roe had come to the apartment in the middle of the night, and the prior interactions D.N. had witnessed between the two were flirtatious and sexual in nature. Indeed, D.N. had moved his bed into the living room on October 23 because his girlfriend was spending the night and he knew Doe had a girl coming over. D.N.'s girlfriend was still at the apartment the next morning when Doe and D.N. briefly discussed Doe's sexual encounter with Roe. D.N. saw a "nasty" used condom on Doe's desk, and told him to throw it away. The record does not reflect that Dr. Allee asked D.N. to identify his girlfriend, or that she attempted to interview her.

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[21] On November 6, Dr. Allee had contact with S.V., but the notes from that meeting are incomplete (page 1 of 2 missing), partially redacted and the relevance, if any, of information Dr. Allee obtained from S.V. is unclear.

Dr. Allee had brief telephonic conversations with Roe on February 9 and 10, 2015, to ask Roe "a few last questions." At Dr. Allee's request, Roe emailed photographs of her bathing suits. Dr. Allee contacted all individuals the parties had identified as potential witnesses, but did not attempt to contact anyone who had been mentioned during the investigation but not fully identified.

On February 10, 2015, Dr. Allee permitted the parties to view the most recent information she had gathered during the interviews on a secure portal. The investigation was closed on February 11, 2015.

6. *Findings and Determinations from the Title IX Investigation*

Under the university's Sexual Misconduct Policy, the Title IX investigator alone makes findings of fact and, using a preponderance of the evidence standard, determines whether the SCC has been violated. The investigator's written decision, and the reasons for that decision, are contained in a SAR.

In her SAR, Dr. Allee concluded, based on her investigation and review of all evidence she deemed relevant, and taking into account her determination as to the parties' credibility, that Doe violated the SCC and "more likely than not, engaged in unwanted sexual conduct that ranged from fondling to vaginal penetration." With respect to the October 24 incident, Dr. Allee determined that the parties' conflicting accounts could not be reconciled, and found Roe's account more credible for several reasons.

First, Dr. Allee found that more evidence corroborated Roe's account of the October 24 incident. Statements made by Roe's three roommates were largely consistent with her account, and Roe told her roommates before going to Doe's apartment that she did not intend to have sex with him. Second; Roe lacked any memory of sexual conduct with Doe on October 9, so she could not

have known that Doe would assume they would have more sexual contact on October 24.[22] Roe told her roommates the sex was nonconsensual. Two roommates saw bruises on Roe on October 24 that they had not seen and would have noticed the night before. Third, text messages sent by Roe to third-party witnesses corroborated her report to Dr. Allee.

Dr. Allee rejected Doe's theory that Roe was motivated to fabricate a claim of sexual assault because she was worried she would be fired as an athletic trainer if it became known she had consensual sex with a student athlete. Dr. Allee found "nothing" to support this theory, and observed that USC "would not retaliate against a student who had experienced non–consensual sexual acts." Dr. Allee also made the unattributed assertion that "USC Athletic Training has had knowledge of athletic trainers engaging in consensual sexual activity with athletes and trainers [who] were not fired despite their employment contract . . . prohibit[ing] fraternizing with athletes."

Dr. Allee was struck by Roe's demeanor and physical reaction upon hearing about the October 9 incident. That reaction "effectively convinced"

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[22] In the SAR, Dr. Allee did not mention that, in a series of flirtatious texts between Doe and Roe on October 23, when they were discussing whether to go and what to wear to the party, Doe told Roe, alternatively, that she "should wear nothing and come to [his] house and smoke [a] blunt," should "come over naked," and asked if the "night [would] end[] up being at [his] house." Roe responded, "Hahaha no I'm not going over to your place naked" and said she "[couldn't] guarantee anything." After Doe told Roe "it's late:/ I just wanted u before u left," Roe responded: "You wanted me? Haha:p," to which Doe responded, "badly."

Dr. Allee that Roe had not previously known about Doe's claim to have "digitally penetrated" her,[23] and "was in distress upon learning about it."

Dr. Allee found Doe's credibility was diminished because his statements "were inconsistent over time and he several times corrected his statements only after reviewing other statements." For example, Doe's explanations differed regarding when he had smoked, where he ejaculated and what he did with the condom.

Dr. Allee also noted that Doe made assumptions about Roe's sexual consent which were inconsistent with USC's policy. Specifically, when Roe came to his house on October 24, he assumed they would have sex because of what had transpired on October 9.[24] Additionally, Doe "just assumed" Roe would like him to pull her hair. Similarly, he had not asked if Roe wanted him to ejaculate on her face (or to swallow his ejaculate), but proceeded to do so anyway, saying, "if she didn't want to she could get out of the way and she did."

Further, although Doe described behavior that made him believe he had Roe's affirmative consent on October 9 and 24 (e.g., lip biting, moaning,

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[23] Later, in his appeal, Doe explained that, when he said he and Roe were "messing around" on October 9, he "want[ed] to be clear that [he] never digitally penetrated [Roe] as [Dr. Allee] claim[ed] [he] did. [Dr. Allee] was making assumptions, and never asked for any clarification of [his] wording."

[24] Under the SCC, the accuser's sexual history is not relevant and may not be used as evidence. However, if here is a sexual history between the parties, and respondent claims consent, the parties' sexual history may be relevant to assess the manner of consent. The mere fact of a current or previous sexual relationship, by itself, is insufficient to constitute consent. (§ 17.04(G).)

kissing and scratching him on his back), Dr. Allee found Roe more credible, and concluded it more likely than not that the sexual activity on October 24 was "forcible and non–consensual." Dr. Allee found that Doe violated sections 11.36.B, 11.41, and 11.53.A–11.53.D of the SCC, but did not commit the other alleged violations. However, as to the incident on October 9, Dr. Allee found that Doe did not violate the SCC. Although Dr. Allee found "Roe['s] distress upon learning of the sexual activity [on October 9] . . . believable," she also found there was insufficient evidence to indicate that "[Doe] knew or should have known [Roe] lacked the capacity to consent to sexual activities."

Dr. Allee determined that expulsion and an order prohibiting Doe from contact with Roe were appropriate sanctions. The parties were notified of Dr. Allee's findings and conclusions, and their right to appeal.

IV. *Doe's Appeal*

On April 3, 2015, Doe submitted an appeal from the SAR. The stated grounds for his appeal were that: (1) new evidence had become available which was sufficient to alter the decision and about which Doe was not aware and could not reasonably have obtained at the time of Dr. Allee's original investigation; (2) procedural errors were committed that materially impacted the fairness of the investigation; and (3) the investigator's conclusions and sanctions were not supported by the findings, and were not supported by the evidence in light of the whole record.

1. *New Evidence*

Doe submitted or identified several items of "new evidence" in support of his appeal. The first was a signed witness statement from K.J., the USC athlete Roe was dating at the time of the October 24 incident, but had not identified to Dr. Allee. K.J. stated that when Roe told him on the afternoon

of October 24 what had happened with an unnamed perpetrator, he "questioned the veracity of whether the incident was non–consensual." K.J. thought the encounter sounded "consensual." Consistent with Doe's theory that Roe had a motive to lie, and potentially corroborating information that Dr. Allee had redacted from E.C.'s witness statement, K.J. represented that a previous sexual encounter between Roe and a USC athlete, was the reason "she [was] no longer doing training for the USC football team." Doe did not specify when he learned K.J.'s identity, or why he was unable to obtain that information during the investigation.

Two items of new evidence related to the bruises on Roe's arm, thighs and breast. First, Doe noted that, in a text exchange on October 28, Roe told S.V. her bruises were "pretty much gone." Doe observed that four days was a surprisingly short amount of time for bruises to heal. Second, Doe submitted an unsigned "Expert Witness Statement" from a registered nurse. The nurse had 18 years of experience, but did not specify whether she had any expertise in sexual assault. The nurse had reviewed the photographs of Roe's bruises, and opined that none was consistent with bruising one would expect to see one day after a forceful sexual assault.

Third, Doe identified L.W. as a witness he could produce. L.W. was the first person, other than D.N., to whom Doe revealed (on October 27) his sexual encounter with Roe on October 24. Doe had not previously identified this witness because he never considered the encounter nonconsensual. L.W. was being belatedly identified because comments made by Roe's witnesses merely regurgitated what Roe told them, and were not investigated fully by Dr. Allee, who accorded them undue weight. In addition, L.W. could reaffirm what K.J. said about Roe having lost her job as a trainer for the football team after having sex with a player.

Fourth, Doe claimed that Roe purposefully had not identified two individuals whom she knew (but Doe did not) who saw her walking with Doe to the taco stand on October 23, and whom Roe tried to avoid. Doe maintained that these individuals would have seen him grope Roe, and claimed that Roe chose not to identify them as witnesses because it would have been detrimental to her story.

Finally, although the Title IX investigator had not found the sexual assault allegations as to the October 9 incident substantiated, Doe identified several items of evidence related to that incident to demonstrate that Roe was not credible, and that Dr. Allee had misconstrued his words. First, he claimed to have given Dr. Allee a detailed description of the bathing suit Roe wore on October 9. (This information is not contained in the SAR.) Although Roe purported to have given photos to Dr. Allee of all her bathing suits, Doe had discovered that, in an effort to discredit him, Roe excluded a photo of the suit he had described to Dr. Allee, and that she had worn on October 9. Doe submitted a photograph of a bathing suit bottom he claimed Roe purposefully hid.

Second, Doe explained that, when he said he and Roe were "messing around," he "never digitally penetrated [Roe] as [Dr. Allee] claim[ed] [he] did." Rather, Dr. Allee misconstrued what he said and never asked for clarification.

Third, Doe took aim at Roe's credibility, arguing she was not as incapacitated as she claimed on October 9. That was evident because E.C. came into the bedroom when Roe and Doe were "messing around," and said "I

knew it" when she saw Roe and Doe on the bed.[25] Roe had quickly left the room for about 10 minutes to talk to E.C. (so she had not been "blacked out" the whole time, nor as drunk as she implied). Due to the press of time, and having "just" received E.C.'s information, Doe had not had sufficient time to contact her to obtain evidence that Roe was "fine" when they spoke on October 9. Nor had Roe been asleep when Doe left. After Doe turned Roe on her side, she said "thank you" and invited him to stay. Doe also provided a statement from D.N., who was with Doe on October 9 when Roe invited them to go swimming. D.N. said Roe had not seemed "drunk or out of it."

2. *Unfair Hearing and Title IX Investigator's Failure to Conduct a Thorough Investigation*

Doe argued that Dr. Allee was "biased," "determined to substantiate the most serious . . . allegations, [and had] failed to properly investigate the incident and develop the record with respect to the most critical points. This flaw infected the entire adjudication process."

Doe also argued there were several fundamental problems with the disciplinary procedures themselves. Given the serious nature of charges

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[25] E.C. denied having been present when Doe was at the apartment on October 9. A substantial portion of Dr. Allee's notes from her interview of E.C. were redacted. That redacted material (revealed to the SBAP at an unknown time) includes E.C.'s statement regarding Roe's sexual history with multiple football players. E.C. said that, following some "inappropriate behaviors" between student trainers and football players, the student trainers had received a group text and been or "were told" that a trainer had "a list and . . . all trainers should come speak to him if they wanted to keep their jobs." All the trainers signed a contract that they would not "hook up" with players. Doe requested to see the redacted information, but the SBAP denied his request on the ground that it was irrelevant.

levied against him and the severe consequences he faced if those charges were sustained, his case should have been be decided by an impartial panel, not by Dr. Allee as both sole investigator and decision maker. Doe had been denied any hearing or opportunity to challenge the veracity of any witness against him. Instead, Dr. Allee, who, he argued. acted more like an advocate than an impartial investigator,[26] chose to credit Roe's evidence over his, and failed to conduct a thorough investigation or contact other witnesses in an effort to ferret out the truth. Further, Dr. Allee did not record interviews, but merely took notes which she summarized in the SAR. Doe argued that Dr. Allee chose to redact potentially material information, and mischaracterized things he said, crafting the SAR to reflect "what she thought was said," and, in that process, make Roe's account sound more favorable. In sum, Dr. Allee had inappropriately occupied the roles of "investigator, . . . judge, jury, and executioner in conducting this investigation, assessing guilt or responsibility, and issuing sanctions in a closed [SAR] process." Doe was "given . . . no reasonable opportunity to be heard, and never had an opportunity to examine, confront, or challenge the witnesses against [him]."

Doe also claimed he was denied equal time during the investigation, and lacked sufficient time to interview all the witnesses (particularly one unidentified witness he discovered just days before filing his appeal), or to investigate and rebut evidence against him. In addition, after he produced photographic evidence of the bathing suit he claimed Roe hid to discredit him, Dr. Allee never questioned Roe about that withheld evidence. Instead, Dr.

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[26] Doe claimed that he sometimes felt that he was "being attacked" during meetings with Dr. Allee when he tried to question things Roe or her witnesses said.

Allee closed the investigation without "giving [Doe] time to respond [to] new [unidentified] evidence . . . sent to the investigator without [his] knowledge."

3. *Unfounded Findings, Conclusions and Sanctions*

In support of the third basis for his appeal, Doe argued the investigator failed adequately to explore material contradictions or incongruities in Roe's story, such as, (1) claiming she came to his house solely to smoke marijuana, but had not smoked; (2) concealing the identity of her then–boyfriend from Dr. Allee, because he was a USC athlete; (3) manufacturing text exchanges to make it appear that she had not gone to Doe's house for sex, so she would not lose her job; (4) returning with Doe to his apartment after going for food, despite the fact that he had just engaged in an aggressive, unwelcome public groping of her; and (5) waiting an inordinate amount of time to be tested for STD's, given her claim that Doe wore no condom. Doe also argued that he was given insufficient time to prepare a defense and had limited resources to gather materials to pursue his appeal.

V. *The SBAP and Dr. Carry Uphold Dr. Allee's Findings; Doe is Expelled and is Not Successful in His Effort to Obtain a Writ of Mandate*

On April 24, 2015, the anonymous SBAP met to review the case file, rejected Doe's contentions, and upheld the sanction of expulsion. The panel affirmed Dr. Allee's findings as to five of six charged SCC violations.[27]

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[27] As to the remaining count, the SBAP recommended that Doe not be held responsible for attempted nonconsensual intercourse, as it was "not possible to be found responsible for both an attempted act and the completed act."

As for Doe's contentions regarding newly discovered evidence, the SBAP agreed with Doe that Dr. Allee should have contacted at least the newly identified witness, and should have followed up with the Athletics Department to ascertain its rules and practices regarding sexual relationships between trainers and athletes. However, the SBAP also found that new evidence identified or produced was, in some instances, irrelevant to the Title IX investigation and, in others, would not have changed the result had it been considered. The panel rejected Doe's assertions that Dr. Allee was biased, and had placed unwarranted emphasis on Roe's statements to witnesses before and after the sexual activity on October 24. In conclusion, the SBAP found no investigatory flaw sufficient to affect the outcome of the investigation, and agreed that expulsion was the appropriate sanction.

On May 12, 2015, four days after receiving the SBAP's recommendations, Dr. Ainsley Carry, the Vice Provost, accepted the SBAP's recommended sanction of expulsion, and Doe was expelled, effective immediately.

Doe filed a petition seeking a writ of administrative mandate against respondents (§ 1094.5). The trial court rejected Doe's contentions that he was denied due process, that Allee or Dr. Carry were biased, and that there was insufficient evidence to support the SAR's findings. The petition was denied. This timely appeal followed entry of judgment.

DISCUSSION

1. *A Justiciable Controversy Exists*

Before we consider the merits of Doe's challenges to the judgment, we decide a preliminary issue: whether a justiciable controversy exists. Respondents insist this matter is moot. They allege that, in January 2016,

while the writ was pending, Doe was charged with committing several felonies near USC, and, in April 2016, sentenced to six years in state prison, a sentence he was serving when the petition was heard. In August 2016, Doe was expelled for independent violations of the SCC. As a result, respondents argue that, regardless of this Court's decision, Doe is no longer eligible to return to USC. We note that the record does not contain evidence of Doe's conviction, but does show that he was expelled in August 2016.

We agree with the trial court. The matter is not moot: "Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life. [Citation.] . . . . [The student's] personal relationships might suffer. [Citation.] And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled." (*Doe v. Baum* (6th. Cir. 2018) 903 F.3d 575, 582 (*Baum*); *Doe v. University of Cincinnati* (6th Cir. 2017) 872 F.3d 393, 400 [a student's expulsion for a sexual offense can have a lasting impact on his personal life and educational and employment opportunities] (*Cincinnati*).) As the trial court stated, Doe's eligibility to return to USC is not "the only 'effectual relief' that [he] can obtain in this action. . . . [E]xpungment of an expulsion mark for sexual misconduct on [Doe's] USC transcript would make it far easier for him to transfer to a different university to continue his education. Expungement could also have a tendency to restore [Doe's] reputation, at least to some degree, in the public eye."

We proceed to consider Doe's challenges to the judgment.

2. *The Standard of Review*

"'The remedy of administrative mandamus . . . applies to private organizations that provide for a formal evidentiary hearing.'" (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 237, fn. 9 (*Doe*

v. USC(1).) As relevant here, the question presented by a petition for writ of administrative mandate is whether there was a fair trial. (§ 1094.5, subd. (b); *Doe v. Regents of University of California (Santa Barbara)* (2018) 28 Cal.App.5th 44, 55 (*UCSB*).) "We review the fairness of the administrative proceeding de novo[,] . . . 'because the ultimate determination of procedural fairness amounts to a question of law.' [Citation.] . . . '[A] "'fair trial'" means . . . "a fair administrative hearing."' [Citations.]" (*Doe v. USC(1), supra,* 246 Cal.App.4th at p. 239; accord, *UCSB, supra,* 28 Cal.App.5th at p. 55; *Doe v. Regents of University of California* (*San Diego*) (2016) 5 Cal.App.5th 1055, 1072 (*UCSD*).)

"The scope of our review from a judgment on a petition for writ of mandate is the same as that of the trial court. [Citation.] 'An appellate court in a case not involving a fundamental vested right reviews the agency's decision, rather than the trial court's decision, applying the same standard of review applicable in the trial court.' [Citation.]" (*Doe v. USC(1), supra,* 246 Cal.App.4th at p. 239.) This and numerous courts have applied this standard to disciplinary decisions involving sexual misconduct at private and public universities. (*Ibid.*; *UCSD, supra,* 5 Cal.App.5th at p. 1072; *Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055, 1065 (*CMC*); *UCSB, supra,* 28 Cal.App.5th at p. 56; *Doe v. University of Southern California* (Dec. 11, 2018) ___ Cal.App.5th ___, ___ [2018 WL6499696] (*Doe v. USC(2).*)

3. *Doe Has Not Shown that Respondents Harbored Bias Against Him*

Initially, Doe contends that respondents–principally Dr. Allee–were biased against him, resulting in an incomplete and unfair investigation and adjudication. Doe argues that information gleaned after the disciplinary proceeding revealed that Dr. Allee conducted extensive work as an advocate

for victims of sexual assault prior to her employment by USC. According to Doe, that evidence demonstrates that Dr. Allee could not conduct a fair disciplinary investigation and was necessarily biased in favor of alleged victims of sexual assault.[28]

While we understand why Doe believes Dr. Allee might harbor an inherent bias against someone accused of sexual assault, Doe's obligation on appeal is to demonstrate actual bias. A disciplinary decision may not be invalidated solely on the basis of an inference or appearance of bias. (See *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219; cf., *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236 ["A mere suggestion of bias is not sufficient to overcome the presumption of integrity and honesty" in a hearing officer].) We agree with the trial court's analysis: "[t]he fact that, before her employment at USC, Dr. Allee did some work as a victims' advocate, . . . and gave presentations regarding preventing sexual assault, does not establish that Dr. Allee is likely biased against all men . . . accused of sexual assault." Doe has not provided evidence to demonstrate that Dr. Allee's findings and conclusions were premised on actual bias against him or generally against anyone accused of sexual assault, or that there is a high probability of such bias. Doe's "mere belief that [a school official] acted with . . . ulterior motives is insufficient to state a claim for relief." (*Doe v. Univ. of*

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[28] Prior to her employment at USC, Dr. Allee worked at the University of California, Santa Barbara (UCSB), directing outreach and services for female survivors of interpersonal violence, harassment, and for a Rape Prevention Education Program. She has made presentations on gender-based violence, focused on the rights of alleged victims, and received an award for her service as an "exemplary advocate for survivors of sexual assault."

Cincinnati (S.D. Ohio 2016) 173 F.Supp.3d 586, 602, fn. omitted (*Univ. of Cincinnati*).)[29]

4. *Fair Hearing Requirements*

Although we conclude that Doe failed to prove actual bias in USC's disciplinary process, we conclude on other grounds that USC's process is fundamentally flawed. As we explain in more detail below, we hold that in a case such as Doe's, in which a student faces serious discipline for alleged sexual misconduct, and the credibility of witnesses is central to the adjudication of the charge, fundamental fairness requires that the university must at least permit cross-examination of adverse witnesses at a hearing in which the witnesses appear in person or by some other means (such as means provided by technology like videoconferencing) before one or more neutral adjudicator(s) with the power independently to judge credibility and find facts. The factfinder may not be a single individual with the divided and inconsistent roles occupied here by the Title IX investigator in the USC system.

a. *General Principles of Fundamental Fairness*

Until recently, few cases had attempted to define "fair hearing standards for student discipline at private universities." (*Doe v. USC(1)*, *supra,* 246 Cal.App.4th at p. 245.) For practical purposes, common law requirements for a fair disciplinary hearing at a private university mirror the

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[29] We also reject Doe's assertion that the members of "the anonymous SBAP panel . . . were not impartial adjudicators." Neither the SBAP itself, nor any individual panel member, is a party to this action.

due process protections at public universities. (*Id.* at pp. 245–247; see *CMC, supra*, 25 Cal.App.5th at p. 1067, fn. 8; accord, *Doe v. USC(2), supra*, ___Cal.App.5th at p. ___, (2018WL6499696), fn. 25; cf., *Doe v. Trustees of the University of Penn.* (E.D. Pa. (2017) 270 F.Supp.3d 799, 813 [student at private university was not entitled to the same due process protections as student at a state university, but due process protections applied in contract action in which private university agreed to provide a "fundamentally fair" disciplinary process].)[30]

Fair hearing requirements are "flexible" and entail no "rigid procedure." (*Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807; *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555 (*Pinsker*).) Disciplinary hearings "need not include all the safeguards and formalities of a criminal trial." (*UCSD, supra*, 5 Cal.App.5th at p. 1078.) "'[T]he formal rules of evidence do not apply . . . .' [Citation.]" (*UCSB, supra,* 28 Cal.App.5th at p. 56; *Univ. of Cincinnati, supra,* 173 F.Supp.3d at p. 602 [there is "no prohibition against the use of hearsay evidence in school disciplinary hearings"].) Historically, all that was required for a student

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[30] We acknowledge that, unlike public universities, which are "'"subject to federal constitutional guarantees,"' [citation] . . . private college[s], generally [are] not subject to the constitutional requirements of procedural due process." (*CMC, supra*, 25 Cal.App.5th at p. 1067, fn. 8.) Nevertheless, "[d]ue process jurisprudence . . . may be 'instructive' in cases determining fair hearing standards for student disciplinary proceedings at private schools." (*Ibid.*, citing *Doe v. USC*(1), *supra*, 246 Cal.App.4th at p. 245; accord, *Doe v. USC(2), supra,* ___ Cal.App.5th at p. ___, fn. 25 [2018WL6499696].) We do not, however, necessarily conclude that the requirements for a fair hearing for a private university are identical to state and federal constitutional requirements. (See *CMC,* at p. 1067, fn. 8.) We need not address that question to resolve this appeal.

facing discipline was that he or she "be given some kind of notice and afforded some kind of hearing." (*Goss v. Lopez* (1975) 419 U.S. 565, 579 (*Goss*); see *Board of Curators of Univ. of Missouri v. Horowitz* (1978) 435 U.S. 78, 85–86 [*Goss* requires only an informal "give and take" between the student and administrative body that, at least, gives the student an opportunity to place his conduct in what he believes is the proper context].)

Nonetheless, fundamental fairness requires that a disciplinary proceeding afford an accused student "'a full opportunity to present his defenses.'" (*UCSD, supra,* 5 Cal.App.5th at p. 1104; *Pinsker, supra,* 12 Cal.3d at p. 555 [fair hearing requires that accused be given a "meaningful opportunity to be heard in his defense"].) "'[T]o comport with due process,' the university's procedures should "'be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' [citation] . . . to insure that they are given a meaningful opportunity to present their case.'"" (*UCSD, supra,* 5 Cal.App.5th at p. 1078.)

b. *Fair Disciplinary Process in Cases Involving Sexual Misconduct, Where Determination Pivots on Witness Credibility*

A spate of recent cases has attempted more clearly to delineate the contours of a "fair hearing" in university disciplinary proceedings involving allegations of sexual misconduct, where the resolution of conflicting accounts turns on witness credibility.[31] These decisions have wrestled with the

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[31] Much of this litigation arose in the wake of the so-called 2011 "Dear Colleague Letter," issued by the U.S. Department of Education's Office for Civil Rights (OCR). Among other things, the 2011 Dear Colleague Letter demanded that academic institutions employ procedures to make it easier for victims of sexual assault to prove their claims in disciplinary actions involving sexual misconduct. It also required schools to adopt measures in

inherent quandaries in evaluating university disciplinary proceedings so as to be fair to both the accused and accusing student, without placing unnecessary burdens on academic institutions. Such situations require recognition of significant competing concerns. There is the accused student's interest in "'avoid[ing] unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. . . . Disciplinarians,

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response, or risk losing federal funding. (See Russlynn Ali, OCR, U.S. Dept. of Educ., Dear Colleague Letter: Sexual Violence (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.)

Questions have been raised about whether disciplinary procedures, implemented in response to the 2011 Dear Colleague letter, in cases alleging sexual assault and discrimination, went too far. (See e.g., *Doe v. Brandeis University* (D.C. Mass. 2016) 177 F.Supp.3d 561, 572 (*Brandeis*); *Doe v. Brown University* (D.C.R.I. 2016) 166 F.Supp.3d 177, 181.) "The goal of reducing sexual assault, and providing appropriate discipline for offenders, is certainly laudable. Whether the elimination of basic procedural protections—and the substantially increased risk that innocent students will be punished—is a fair price to achieve that goal is another question altogether." (*Brandeis, supra,* 177 F.Supp.3d at p. 572; see *Doe v. Marymount University* (E.D. Va. 2018) 297 F.Supp.3d 573, 583, fn. 14, citing *Brandeis, supra,* 177 F.Supp.3d at p. 572.)

In September 2017, OCR withdrew the 2011 Dear Colleague Letter. OCR, Dear Colleague Letter (Sept. 22, 2017) https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [as of Jan. 3, 2019].) On November 15, 2018, OCR issued proposed regulations modifying the minimum standards for a Title IX investigation of allegations of sexual misconduct. (OCR, Title IX of the Education Amendments of 1972 Notice of Proposed Rulemaking <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf> [as of Jan. 3, 2019] (Proposed Regulations).) Under the Proposed Regulations, on track to become final by February 2019, an investigator also may not serve as adjudicator, universities must hold live hearings, and accused students may have an "advisor" cross-examine the accuser and witnesses, either in person or through a technological medium. (Proposed Regulations, § 106.45, subd. (b)(3), (4).)

although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.'" (*Doe v. USC(1), supra,* 246 Cal.App.4th at p. 240; see *UCSD, supra,* 5 Cal.App.5th at p. 1078; *CMC, supra,* 25 Cal.App.5th at p. 1066.) At the same time, it is vital that universities aim to provide safe environments for their students. "Disciplinary proceedings involving sexual misconduct must also account for the well-being of the alleged victim, who often 'live[s], work[s], and stud[ies] on a shared college campus' with the alleged perpetrator. [Citations.]" (*CMC, supra,* 25 Cal.App.5th at p. 1066.)

Further, these concerns must be addressed in light of the nature of a university and the limits of its resources. "'"A formalized hearing process would divert both resources and attention from a university's main calling, that is education. Although a university must treat students fairly, it is not required to convert its classrooms into courtrooms.'" [Citation.]" (*CMC, supra,* 25 Cal.App.5th at p. 1066.) To comport with due process and address these concerns, university procedures must be tailored in light of the matters at issue, to ensure that parties have a meaningful opportunity to present their case. (*UCSD, supra,* 5 Cal.App.5th at p. 1078.)

Recent cases have grappled with these concerns in the context of an accused student's right to confront adverse witnesses. In *CMC, supra,* 25 Cal.App.5th 1055, a student at a private college faced suspension after being accused of engaging in nonconsensual sex with another student. He claimed the sex was consensual. Only the two students witnessed the incident. (*CMC, supra,* 25 Cal.App.5th at p. 1070.) The results of an investigation

conducted by an outside investigator were referred to a committee consisting of that investigator and two CMC representatives. The committee was charged with the responsibility to meet in order to evaluate the evidence, and decide by majority vote whether the accused student committed sexual misconduct. (*Id.* at pp. 1062–1063.) CMC's procedures permitted, but did not require, the parties to appear at the meeting to make an oral statement. Each student submitted a written statement to the committee in advance of the hearing, but only the accused student appeared and spoke at the hearing. (*Id.* at p. 1063.) The committee found his accuser more credible. (*Id.* at p. 1064.)

Our colleagues in Division One found that CMC denied the accused student a fair hearing, given the accuser's failure to appear at the hearing to permit the committee to assess her credibility. Fairness required that committee members hear from her directly before choosing to credit her account. (*CMC, supra*, 25 Cal.App.5th at pp. 1072–1073.) The court held "that where . . . [an accused student] was facing potentially severe consequences and the [review] Committee's decision against him turned on believing [his accuser], the Committee's procedures should have included an opportunity for the Committee to assess [the accuser's] credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee's asking her appropriate questions proposed by [the accused] or the Committee itself." (*Id.* at p. 1057.)

In *Cincinnati*, university procedures permitted an accused student to question witnesses indirectly by submitting questions to a factfinding panel at a live hearing. (*Cincinnati, supra*, 872 F.3d at p. 396.) However, the complaining witness chose not to appear, and the accused student had no opportunity to question her, indirectly or otherwise. (*Id.* at p. 397.)

Nevertheless, the review panel relied on an investigator's written report to find the accusing student's statement that she had not consented to sex more credible than the accused's, who claimed the sexual encounter was consensual. (*Id.* at pp. 402, 407.) In light of the directly conflicting claims, and an absence of corroborative evidence to either support or refute the allegations, the review panel was forced to choose whom to believe. "[T]he panel resolved this 'problem of credibility' without assessing [the complainant's] credibility. [Citation.]" (*Id.* at p. 402.) Indeed, "it decided [the accused student's] fate without seeing or hearing from [the complainant] at all." (*Ibid.*) That result was not merely "disturbing"; it was "a denial of due process." (*Ibid.*)

In *UCSB,* our colleagues in Division Six similarly found that neither an accused student nor his accuser received a fair hearing in a case that "turned on the [fact finder's] determination of the credibility of the witnesses. Credibility cannot be properly decided until the accused is given the opportunity to adequately respond to the accusation. The lack of due process in the hearing . . . precluded a fair evaluation of the witnesses' credibility." (*UCSB, supra*, 28 Cal.App.5th at p. 61.) "In disciplining college students, the fundamental principles of fairness require, at a minimum, 'giving the accused students notice of the charges and an opportunity to be heard in their own defense.'" (*Id.* at p. 56.)

In *Baum*, two students gave inconsistent accounts as to whether the accusing student had been so drunk she lacked the capacity to consent. (*Baum, supra*, 903 F.3d at pp. 578-579.) An investigator interviewed 23 witnesses: statements from female witnesses corroborated the accuser; those from male witnesses corroborated the accused's account. (*Id.* at p. 579.) The court found there was a "significant risk" that the accused was denied due

process because the ultimate determination turned on credibility, and the university relied on witness statements rather than receiving live testimony from the accuser, the accused or witnesses. (*Id.* at pp. 581–582, 585.)

"'A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not.' [Citation.] 'The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause.' [Citation.] Few procedures safeguard accuracy better than adversarial questioning. In the case of competing narratives, 'cross–examination has always been considered a most effective way to ascertain truth.' [Citations.] [¶] 'The ability to cross–examine is most critical when the issue is the credibility of the accuser.' [Citation.] Cross–examination takes aim at credibility like no other procedural device. [Citations.] A cross-examiner may 'delve into the witness' story to test the witness' perceptions and memory.' [Citation.] He may 'expose testimonial infirmities such as forgetfulness, confusion, or evasion . . . thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.' [Citation.] He may 'reveal[] possible biases, prejudices, or ulterior motives' that color the witness's testimony. [Citation.] His strategy may also backfire, provoking the kind of confident response that makes the witness appear more believable to the fact finder than he intended. [Citations.] Whatever the outcome, 'the greatest legal engine ever invented for the discovery of truth' will do what it is meant to: 'permit[] the [fact finder] that is to decide the [litigant]'s fate to observe the demeanor of the witness in making his statement, thus aiding the [fact finder] in assessing his credibility.' [Citation.]'" (*Cincinnati, supra,* 872 F.3d at pp. 401–402.)

We agree with *CMC*, *Cincinnati* and *UCSB*, that, where credibility is central to a university's determination, a student accused of sexual misconduct has a right to cross-examine his accuser, directly or indirectly, so the fact finder can assess the accuser's credibility. (*CMC, supra*, 25 Cal.App.5th at p. 1070; *Cincinnati, supra*, 872 F.3d at p. 401 ["[T]he opportunity to question a witness and observe her demeanor while being questioned can be just as important to the trier of fact as it is to the accused"]; *UCSB, supra*, 28 Cal.App.5th at p. 60.) Recognizing the risk that an accusing witness may suffer trauma if personally confronted by an alleged assailant at a hearing, we observed in *Doe v. USC(1), supra*, 246 Cal.App.4th 221, that mechanisms can readily be fashioned to "provid[e] accused students with the opportunity to hear the evidence being presented against them without subjecting alleged victims to direct cross-examination by the accused." (*Id.* at p. 245, fn. 12.) For instance, the court in *CMC* noted that an accuser could be present "either physically or through videoconference or like technology to enable the finder of fact to assess the complaining witness's credibility in responding to its own questions or those proposed by the accused student." (*CMC, supra*, 25 Cal.App.5th at p. 1070; accord, *UCSD, supra*, 5 Cal.App.4th at pp. 1103–1104.) In *Baum,* the Sixth Circuit agreed, observing that "if the university does not want the accused to cross–examine the accuser under any scenario, then it must allow a representative to do so." (*Baum, supra*, 903 F.3d at p. 583, fn. 3.)

We also agree with *Baum's* holding extending the right of cross-examination to the questioning of witnesses other than the complainant where their credibility is critical to the fact-finder's determination. "[I]f a university is faced with competing narratives about potential misconduct," some form of in–person questioning is required to enable "the fact-finder [to]

observe the witness's demeanor under that questioning." (*Baum, supra*, 903 F.3d at pp. 581-582.)

Doe v. USC(2), supra, __ Cal.App.5th ___ [2018 WL 6499696] is the most recent addition to this growing body of law. In *Doe v. USC(2),* our colleagues in Division Seven found a denial of due process in a case involving allegations of sexual misconduct resolved under the same student disciplinary procedure at issue here. The court found that a USC student accused of sexual assault and rape, and facing expulsion, was denied a fair hearing when, among other things, USC's Title IX investigator failed personally to interview critical witnesses to observe their demeanor and assess credibility. (*Id.* at pp. *14-16.) The determination whether expulsion was appropriate turned on the credibility of several inconsistent witness accounts, and the investigator bore responsibility to determine credibility. (*Ibid.*) The court held that the investigator could not make a credibility determination based on a cold record, i.e., written witness statements prepared by a different investigator who had actually conducted the witness interviews. (*Id.* at pp. *13-14.)

The court reversed and remanded the matter to permit USC to conduct a new disciplinary hearing. In the event the university chose to reopen the investigation, it was instructed that providing the "accused student . . . the opportunity indirectly to question the complainant" would be part of the investigator's obligation to assess credibility. (*Id.* at p. *17.) Although USC's procedures do not provide an accused student the right to submit questions to be asked of the complainant, the court required that the university do so. The court specifically declined to reach the question whether USC's failure to provide a procedure to permit an accused student indirectly to question witnesses against him violated his right to a fair hearing. (*Id.* at p. *17, fn.

36.) In the course of its discussion, the court observed in a footnote: "Although the Title IX investigator held dual roles as the investigator and adjudicator, 'the combination of investigative and adjudicative functions does not, without more, constitute a due process violation . . . .' [Citations.]" (*Id.* at pp. *35-36, fn. 29.)

In our view, the analysis in *USC v. Doe(2)* did not fully consider a key question: whether the right to a fair hearing, and in particular the right to cross–examination, has any practical efficacy without structural procedural changes in a procedure such as that used by USC. It is true that an administrative procedure in which a single individual or body investigates and adjudicates does not, "without more," violate due process. In *Doe v. USC*(1), *supra*, 246 Cal.App.4th 221, we recognized "'the value of cross-examination as a means of uncovering the truth [citation], [but] reject[ed] the notion that as a matter of law every administrative appeal . . . must afford the [accused] an opportunity to confront and cross-examine witnesses.'" (*Id.* at p. 245.) We adhere to that view. However, as we also observed, the "'[s]pecific requirements for procedural due process vary depending upon the situation under consideration and the interests involved.' [Citation.]" (*Id.* at p. 244.) When credibility of witnesses is essential to a finding of sexual misconduct, the stakes at issue in the adjudication are high, the interests are significant, and the accused's opportunity to confront adverse witnesses in the face of competing narratives is key. "Cross-examination takes aim at credibility like no other procedural device." (*Cincinnati, supra*, 872 F.3d at p. 401.) Under such circumstances, the performance of this key function is simply too important to entrust to the Title IX investigator in USC's procedure.

As we have explained, in USC's system, no in–person hearing is ever held, nor is one required. Instead, the Title IX investigator interviews witnesses, gathers other evidence, and prepares a written report in which the investigator acts as prosecutor and tribunal, making factual findings, deciding credibility, and imposing discipline. The notion that a single individual, acting in these overlapping and conflicting capacities, is capable of effectively implementing an accused student's right of cross–examination by posing prepared questions to witnesses in the course of the investigation ignores the fundamental nature of cross–examination: adversarial questioning at an in–person hearing at which a neutral fact finder can observe and assess the witness' credibility. (See *Baum, supra*, 903 F.3d at p. 586 ["'Few procedures safeguard accuracy better than adversarial questioning'" through cross-examination]; cf., *Whitford v. Boglino* (7th Cir. 1995) 63 F.3d 527, 534 [due process forbids an officer who was substantially involved in the investigation of charges against an inmate from also serving on the adjudicating committee].) At bottom, assessing what is necessary to conduct meaningful cross–examination depends on a common sense evaluation of the procedure at issue in the context of the decision to be made. From that prospective, a right of "cross–examination" implemented by a single individual acting as investigator, prosecutor, factfinder and sentencer, is incompatible with adversarial questioning designed to uncover the truth. It is simply an extension of the investigation and prosecution itself.[32]

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[32] In noting that combining the roles of investigator and adjudicator does not without more violate due process, the court in *USC v. Doe(2)* cited several cases, none of which are inconsistent with our conclusion that USC's system is fundamentally unfair because the Title IX investigator is incapable of effectively implementing the accused's student's right to cross-examine

Moreover, the harm to fundamental fairness created by USC's system is amplified by the limited review of the investigator's factual findings available in the university's appellate process. As we have explained, the SBAP's review relies wholly on the SAR, plus any additional written materials accepted on appeal, and is limited to review for substantial evidence. The SBAP may not substitute its credibility findings for those made by the investigator, and may not make new factual findings. Because a version of events provided by a single witness (assuming it is not implausible on its face) constitutes substantial evidence, the mere fact that the complainant's allegations of misconduct are deemed credible by the investigator constitutes substantial evidence. Thus, the SBAP will virtually never be in a position to set aside an investigator's factual findings.

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witnesses. *Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 548-549 stands for the proposition that a party must show actual bias on the part of a decisionmaker, not merely the appearance of bias, to establish a denial of due process. (*Id.* at pp. 548–549.)

In *Withrow v. Larkin* (1975) 421 U.S. 35, the Court observed that a licensing board's initial determination of probable cause, and its ultimate adjudication rested on different bases and had different purposes. Thus, the fact that the same agency made them and they related to the same issues would not *ordinarily* constitute a procedural due process violation. (*Id.* at p. 58.) Similarly, *Griggs v. Board of Trustees* (1964) 61 Cal.2d 93, and *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, agreed that the mere combination of investigative and adjudicative functions in an agency do not necessarily constitute denial of a fair hearing. (*Griggs v. Board of Trustees, supra,* 61 Cal.2d at p. 98; *Hongsathavij v. Queen of Angels etc. Medical Center, supra,* 62 Cal.App.4th at p. 1142.) However, as the Court cautioned in *Withrow v. Larkin,* a substantial due process question is clearly raised "if the initial view of the facts based on the evidence derived from nonadversarial processes . . . foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision." (*Withrow v. Larkin, supra,* 421 U.S. at p. 58.)

Moreover, because the SBAP cannot modify a sanction imposed by the investigator unless it is unsupported by the investigator's factual findings or is grossly disproportionate to the violation shown by those findings, the sanction imposed by the investigator will rarely, if ever, be modified.

In light of these concerns, we hold that when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross–examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (e.g., videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments. That factfinder cannot be a single individual with the divided and inconsistent roles occupied by the Title IX investigator in the USC system.

5. *Doe Was Denied a Fair Hearing*

The flaws in Dr. Allee's investigation, which formed the basis of her factual findings, illustrate well the significant dangers created by USC's system. This case turned on witness credibility. There are inconsistent accounts from Roe and Doe about whether their sexual encounter was consensual. The only physical evidence is photographs of small bruises on Roe' arms, breast and thigh. That evidence could support either Doe's claim of vigorous consensual sex, or Roe's charge of sexual assault. Evaluation of the credibility of the only witnesses to the event was pivotal to a fair adjudication.

Dr. Allee had unfettered discretion to chart the course and scope of her investigation and to determine credibility, and exercised that discretion in questionable ways. In his first meeting with Dr. Allee, Doe articulated his theory that Roe had a strong motive to fabricate a charge of rape. Dr. Allee seems to have rejected that theory almost immediately, despite investigative leads–such as statements by E.C. and K.J., and Roe's texts to Mia–that, if pursued, would lend support to Doe's theory, and weaken Roe's credibility. This was symptomatic of a larger problem with Dr. Allee's investigation. She did not follow up with presumably identifiable and available witnesses (such as D.N.'s girlfriend, Mia, K.J. or the women who saw Roe and Doe walking together on October 23), who might have filled in holes in the investigation, thus providing a fuller picture from which to make the all-important credibility determination.

In addition, E.C., Roe's long-term roommate at USC, specifically informed the investigator that Roe had been disciplined for having sex with a football player, had agreed in writing not to do so, and could lose her job if she did so again. Roe herself told Mia she was worried about her job and ability to obtain recommendations for graduate school if her sexual encounter with Doe became known. Inexplicably, Dr. Allee failed to check with the Athletic Department to determine its policies and practices regarding sexual relations between student trainers and athletes, let alone ascertain the existence of the agreement Roe purportedly signed. Instead, Dr. Allee accepted at face value Roe's claim that she knew several "trainers [who had] hooked up with athletes and [were] fine." Dr. Allee also made the unattributed, unequivocal pronouncement that "USC's Athletic Training [Department] has had knowledge of athletic trainers engaging in consensual sexual activity with athletes and trainers [who] were not fired despite their

employment contract . . . prohibit[ing] fraternizing with athletes."[33] Finally, in the SAR, Dr. Allee stated that USC "would not retaliate against a student who had experienced *non-consensual* sexual acts." (Italics added.) This, of course, does not address Doe's theory that Roe manufactured the charge against him for fear she would suffer negative consequences if her *consensual* sex acts with a football player became known, and suggests, at a minimum, that Dr. Allee may have been confused.

Deficiencies such as these are virtually unavoidable in USC's system, which places in a single individual the overlapping and inconsistent roles of investigator, prosecutor, factfinder, and sentencer. While providing a hearing at which the witnesses appear and are cross-examined before a neutral factfinder cannot ensure that such flaws do not occur, such a procedure at least provides an accused student with a fair and meaningful opportunity to confront the adverse witnesses in an attempt to expose weaknesses in the evidence. In Doe's case, he was accused of sexual misconduct for which he faced serious disciplinary sanctions, and the credibility of witnesses was central to the adjudication of the allegations against him. In those circumstances, he was entitled to a procedure in which he could cross-examine witnesses, directly or indirectly, at a hearing at which the witnesses appeared in person or by other means before a neutral adjudicator with the power to make finding of credibility and facts. Because USC failed to provide such a procedure, the adjudication findings that he committed sexual

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[33] Although the SBAP specifically questioned Dr. Allee's failure to follow up with the Athletic Department, and observed that she should have contacted at least one of Doe's new witnesses, there remained sufficient (a preponderance of) evidence to sustain the SAR's findings.

misconduct in violation of the SCC cannot stand. (*UCSD*, *supra*, 5 Cal.App.5th at p. 1084.)

DISPOSITION

The judgment is reversed and the matter remanded to the trial court with directions to grant Doe's petition for writ of administrative mandate insofar as it seeks to set aside the findings that he violated USC's student conduct code. Because Doe is no longer eligible for reinstatement, he is not entitled to that relief. Doe is awarded his costs on appeal.

CERTIFIED FOR PUBLICATION

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

DUNNING, J.*

*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Honoree & Participant Biographies

- **Jerry Zanelli**, Founder Women's Premier Soccer League, Honoree
- **Fair Play for Girls in Sports** – Legal Aid at Work, Honoree

- **Alicia Hetman,** American Association of University Women California, State Committee Chair, Title IX
- **Laura Faer,** California Attorney General's Office, Deputy Attorney General, Bureau of Children's Justice in the Civil Rights Enforcement Section
- **Suzanne Taylor,** University of California, Systemwide Title IX Coordinator
- **Linda Hoos,** California State University, Systemwide Discrimination, Harassment and Retaliation & Title IX Compliance Officer
- **Peter Khang ,** California Community Colleges, Deputy Counsel
- **Thomas Vu,** California Colleges and Universities, Vice President of Policy, Association of Independent
- **Khieem Jackson,** California Department of Education, Deputy Superintendent, Government Affairs and Charter Schools Division
- **Roger Blake,** , California Interscholastic Federation, Executive Director
- **Ashley Sunamoto,** California Association for Health, Physical Education, Recreation and Dance, Vice President in Interscholastic Athletics
- **Kim Turner,** Fair Play for Girls in Sports Project, Legal Aid at Work, Senior Staff Attorney
- **Elizabeth Kristen,** Fair Play for Girls in Sports Project, Legal Aid at Work, Project Director and Senior Staff Attorney

Honoree
Jerry Zanelli, Founder
Women's Premier Soccer League

Jerry Zanelli, a pioneer in women's soccer, worked 47 years in women's soccer as a coach, owner and league commissioner. He founded the Women's Premier Soccer League (WPSL) in 1998, and within 20 years the league grew into the largest women's soccer league in the world. The 2018 WPSL season had 106 clubs competing for the Jerry Zanelli Cup. Zanelli founded and coached the California Storm, and the Sacramento club became a dominant force within the league, winning three league championships (1999, 2002, 2004) and three additional runner-up finishes. The list of players Zanelli coached at the Storm is extraordinary – notably FIFA Women's World Cup stars Brandi Chastain, Julie Foudy, Alex Morgan and Sissi.

Honoree
Fair Play for Girls in Sports

The first Fair Play case was launched in 2003 with the Cruz v. Alhambra class action (with California Women's Law Center – CWLC) addressing gender inequity in athletics at a Los Angeles-area high school. However, they officially named their work the Fair Play for Girls in Sports project in 2011 representing girls, particularly in middle and high school, seeking to ensure that female youth in underserved areas, low-income communities, and communities of color can join sports teams and experience equity on such teams. Over the last 15 years, the Fair Play project has spurred schools to upgrade athletic facilities to equalized treatment and benefits for female athletes, add new teams for girls where opportunity lacked, and improve amenities such as uniforms and locker rooms that for too long were unequal.

Alicia Hetman, American Association of University Women, California, State Committee Chair, Title IX

Alicia Hetman has been a Title IX consultant for the American Association of University Women (AAUW) California chapter since 2015. A member of AAUW since 1976, she has served as the Vice Chair of the National Board (2015-17); President of AAUW, California (2012-14); and on the AAUW National Board (2009-11) and AAUW Educational Foundation Board (2007-09). In 2014 Ms. Hetman was the AAUW's Title IX Champion awardee.

In more than 15 years as a California Department of Education (CDE) education consultant, she developed and implemented the provisions of AB 1479 (Speier), providing for gender equity compliance reviews in California public K-12 districts; in addition, she conducted on-site gender equity reviews with the CDE Coordinated Compliance Review process, and worked with CDE legal staff on Uniform Complaint Procedures and proposed sexual harassment regulations

Laura L. Faer, California Attorney Generals' Office, Deputy Attorney General, Bureau of Children's Justice Civil Rights Enforcement

Laura Faer is currently a Deputy Attorney General in the Bureau of Children's Justice in the Civil Rights Enforcement Section within the California Attorney Generals' Office and an adjunct professor at UC Hastings College of Law where she teaches a course on federal civil rights law, theory and practice. Ms. Faer previously served as Regional Director of the Office for Civil Rights for the United States Department of Education, where she was responsible for overseeing civil rights compliance, including with Title IX of the Education Amendments Act of 1972, for the State of California. In that role, she led the office's successful resolution of systemic cases addressing student complaints of sexual harassment and sexual violence at a number of California colleges, universities, and school districts.

Ms. Faer is an expert in education, youth, and civil rights law. She has served as lead counsel on a number of groundbreaking education equity cases. Among other cases, she successfully represented four foster youth siblings who were unlawfully segregated from the public school setting and challenged solitary confinement and education deprivation conditions for juveniles in California. In 2011, she was named a California Lawyer Attorney of the Year after she helped secure a landmark settlement in Casey A. v. Gundry, a class action alleging that youth detained at the largest complex of probation camps in the nation were denied a constitutionally adequate education.

In her position as Director of the Statewide Education Rights Project at Public Counsel, she led the organization's sponsorship of more than ten pieces of legislation, including AB 1933, addressing education stability rights for foster youth, and AB 420, limiting suspensions and expulsions for the catch-all category of willful defiance and disruption. She clerked for Judge Stephen Reinhardt on the Ninth Circuit Court of Appeals and has received other awards and recognition for her championship of civil rights.

Suzanne Taylor, University of California, Systemwide Title IX Coordinator

Prior to coming to University of California, Suzanne Taylor was a Civil Rights Attorney for over a decade with the U.S. Department of Education, Office for Civil Rights, where she investigated complex civil rights allegations, including institution-wide sexual violence complaints. Suzanne was lead attorney on several novel cases, including the first in which OCR applied Title IX to remedy discrimination based on transgender status, OCR's first significant harassment finding based on a gender stereotyping theory, and OCR's first resolution under the (now-rescinded) April 2011 Dear Colleague Letter in the K-12 context.

She joined UC in November 2016 as a Title IX Principal Investigator in the Office of the President where, among other responsibilities, she conducted Title IX investigations on campuses throughout the system.

As Systemwide Title IX Coordinator for the University of California (UC), Suzanne provides direction and support for the Title IX offices on UC's campuses. Among other roles, her office assists in implementing systemwide initiatives and best practices in harassment prevention and response.

Linda Hoos, California State University, Systemwide Discrimination, Harassment and Retaliation & Title IX Compliance Officer

Linda Hoos was appointed the California State University (CSU) Systemwide Discrimination, Harassment and Retaliation (DHR) & Title IX Compliance Officer effective October 22, 2018, by the CSU Chancellor. Prior to the appointment, Hoos served as Cal Poly Pomona's (CPP) Chief Diversity Officer and Assistant Vice President, with oversight of the Office of Equity, Inclusion, and Compliance. In her role, Hoos acted as CPP's Title IX Coordinator, DHR Administrator, Americans with Disabilities Act (ADA) Coordinator, and campus liaison with the U.S. Office for Civil Rights, U.S. Equal Employment Opportunity Commission, and the California Department of Fair Employment and Housing. During her time at CPP, Hoos provided keen leadership in overseeing campus-wide efforts to ensure institutional equity, access and inclusion for all members of the university community.

Peter Khang, California Community Colleges, Deputy Counsel

Peter V. Khang currently serves as Deputy Counsel at the California Community Colleges Chancellor's Office. Mr. Khang oversees the unlawful discrimination process for the California community college system.

He has provided training and guidance to students and districts on various topics, including Title V complaints, Title IX, and the Cleary Act.

Mr. Khang received a B.A. in Legal Studies and Education from U.C. Berkeley, and a J.D. from Lincoln Law School of Sacramento.

Thomas Vu
Association of Independent California Colleges and Universities, Vice President of Policy

Thomas Vu is Vice President for Policy for the Association of Independent California Colleges and Universities (AICCU). In this role, he develops and manages the execution of AICCU's agenda on state and federal policy. This includes outreach and engagement responsibilities between federal and state policymakers; providing original policy development; and cultivating and managing the internal and external stakeholders required for successful policy development and implementation.

Previously, he worked in government relations for the California Chamber of Commerce, the California Special Districts Association, and the California Association for Health Services at Home.

Tom graduated from UC San Diego with Bachelor of Arts degrees in Political Science and Economics, and a minor in Literature. He has a Master of Public Administration degree from the University of Southern California.

Khieem Jackson, California Department of Education, Deputy Superintendent Government Affairs and Charter Schools Division

Khieem Jackson was born and raised in South Los Angeles. He studied Aerospace Studies and Aviation Business at Embry Riddle Aeronautical University. After receiving his commission as an Officer in the United States Marine Corps (USMC), Khieem completed numerous combat and non-combat deployments as a Naval Aviator.

Khieem was selected as the USMC Headquarters Marine Corps, Office of Legislative Affairs Deputy Director to the US House of Representatives on Capitol Hill. He maintains a passion for the Marine Corps and Veterans.

Khieem cultivated his skills in K-12 policy and advocacy as the Director of Government Relations for San Diego Unified School District, where his passion for service and love of children were blended to promote, support, and influence policies that increased educational investments and that bolstered local, state and federal efforts on the full span of K-12 programs.

He now serves as the California Department of Education (CDE) Deputy Superintendent for Government Affairs and Charter Schools Branch, where he leads a dedicated team of professionals in pursuit of the CDE's purpose to support schools in providing a world-class education for all students, from early childhood to adulthood.

Roger L. Blake, California Interscholastic Federation (CIF), Executive Director

Roger L. Blake has completed his seventh year as CIF Executive Director and has been involved in education for almost 43 years as a teacher, coach, administrator, athletic director, assistant executive director and associate executive director. For the past 21 years, Blake has held positions within the CIF as Director of Education & Training (1998-2001), Assistant Executive Director (2001-07) and Associate Executive Director (2007-2012). Blake has also served on several committees for the CIF and Southern Section during his time as a coach and administrator.

After receiving his Bachelor of Science Degree from California State University, Fullerton in 1976, Blake began his teaching and coaching career at Sonora High School (1976-77) and Cajon High School (1977-78). Next, Blake worked 24 years in the Lake Elsinore Unified School District as a teacher and boys' varsity basketball coach (1978-94), Assistant Dean of Students (1980-81), Athletic Director (1984-94) and Director of District Athletics (1994-2001). During that time, he also served as Special Advisor for the Governor's Council on Physical Fitness and Sports (1998-2001). In 1981, while at Elsinore High School, Blake earned his Master of Arts from Azusa Pacific University.

Additionally, Blake is a Certified Master Athletic Administrator through the National Interscholastic Athletic Administrators Association (NIAAA) and has been a member of the National Federation of State High School Associations (NFHS) National Teaching Faculty on various subjects. He was also the NFHS Chairperson for the Coaching Education Committee (2007-11) and served on the Committee (2001-05). Throughout his career Blake has also been involved with the California State Athletic Directors Association (CSADA) and has served on the Board of Directors since 1996.

Ashley Sunamoto, California Association for Health, Physical Education, Recreation and Dance Vice President in Interscholastic Athletics

Mrs. Ashley Sunamoto, M.A. is a full time teacher and Athletic Director at Riverdale High School. She is in her eleventh year at Riverdale High School where she educates sophomores in physical education and upperclassmen in a Sports Management course. She is in her eighth year as a Director of Athletics. She is a part of the Positive Behavioral Interventions & Supports (PBIS) team for her school where they implement strategies to help improve social, emotional and academic outcomes for students. She serves on the California Interscholastic Federation (CIF) Central Section Board of Directors representing West Sequoia League. She also serves on the Board of Directors position within the California Association for Health, Physical Education, Recreation and Dance (CAHPERD) as the organizations Vice President in Interscholastic Athletics. Her passion has always been educating those around her on the benefits of living a healthy and active lifestyle.

Kim Turner, J.D., Fair Play for Girls in Sports Project Legal Aid at Work, Senior Staff Attorney

Kim works with the Gender Equity & LGBT Rights Program and the Fair Play for Girls in Sports Project of Legal Aid at Work. Through litigation, education and policy work, Kim advocates for equality, with a specific focus on athletic opportunities for female youth — particularly in low-income communities. Kim has practiced a mixture of Title IX, employment and housing law, including as a staff attorney with Bay Area Legal Aid. Before law school, Kim worked for Senator Dianne Feinstein and the National League of Cities in Washington, D.C. She graduated from Cardozo Law School in New York City in 2008. And she received a B.A. from Brown University in 2002. At Brown, Kim played for the varsity women's volleyball team, winning an Ivy League title.

Elizabeth Kristen, J.D., Fair Play for Girls in Sports Project, Legal Aid at Work
Project Director and Senior Staff Attorney

Elizabeth Kristen is the director of our Gender Equity & LGBT Rights Program, where she represents low-wage workers facing employment discrimination and harassment based on sex, sexual orientation, gender identity, pregnancy, military, or veteran status. As director of our Fair Play for Girls in Sports project, she engages in community education, negotiations, litigation, and policy work on behalf of female students who have not been afforded equal athletic opportunities under Title IX. She won a ground breaking Ninth Circuit ruling, with her co-counsel that enforces Title IX of the Education Amendments in a Southern California high school (Ollier v. Sweetwater).

Elizabeth graduated from Berkeley Law in 2001. She was selected for the Order of the Coif and served as an editor for the California Law Review. Prior to joining Legal Aid at Work in 2002 as a Skadden Fellow, she clerked for the Honorable James R. Browning on the Ninth U.S. Circuit Court of Appeals in San Francisco.

In 2015, California Lawyer selected Elizabeth as one of its California Lawyers of the Year in the field of Civil Rights. Elizabeth is a Northern California Super Lawyer. She was the recipient of Protect our Defenders' Justice Award. In 2012-2013, Elizabeth served as a Harvard Law School Wasserstein Public Interest Fellow. She was a lecturer at Berkeley Law School from 2008-2013.

Presentations & Handouts

- Comment on Department of Education Proposed Rule, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* – California Community Colleges

- *Eliminating Barriers to Equality in Education*, California Department of Education, Khieem Jackson, Deputy Superintendent, Government Affairs and Charter Schools Division presentation

- *Many Calif. schools don't report on gender equity in sports as required: Report* - By Kim Turner, Senior Staff Attorney with Legal Aid at Work, June 23, 2017

- *Missing Report Cards: Available data show stark gender inequality in sports programs, and many California public schools shirk reporting requirement* - Legal Aid at Work, Fair Play for Girls in Sports Project, June 22, 2017

California Community Colleges

ELOY ORTIZ OAKLEY
Chancellor
Executive Office

Docket ID: ED-2018-OCR-0064

Submitted via www.regulations.gov

Kenneth L. Marcus
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

RE: Title IX of the Education Amendments of 1972 (34 CFR § 106)

Dear Mr. Marcus:

This letter responds to the Department of Education's Notice of Proposed Rulemaking ("NPRM") for rules that would govern the obligations of educational institutions receiving federal funds ("recipients") to respond to sexual harassment allegations. The NPRM was published in the Federal Register on November 29, 2018.

I am the Chancellor of the California Community Colleges, responsible for giving effect to the policies of the California Community Colleges Board of Governors ("Board"). The Board regulates 73 community college districts and 115 colleges that serve more than 2.1 million students annually. It is the largest and most diverse post-secondary educational institution in the United States. We serve Californians and international students in every region throughout the state. The Chancellor's Office also serves as an appellate body for hundreds of discrimination complaints arising at the college level. This letter is joined by the Los Angeles Community College District, Los Rios Community College District, San Francisco Community College District, El Camino Community College District, and Peralta Community College District.

The proposed rules are deeply concerning. Taken together, they fundamentally alter the threshold for investigating sexual harassment on our campuses to an unreasonable standard, create unnecessary barriers for already traumatized victims, and transform a respondent's presumption of innocence from a shield to a spear. Taken together, they will have a significant chilling effect on sexual harassment victims' ability and willingness to bring forward allegations of sexual harassment. This will make our campuses less safe. The proposed rules will also impose significant financial and logistical burdens on our campuses. The many California community colleges that already have resource

challenges or are located far from cities where expertise is available to implement the proposed rules fully will be disproportionately affected. At the core of these proposed rules is the department's decision to apply selectively the standards developed by courts for the imposition of liability under Title IX to an administrative process that should be focused on creating safe campus environments for students. This approach is unwise, and will undermine the effectiveness of Title IX.

To summarize the proposed rules, a recipient college must respond to allegations of sexual harassment only if the conduct rises to the level of quid pro quo harassment, "serious and pervasive" harassment, or constitutes a crime, and the recipient has "actual knowledge" of the harassment from a victim's report to either the Title IX Coordinator, or to another official "with authority to institute corrective measures." To avoid a violation of Title IX, a recipient is required merely to respond to allegations of sexual harassment in a manner that is not "deliberately indifferent." "Known reports" of sexual harassment must be addressed, but only with non-punitive, non-disciplinary "supportive measures." A recipient's duty to investigate sexual harassment allegations may be triggered under two circumstances: (1) a victim filing a formal written complaint with the recipient's EEO Officer, or an official "with authority to institute corrective measures;" or (2) where the recipient "has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment." When the formal grievance process is triggered, the proposed rules require an investigation, the exchange of evidence, a live hearing with cross-examination, and a written adjudication. Complainants and respondents must be treated "equally" in the formal process, and recipients must provide supportive measures to both, including an "aligned" advisor to conduct cross-examinations during the live hearing. According to the NPRM, a recipient's failure to treat complainants and respondents "equally" could constitute sex discrimination. Under the proposed rules, it is likely that determinations that sexual harassment occurred will require "clear and convincing evidence," a standard significantly higher than the more appropriate "preponderance of the evidence" standard.

Our concerns encompass each of the elements of the proposed rules described above, and are explained in more detail below.

34 CFR § 106.30 – The definition of "sexual harassment" is too narrow.

The proposed rules would allow recipients to ignore sex-based misconduct that could have significant impacts on student safety. They would define sexual harassment to

include: (1) quid pro quo harassment that conditions educational benefits on participation in sexual activity; (2) unwelcome conduct of a sexual nature that is so severe, pervasive, and objectively offensive that it denies equal access to education; and (3) sexual assault. The regulations do not purport to address conduct below these thresholds because "Title IX does not prohibit sex-based misconduct that does not rise to that level of scrutiny." 83 Fed. Reg. 61466.

The practical effect of this regulation is that state and local governments will impose separate processes to address sexual harassment that falls below the Title IX threshold identified in the proposed rules. This will be inefficient for colleges and confusing for complainants and respondents. Those responsible for implementing sexual harassment policies will often find it difficult or impossible to determine whether sexual misconduct conduct falls above or below the Title IX threshold.

34 CFR § 106.44(a) – The "actual knowledge" requirement is too narrow.

The proposed regulations impose a duty to "respond" to allegations of sexual harassment only when a recipient has "actual" knowledge of sexual harassment. This approach is flawed.

First, the proposed rules do away with imputed knowledge and constructive knowledge that are common to this area of the law, and which motivate campus officials to be vigilant about sexual harassment. The actual knowledge requirement undermines this.

The definition of ''actual knowledge'' is also unduly restrictive. Actual knowledge of sexual harassment allegations only occurs with notice "to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient." A complainant should be able to report sexual harassment to a broad class of officials, who would have a duty to take action. As the NPRM acknowledges, who constitutes an official with "authority to institute corrective measures" is undefined, and will be subject to a fact-intensive inquiry regarding the responsibilities of individual school officials that student complainants would have no knowledge of. 83 Fed. Reg. 61467. The identity of the officials to whom victims may report sexual harassment and expect a response should be certain, and should encompass a broader array of individuals than the proposed rules contemplate.

The consequences of the actual knowledge requirement are predictable. A department within a recipient college could have serious, pervasive sexual harassment known to

members of a department, including a department's leadership. Under the proposed rule, the recipient would not have actual knowledge, and would have no duty to respond. And actual knowledge would not be established by a third-party report of sexual harassment.

Recipients should be required to act when a broader range of school officials receive credible allegations of sexual harassment, regardless of their source. This change is necessary to protect students and faculty members adequately from discriminatory conduct that inhibits their ability to benefit from college educational programs.

34 CFR § 106.44(a) – The "deliberate indifference" standard is too weak.

The proposed rules would fail to incentivize recipients to take strong action to ensure campuses and students are free from sexual harassment. When a recipient has "actual knowledge" of sexual harassment (not merely actual knowledge of an allegation), the proposed rules only require that it must avoid "deliberate indifference" to the report. "Deliberate indifference" is described as a response that would be "clearly unreasonable in light of all the known circumstances." 83 Fed. Reg. 61468.

The federal government should encourage recipients to strive for more effective responses through stronger rules, not ones that are so elastic they implicitly sanction "looking the other way." The department's rationale for departing from the current "reasonableness" standard is that the "deliberate indifference" standard is more deferential to local campus disciplinary processes. That rationale does not justify giving license to a host of unreasonable responses that fail adequately to protect campuses and complainants and yet may not rise to the level of "deliberate indifference."

34 CFR §§ 106.30, 106.45(b)(1)(i), and 34 CFR § 106.45(b)(1)(ix) – The "supportive measures" requirements are unnecessary and expensive.

We support in principle the presumption of innocence for respondents as proposed by 34 CFR § 106.45(b)(1)(iv). However, the department goes beyond this presumption of innocence to establish a concept of "equal treatment" that requires a host of non-disciplinary, non-punitive "supportive measures" to be provided to complainants and respondents alike that will impose expenses upon California community colleges that are not justified. In addition, and perhaps more insidious, the extent to which the rules would require recipients to provide services to accused harassers is unprecedented, belies the department's expressed view that claims of sexual harassment should be

taken seriously, and suggests instead that the department views claims of sexual harassment as unreliable.[1]

The proposed rules also limit a recipient's duty to provide supportive measures to complainants who have reported sexual harassment to the Title IX Coordinator, or to another official with authority to institute corrective measures. A report to another college official will not require supportive measures, or any other response.

The department's effort to "level the playing field" between complainants and respondents by requiring equality in the provision of supportive services is blind to the fiscal realities of California community colleges, and the need to prioritize the allocation of scarce resources to the victims of sexual harassment. There may be circumstances where the provision of supportive services to respondents is "appropriate," but the proposed rules create a requirement that is not warranted by our collective experience.

34 CFR § 106.45 – The grievance procedure triggers are insufficient.

A recipient's duty to invoke the grievance process (which includes an investigation) is triggered under only two circumstances: (1) a victim of sexual harassment files a formal written complaint with the recipient's EEO Officer, or an official "with authority to institute corrective measures;" or (2) the recipient "has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment." Under the second circumstance, the EEO Officer is authorized to invoke the grievance process if a complaint has not been filed.

These grievance process triggers are infused with the deficiencies discussed above related to the narrow actual knowledge requirement, the heightened definition of sexual harassment, and the uncertain identity of the official with corrective measure authority. Taken as a whole, we can expect that under this approach, significant

[1] The Proposed rules define "supportive measures" as "non-disciplinary, non-punitive individualized services offered as appropriate, . . . without . . . charge, to the complainant or the respondent." Supportive measures the proposed rules would require complainants and respondents to have equal access to may include "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures." 83 Fed. Reg. 61470.

instances of sexual misconduct that adversely affect campus life will be unreported and uninvestigated.

34 CFR §§ 106.44, 106.45(b)(3)(vii) – The grievance process unduly expensive and will chill reporting of sexual harassment.

The proposed rules establish a grievance process that will be unduly expensive, and more importantly will have a chilling effect on the reporting of sexual harassment.

The proposed rules require that once a complaint gives the recipient actual knowledge of sexual harassment, the grievance process must be followed, through a gauntlet of due process protections for the respondent, to a full adjudication. There may be circumstances where an "off-ramp" would be appropriate. It is not clear that the proposed rules provide one.

Live hearing and cross-examination

The proposed rules require that at least ten days before the hearing, the parties must exchange their evidence. Then the recipient must provide a live hearing with cross-examination of witnesses. A decision maker may not consider the testimony of a party or witness who refuses to be cross-examined.

The proposed rules establish a special process for cross-examination. First, the cross-examination must be conducted by an advisor who is "aligned" with the person on whose behalf the cross-examination is being conducted. Second, the cross-examination of the complainant and the respondent are to be in separate rooms while allowing the other party to view the cross-examination through an audio-video linkage. The cross-examination process will lead to unfair proceedings, chill reporting of sexual harassment, and is unwarranted according to the department's own rationale for the proposed rules.

The cross-examination requirement is not compatible with the stated purpose of the proposed rules, which are tailored in many ways to address the potential liability of recipients. Relying on *Cannon v. Univ. of Chicago*, 414 U.S. 677, 704 (1979), the department explains that Title IX is "designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner." 83 Fed. Reg. 61466. This approach underlies many provisions including the "actual knowledge" requirement, and the limited definition of "sexual harassment." The cross-examination

requirement, however, abandons this rationale. The confrontation inherent in cross-examination is designed to protect parties facing liability—it will not reliably serve the interests of a recipient in avoiding discrimination. A better approach for scrutinizing the parties' testimony, and one more in line with the department's stated concern for protecting against discrimination by recipients, would be to have an objective, trauma-informed decision-maker conduct any needed questioning.

Under this proposed rule, complainants will be required to submit to a trial in order to advance their right to a safe educational environment. While there may be rare instances where this level of process is necessary to separate fact from fiction, it should not be required in every case. This approach tips the balance too far in the direction of intimidating complainants, and will decrease the reporting of sexual misconduct.

Advisors

The proposed rules also require recipients to provide either party an advisor if the party does not have an advisor. This rule is problematic for at least two reasons.

First, it is not clear what level of training an advisor is expected to have. Under the proposed rules, the advisor role may be filled by an attorney retained by the complainant or the respondent. In many cases one party will be able to afford to retain a skilled attorney to conduct the cross-examination, while the other will need to rely upon a less well-trained advisor provided by the recipient. This disparity belies the department's stated objective of ensuring an equitable process.

In addition, the dual advisor requirement presents a significant financial and logistical burden for California community colleges that will likely not have sufficient, trained staff available to fulfill this obligation and so will be required to contract the service at significant expense. Requiring community colleges to hire advisors, in addition to a separate coordinator, investigator, and decision-maker, will create a financial burden that is unsustainable in our system.

Cross-examination technology

The proposed rules require that recipients provide separate rooms with technology to enable parties to simultaneously see and hear answers and questions. This rule would create an undue financial burden for our colleges due to the lack of space and facilities

to comply with this requirement. Further, purchasing the technology to enable cross-examination in different rooms would represent another unnecessary expense.

34 CFR § 106.44(a) and (b)(4) – The jurisdictional limitation will have adverse consequences within the United States

California Community Colleges offer programs abroad in Europe, Asia, and other countries through California Colleges for International Education, a consortium of California community colleges. (See ccieworld.org/index.html, last visited Jan. 18, 2019.) However, the proposed rules do not require recipients to respond when they have actual knowledge of sexual harassment allegations that arise outside the United States—regardless of the nexus those allegations have to recipient educational programs. Setting aside why the department would decline to exercise jurisdiction in this way, this rule will also have domestic consequences. Upon returning, victims may encounter perpetrators on campus, and be denied even supportive measures. A complaint could be dismissed merely because of where the sexual harassment occurred, and the student would have no remedy.

This rule is inadequately protective of students studying abroad.

34 CFR § 106.44(e)(5) – The requirement of a signed complaint is an unnecessarily bureaucratic obstacle.

The proposed rules impose strict requirements on the content of sexual harassment complaints that are unnecessary, unduly burdensome, and will chill the reporting of claims. All formal complaints must be signed and filed with the Title IX Coordinator. The signature requirement is anachronistic and unnecessary in the age of email.

In addition, the complaint must enumerate every allegation, and may not rely upon other documents like a police report or a previous verbal report. This requirement is incompatible with the California community colleges long-held view that sexual harassment victims need not file multiple reports of the same incident to trigger the procedures required by federal and state law. One incident report, whether with law enforcement or a responsible party on campus, will provide sufficient notice to all concerned parties.

The final rule should eliminate these unnecessarily bureaucratic requirements.

34 CFR § 106.45(b)(1)(iii) – The dual-investigator requirement is expensive an unnecessary.

The department claims that the proposed rules will decrease costs for recipients across the country. While it may be true that overall costs of compliance will decline due to the chilling effect the regulations will have on reporting incidents, it is clear that the costs of individual sexual harassment cases will significantly increase, without any expectation of improved results. This approach to cost containment strikes the wrong balance of public interests.

The proposed rules would eliminate the single-investigator model, creating financial and logistical concerns, especially for colleges in rural areas where the availability of expertise is limited. The proposed rules would require community colleges to hire and train a Title IX Coordinator, two investigators, a "decision-maker," and advisors for both parties when they are unable to afford one. (34 CFR § 106.45(b)(3)(vii).) Recipients will need to be prepared to deploy five separate people to address every sexual harassment complaint. Community colleges often have individuals serving multiple functions in a Title IX matter due to their staffing constraints and limited resources.

The proposed rules should be amended to eliminate the need for f multiple investigators, and the requirement to provide support persons for respondents. These changes would ease the financial burden of compliance.

34 CFR § 106.45(b)(4)(i) – The "clear and convincing evidence" standard is inappropriate.

This proposed rules appear to allow colleges to apply either the "preponderance of the evidence" standard that applies in most civil litigation, or the significantly higher "clear and convincing evidence" standard that typically applies in cases challenging administrative decisions, when determining whether a sexual harassment complaint is substantiated.

The effect of the "clear and convincing" evidence standard, particularly in combination with the other obstacles these proposed rules present to complainants, will be to impose a substantial additional burden on sex harassment victims, likely discouraging all but the most determined victims from proceeding with meritorious complaints. The department's approach should be much more protective of students and campus safety.

California Community Colleges

ELOY ORTIZ OAKLEY
Chancellor
Executive Office

34 CFR § 106.45(b)(5) – The appeals provisions are unequitable.

The proposed rules give colleges the discretion to allow both parties to appeal a determination following completion of the hearing process. However, the proposed rules prohibit complainants from appealing the adequacy of the sanction or discipline imposed (or not imposed) upon the respondent. No conditions are imposed upon a respondent's appeal. This approach is not equitable, and undermines the purposes of Title IX, which was intended to restore victims' ability to enjoy and access educational benefits or activities, free from sex discrimination or harassment. However, if a respondent's discipline does not fully restore a complainant's access to education, the complainant should be able to appeal.

Thank you for the opportunity to submit comments on the NPRM.

Eloy Ortiz Oakley
Chancellor of the California Community Colleges

Eliminating Barriers to Equality in Education

Khieem Jackson, Deputy Superintendent, Government Affairs and Charter Schools Division

CALIFORNIA DEPARTMENT OF EDUCATION
Tony Thurmond, State Superintendent of Public Instruction

TONY THURMOND
State Superintendent
of Public Instruction

California: Above and Beyond Title IX

It is the policy of the State of California that all persons, regardless of gender should enjoy freedom from discrimination of any kind in the educational institutions of the state. California *Education Code*, sections 221.5–231.5, known as the Sex Equity in Education Act expand upon gender equity and Title IX laws.

TONY THURMOND
State Superintendent
of Public Instruction

Ensuring Equity

- The California Department of Education formally monitors educational equity through:
  - Educational Equity Reviews
  - Civil Rights Reviews
  - Uniform Complaint Procedures

Gender Equity in California STEM Education

TONY THURMOND
State Superintendent
of Public Instruction

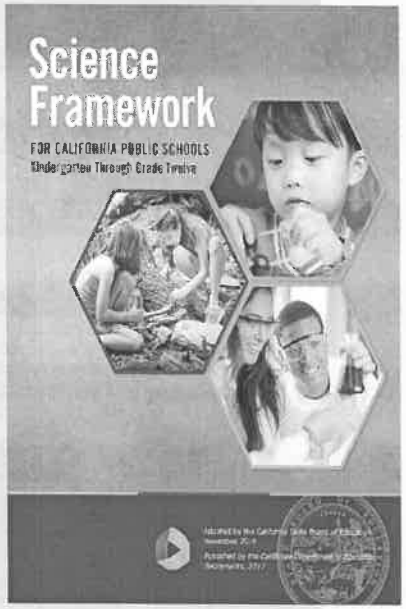
TONY THURMOND
State Superintendent
of Public Instruction

Women in the Workforce

"Women make up half of the total U.S. college-edcuated workforce, but only 29% of the science and engineering workforce."

Source: *National Girls Collaborative Project (2019)*
https://ngcproject.org/statistics

TONY THURMOND
State Superintendent
of Public Instruction



California Science Framework

- Ch. 10 Access and Equity
- Many of California's teachers, schools, and districts have embraced approaches to positively impacting the achievement of girls.
- The framework can be used to increase girls' self-efficacy in science and engineering which can be critical in developing their pursuit of careers in science

TONY THURMOND
State Superintendent
of Public Instruction

Guidance to Teachers from the Framework

- Intentionally position girls in leadership positions during group work
- Convey positive messages about the competencies of girls and young women
- Intentionally highlight and/ or provide access for all K-12 students to women role models and mentors in STEM fields.
- Critically and continuously self-assess how they ensure that their female students have equal opportunities to participate.

Expanded Learning Opportunities for Girls

- Inspiration for STEM-related goals is often related to expanded learning opportunities where girls positively experience science.
  - Engaging Girls in STEM Town Halls at LACOE, SJCOE, and Riverside COE
  - Mother/ Daughter Science Camp in Merced County

Promoting Girls in STEM

TONY THURMOND
State Superintendent
of Public Instruction

LEGAL AID AT WORK

Many Calif. schools don't report on gender equity in sports as required: Report

June 22, 2017

By Kim Turner, Senior Staff Attorney with Legal Aid at Work

Less than half of surveyed California high schools are reporting as required on girls' opportunities to play sports, according to a new report from Legal Aid at Work. And the information that has been posted shows significant gaps – even though federally funded schools have been required for 45 years to serve male and female students equally.

Both the inequities and the failure to post data seem to cross racial and socioeconomic lines statewide.

Read our white paper on compliance with SB 1349.

California public schools that receive federal funds are now required by state law to post data online about student participation in competitive sports. They must report how many girls and boys are playing interscholastic sports, what levels (*e.g.*, JV, Varsity) and opportunities are available to girls and to boys, and how those numbers compare with girls' and boys' enrollment at the school.

The requirement covers public elementary, middle, and high schools, including charters. A new study by Fair Play for Girls in Sports shows that schools of all sizes and types serving the full range of California communities are not complying with the law – and that dramatic inequities in athletic opportunities for girls and boys persist across this range of schools.

The new reporting requirement, passed in 2014 as SB 1349, seeks both to shed light on longstanding gender inequity in athletics and to spur schools to address the problem. This inequity matters because girls who play sports experience better health, more academic success, and greater future

prospects in employment. Gender inequity in athletics is illegal under the 45-year-old federal law known as Title IX, which requires gender equity in all educational programming, including sports, in schools that receive federal funding.

SB 1349 requires schools to post data about girls in sports, on either their website or their district's site. Fair Play, a project of nonprofit Legal Aid at Work, analyzed 108 randomly selected high schools and found that less than half – just 48 percent (51 of 107) – had posted any data at all about the gender breakdown in their athletic programs as of June 2017. The law took effect in 2016. Among those that did post data, whether for 2015-2016 or 2016-2017 or both, we found an average gap of 6 percentage points between girls' participation rate in sports and girls' enrollment in the school, meaning that girls in the schools we studied are afforded far fewer athletic opportunities than they should be in relation to enrollment.

Use this calculator to determine your school's participation gap and how many more girls there should be playing competitive sports.

Our research shows that girls across California are getting far fewer chances than boys to play sports, despite accounting for approximately half of students, and despite studies that show that girls are equally interested in sports in comparison with boys. In fact, this finding may be conservative: It's reasonable to anticipate even bigger participation gaps at schools that do not comply at all with SB 1349.

We also found that the lack of compliance with SB 1349 does not correlate with the ethnic or socioeconomic composition of the community a school serves; inequities in sports for girls in California – and failure to post data that could shed a light on the issue – seem to cross all racial and socioeconomic lines.

Our report opens with a history of Title IX and the inequity that SB 1349 seeks to remedy. We review the law's requirements and other similar reporting mandates, to show that this data was not previously available in a condition that made it possible to derive a picture of gender equity. Finally, we describe our methodology, our findings about compliance and about the condition of the data that is reported. We further offer a note on what constitutes a sport under Title IX. We conclude with recommendations for

improving schools' reporting on gender equity in sports and offer a range of tools students and their advocates can use in the fight for gender equity in sports programs across California.

Federally funded California schools must step up to meet the demands of the law by posting athletics data so that students, parents, guardians, school staff, and the community can better understand and can act to remedy gender inequities.

Here are more resources about this new reporting requirement and how you can exercise your rights under Title IX:

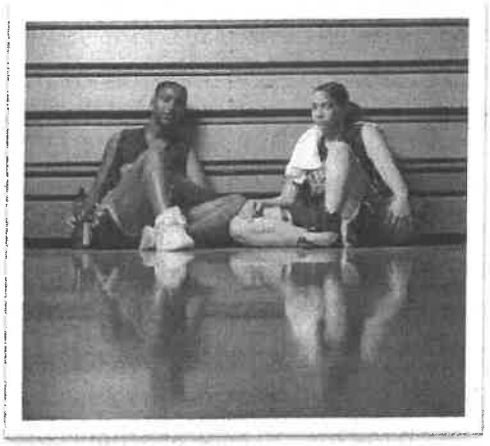
- A fact sheet on SB 1349;
- A brochure explaining Title IX;
- A sample letter you can use to request changes in your local school (known as a "demand letter");
- An online calculator to determine the gap between the share of students at your school who are girls and the share who are participating in sports;

- A video about Title IX to show your friends and colleagues and help them understand the issue and their rights;
- A fact sheet on whether cheerleading can be considered a "sport"; and
- A webinar about how Title IX applies to K-12 school sports.

EMAIL US

Legal Aid at Work, 180 Montgomery Street, Suite 600, San Francisco CA 94104 / 415-864-8848

Missing Report Cards: Available data show stark gender inequality in sports programs, and many California public schools shirk reporting requirement



June 23, 2017
Legal Aid at Work
Fair Play for Girls in Sports Project

Executive Summary

Title IX, a federal law, which is marking its 45th anniversary this month, requires gender equity in all educational programming, including sports, in schools that receive federal funding. Specifically, female and male students must experience gender equity in the athletic treatment and benefits they are afforded by their educational institutions and in the opportunities provided in the form of individual and team sports. As recipients of federal funds, California public and charter schools are covered by Title IX.

Given the difficulty in measuring the progress made by public and charter K-12 schools in complying with Title IX, in 2014, the California state legislature passed SB 1349. It mandated that all schools, following the 2015-2016 school year, and thereafter on an annual basis, post on the school's website (or district site) metrics on students' participation in competitive sports by gender. In particular schools must report: the numbers of female and male students playing interscholastic sports; the levels at which they each are playing (*e.g.*, JV, Varsity); and the athletic opportunities available. The website reporting must also include the number of female and male students enrolled, so as to provide a comparison to the numbers of those female and male students participating in sports programs. The intent behind SB 1349 was to produce data that could shed light on longstanding gender inequity in school athletic programs and to spur schools, girls, parents, and community members to address the problem.

Based on a new study, conducted by Fair Play for Girls in Sports (a project of Legal Aid at Work), we conclude that public schools of all sizes and types serving the full range of California communities are not complying with SB 1349, by failing to post required data. And the data that has been posted and analyzed strongly suggests that girls continue to face dramatic inequities in athletic opportunities.

The imbalance matters in the number of girls enrolled in school in contrast to the number participating in sports because girls are being denied equal access to sports, and the facilities, coaching, training, and benefits related to sports participation—in disregard of Title IX and

fundamental fairness. There are both short- and long-term benefits girls gain from participation. Girls who play sports experience better health, more academic success, and greater future prospects in employment. In sum, failure to share key data that would uncover Title IX problems and trigger solutions, results in denying girls a better future.

Fair Play analyzed 107 randomly selected high schools and found that less than half — just 48 percent — had posted any data at all about the participation rates by gender in their athletic programs as of June 2017. Among those that did post data, for the 2015-2016 school year, the 2016-2017 school year, or both, we found an average gap of 6 percentage points between the numbers of girls' enrolled in the schools and the numbers of girls participating in sports programs. This finding may be conservative because it may be reasonable to assume even bigger participation gaps at schools that do not comply at all with SB 1349.

Among schools that posted data, girls are afforded far fewer athletic opportunities than they should be given their enrollment numbers. This is the case even though girls account for approximately one half of all enrolled students. And studies demonstrate that girls are equally interested in playing sports.

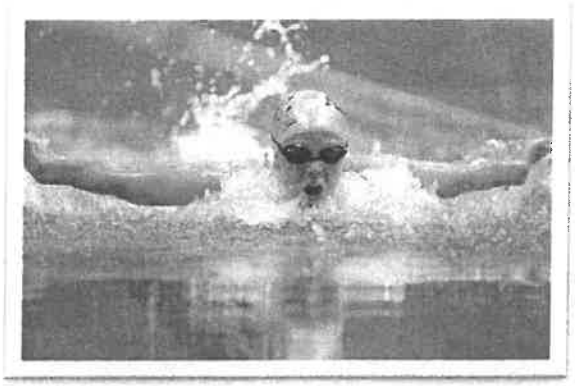
We also found that the lack of compliance with SB 1349 does not correlate with the racial, ethnic or socioeconomic composition of the school's student body; inequities in sports for girls in California and failure by schools to post data that could shed light on the issue appear to cross racial, ethnic, and socioeconomic lines.

Our report opens with a brief history of Title IX. And we describe the tools that SB 1349 creates to help identify and remedy gender-based inequities in schools and school districts. We then review the requirements of SB 1349 and other similar reporting mandates and their limitations in exposing gender inequities. Finally, we describe our methodology, our findings with regard to compliance, and a summary of the manner in which the data is being reported. We further discuss what constitutes a sport under Title IX. We conclude with recommendations for ensuring that all schools and school districts comply with SB 1349 and suggestions for ways that they can improve their reporting on gender equity in sports. Finally, we offer a range of tools students and their advocates can use in the fight for gender equity in sports programs across California.

California public and charter schools must step up to meet the obligations of SB 1349 by posting the specified data so that students, parents, guardians, school leadership, and the community can apply what they learn and ensure girls finally enjoy the promise of equity afforded under Title IX.

Title IX's History and the Inequity that SB 1349 Seeks to Remedy

The federal law known as Title IX,[i] which took effect 45 years ago, requires gender equity in all programs and facilities — including sports — at all schools that receive even a dollar of federal funding. The law seeks to ensure that girls are equally accommodated by the school's athletic offerings.[ii] The law applies to elementary, middle, and high schools and institutions of higher education, but K-12 schools often are not held accountable for violating Title IX's mandates. And few attorneys or other advocates are monitoring gender equity due to lacking resources and community-wide inattention to inequity issues, especially at the K-12 school level.



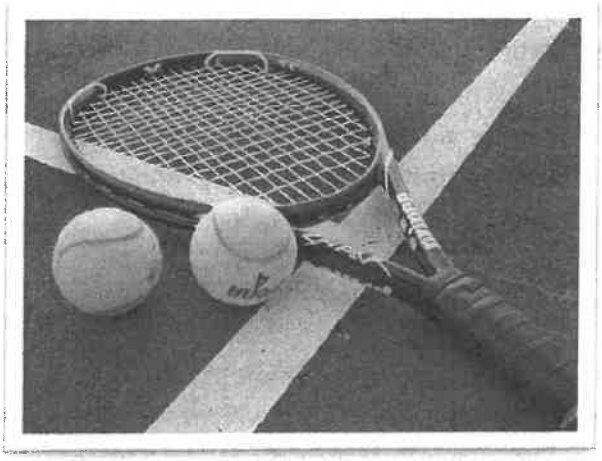
Unfortunately, many K-12 schools simply don't abide by Title IX, and many girls and their families are unaware of their rights and how to exercise them. Members of the public need clear information about gender inequity in sports so they can start leveling playing fields throughout California. California's Legislature passed SB 1349[iii] in 2014 with the goals of shining a light on sports participation and encouraging greater compliance with Title IX.

Sponsored by State Sen. Hannah-Beth Jackson (D-Santa Barbara), SB 1349 requires each school to post data on its website (or on its district's website) about the gender breakdown of its students who participate in competitive sports, starting in 2015-2016. This provides a ready gauge — a "report card" on sports opportunities — that students, parents, guardians, school staff, coaches, and administrators can use to assess whether a school is providing girls with equal opportunities in athletics.

Schools have long been required to post or publish information about test scores and other academic targets but were not previously required to disclose athletic participation data on their school or district site. Ensuring that girls have equal opportunities to play sports allows them to reap short-term and lifelong benefits. In comparison with non-athletes, those benefits experienced by female athletes include improved health and academic performance and — later in life — 7 percent higher wages.[iv] Girls who don't get the chance to play sports also miss

out on the related health, academic, and workforce advantages of participation, and they are not experiencing Title IX's promise of gender equity in schools.

New analysis[v] from Fair Play for Girls in Sports reveals that schools are reporting SB 1349 data at a low rate, and even schools that are complying do not have equitable sports programs. Across California, 463,137 boys participate in competitive (private and public) high school sports but only 338,980 girls do, a difference of 124,157, despite girls' strong interest in sports participation.[vi] That means girls make up just 42 percent of high school athletes, while high school enrollment statewide is about 49 percent female, a gap of nearly 7 percentage points. Our analysis of schools in compliance with SB 1349, conducted by a random sample of public high schools, reveals a similar average 6 percent gap[vii] between the enrollment of girls and girls' athletic representation; this figure includes only those schools in our sample that have posted clear data. That is, on average, 90 more female athletes should be added to each of these randomly selected schools' athletic programs to ensure that the percentage of girls participating in after-school sports matches the share of girls in the student body (the selected schools have an average enrollment of 1,765).



Federally funded California schools must step up to meet the demands of the law by posting athletics data so that students, parents, guardians, school staff, coaches, and the community can better understand and can act to remedy gender inequities.

Lack of accurate, current data led to passage of SB 1349

On the federal level, the web-based Equity in Athletics Data Analysis[viii] provides information about the number of female and male athletes at colleges and universities that receive federal funds, in comparison to enrollment, but such comprehensive data is not available for primary and secondary schools.[ix] The federal Department of Education hosts a civil rights data collection website[x] with limited information about the number of female and male athletes and enrollment at the high school level, but this information is difficult to locate, not available on school or district websites where parents can find it, and it is often outdated. Efforts to create a federal disclosure requirement for primary and secondary schools have failed.[xi] At the state level, California's Department of Education does not require schools to report or post athletics data. And information on participation in sports is not in the department's DataQuest system.[xii]

SB 1349's Requirements

SB 1349 requires each California public school that offers competitive athletics at the elementary or secondary level, including charters, to post:

- their enrollment, by gender;
- the number of male and female students participating in competitive athletics[xiii]; and
- the number of teams and competition levels afforded to girls and boys.

Schools must post the information annually on their website or their district's website.

Methodology

In our study,[xiv] Fair Play randomly selected 107 federally funded high schools[xv] in California to examine SB 1349 compliance.[xvi] We searched for SB 1349 data on the websites covering each school or its district. Fair Play analyzed the quality of the data, with a focus on whether the total enrollment and athletic participation figures are posted by gender. From the federal Department of Education's Office for Civil Rights Civil Rights Data Collection website, we gathered information on each school's student body's racial/ethnic make-up, and the share of its students who qualify for free and reduced-price lunch.

A note on our math: As indicated, we compared the share of boys and girls in a school with the share participating in sports to come up with the percentage known as the "participation gap." The gold standard under Title IX is that if enrollment is 49 percent girls, then 49 percent of participants in athletic programs should be girls. Across the schools clearly reporting data under SB 1349, we found enrollment is about 49 percent female, but girls made up just 43 percent of sports program participants and boys made up 57 percent. Thus, in a hypothetical sample school of 1000 students, with 490 girls and 510 boys enrolled, there would be just 215 female athletes (43 percent) and 285 male athletes (57 percent). This hypothetical school would need to add 59 girls to existing teams and/or add new teams and levels to bring girls' athletic participation up to 49 percent of the program and make it equitable.

Extrapolating from the average 6-percentage-point gap to the total enrollment at the schools in our sample that have reported SB 1349 data, we found that on average 90 more girls should be participating in sports at each school (note: the average overall enrollment was 1,765

students).[xvii] There are over 11,000 K-12 public schools in California, including charter schools (which often accept federal funds rendering them covered by Title IX), and approximately three million female and three million male students enrolled.[xviii] Considering simply California's 1,339 traditional high schools, there are approximately 120,510 girls who should be participating in sports that are currently sitting on the sidelines, if 90 more athletes are added to each high school.[xix] Girls wish to play in greater numbers but are cut, or their schools don't offer novice-level to encourage learning, and girls aren't surveyed about which sports they would like to play.[xx] And the number is probably greater: It's reasonable to anticipate even bigger participation gaps at schools that do not post data in compliance with SB 1349.

Findings about SB 1349 compliance

Our review of SB 1349 compliance by a random sample of 107 high schools in California shows:

- Just 48 percent (51 of 107) are reporting SB 1349 athletics data on their school and/or district websites, meaning less than half of schools subject to the law are following it.
- Schools posting data have average non-white enrollment of 70.1 percent, nearly the same as schools in our sample that are not posting data (70.5 percent), suggesting that non-compliance is not tied to a school's racial/ethnic makeup.
- Schools posting data have students who qualify for free and reduced-price lunch at a rate of 53.6 percent, nearly the same rate as schools not posting data (54.5 percent), revealing that non-compliance also does not correlate with this gauge of the socioeconomic status of a school's student body.

Thus, lack of compliance with SB 1349 does not appear to correlate with the racial or socioeconomic composition of the community a school serves. Accordingly, these data reporting compliance issues appear to transcend the racial and socioeconomic makeup of California schools.

Findings on how schools report SB 1349 data

There is a great deal of room for improvement because so few schools post SB 1349 data. Following are our findings about the data that has been posted so far under SB 1349.

Posted material varies widely — Among schools in our sample that complied at least in part with SB 1349 in 2016 and 2017, posted data varies in at least six ways. This makes it difficult for

a parent, guardian, student, community member, coach, or even school staff member to compare or use the information. Our research revealed these variations:

1. Several reporting schools failed to tally participation in athletics by gender and provided only sub-totals for each team or sport, rendering it hard to evaluate participation rates overall.

2. Schools posted very different levels of information. One school, for example, simply posted the number of girls and boys who participate in sports and the total number of male and female students, without noting sports or levels offered. Others schools posted a great deal more than required, including information on coaching.

3. Some districts combined data for all their schools into one document, even where the schools maintain their own websites and should place the data there. This made it harder to find and use the information on a localized level.

4. Finding the information typically requires a search of non-obvious terms like "SB 1349" or "Title IX" on the school site. Most schools place the data somewhere within the athletics area of the school website, under headings such as "Title IX" or "SB 1349," but some label it with generic terms like "athletic data."

5. Some schools explained the data and why it was posted, and others did not. Providing more context for the posting will help the community understand why the school or district is providing athletic participation data.

6. Only a handful of the randomly selected schools we studied explain how to follow up. At least one high school included the name and contact information for their Title IX Coordinator, along with their athletics data, in case a student wishes to discuss inequities with a staff member or administrator. Some schools include an athletic interest survey link, possibly in an attempt to learn which sports the underrepresented sex would like to play. Schools should provide follow-up contact information.

   Note: Newly-passed California law SB 1375, will soon require (as of July 1, 2017) federally-funded California schools to post information regarding Title IX coordinators and related information.

Better compliance need not be costly or time-consuming — Non-reporting schools already compile much of the same athletics participation data for the California Interscholastic Federation (CIF), a nonprofit empowered by the state to govern private and public high school athletics, and by other entities such as the federal Department of

Education's Office for Civil Rights. In fact, CIF has surveys its member schools about sports participation for several years.[xxi] But CIF's Participation Census hasn't required schools to tally their male and female athletes to give the big picture of how many spots girls and boys fill throughout a school's athletic program. Therefore, it should be relatively simple for schools to post the already collected data online in compliance with SB 1349. Fair Play, within its toolkit of SB 1349 materials (detailed below) offers a calculator for individuals to determine the number of girls a school should add to its athletic program to reach proportionality.

Cheerleading confusion – what constitutes a sport

Of the schools we studied that post athletics data in compliance with SB 1349, several attempted to include cheerleading. Currently, cheerleading is not recognized as a sport in California, based on Title IX guidance as interpreted by the courts and the federal Department of Education's Office for Civil Rights. For cheerleading to count as compliant with Title IX, participants must receive the same types of benefits, treatment, and opportunities as comparable interscholastic athletes. Those include robust competition schedules, adequate coaching, and other support, regardless of whether CIF or the state Legislature labels the activity a "sport." These standards will help ensure that girls reap the benefits of true athletic participation and don't simply cheer on other teams.

Conclusion and recommendations for improving compliance with SB 1349

Schools across California must immediately comply with SB 1349 and remedy the reporting deficiencies that Fair Play revealed. Girls need and deserve the lifelong benefits of participating in competitive sports, and federal and state laws require schools to provide girls and boys with equal access and opportunities to participate in competitive sports.

We recommend the following four improvements in reporting of SB 1349 data:

- Schools and districts can readily use the gender data they already compile regarding enrollment, athletes, teams, and levels, and they should do so;

- Schools should make their SB 1349 data easy to find online (preferably on their own websites rather than a district website);

- Schools should include an explanation with their SB 1349 data of where it comes from, what it indicates, why it's important, and how an individual can follow-up on inequity;

- The data's key elements — enrollment, numbers of athletes, numbers and levels of teams — must be clear and highlighted.

Appendix 1

To help empower students and community members to take action, we offer the following resources:

- a fact sheet on SB 1349;
- a brochure on Title IX to easily understand and explain to others the law's requirements;
- a sample demand letter to request change in any local school;
- an online calculator to determine how many more female athletes should be added in any given school;
- a link to our short training video on Title IX;
- a fact sheet regarding cheerleading and whether/how it can be considered a "sport"; and
- a webinar as to how Title IX operates in the K-12 schools athletics context.

Appendix 2

Below is a sample posting (note: all sports, levels, and figures are simply hypothetical).

SB 1349 – Title IX Data: Pursuant to SB 1349, Education Code Section 221.9, beginning in the 2015-16 school year and every year thereafter, public primary and secondary schools (including charters) in California are required to publicly report information regarding the school's competitive athletics to include total enrollment, classified by gender; the number of students enrolled at the school who participate in competitive athletics, classified by gender; and the number of boys' and girls' teams, classified by sport and by competition level.

Student Gender	**Total School Enrollment**		**Number of Athletes**	
Female	500		200	
Male	500		200	
Sport, Level, Co-Ed(?)	**Girls' Teams**	**Number of female athletes**	**Boys' Teams**	**Number of male athletes**
Baseball, Varsity	0	0	1	15
Baseball, JV	0	0	1	12
Basketball, Varsity	1	10	1	10
Basketball, JV	1	10	1	9
Cross Country, Varsity, Co-Ed	1	20	1	15
Football, Varsity, Co-Ed	0	2	0	25
Football, JV	0	0	0	25
Soccer, Varsity	1	20	1	15
Soccer, JV	1	19	0	14
Softball, Varsity	1	15	0	0
Softball, JV	1	15	0	0
Tennis, Varsity	1	16	1	13
Track, Varsity, Co-Ed	1	25	1	20
Volleyball. Varsity	1	15	1	12
Volleyball, JV	1	18	0	0
Wrestling, Varsity, Co-Ed	1	5	0	15
Lacrosse, Varsity	1	10	0	0
TOTALS	**13**	**200**	**9**	**200**

[i] 20 U.S.C. § 1681, et. seq.

[ii] Under Title IX, a school may meet the law's requirements in one of three ways: (1) by showing substantial proportionality, or a close mirroring in the percentage of female students enrolled and female students participating in athletics; (2) by showing a history and continuing practice of program expansion for girls; or (3) showing girls' interests in sports have been fully accommodated such that no more wish to play than currently do, such as through athletic interest surveys.

[iii] Cal. Educ. Code § 221.9.

[iv] "Based on the findings from 23 studies examining the effect of moderate and vigorous physical activity during adolescence on cancer risk, those who had the highest physical activity during adolescence and young adulthood were 20% less likely to get breast cancer later in life." WOMEN'S SPORTS FOUND., *Her Life Depends on It III*, (Jan 21, 2016), *available at* http://www.womenssportsfoundation.org/wp-content/uploads/2016/08/hldoi-iii_full-report.pdf; *see also* NAT'L WOMEN'S LAW CTR., *Finishing Last: Girls of Color and School Sports Opportunities*, (May 2015), *available at* https://nwlc.org/wp-content/uploads/2015/08/final_nwlc_girlsfinishing last_report.pdf ("Although often overlooked, girls—particularly girls of color—drop out at high rates. . . . Playing sports increases the likelihood that they will graduate from high school, have higher grades, and score higher on standardized tests."); Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports* (Nat'l Bureau of Econ. Res., Working Paper No. 15728), (Feb. 2010), *available at* http://www.nber.org/papers/w15728.pdf (noting girls who play sports in high school make 7% higher wages later in life compared to their non-athletes peers).

[v] All data supporting the conclusions of this report can be made available upon request.

[vi] NATIONAL FEDERATION OF HIGH SCHOOLS, *2015-2016 Summary of Athletics Participation Totals By State* at 56, *available at* http://www.nfhs.org/ParticipationStatistics/PDF/201516_Sports_Participation_Survey.pdf.

[vii] Federal courts have found educational institutions in violation of Title IX for participation gaps of 6.7% (*Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 856–57 (9th Cir. 2014)) and 3.62% (*Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 91, 105–07 (2d Cir. 2012)).

[viii] Equity in Athletics Data Analysis, U.S. Dept. of Education, *available at* https://ope.ed.gov/athletics/.

[ix] For more information on the federal Equity in Athletics Disclosure Act, see National Women's Law Center, *Legislative Developments: The Equity in Athletics Disclosure Act, Breaking Down Barriers*, available at https://nwlc.org/wp-content/uploads/2015/08/BDB07_Ch7and8.pdf.

[x] U.S. DEPT. OF EDUCATION, *Civil Rights Data Collection, available at* https://ocrdata.ed.gov/DistrictSchoolSearch (currently, data is from 2013 and is self-reported by schools).

[xi] *See e.g.*, The High School Sports Information Collection Act of 2007, available at https://www.congress.gov/bill/110th-congress/senate-bill/518 (proposing the requiring of data collection from secondary schools regarding athletic programs, including participant gender and race, team schedules, budget, and other information).

[xii] CA Dept. of Education, *DataQuest*, , *available at* http://www.cde.ca.gov/ds/sd/cb/dataquest.asp (facts about California schools and districts).

[xiii] "'Competitive athletics' means sports where the activity has coaches, a governing organization, and practices, and competes during a defined season, and has competition as its primary goal." Cal. Educ. Code § 221.9.

[xiv] This work, report, and related materials were made possible with support from the Flom Incubator Grant Program of the Skadden Foundation and the assistance of several attorneys and law students.

[xv] Several dozen California public/charter middle schools were examined as well, given SB 1349 also applies to such schools, yet very few reported any data. This analysis was confined primarily to high schools, particularly given the great amount of resources and time focused on high school sports. Middle school sports are a critical feeder into high school athletics and thus, middle schools must increase compliance so as to provide data on gender inequity, allowing action and improvement.

[xvi] Note, the majority of data posted references the 2015-2016 school year enrollment and athletics data. However, a handful of schools have begun posting their 2016-2017 data as this school year concludes, in accordance with the requirement that such data be shared every year.

[xvii] Under Title IX, a school may meet the law's requirements in one of three ways: (1) by showing substantial proportionality, or a close mirroring in the percentage of female students enrolled and female students participating in athletics; (2) by showing a history and continuing practice of program expansion for girls; or (3) showing girls' interests in sports have been fully accommodated such that no more wish to play than currently do, such as through athletic interest surveys. Note, a few schools had a negative participation gap, meaning girls' share of sports opportunities was larger than their share in enrollment, but this was rare.

[xviii] *See* CalEdFacts, *Fingertip Facts on Education in California*, (Sept. 29, 2016), http://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp.

[xix] *Id.*

[xx] "[S]chools cannot use a myth that 'boys are more interested in sports than girls,' to justify providing more participation opportunities for boys than girls. There is no research that shows that boys are more interested in sports than girls. We do know that girls are just as interested in sports as boys when they are young. A combination of lack of opportunity, lack of peer group support when they do play sports and lack of encouragement causes them to drop out of sports at a rate that is two times greater than boys." WOMEN'S SPORTS FOUNDATION, *Mythbusting: What Every Female Athlete Should Know!*, (Aug. 11, 2011) *available at* https://www.womenssportsfoundation.org/athletes/for-athletes/know-your rights/athletes/mythbusting-every-female-athlete-know/

[xxi] CALIFORNIA INTERSCHOLASTIC FEDERATION, *Participation Census*, (June 1, 2017), *available at* http://www.cifstate.org/coaches-admin/census/index.

Informational Links

- Title IX in a Nutshell
- Before Title IX came along, many people didn't believe discrimination against women was a problem
- Filling the Gaps: Women, Civil Rights, and Title IX
- Any Press is Good Press? The Unanticipated Effects of Title IX Investigations on University Outcomes
- Social Justice and Men's Interests: The Case of Title IX
- Title IX: How a Good Law Went Terribly Wrong
- Will 2019 be the year that colleges and universities stop openly discriminating against men, 47 years after Title IX?
- The History, Uses, and Abuses of Title IX

ADDITIONAL TITLE IX INFORMATION

For more background information on Title IX, please visit the links listed below:

Title IX in a Nutshell
http://www.acostacarpenter.org/Title%20IX%20in%20a%20nutshell.pdf

Before Title IX came along, many people didn't believe discrimination against women was a problem
https://www.latimes.com/opinion/op-ed/la-ol-patt-morrison-asks-bernice-sandler-title-ix-sex-discrimination-20170816-htmlstory.html

Filling the Gaps: Women, Civil Rights, and Title IX
https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol31_2004/summer2004/irr_hr_summer04_gaps/

Any Press is Good Press? The Unanticipated Effects of Title IX Investigations on University Outcomes
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3218104

Social Justice and Men's Interests: The Case of Title IX
https://www.researchgate.net/publication/249675965_Social_Justice_and_Men's_Interests_The_Case_of_Title_IX

Title IX: How a Good Law Went Terribly Wrong
http://time.com/2912420/titleix-anniversary/

Will 2019 be the year that colleges and universities stop openly discriminating against men, 47 years after Title IX?
https://www.aei.org/publication/will-2019-be-the-year-that-colleges-and-universities-stop-openly-discriminating-against-male-students-47-years-after-title-ix/

The History, Uses, and Abuses of Title IX
https://www.aaup.org/report/history-uses-and-abuses-title-ix